

UNITED STATES OF AMERICA

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LIBRARY OF CONGRESS

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COPYRIGHT OFFICE

SECTION 1201

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RULEMAKING HEARING: EXEMPTIONS FROM PROHIBITIONS ON
CIRCUMVENTION OF TECHNOLOGICAL MEASURES THAT CONTROL
ACCESS TO COPYRIGHTED WORKS

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Wednesday,
May 14, 2003

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The hearing was held at 9:00 a.m. in the 2002-
4C, UCLA Law School Moot Courtroom, Los Angeles, CA,
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

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

9:10 a.m.

MS. PETERS: Good morning. I'm Marybeth Peters, the Register of Copyrights. And I would like to welcome everyone to the first day of hearings in Los Angeles in this Section 1201 anti-circumvention rulemaking.

The purpose of this rulemaking proceeding is to determine whether there are particular classes of works as to which users are or likely to be adversely effected in their ability to make noninfringing uses if they are prohibited from circumventing technological measures that control access. That's quite a sentence.

Today we have several sessions. And the first one will deal with filtering software. The second will deal with malfunctioning, damaged and obsolete technological protection measures, as well as research security in the public domain. And the afternoon session will deal with copy protected CDs.

You should know that comments, the reply comments and 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

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1 Commerce will result in my recommendation to the
2 Librarian of Congress. The Librarian must make a
3 determination before October 28, 2003 on whether or
4 not there will be any exemptions to the prohibition
5 during the next three year period.

6 The entire record of this, as well as
7 the last 1201 rulemaking, are on our website. We
8 will be posting the transcripts of all hearings
9 approximately one week after each hearing.

10 The transcripts as posted are
11 uncorrected, but each witness does have an
12 opportunity to correct the transcripts.

13 Let me take this moment to introduce the
14 rest of Copyright Office panel. To my immediate
15 left is David Carson, who is our general counsel. To
16 my immediate right is Rob Kasunic, who is senior
17 attorney and advisor in the Office of the General
18 Counsel. To his right is Charlotte Douglass, who is
19 a principal legal advisor to the General Counsel.

20 I'm going to try to change this. Last
21 time I said to the far was Steve Tepp. That's the
22 far left. And he said I've never been characterized
23 that way, Marybeth. So, to the left of the General
24 Counsel is Steve Tepp

25 MR. TEPP: That's even worse.

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1 MS. PETERS: Whatever. Policy planning
2 advisor in the Office of Policy and International
3 Affairs.

4 The format of each hearing is that each
5 panel has 3 parts. First, the witnesses present
6 their testimony, and obviously this is your chance
7 to make your case and your chance to rebut his case.
8 Then we get to ask questions and, hopefully, they
9 will be equally tough for each side. You should not
10 take any of our questioning as an indication of what
11 we think. This is just the exercise by which we dig
12 out information. Even our facial expressions should
13 not in anyway be taken to reflect what we think.
14 Because the truth is at this moment we have made no
15 decision, and we haven't even sat down amongst
16 ourselves to talk about any particular exemption or
17 what the evidence is. So it's all totally wide
18 open.

19 If in fact this hasn't happened there's
20 an opportunity to the panel for each of you to
21 question happen. Mostly it's happened that during
22 our questioning you sort of question each other.

23 Obviously, because we have some time
24 constraints here, we do reserve the right to ask
25 each person who testifies to answer any additional

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1 questions. And, obviously, those questions will be
2 made and the answers will be made available to
3 everybody.

4 I want to at this point thank David
5 Nimmer of USCLA who was instrumental in getting
6 these very nice facilities for us, and actually
7 thank UCLA for all the work in making this possible.

8 So without further ado, I should mention
9 that Jeff Joiner has joined us, and he's an attorney
10 with NTIA, National Telecommunications and
11 Information Administration. So he's representing the
12 Assistant Secretary that I referred to as having a
13 consultation involving in this process.

14 The first panel is dealing with
15 filtering software. And the witnesses are James Tyre
16 from Censorware Project and Steve Metalitz, who
17 filed on behalf of many copyright owners a very
18 extensive statement.

19 So we start with the proponent of an
20 exemption and then we go to the other side. So we
21 will start with you, Mr. Tyre.

22 MR. CARSON: The microphones.

23 MS. PETERS: Oh, yes, the microphones.

24 The microphones are actually not to project the
25 sound to everybody who is here. The microphones are

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1 solely to assist the recorder. So, when you speak
2 as when we speak, you need to really speak out so
3 that everybody in the room can, in fact, hear you.
4 Okay? Thank you.

5 MR. TYRE: Thank you. My name is James
6 Tyre, as you indicated. I'm here on behalf of the
7 Censorware Project.

8 I'm probably at least a little bit of a
9 mystery both to you on the panel and to Mr. Metalitz
10 because, unlike the people who spoke in Washington
11 all of whom I know fairly well and also unlike Mr.
12 Metalitz, I was unable to submit written comments.
13 So I come here as a bit of a blank slate. And that
14 being the case, I want to tell you just a little bit
15 about myself and what the Censorware Project is to
16 put the testimony I'm going to give in perspective.

17 I am a lawyer here in the Los Angeles
18 area. I have been in practice since 1978. Much of my
19 practice, though not all of it, has been devoted to
20 First Amendment issues. And it was the First
21 Amendment aspect of Censorware that brought me into
22 this particular field that got me interested in it:
23 First, really as something interesting just to
24 explore, then working really with it. Then starting
25 to think about the legal ramifications of it.

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1 The Censorware Project is a group
2 currently consisting of four people, myself,
3 Jonathan Wallace, Jamie McCarthy, Bennett Haselton.
4 Originally there were two others, including Seth
5 Finkelstein from whom you heard a great deal when
6 you had a session in Washington. Seth has not been
7 a part of the group since about 1998/1999, somewhere
8 in that area. But certainly he was essential when we
9 started the group.

10 What happened is that it was around 1995
11 when the issue of Censorware began to become an
12 issue. Seth was telling you that he had been on the
13 Internet since 1985. He had been seeing a lot of
14 changes in it. I cannot tell you that I'm that much
15 of an Internet veteran. But fairly shortly after I
16 did get onto the Internet, I happened upon an email
17 discussion group that had to do generally with
18 issues of censorship regarding the Internet, and
19 specifically censorware. And I got interested in
20 it, not so much in the sense that I was immediately
21 thinking about filing a legal case or anything of
22 that sort, but I got interested in the implications,
23 specifically First Amendment implications, at some
24 point other possible theories that might be
25 available for use with censorware. And, obviously

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1 the First Amendment implications would apply only if
2 the censorware was being used in a public
3 institution.

4 We have never taken the position, I
5 don't know anyone that's ever taken the position,
6 that if a family chooses to use censorware in the
7 home or if a private corporation chooses to use it
8 at the workplace, that there are any First Amendment
9 issues there. We may criticize it because we don't
10 like censorware does, but we make no claims that
11 there's any particular legal significance to it.

12 In any event, it was in 1995/1996 when
13 this was really a hot topic, and it became quickly
14 apparent that there was a group of us that had a
15 fairly common interest. And I should also indicate
16 that one of the other witnesses from whom you heard
17 a lot in Washington, David Burt, was a part of these
18 discussions. I believe I first encountered him on
19 the Internet in 1996 or possibly 1997.

20 So many of us who have been working in
21 this field, regardless of which side we're on, are
22 old acquaintances. Whether we're friends or not is
23 a different story, but we've known each other for
24 quite a long time.

25 But what happened was, and I know you've

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1 heard a little bit about the Mainstream Loudoun case
2 in Virginia. That case, actually, was essential to
3 how the Censorware Project came into being. And it's
4 actually a good illustration of the kind of work we
5 do and what the effect has.

6 Jonathan Wallace, one of the founding
7 members of the Censorware Project, like myself, is
8 also an attorney. And he had done some writing on
9 his own site, "The Ethical Spectacle," spectacle.org
10 about what he viewed as some of the legal issues
11 involving censorware. And it was a very good essay
12 he wrote. This would have been probably in
13 1996/1997. And it was about that time when in
14 Loudoun County, Virginia the public library was
15 considering putting in censorware, and specifically
16 a particular version of X-Stop called the Felony
17 Load. And a lot of censorware companies and
18 censorware products have changed names, so I just
19 indicate that the product that then was known by X-
20 Stop then was manufactured by a company called Log-
21 On Data Corporation. That product actually is the
22 product of one of the three companies that signed on
23 to David Burt's comments, that being 8e6
24 Technologies. At some point the company changed its
25 name. So we're talking about a product of that

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1 company.

2 But there was a group in Loudoun County
3 called Mainstream Loudoun. It was extremely
4 concerned with the implications of censorware being
5 used in their libraries. So the head of that group
6 sent an email to Jonathan Wallace and said we really
7 like what you've written in your essay, but can you
8 help us? Can you give us something more tangible.
9 And, again, this was before the Censorware Project
10 as a group existed. But Jonathan contacted two
11 people: Myself, Seth Finkelstein, said can we do
12 something to help these people. The answer was yes.

13 You've heard about some of the
14 decryption work that Seth Finkelstein did. At that
15 time he decrypted the X-Stop blacklist. He and I
16 together poured through that list looking for the
17 flaws in it and we fed the results from that, from
18 our work there to Jonathan Wallace who wrote a
19 scathing article about X-Stop.

20 One of the interesting things was that
21 X-Stop was a fairly new product on the market at the
22 time. And it had gotten a number of glowing
23 endorsements from quite a number of people,
24 including specially David Burt, who at that time was
25 still a librarian not working for N2H2.

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1 And we put out that report. And
2 everybody went, in effect, "Oh, my God." And
3 everybody who endorsed that product, including David
4 Burt, ran away from it as fast as they could.
5 Everyone except the Loudoun County Public Library
6 system.

7 So, the lawsuit was filed with a lawyer
8 by the name of Bob Corn-Revere representing the
9 plaintiffs, who were library patrons. Shortly
10 thereafter a group of website owners whose content
11 was being blocked in the libraries represented by
12 Ann Beeson of the ACLU intervened on the plaintiff's
13 side in that case. The lawsuit went forward.

14 David Burt makes a technically correct
15 statement but very misleading statement in his joint
16 chilling reply to the effect of there's nothing in
17 the court record to indicate that the Censorware
18 Project in general or Seth in particular had
19 anything to do with developing the evidence in the
20 case. That statement is 100 percent correct and 100
21 percent misleading. Because what happened was Seth
22 decrypted the list not just once, but on many, many,
23 many different occasions because you want to see
24 what happens as they find out about new bad blocks,
25 whether they unblocked them, what new they've added

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1 to the black list, things like that. Through the
2 Censorware Project we were analyzing the lists, we
3 were going through the lists. We were feeding the
4 list bad blocks to the appropriate people involved
5 in the case.

6 So it may well be that the court record
7 says that library patron X has a declaration that
8 says "I found these 6 bad blocks using the library
9 terminals and, thus, using X-Stop as installed in
10 the libraries." Guess where he found out where to
11 look at those websites?

12 That was the impetus of how the
13 Censorware Project was formed. The three of us
14 working on that and then we added in three other
15 people as we went on to other projects.

16 The first project we did as a group was
17 a dissection, also based on decryption of
18 CyberPatrol, which you've heard a good deal about,
19 specifically in the context of the Microsystems
20 lawsuit. A lot of these products, as I said, have
21 changed names over the years and CyberPatrol along
22 with another product SurfWatch now have been merged
23 into a product called SurfControl, which I'll be
24 talking about a little bit today. So I want to sort
25 of keep the players straight.

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1 It's interesting one of the things
2 that's said in the joint reply comment; and for this
3 purpose, when I'm talking about joint reply,
4 hopefully you will just assume that I'm focusing on
5 the joint reply filed by Mr. Burt. I have no
6 intention of slighting or ignoring Mr. Metalitz'
7 comment, and I will address some of the things you
8 have. But I'm sure he would agree that there's a
9 great deal more detail, and properly so, in the
10 joint reply of the censorware companies than in that
11 which Mr. Metalitz put together.

12 Mr. Burt said, and I believe this was
13 actually in his testimony as opposed to in the joint
14 reply, he said have reports based upon decryption
15 ever really helped at all? And he said "No, they
16 don't help us at all." And, of course, I'm
17 paraphrasing. I don't have an exact quote in front
18 of me. Because they just talk about a few sites here
19 and there. They're really not of any use to us.

20 Well, there's this interesting little
21 phenomenon because every time we have done a report,
22 regardless of what the software it is, and we have
23 done major reports upon CyberPatrol, X-Stop,
24 SmartFilter, WebSense and -- I'm missing one.
25 There's one other, I'm temporarily blanking on it.

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1 But five of them. Every time we've done a report,
2 within 2 days the appropriate censorware company has
3 gone through our reports, whether they were based on
4 decryption or some other techniques, and guess what?
5 The sites that we said were bad blocks suddenly are
6 off the list. It's folly to say that the censorware
7 companies do not pay attention to what we do and
8 that they put little credence into the reports that
9 are based upon decryption or other techniques.

10 We started the Censorware Project in
11 1997. We've been doing this since then. We're
12 strictly a volunteer group. We all have real jobs,
13 other things to do.

14 These kinds of reports, frankly, are a
15 great deal more difficult to do than they used to
16 be. I remember the good old days when a censorware
17 black list might have 10,000 or 15,000 items on it.
18 It was big news in the industry when the first
19 censorware black list had 100,000 items. Now,
20 according to David Burt's testimony a month ago, and
21 I believe him, the N2H2 black list has 4 million
22 items on it. It's hard work to go through these
23 lists. So it's not as easy to do these kinds of
24 reports as it used to be. But, every report that we
25 have done based upon decryption and based upon other

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1 techniques we have used, has been taken very
2 seriously by the censorware companies and by other
3 people.

4 My primary purpose today is to go
5 through and counter some of the statements that Mr.
6 Burt made, both in his written comments and in his
7 oral testimony. And really focus on one broader
8 issue.

9 You've heard testimony that, in essence,
10 there are three types of ways of doing this sort of
11 work. The first way is to start off by decrypting
12 the encrypted database and having decrypted it,
13 analyze it by whatever means one does, drawing
14 whatever conclusions and making whatever report one
15 wants to make based upon that. That's what's at
16 issue here today.

17 But what's relevant to whether this
18 exemption should be extended for another 3 years
19 isn't just that question. I think one thing that's
20 unique about this particular class, both as the
21 exemption was granted 3 years ago and if it should
22 be granted again for the next 3 years, is nobody
23 disputes that the study of censorware is an
24 incredibly important, very legitimate course of
25 study. There is nothing silly about it. There is

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1 nothing frivolous about it. It is socially
2 important. It is legally important. No one has
3 ever disputed those contentions. Certainly David
4 Burt never has, and I don't think that Mr. Metalitz
5 will, though I certainly do not presume to be able
6 to read his mind.

7 The only question here is whether the
8 importance of being able to continue decryption
9 based studies as opposed to other techniques is
10 sufficient to justify the continuation of the
11 exemption. So when I get into my testimony, and I
12 realize you want to keep the opening statement short
13 and I've spent a fair amount of time just giving you
14 some of my background so I'll hold off on this until
15 we get into the question period, but I do want to
16 spend a fair amount of time focusing on the specific
17 issue of the benefits of doing decryption study
18 versus doing what is called either database querying
19 or sampling versus what has been called log file
20 analysis. And in some cases log file analysis
21 really is nothing more than a subset of database
22 querying or sampling. In some cases it's a little
23 bit different.

24 One project we as the Censorware Project
25 did is a little bit different. We've done them all,

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1 so I'm in a position that not many are in to speak
2 to the benefits and detriments of all of them. And
3 I'd like to spend the bulk of my time, hopefully
4 once we get into the questions, talking about the
5 differences, specifically talking about the
6 weaknesses with database querying. And as a subset
7 of that, very much talking about the weaknesses of
8 the URL checkers, which you've heard a lot about by
9 N2H2 and some, but by no means, all of the other
10 censorware companies offer.

11 And with that, I suspect, I've talked
12 more than enough for what you want to hear as an
13 opening statement, so I will defer to Mr. Metalitz
14 and then get to questions later.

15 MS. PETERS: Okay. Thank you very much,
16 Mr. Tyre.

17 Mr. Metalitz?

18 MR. METALITZ: Thank you very much. It's
19 a pleasure to be back here.

20 I was thinking back to the last time
21 that I was in this position before this panel, which
22 was 3 years ago in Palo Alto. And much has changed
23 since then. We live in a different world, some might
24 say, than we did in the summer of 2000.

25 And on a less consequential scale,

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1 things have changed in the nature of this proceeding
2 as well. And if I might, if I could just take a
3 minute for some general observations before I turn
4 to the subject of filtering software.

5 I really want to talk about three things
6 that have changed that are quite relevant to this
7 proceeding and that I hope will be reflected in the
8 decision that ultimately results from this
9 proceeding.

10 The first change, of course, is that the
11 prohibition that we're talking about 1201(a)(1) is
12 now in force, and it wasn't three years ago. So,
13 you know, I think this proceeding can now turn to
14 what Congress said should be its main focus, which
15 is determining whether a substantial adverse impact
16 on the availability of works for noninfringing uses
17 is actually occurring rather than focusing as was
18 inevitable in the 2000 proceeding on speculation or
19 prediction about what would occur once the
20 prohibition went into effect.

21 So I think that the burden that the
22 proponents of exemptions must carry in this
23 proceeding, as they did in 2000, they had the burden
24 of persuading you to recommend to the Librarian that
25 an exemption be granted for a particular class of

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1 works, but they also needed to come forward with
2 concrete evidence of the substantial adverse impact
3 that is actually occurring and that is caused by the
4 presence of 1201(a)(1).

5 Similarly, if they challenge the
6 interpretations that you have made of the statute,
7 whether these be procedural ground rules for the
8 proceeding or the substantive conclusions that you
9 reached in 2000, that is also a burden of persuasion
10 that they must undertake and they would need to
11 persuade you why you were wrong in some of the
12 conclusions that you reached last time.

13 The second thing that has changed is
14 that we now have some court decisions that have
15 really vindicated the interpretations that you
16 recommended to the Librarian in 2000 and that he
17 adopted them on some key aspects of Section 1201.
18 Of course, there haven't been any court decisions
19 directly on Section 1201(a)(1), but the decisions on
20 other aspects of the statute have clearly
21 established a point that is consistent with your
22 conclusions three years ago, and that is that fair
23 use, one of the noninfringing uses we're talking
24 about here, does not encompass a guarantee of access
25 to copyrighted material by a preferred method or in

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1 a preferred format. That's stated very clearly in
2 the Corley decision in the Second Circuit, echoed in
3 the ElCom decision in the District Court here in
4 California. And I think it's quite consistent with
5 the conclusion that you reached 3 years ago.

6 The third change that has occurred over
7 the last 3 years, and one that I will come back to
8 later on today and tomorrow, is that there has been
9 a huge expansion of availability of all kinds of
10 works in digital formats for noninfringing uses.
11 Really we can speak of a digital cornucopia that is
12 now available to the American public to a much
13 greater degree than was the case 3 years ago. And
14 much of this is attributable to the use of formats
15 and distribution methods that rely upon
16 technological protection measures, and particularly
17 upon access controls. And we've given some examples
18 in our reply comments.

19 We'll talk more about the DVD tomorrow.
20 We'll talk about online music distribution this
21 afternoon as well in the software field,
22 entertainment software, business applications,
23 digital and online delivery of text and database.
24 The fact is that today measured against 3 years ago,
25 we have far more availability by far more people to

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1 far more material in digital form than we did 3
2 years ago.

3 And the significance of this is really
4 twofold. One, your mission is to determine whether
5 the availability of these materials for
6 noninfringing uses has been substantially adversely
7 affected by Section 1201(a)(1). And this includes
8 the availability through licenses, through permitted
9 uses and other types of noninfringing use. So if
10 those have increased, then the availability of these
11 works has also increased and you need to take that
12 into account.

13 Second, I want to emphasize that as you
14 recognized in your conclusions in 2000, you are
15 really performing here not a one sided calculation,
16 but a net calculation. And even in instances where
17 you find some adverse impact on the availability of
18 works for noninfringing uses, you also have to look
19 at the degree to which technological protection
20 measures have facilitated this use. It is a net
21 calculation, and I think Congress was correct when
22 it said the question here is whether on balance
23 there has been an adverse impact on the availability
24 for noninfringing use that is substantial enough to
25 justify an exemption.

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1 So this is a question I'm going to come
2 back to, not really as a promotion for what the 17
3 organizations that I represent here have done in
4 terms of making material available to the public,
5 but simply as a way to shed light on the balance
6 that you need to strike in the proceeding that we're
7 engaged in.

8 Well, let me turn now to the question of
9 filtering software and just briefly summarize our
10 position on this.

11 First of all, the exemption that's been
12 proposed is verbatim the same or almost the same as
13 the one that is in existence now. So it presents
14 squarely the question of how you should proceed in
15 judging whether the exemption should be recognized
16 for an additional 3 years. And I think nothing is
17 clearer from the legislative history and also from
18 your prior conclusions that this is a de novo
19 determination. The burden remains on the proponents.
20 And the fact that there has been an exemption in
21 effect for the current 3 years does not weigh in the
22 balance as to whether there should be a new
23 exemption recognized for an additional 3 years.

24 I think with regard to filtering
25 software, unlike the other exemption that we'll talk

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1 about later on today, I think at least some of the
2 proponents of the exemption have made an effort to
3 shoulder that burden and tried to present to you
4 with information to demonstrate how the exemption
5 has operated in practice and why it is needed, why
6 it is still needed or why it should be renewed. I
7 think Mr. Tyre's presentation also was along that
8 line. But I did want to underscore the de novo
9 nature of the determination and the fact that the
10 burden remains on the proponents to bring forward,
11 again, concrete evidence about what is actually
12 occurring.

13 Now, in the 2000 rule recommendations
14 that was adopted by the Librarian, you essentially
15 had an uncontested proceeding. I think the
16 conclusion virtually states that, and there are
17 several conclusions that were drawn there. For
18 example, people who wanted to make fair use of the
19 type of comment and criticism use that Mr. Tyre's
20 talked about of these lists of websites had no
21 alternative but to decrypt them. That there was no
22 other legitimate way to obtain access to this
23 information. And you also had no other evidence
24 before you at that point, according to your
25 conclusion, that these technological protection

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1 measures were at all use facilitating or that
2 granting an exemption for decrypting them would
3 decrease their availability in anyway.

4 I think all of those points are now very
5 hotly contested in the proceeding before you. You
6 have an extensive submission from several of the
7 companies, and you had testimony April 11th. And I
8 know Mr. Tyre will be rebutting some of that
9 testimony as well. My point is simply that you now
10 have the issue joined before you, and I think you're
11 in a position to determine whether the proponents of
12 the exemption can carry the day. But certainly the
13 record before you raises a question about whether
14 you can, in fact, find out without decryption
15 whether any given site is blocked by one of these
16 programs. And you also have evidence, which I'm sure
17 Mr. Tyre will comment on, that there has been a
18 great deal of research and comment and criticism
19 that's been undertaken of these programs by methods
20 that do not involve circumvention of technological
21 controls.

22 Now, one other factor that I think is
23 extremely relevant here, which is what use has been
24 made of this exemption during the period since it
25 came into force in October of 2000 up until today, I

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1 think that as least as of the beginning of this
2 hearing the record was quite murky about that, as I
3 read the transcript of the April 11th hearing. It
4 wasn't clear what the witness testifying there
5 actually had done.

6 Now Mr. Tyre's testimony that describes
7 a little bit of what he did and perhaps he will
8 pursue that further to find out whether those acts
9 of decryption took place before or after the
10 exemption came into force. But as we pointed out in
11 our reply comments, it is relevant what use is being
12 made of this, how often it's being used, how many
13 people are using it. And I hope you can develop the
14 record on that before you reach a conclusion about
15 this exemption.

16 Now, I'm not sure that the organizations
17 that filed our joint reply comments really have much
18 light to shed on how some of these contested issues
19 should be resolved. But I do want to just refer to
20 three aspects of the evidence as it stands now that
21 I think are relevant.

22 First, I think you have to determine
23 whether what the proponents are seeking is the
24 preferential or optimal means of obtaining access of
25 this information for their fair use purposes or by

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1 contrast, do they have sufficient access to it now,
2 is it sufficiently available for them to carry out
3 these types of activities without circumventing?
4 And this, of course, has to be gauged in the light
5 of the conclusion that you reached in 2000 and that
6 the courts reenforced in the ensuing two years that
7 fair use does not necessarily mean fair use in the
8 preferred or optimal format. Just noting access to
9 material in a preferred or optimal format.

10 The second issue is the scope of the
11 adverse impact. Is it de minimis or widespread?
12 And, again, this gets to the question of what
13 actually is being done under the shelter of this
14 exemption today.

15 And the third point which I hope that
16 the record will be developed on is whatever adverse
17 impact there is can be ameliorated or even
18 eliminated in other ways such as through private
19 agreements. And I thought there were some
20 tantalizing hints of this in the testimony you heard
21 on April 11th about the potential availability of
22 these lists to bona fide researchers under agreement
23 with the proprietors, the people that compiled them
24 and that have the copyright interest in them.

25 I think it's Mr. Tyre's right that some

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1 of these reports have been taken very seriously, and
2 there may be a very active interest on the part of
3 some of these companies in cooperating with
4 researchers, which might correspondingly reduce the
5 need for any exemption in this area.

6 Now, finally, I just want to come to our
7 main concern about this exemption. And I hope I
8 don't get too deeply into the arcane and
9 metaphysical question that I'm sure we will grapple
10 with today and tomorrow, which is what is a
11 particular class of works in terms of the statute. I
12 think this is actually a simpler question as to
13 whether this class that you recognized in 2000 is
14 too broad. I'm going to assume for now that the
15 class you recognized fits the criteria of the
16 statute. In other words, it describes a particular
17 class of works.

18 And I want to emphasize this point,
19 because we do live in a different world today than
20 we lived in in the year 2000. And I think our
21 concerns about computer security and about
22 protection of the safety and security of our
23 computer networks is heightened today contrasted to
24 where we might have been in the year 2000.

25 We know that filtering software that may

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1 fit the description that appears in the exemption
2 that exists now is one of the key tools in keeping
3 our network safe and secure. And many of those
4 filtering software packages may include lists of
5 websites that either are the sources of viruses or
6 the source of SPAM, which is of course is a scourge
7 that we're all having to deal with increasingly now.

8 In other words, that programs that
9 really I don't think anyone in Mr. Tyre's would
10 consider censorware may be swept within the ambit of
11 this exception with potentially very serious
12 consequences in terms of compromising the security
13 and safety of computer networks.

14 Now, of course, there's no evidence in
15 this record whatsoever that there has been any
16 substantial adverse impact on the availability of
17 copyrighted materials for noninfringing uses or that
18 were would be any of the action of circumventing
19 access to those types of security software lists
20 were to be prohibited. So there's really no basis
21 for extending or maintaining such a broad definition
22 of this particular class of works with the breadth
23 that would include those kinds of security programs.

24 And I think one thing that I hope that
25 the panel will is, and I think Mr. Tyre and his

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1 group could probably make a very important
2 contribution here, is to more narrowly focus this
3 exemption if you conclude based on the testimony
4 that you hear and the contested issues that are
5 before you, that it is justified and that the
6 proponents have met their burden with respect to
7 censorware, then I think the exemption needs a
8 definition of censorware. The exemption needs that
9 in order to more tightly focus it on the area where
10 the need for it has been shown.

11 And, again, because of the name of this
12 project, I'm sure Mr. Tire can provide you with a
13 proposed definition of censorware that might be
14 useful to you and that might fit better within the
15 definition of a particular class of works that
16 Congress urged you to look at.

17 So, I will conclude there and be glad to
18 try to answer any questions you may have either
19 about my general remarks or about the filtering
20 software exemption. Thank you.

21 MS. PETERS: Thank you.

22 Let me start the questioning, and
23 actually you asked the questions that I sort of had
24 identified.

25 Mr. Tyre, you talked about the three

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1 ways in which people try to deal with what's in the
2 fire of CyberPatrol or whatever. And you mentioned
3 decrypting and analyzing, and then reporting
4 database inquiry log file analysis. Could you tell
5 us why the database inquiry and the log file
6 analysis is not sufficient and why the decryption
7 method is not only the preferred, but the only way
8 that you can do what you want if you can do that?
9 And comment a little bit about Mr. Metalitz' issue
10 with regard to wouldn't special agreements work?

11 MR. TYRE: Okay. I'd be perfectly glad
12 to talk about that. I think that's the main reason
13 why I'm here today, as a matter of fact. And this
14 actually does go both to what Mr. Metalitz has said
15 today and what he has in his joint reply, and also
16 what happened in the Washington testimony.

17 I'm going to break it down into
18 segments. And let me refine one thing that you just
19 said.

20 We have never contended that the other
21 methods based upon any technique other than
22 decryption for doing this kind of work are
23 completely inadequate. We've done studies using log
24 file analysis and database querying ourselves.
25 There's lots of things you cannot find out using

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1 those methods. They are not nearly as good as
2 decryption and analysis based upon description. But
3 we are not saying, and I want the record to be clear
4 on this, that they are useless.

5 MS. PETERS: So you think they're too
6 limited?

7 MR. TYRE: Yes.

8 MS. PETERS: Okay.

9 MR. TYRE: Yes.

10 Now, I want to start off with database
11 querying or sampling, and I want to start even more
12 focused on that with the specific question of so-
13 called URL checkers because Mr. Burt told you and he
14 gave screen shots in his joint reply comments of the
15 URL checkers of four censorware companies, his own,
16 N2H2, WebSense, SmartFilter and SurfControl, which
17 is what used to be CyberPatrol have. They're web
18 interfaces. You can go to them. You can type in a
19 URL and it'll tell you it's not blocked, it's
20 blocked in this category, it's blocked in that
21 category. Great. What's the problem?

22 Problem number one: Mr. Burt used very
23 careful language to tell you about those four and no
24 others. If you want to take a look at my Exhibit 2
25 in your booklets, this is just a little survey I did

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1 on Monday just confirming results I already knew.

2 I checked the nine major censorware
3 copies. How many of those censorware companies even
4 offer URL checkers? Exactly the four that Mr. Burt
5 mentioned and not one more. Four out of nine offer
6 them.

7 And I should note that two of the three
8 who signed onto Mr. Burt's joint reply companies,
9 8e6 Technologies and BSafe Online do not offer them.
10 So we've got nine major censorware companies, five
11 don't even have them. So let's completely throw them
12 out for purposes of talking about URL checkers.
13 That's half the industry right there.

14 Now, there are other players than just
15 these nine, but I choose the nine major players
16 because I didn't want to make this list too
17 extensive. And between these nine we have most of
18 the field covered.

19 Then I want to talk specifically about
20 one particular URL checker, that being the URL
21 checker of WebSense. And I ask you to flip over
22 quickly to Exhibit 3. WebSense's URL checker is
23 different from that of all the others. Because with
24 all the others, N2H2, SurfControl, you just go
25 there, you type in to your heart's content, you get

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1 whatever results they give you. Not WebSense.
2 WebSense as you can see from the form here they make
3 you register using a real email address, you can't
4 even use a webmail address such a yahoo.com or
5 hotmail.com, or something like that. You also can't
6 use an AOL.com address or an earthlink.net address,
7 or something of those sorts because they consider
8 those to be addresses for home users, not for
9 serious business Internet uses. That's an
10 interesting assumption on their part, but that's the
11 assumption they offer. And it's spelled out right
12 here in this little exhibit. It's one of the reasons
13 why I printed it out.

14 So as long as you have a good enough
15 email address to satisfy their criteria, then they
16 will email you a password and if they email you the
17 password, then and only then can you access their
18 URL checker.

19 And if you look at the very bottom of
20 page 1 of Exhibit 3 going over to page 2, you'll
21 find their terms of service. And their terms of
22 service say, in a nutshell, you can use this if you
23 are a customer or you're seriously considering
24 becoming a customer of WebSense.

25 So the minute I clicked on that, I

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1 violated their agreement. They can sue me if they
2 want. I'm saying it openly. I have no intention of
3 ever becoming a WebSense customer, but that's what I
4 had to do to get access to their URL checker.

5 Then here's the real flaw in WebSense.
6 Let's go to Exhibit 4. It's a big exhibit, you do
7 not have to look at all pages.

8 The first URL I called up on their URL
9 checker just because it might amuse you was
10 something called www.copyright.gov/1201. And you'll
11 be happy to know that you are classified as a
12 government site in their web checker. It might have
13 made for a good joke if you were classified as a
14 porn site, but they got this one right.

15 MR. CARSON: There's a lot of scurrilous
16 information in there.

17 MR. TYRE: Now, if you want at your
18 leisure, you can go through the next 21 pages. I
19 don't really care. What I want you to do right now,
20 this is a test I ran going through this just
21 manually entering URLs at random. For the purposes
22 of this test I don't care whether their
23 classification of any particular website was right
24 or wrong. What I do care about, and I've replicated
25 this experiment more than several time; this was not

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1 an anomaly, is that after running 21 pages, what you
2 see in the first 21 pages of this exhibit. You get
3 to page 22, and please forgive me if I have to
4 squint a lot when I'm reading things, but I don't
5 have a whole lot of eyesight.

6 But on page 22 WebSense site look up
7 tool. "Your organization has exceeded the maximum
8 number of lookups for a single day. Please try again
9 tomorrow. WebSense has implemented a limit to ensure
10 the use of the master database for WebSense
11 customers and prospects only. Thank you for your
12 understanding." Twenty-one a day. That's very
13 helpful. I hope the record reflects I was being
14 highly sarcastic in saying that.

15 I think we can pretty well discount the
16 WebSense URL checker as a valuable research tool.
17 So now we're down to only three companies out of
18 nine that have even potentially valuable URL
19 checkers.

20 The next exhibit, Exhibit 5, all of
21 these were done from N2H2's URL checker. These were
22 not done to show any particular problem with N2H2's
23 URL checker. It has had problems in the past. Those
24 problems apparently do not exist anymore, so I'm not
25 going to talk about those problems.

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1 I created these exhibits to illustrate
2 in a fairly tangible fashion what some of the
3 problems with database querying are. And for the
4 purposes of this, it does not matter whether in this
5 particular case I happened to be using a URL
6 checker, as I did for this exhibit, or whether I
7 happened to have a running copy of N2H2 and I'm
8 doing more extensive database querying. The problem
9 is the same.

10 In the CIPA trial, CIPA being the
11 Children's Internet Protection Act the formal case
12 being American Library Association v. United States
13 There was expert testimony, and this necessarily was
14 very rough, that there are approximately 2 billion
15 webpages out there. That was a year ago. We don't
16 need an expert to sit here today and tell us that
17 same expert would give us a much larger number
18 today. And it wasn't actually 2 billion webpages,
19 it was 2 billion indexable webpages. Only those
20 pages that can be found and indexed by search
21 engines, which is a subset of the entire web.

22 I could explain that if you want, but I
23 think the figure of 2 billion by itself is big
24 enough to make one of my points.

25 Then you have something like N2H2, which

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1 has a database of 4 million entries, according to
2 David Burt. That doesn't necessarily mean that they
3 block 4 million websites. Those 4 million entries
4 could block, for all we know, 7 or 8 million
5 websites. For example, as all of the censorware
6 companies do, they have blocks in certain of their
7 blocking categories on the free web page services.
8 All of them block Geocities or what used to be
9 geocities. Now it's pages.yahoo.com in at least one
10 of their blocking categories. That's only one entry
11 in their database, but that entry in their database
12 puts a block on however many tens of thousands or
13 maybe even hundreds of thousands pages there are on
14 Geocities, as I still prefer to call it because I'm
15 just used to saying that.

16 You think about those numbers, 4 million
17 entries in the database, 2 billion webpages. Not
18 websites, webpages. How is one going to devise a
19 statistical sampling for a database query that it's
20 going to find truly meaningful ways of discovering
21 what the problems in the database are?

22 And this next set of exhibits is
23 intended to illustrate for any database querying
24 method, not just for N2H2 URL checkers, that there
25 are problems with that which can be solved by

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1 decrypting, looking at the list, but that cannot be
2 solved effectively simply by database querying.

3 Now you'll see on the first page of
4 Exhibit 5 I called up the site peacefire.org to see
5 how it was classified. And it's classified not
6 currently categorized in the N2H2 database. Great.
7 Peacefire's clean. Don't have to worry about it.
8 Move on to the next domain name, right? Wrong.

9 Turn to the next page. Go to a
10 subdirectory in peacefire.org, peacefire.org/bypass.
11 That subdirectory is blocked by N2H2 as a loophole
12 site. And I believe you heard just a little bit
13 about what a loophole site is, so I'm not going to
14 further burden the record with that. I just chose
15 that one because I happened to know that it was
16 there, not because I want to further burden the
17 record talking about what false sites is.

18 So, what do you do when you build a
19 database for the purpose of doing a database
20 inquiry? Do you do it just with domain names? Do
21 you do with directories? Do you do it with
22 subdirectories? How do you build that database and
23 how do you even know what subdirectories that you
24 are to include in the database? This is a problem.

25 Another example, the same problem. And

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1 I'm glad they're sitting behind me, because I
2 wouldn't want to be talking their back. But the next
3 page of Exhibit 5 I called up eff.org. They're
4 clean. Not categorized. Wrong. Turn to the next
5 page, their Blue Ribbon Campaign, which they've been
6 running since perhaps 1993/1994 is in the world
7 according to N2H2 a drug site. And I thought it was
8 important that you know N2H2 thinks it's a drug
9 site, because later today and tomorrow you're going
10 to be hearing a lot from EFF personnel, and you
11 really ought to know the quality and caliber, at
12 last according to N2H2 of who you're dealing with.
13 Who in this right mind who has ever looked at the
14 EFF Blue Ribbon site could possibly think it's a
15 drug site? How could one imagine searching that
16 particular subdirectory, and yet there it is in the
17 N2H2 database, it's a drug site. So I have a bunch
18 of druggies sitting behind me according to N2H2.

19 Now, I told them I was going to tell a
20 joke at their expense. I can't see behind me to see
21 if they're laughing or they're staring at me.

22 Now, we turn to the next one and we get
23 to a very interesting example. The next page in the
24 exhibit is snark.freeseve.co.uk. UK being the
25 country code for the United Kingdom. That's the

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1 basic root domain. And we see that N2H2 blocks in
2 the games category.

3 So suppose I want to find out how that
4 website is blocked or it's because I happen to be
5 the owner of that website, which I'm not, I type in
6 the website address. I see, okay, it's games. I
7 don't care if it's blocked in games. I only care if
8 it's blocked in the categories that a public library
9 likely would use. So I won't do anymore searching
10 because I'm not concerned with the games category.
11 Once again, please turn to the next page we start
12 going down to a subdirectory level. We've got
13 snark.freemove.co.uk/ -- uh-oh censorware. And
14 guess what. That's illegal. So depending upon where
15 we are on that site, we have N2H2 taking the same
16 site, categorizing it under two completely different
17 categories. If I was just setting up a random
18 database, how would I know, particularly if I didn't
19 have the knowledge and experience that I had, to
20 know that gosh, they may classify part of the site
21 one way, they may classify another part of the site
22 a different way?

23 And then I want to turn to the final
24 example where I'm going to walk you through a series
25 of 4 pages to show just how far you have to dig to

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1 find some of these.

2 This next site is danny.oz.au, AU being
3 the country code for Australia. The Root domain name
4 free bill of health from N2H2.

5 Let's go down one directory to the next
6 page, danny.oz.au/freedom. Clean bill of health.
7 No problem.

8 Let's go to the next page, down one more
9 subdirectory level, danny.oz.au/freedom/censorware.
10 Well, that censorware site's okay. No problem.

11 Let's go to the last page of the exhibit
12 going really deep into that site,
13 danny.oz.au/freedom/censorware/ifilter.html. Uh-oh,
14 we've got profanity there.

15 Now, how far have we had to dig into
16 that site to find something N2H2 blocked? How could
17 anybody in the real world as opposed to in some
18 completely theoretically world even think to go down
19 that far in the directory structure of that website
20 to look to see if there's a block or not. Maybe
21 Danny yee the owner of this site, might think of
22 that. But I have no clue who else would think of
23 that.

24 And if you're wondering, well, how did I
25 know this if nobody else would think of that? There

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1 was some dispute about whether Seth Finkelstein had
2 decrypted the N2H2 black list. I asked Seth to find
3 me examples to prove a point I wanted to make here
4 today. He did not give me the entire decrypted black
5 list. I do not have it. I have never asked for it.
6 But I specified to him what I wanted, find examples.
7 He sent me examples.

8 These examples that I just gave to you
9 came from Seth's decrypted black list which Mr. Burt
10 claims Seth never decrypted. That's how I know about
11 these examples, and it's unlikely I ever could have
12 found them without Seth having decrypted the black
13 list and given me these examples.

14 MS. PETERS: So you're basically saying
15 that decryption is the only way to have gotten this?

16 MR. TYRE: Sure. For this purpose, yes.

17 MS. PETERS: Okay.

18 MR. TYRE: Suppose hypothetically I had
19 a list of every domain name in every top level
20 directory, whether it be the big three .com, .org,
21 .net, whether it include the sponsored TLDs, whether
22 it be yours, .gov, .mil, whether we get into country
23 codes such as a .au or a .uk; suppose I had the list
24 of every single one of those, could I write a script
25 that would feed every single one of those through

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1 N2H2 or SurfControl or so forth? I personally
2 couldn't, but I know many people who could.

3 Let me very quickly say that I
4 personally do not do decryption because I do not
5 have the technical skills for it. It is a very, very
6 skilled thing to do. And I do not have those
7 skills, but I know a lot about the results of it
8 because I've worked with people who do it.

9 But let's get back to what I was saying.
10 I feed through every single domain name in the world
11 regardless of what TLD is, it's going to give me a
12 picture. It's not going to tell me everything
13 because it's not going to tell me whether a
14 particular site instead of being blocked at the
15 domain level is going to be blocked at a directory
16 level or a 3 level below subdirectory level. It's
17 not going to tell me with that snark.freeseve. site
18 whether it's going to have one kind of block at the
19 Root or main level and another kind of block at the
20 lower level. These are the reasons why database
21 querying is not as effective as decrypting the
22 entire black list and going through it.

23 One uses tools to go through it. One
24 can't simply read the black list or else one would
25 go crazy. And by the time one finished reading it,

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1 it would be completely out of date in any event. But
2 the only way to find blocks at this level of
3 granularity is by doing decryption.

4 Give you another example, this is an
5 example from the past but it's a good example of why
6 database querying is not good.

7 Most of the studies we do at Censorware
8 Project we look for so-called overblocking or blocks
9 are wrong or they're bad blocks. Occasionally we've
10 done the other side where we look at underblocking
11 where they don't block what they were supposed to
12 do. We did a study with N2H2 where we did both. But
13 that's one of the few times we've done both sides of
14 it. But there's a very famous example that we did
15 with CyberPatrol.

16 A site called maplesoccer.org. It's a
17 youth soccer league in Massachusetts. You all know
18 what youth soccer leagues are. You can all pretty
19 well imagine what would be on the website of a youth
20 soccer league. Here are the teams, here are the
21 standings, here's the schedule, here's the age
22 groups, all that. Who would think to put that into
23 a database query as part of a sampling?

24 CyberPatrol blocked it. Why did
25 CyberPatrol block it? Because it talked about teens

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1 age 13 to 15. Uh-oh, that could be sexual. Could
2 be child pornography. Could be a variety of other
3 things. It wasn't.

4 And the funny thing about that was we
5 exposed that block, CyberPatrol, as did all of the
6 other companies, went back and unblocked. Then they
7 went back and they reblocked it. We exposed the
8 fact that they're stupid, they reblocked this site.
9 They unblocked it. Went back and reblocked it. Not
10 because they're malicious, but because they do most
11 of this by computer robots, not by human review, and
12 the computer robots are stupid. Computers are not
13 smart for this kind of work. They never have been.
14 Some day they may will be, but they surely are not
15 today.

16 So we did that a second time. They
17 unblocked it, they reblocked it. I won't tell you
18 exactly how many times we went through this cycle,
19 but eventually I decided to have some fun with this.

20 I wrote an open letter, you know, from
21 the President of CyberPatrol: From the President of
22 Cyberpatrol to the PR Director for CyberPatrol, who
23 was actually on one of these discussion lists I was
24 telling you about, and was very active in the
25 discussion. At that time people from all sides

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1 really were talking about this. Her name was Susan
2 Getgood. And the memo said something to the effect
3 of "Susan, they're killing me. You've got to find a
4 way that we can't keep reblocking this site. Those
5 Censorware Project guys are just driving us nuts.
6 Fix our program. Do something."

7 They kept reblocking it. They kept
8 unblocking it. Eventually they fixed the problem.
9 And that story is not just a fun little story, but
10 it's an answer to a question that was raised in the
11 first hearing. You know that during the first
12 hearing Seth Finkelstein did have on one or two
13 occasions access to the N2H2 encrypted black list.
14 But then N2H2 stopped letting him have it, not
15 surprisingly, but they stopped. Was it enough for
16 him to have it once? To analyze it once, yes. Was
17 it enough for him to determine how many new mistakes
18 they kept making, whether the mistakes are isolated
19 instances, whether they're a problem at the system
20 level? The only way you can do that is if you keep
21 doing this over and over and over again.

22 In the Mainstream Loudoun case we went
23 through probably 8 or 9 different iterations of X-
24 Stop because it was important to see not only
25 whether in the course of discovery the bad blocks

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1 that were being revealed were being unblocked, which
2 for the most part they were, but what new bad blocks
3 were being added. It's like the old Jay Leno
4 commercial for Doritos, "we make more." It's
5 guaranteed every time censorware companies add more
6 to their black list, there's going to be more
7 mistakes on them. You have to have continuous
8 access to the list to find out what's on it. It's
9 all fine and good to know what was blocked two
10 months ago, but that doesn't tell you what's blocked
11 today and how systemic the problems are.

12 Now, that's why combining those factors
13 together, doing database querying although it has
14 its uses, is not as effective as doing decryption
15 and having the ability to do the decryption as
16 frequently as possible.

17 MS. PETERS: I asked about private
18 agreements, and you just basically cited and said
19 that Mr. Finkelstein basically had the list but no
20 longer did. Is that a comment on what agreements
21 might be reached that maybe you can get an agreement
22 to get it once, but having continuous access is a
23 problem?

24 MR. TYRE: The practices vary somewhat
25 from company-to-company. But the normal practice is

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1 that you fill out a form, you give them your
2 information. Anytime I've ever done this, I've used
3 truthful information, no fictitious identity. And I
4 believe that the same is true for Seth and other
5 people I know who have done this. You fill out the
6 form, they don't do any particular checking on it,
7 you just enter your information. As soon as it's
8 entered, you can download the 30 day trial.

9 The only time I've known of when that
10 was not the case was with a product called
11 SmartFilter when their sales person after I
12 registered actually called me. And before he called
13 me, he did a search on me and he saw I was a member
14 of the Censorware Project and saw what the
15 Censorware Project did. And he still let me have a
16 sample. It's the only time I know of that's ever
17 happened when a company has agreed to let someone
18 like the various members of the Censorware Project -
19 - I think I'll pass on defining whether we're
20 reputable or not. That's for others to decide. Has
21 actually let any of us have something like that with
22 knowledge of who we are.

23 David Burt's testimony in Washington was
24 very specific with a reputable lab, such as Consumer
25 Reports or something along those lines, we've talked

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1 about this within N2H2, but we've not really
2 decided. Maybe if they let us be present while they
3 do their testing, maybe if they sign a nondisclosure
4 agreement, then maybe we'd let them have the
5 information and we'd give it to them in a decrypted
6 form. We wouldn't even make them go through the
7 trouble of figuring out how to decrypt it. So if
8 that was maybe, he was in no position to say that,
9 yes, faced with a request like that, that the
10 company would agree to that.

11 And if you're talking about folks like
12 us, folks who are not a reputable lab such as
13 Consumer Reports, even though what we do is far more
14 in depth than what Consumer Reports does, there's
15 many maxims of jurisprudence. One of those maxims of
16 jurisprudence here in California, which is in our
17 civil code, is that the law does not require idle
18 acts. I can tell you, that if I were to go to a
19 censorware company today or if Seth were to go to a
20 censorware company today or if certain other people
21 were and say this is who I am, this is why I want
22 it, it would be the ultimate idle act. They would
23 never agree.

24 MS. PETERS: So your answer is no?

25 MR. TYRE: If I remember the question,

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1 yes.

2 MS. PETERS: Can this problem be
3 ameliorated through private agreements?

4 MR. TYRE: In my opinion, no. First of
5 all, I don't think the censorware companies ever
6 would agree. And second, if part of the agreement
7 was an NDA, then what would be the point? Our
8 purpose is to expose the flaws.

9 MS. PETERS: Okay. One last question, I
10 don't want to hog it all. Mr. Metalitz said even if
11 the case is proved, the class is too broad and the
12 focus is on censorware and can you come up with a
13 definition. Is it possible to come up with a
14 definition for censorware that distinguishes it from
15 the broader class of filtering software that would
16 deal with security and other things?

17 MR. TYRE: Well, I'm going to turn that
18 around a little bit. And I'm doing this not just as
19 a lawyer's trick, but because from the first moment
20 I read Mr. Metalitz' comment, I had an idea of what
21 he was talking about but I wasn't sure. I've asked a
22 lot of people, not just other censorware people, but
23 computer security people who are among my client
24 list. And no one has been able to figure out exactly
25 what is meant by what Mr. Metalitz wrote and exactly

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1 what definition, if any, would satisfy his request.

2 So I'm going to suggest to this panel
3 that the burden should not be on me or any other
4 proponent of censorware of this exemption to limit
5 the proposed exemption. The burden should be on Mr.
6 Metalitz as the one who proposed this amendment or
7 limitation, or whatever you want to call it, to
8 specify in writing that can be analyzed as opposed
9 to being just a theoretical construct exactly what
10 it is that he does or does not want. And your
11 having indicated at the beginning that there will be
12 a chance for supplemental comments after this is
13 over, I think that's the appropriate forum to do
14 that in. I don't think it's appropriate today.

15 Again, not because I'm playing games,
16 but seriously because no one, including computer
17 security experts who are clients of mine, really
18 understands it. I'm very uncomfortable taking on
19 the burden of trying to deal with it at all before I
20 see something more tangible from Mr. Metalitz.

21 MS. PETERS: Okay. Do you want to
22 comment at all?

23 MR. METALITZ: Yes. Sure. We have put
24 something in writing to say we think the filtering
25 software that was covered by the evidence that's

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1 been presented here, and it's on page 13 of our
2 joint reply comments. "Filtering software used to
3 prevent access to Internet sites containing material
4 deemed objectionable to children or otherwise
5 inappropriate for some segment of the public or for
6 display in a public setting."

7 Now, that may not be a very good
8 definition, and I would think that people who have
9 the word "censorware" in their name would have
10 probably a sharper definition of what kinds of
11 material they're talking about. But the burden, of
12 course, is on the proponent throughout this
13 proceeding and this panel can't recommend an
14 exemption unless there's evidence to support it that
15 shows a substantial adverse impact on the
16 availability of something, some copyrighted work or
17 noninfringing purposes. So I would suggest that, you
18 know, we've taken a stab at it and I'm sure Mr. Tyre
19 can do a lot better. But we just think that whatever
20 finding is made here ought to conform to the
21 evidence and not extend much more broadly to get
22 into areas that aren't covered by the evidence.

23 MS. PETERS: We may do a question. The
24 way the supplemental come in is if we actually come
25 up with questions that we believe we need further

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1 input from. So, we'll handle it that way.

2 MR. TYRE: May I quickly respond to
3 that?

4 MS. PETERS: Yes. Sure.

5 MR. TYRE: Certainly we can provide a
6 more precise definition of censorware. I don't have
7 one in writing in front of me, but that can be done.
8 That's not the problem.

9 The problem is dealing with the other
10 aspects of what Mr. Metalitz proposes, and that
11 these things other than what would be defined as
12 censorware. And one of the specific reasons why
13 that's a problem, is because there's been so much
14 consolidation in the industry, the relevance
15 industry segment, that it's not a surprise that you
16 have companies such as Symantec which are offering
17 integrated products which consist both of
18 traditional censorware and of firewall protection,
19 antivirus protection things of that nature.

20 And what I'm asking for, I don't know
21 whether I'll get it, but what I'm asking for is
22 something from Mr. Metalitz that tells us how we
23 deal with something like that, how we deal with an
24 integrated product. And further, how we deal with
25 what I would call a pure censorware company such as

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1 N2H2 not suddenly grasping onto this newly limited
2 category and by making a few minor changes into its
3 database, suddenly turning itself into a company
4 that in addition to doing censorware has some minor
5 security functions, some minor virus protection.
6 And all of a sudden because of however this
7 definition may work, finds itself because of
8 imprecise wording or any other reasons no longer
9 subject to an exemption, assuming of course that
10 there's going to be an exemption at all.

11 So I'm really troubled by how all of
12 this will play out. And that's why, though I may
13 not get my wish, I am wishing that you will put the
14 burden on Mr. Metalitz to give us something far more
15 concrete to consider than what has been given.

16 MS. PETERS: I've basically hogged the
17 questions. So, David, how about you.

18 MR. CARSON: Let me just suggest to you,
19 don't assume we're going to put a burden on you or
20 Mr. Metalitz. But it would be in your interest to
21 provide a more precisely defined class and what you
22 would like to see if we were to go in that
23 direction.

24 I assume you're not saying that there is
25 a reason why people should be able to have access to

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1 lists of what a virus swapping software blocks? Is
2 that true or is that of interest to you?

3 MR. TYRE: Speaking for myself and for
4 the Censorware Project, that is not of interest to
5 us. Whether it would be of interest to other
6 security researchers, I have no knowledge or
7 comment.

8 MR. CARSON: Right. But they haven't
9 come forward in any event, so that's not really
10 before us, I don't think.

11 I'm not sure I've heard a precise answer
12 to this question, and I think it's perhaps an
13 important one. Can you tell us how people have
14 since October 28, 2000 been taking advantage of the
15 exempted class for compilations of consisting of
16 websites blocks by filtering software applications?

17 MR. TYRE: That's an easy question to
18 answer and it's a difficult question to answer
19 because there's not really a whole lot that I can
20 say about that that wasn't already said in
21 Washington.

22 MR. CARSON: Well, not a whole lot was
23 said, unfortunately, in Washington.

24 MR. TYRE: I'm quite well aware of that.
25 I have gone through that transcript more than once.

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1 Mr. Burt contends that Mr. Finkelstein
2 hasn't even done the work that he says he's done. I
3 personally got a rather large chuckle about Mr.
4 Band's comment about the Iraqi Information Minister.
5 I sincerely hope that this panel does believe that
6 Mr. Finkelstein has, in fact, done what he says he
7 has done. And I've told you straight out that some
8 of what I've presented to you today is based upon
9 the work that Mr. Finkelstein has done, that
10 specifically decryption work of N2H2, not other work
11 that has been done.

12 There really isn't a great deal that I
13 personally know of that has been done in the last 3
14 years, but I think there are a couple of reasons for
15 that. And I think there's also a quick response I
16 want to make that's related to that to one of the
17 remarks that Mr. Metalitz made in the beginning.
18 And that is that I believe he has incorrectly stated
19 what the appropriate considerations are for the
20 Copyright Office and for the Librarian of Congress.

21 There's no doubt that what has or has
22 not been done in the last 3 years is a relevant
23 factor. You'll never hear me say otherwise. But Mr.
24 Metalitz indicated in his opening statement today
25 that that's the only relevant factor. I believe

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1 that's incorrect, both from reading the statute and
2 from reading your notice of inquiry, I believe that
3 regardless of whether it's an exemption that never
4 has existed or it's a request to in effect renew an
5 exemption that already has requested, such as this
6 one, the focus is the same. The focus is "either/or"
7 it's an either/or not an "and". Either what has
8 happened before or what is likely to happen in the
9 future.

10 MR. CARSON: Could I stop you for a
11 second? Do you dispute that, Mr. Metalitz?

12 MR. METALITZ: If I understand what Mr.
13 Tyre is saying, no I would not say that what is
14 actually occurring now is the only relevant factor.
15 But Congress said that should be the main focus of
16 this proceeding.

17 MR. CARSON: So you don't dispute -- I'm
18 sorry. Go ahead.

19 MR. METALITZ: And now that the
20 prohibition is in effect, I think it's highly
21 relevant what use is being made of it.

22 MR. CARSON: But you don't dispute that
23 at least in theory, even if nothing were happening
24 now, if we could predict that it's more likely than
25 not that in the next 3 years it's going to happen,

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1 it's perfectly relevant for us to come up with an
2 exemption if that's where it takes us?

3 MR. METALITZ: Yes. If it meets the
4 criteria that are in the statute and legislative
5 history. And I think you've spelled them out in the
6 conclusion in 2000 what the burden would be in that
7 situation.

8 MR. CARSON: Okay.

9 Sorry for interrupting you. I just
10 wanted to clear it up. Please go ahead with your --

11 MR. TYRE: That's quite all right. It
12 was useful.

13 Now, let's get back to that. I cannot
14 cite to you any specific examples that are not
15 already in the record. I'd love to be able to, but
16 I'm not going to make up facts that don't exist.
17 What I can tell you is that there's sort of a unique
18 dynamic that's at play here, and this was not really
19 discussed at the Washington hearing.

20 This whole exemption has many unique
21 qualities about it, not the least of which it's one
22 of the two exemptions that you granted 2½ years ago.
23 Most of the proposed exemptions that were requested
24 then were rejected. And so this is one that at least
25 to some extent has had the opportunity to be field

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1 tested.

2 But you've heard a great deal of
3 testimony already about how hard this work is. And
4 I'm not talking about what's been said about the
5 legal risks involved. I'm talking about that this is
6 extremely difficult work to figure out how to
7 decrypt these programs in the first place. This is
8 not work for an amateur. This is work for trained
9 professionals who focus specifically on knowledge of
10 cryptography. There aren't a whole lot of people
11 who are capable of doing this kind of work, and it's
12 a continuing arms race as one version of the program
13 gets decrypted, then the censorware companies
14 respond as you would expect them to. They make
15 better encryption so then you need more skill to
16 decrypt it. It's hard work. It's time consuming
17 work.

18 I cannot say this of my own personal
19 knowledge, but having gone through this with people
20 who have figured out how to decrypt this - Seth
21 being one of them, not the only one - I have pretty
22 solid knowledge of how much is involved in doing
23 this.

24 Given how hard the work is, there's
25 another factor that comes into play here. Sure,

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1 it's true that this exemption has been on the books
2 since October of 2000. But 2 months later or 3
3 months later in December 2000 CIPA was passed, the
4 Children's Internet Protection Act. And with, I
5 believe -- I'm not even sure if it was the day after
6 the legislation was signed. It may have even been
7 the day before it was signed. I don't recall, I
8 don't care. The twin lawsuits by the American
9 Library Association and the ACLU were filed
10 challenging the constitutionality of CIPA. And
11 those lawsuits were on a fairly fast track. You know
12 they went to trial. You know they were decided.
13 Approximately a year ago the three judge trial court
14 found that CIPA was unconstitutional as applied to
15 public libraries. The matter since has been argued
16 in the Supreme Court. And at some point before you
17 make your final rulemaking, the Supreme Court
18 presumably will decide that case.

19 I make no prediction on what that
20 decision will be. But I think it plays an important
21 psychological dynamic here because everyone has said
22 on both sides - Mr. Burt said I think, I know Mr.
23 Band said it, I know Mr. Finkelstein said it - that
24 what does or does not happen in the CIPA case will
25 have an impact on how this work is done in the

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1 future. And by that I mean specifically decryption
2 work where you can get into some of the in depth
3 things such as the loophole sites that you cannot
4 get into simply by doing database querying or log
5 file analysis.

6 The people who do this do this in their
7 spare time. They put in an awful lot of time to do
8 it. And there has been a feeling on the part of
9 those people, myself included, that is it really
10 worth investing a lot of time now when this major
11 court case is out there and this major court case
12 may have a huge impact on what the relative value of
13 this work is in the future. That's a psychological
14 issue. That may or may not resonate with you, but
15 it's a real issue. That issue that CIPA became law
16 and was challenged in the court within a few months
17 of when this exemption came to effect is one of the
18 reasons why there hasn't been a lot of this work
19 done in the last 2½ years. But by the same token,
20 knowing that the Supreme Court will be deciding the
21 case within the next month or at least in theory it
22 should be - I'm certainly not going to tell them
23 what to do - that there is a good likelihood, which
24 is the standard, that once the CIPA case is decided
25 and we know again where the landscape is that those

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1 who have been in the field, those who may be
2 interested in getting into the field will resume
3 their work.

4 MR. CARSON: I'm going to follow up on a
5 question that the Registrar asked you with respect
6 to the experience of getting access voluntarily from
7 the censorware suppliers to those lists. Have there
8 been cases where the Censorware Project or people in
9 a similar situation have tried to get access to
10 those lists and it's been flat out refused?

11 MR. TYRE: I'm sorry. I did not hear the
12 last part.

13 MR. CARSON: Have there been cases where
14 the Censorware Project or people in similar
15 situations have requested access to lists of blocked
16 websites and that access has been refused?

17 MR. TYRE: Yes.

18 MR. CARSON: Okay. Give me some idea of
19 the nature and quantity of those attempts?

20 MR. TYRE: Well, you already have in the
21 record that N2H2 flat out turned down Seth
22 Finkelstein once.

23 MR. CARSON: Yes, that's once.

24 MR. TYRE: Once.

25 MR. CARSON: I'm trying to get a sense

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1 of quantity of the problem, the nature of the
2 problem.

3 MR. TYRE: There was a time when I tried
4 to get one and, honestly, I'm blanking on which
5 product it was. There are so many of them, they
6 sometimes blend together. And they turned me down.

7 A lot of times you can get it the first
8 time because a lot of times you can get it the first
9 time because their system is automated. You give
10 them legitimate information, 2 minutes later you're
11 eligible to download it, you download it. It's the
12 second time that's the problem.

13 You do it the first time, then we go out
14 and we do a report. You do it a second time, no.
15 They'll not give it to you. Sometimes there are
16 other ways of getting a hold of it. But if you ask
17 for it, will they give it to you? No.

18 MR. CARSON: And you're telling us that
19 based upon a single experience of Mr. Finkelstein
20 and a single experience by you, is that correct?

21 MR. TYRE: Two experiences plus having
22 dealt with all these companies and knowing that
23 particularly after we've done a particularly
24 scathing reporting on them that if we asked for it
25 again, they'd just laugh at us.

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1 MR. CARSON: And the two specific
2 experiences were both with a single company, N2H2,
3 is that correct?

4 MR. TYRE: No.

5 MR. CARSON: Oh, I'm sorry. Mr.
6 Finkelstein was with N2H2 and yours was with?

7 MR. TYRE: Yes. I apologize for not
8 remembering which mine was with. There's been a lot
9 of consolidation in the industry and I'm not
10 specifically remembering what it was. But I will
11 state for a fact that it was not N2H2. I have never
12 made that request of N2H2.

13 So we have two instances, two companies
14 and I'd be willing to make a rather substantial
15 wager that that doesn't answer your question. But if
16 I were to go ask the other companies, I'd know what
17 the answer would be.

18 MR. CARSON: So you're asking us to make
19 judgments based upon your prediction, based upon
20 your experience?

21 MR. TYRE: Oh, no. I know to a moral
22 certainty what the responses will be. I'm not
23 asking you to --

24 MR. CARSON: You think you've shown us
25 two moral --

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1 MR. TYRE: I'm not asking you to take
2 that as evidence.

3 MR. CARSON: Okay. All right. Thank
4 you.

5 MS. PETERS: How about going to Steve.

6 MR. TEPP: Okay. Thank you.

7 Just sort of following on what we've
8 already been talking about, Mr. Tyre, when we were
9 in Washington Mr. Finkelstein was asked about how
10 many people take advantage of this exemption. And
11 notwithstanding your comments about the CIPA case
12 and whatever chilling effect you think that has, you
13 made a comment about the limited number of people
14 who have the technical skills to do this given the
15 level of detail of knowledge that's required.

16 Mr. Finkelstein told us he thought about
17 6 people were using this exception. Do you think
18 that the number -- needless to say, that's an
19 extremely small number given the population of the
20 United States. What it in your estimation is the
21 number of people who are capable and interested in
22 doing this so that, for example, if the CIPA
23 decision goes the way you and your colleagues would
24 like what should we expect to see in the next 3
25 years should this exemption be renewed?

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1 MR. TYRE: I'll give you somewhat of an
2 anecdotal example to that. I've been involved in a
3 number of the DMCA lawsuits, including the 2600
4 cases in Amicus and the Felten case as one of the
5 attorneys for Ed Felten and his researchers at
6 Princeton and Rice. I've done a lot of speaking on
7 DMCA. And it's reasonable to conclude that my views
8 on the DMCA do not coincide with those of Mr.
9 Metalitz. But we're not here to talk about that
10 today.

11 What I think is absolutely fascinating
12 is that I believe there's a conference called Crypto
13 which takes place on an annual basis in Santa
14 Barbara. It is considered by many to be the leading
15 conference of cryptographers in the world. People
16 come from all over the world to that conference. Of
17 course, one of the reasons why is it's in late
18 summer in Santa Barbara and it's hard to find a
19 better place to be at that time of year, but still
20 the talent that is assembled there is extraordinary.
21 That's your class of the people who could get into
22 this field if they wanted to get into this field.

23 When I was there speaking one of the
24 persons there, a nationally known expert on computer
25 security, Matt Blaze came up to me afterwards and

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1 said to me "Wow, Jim, you're my hero." Not because
2 of anything I had done because of the DMCA, but
3 because of my Censorware Project work. I didn't have
4 the heart to tell him that I wasn't the person who
5 was actually doing the decryption. I do not have
6 those technical skills, as I've said before. But he
7 found, and quite a number of people at that
8 conference, were more interested in talking with me
9 about censorware decryption work than they were
10 about talking with me about DMCA. Because DMCA is
11 just lawyers and cryptographers don't want to talk
12 to lawyers. They want to talk to people who are
13 doing work. And I've got these cryptographers who
14 are world famous cryptographers coming up to me and
15 saying tell me about censorware. What can we do?
16 How can we help? Is this something that we can get
17 into?

18 Will any of them actually do it if the
19 exemption is renewed for another 3 years? I don't
20 know. If it is, oh, I can put together a very long
21 list of people who I would want to talk to if I
22 wanted to expand the field of people who have the
23 appropriate skill set to learn how to do this and to
24 get involved in this. Because we could use more
25 than those we have.

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1 MR. TEPP: Okay. Well, just to get a
2 sense of the value of your anecdote, how many people
3 come to this conference in Santa Barbara on average?

4 MR. TYRE: Several hundred minimum,
5 maybe more. When I did my speaking gig there we
6 were in an auditorium that I would guesstimate sat
7 about 200. The house was packed, standing room only.
8 They hadn't come to listen to me talk about
9 censorware. They came to listen to me talk about
10 the DMCA at this particular session. That was the
11 sole purpose of that session. So there had to be at
12 least 250 to 300 people in that room, and they were
13 maybe not from every single continent on the world,
14 but most of them.

15 MR. TEPP: Okay. Thanks.

16 One other thing in a similar sort of
17 vein, you referred earlier to how the reports that
18 have been done almost invariably result in one of
19 the companies whose product is being analyzed making
20 corrections in line with the critique in the
21 reports. Can you give us a sense of how many reports
22 have been done in the last 3 years, or more
23 precisely since October 29, 2000.

24 MR. TYRE: Okay. Yes. Zero. If that's
25 precise enough for you.

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1 We haven't done it, in large part, for
2 the reason that I mentioned. Seth is not the only
3 member of the Censorware Project and as I've
4 indicated he is a former member, he has not been a
5 member since before October 2000 or anytime in 2000,
6 who is capable of doing this kind of work but for
7 the reason that I mentioned that there has been a
8 feeling that given the focus on the CIPA case that
9 there is maybe not the energy level that there was
10 to continue doing these kinds of reports. Given the
11 energy that's involved in them, given the time
12 consumption that's involved in them we haven't done
13 any.

14 Will that change once CIPA is decided
15 and if the exemption is renewed? I think it will. I
16 believe strongly that it will. But our last report,
17 which happened to be on Mr. Burt's company N2H2 was
18 in 2000 but probably -- it was in 2000. I'm not
19 certain when in 2000 it was. It may or may not have
20 been after October 2000. But with that one
21 qualification we have not done any.

22 MR. TEPP: Okay. Thank you.

23 One last question, this one for Mr.
24 Metalitz. Looking at the opposite side of the
25 equation, the potential harm done to right holders

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1 over the past 3 years and should the exemption be
2 renewed perspective in the coming 3 years, when we
3 look at the situation that's been described you
4 talked about the burgeoning number of copyrighted
5 works available on the Internet; Mr. Tyre's talked
6 to us about the explosion of the number of sites on
7 filtering lists and there appear to be several
8 filtering companies, it doesn't appear to be at
9 first blush to be an industry in distress. Can you
10 comment for us about what, if any, harm there might
11 be should this exemption be renewed for the coming 3
12 years?

13 MR. METALITZ: In terms of the health of
14 the censorware industry, I'm not sure I can add
15 anything to what Mr. Burt has submitted in his
16 testimony. He's much more knowledgeable about that
17 than I am. I'm not sure that the balance sheets of
18 the particular companies or whether they've
19 consolidated or not is necessarily the right test.
20 But I don't have any information really that would
21 shed much light on that with regard to the
22 censorware companies.

23 MR. TEPP: Or does it have any effect on
24 the 17 entities that you're representing today?

25 MR. METALITZ: I'm not sure if any of

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1 the companies that are involved here are members of
2 any the associations that I represent. To my
3 knowledge, they are not. So I don't know that it
4 has any direct impact on them. And I think I'm not
5 really the person to ask about that.

6 MR. TEPP: Well, you're the closest
7 we've got today, so I thought I'd give it a try.
8 Thank you.

9 MS. PETERS: Okay. Thank you.

10 Rob?

11 MR. KASUNIC: Okay. I have just a
12 couple of questions, mostly for Mr. Metalitz.
13 Mostly we haven't heard him talk as much. And in the
14 interest of time I'm going to sensor myself today.

15 MR. TYRE: You can't do that. You have
16 to speak freely.

17 MR. KASUNIC: Mr. Metalitz, you had
18 mentioned that this is a net calculation and we do
19 have to look at the overall balance. And in line
20 with that last question just so we're absolutely
21 clear, if we do find any evidence of more than de
22 minimis harm that then we would looking to what the
23 adverse effect on the industry would be. And one
24 thing we do have in the record that was in N2H2's
25 annual report was that this exemption final rule

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1 will not effect the value of lists of blocked
2 websites. So that there's a statement that this
3 would have seemingly no adverse effect on the value
4 of these sites. There's nothing else to add in
5 terms of what harm the exemption has had or is
6 likely to have in the next 3 years?

7 MR. METALITZ: Well, I think you're
8 using harm to the industry as a shorthand for the
9 statutory standard, really, which has there been any
10 adverse impact on the availability of this
11 copyrighted material for noninfringing purposes. And
12 I think the record shows that a lot of this material
13 is available for the noninfringing purpose that Mr.
14 Tyre wants to promote or at least a close cousin of
15 that purpose. Because the record shows that a lot
16 of evaluations, criticism and comment about these
17 products has taken place.

18 Now, I don't say that it's possible
19 there could be more of that criticism, comment of
20 that noninfringing use that we're talking about if
21 the exemption were extended. But this really gets
22 into the question of to what extent has the
23 exemption contributed to that availability.

24 Obviously, the health of whether the
25 extension of the exemption or the renewal of the

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1 exemption would have a specific impact on the bottom
2 line of a particular company is a somewhat different
3 question. They obviously could be related, and I
4 don't really know what significance to ascribe to
5 the statement that you just read that came from one
6 of their securities filings. That partly would have
7 to do with how diversified their business is, and I
8 just frankly don't know the answer to that question.

9 MR. KASUNIC: Okay. Well, in line with
10 that then in your reply comment you state that we
11 should be looking at -- and this is a follow up on
12 what Mr. Tepp was asking - how many members of the
13 public, how often and how frequently and how much
14 they expect to utilize this in the next 3 years.
15 But given the limits that may be placed on harm and
16 probably the very small number of people who could
17 accomplish or make use of any recommendation we make
18 to continue the exemption, what possibility of
19 adverse effect would you foresee in the next 3 years
20 that we haven't seen in the last 3 years?

21 MR. METALITZ: Well, I think you maybe -
22 - if I can suggest, you might be looking at this
23 through the wrong end of the telescope. I think the
24 question is if the exemption is allowed to come into
25 force -- excuse me. If the prohibition is allowed

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1 to come into force for these products, for these
2 works, which it has never done because the Librarian
3 issued an exemption on October 28, 2000; if the
4 exemption comes into force, will it have a
5 substantial adverse impact on the availability of
6 this material for noninfringing uses? I think
7 that's the question that's before you. And only if
8 you find that it will have a substantial adverse
9 impact, can you justifiably extend the exemption.

10 Now, the number of people who can do it
11 and how often they do it, and what use they make of
12 the exemption is relevant because Congress said if
13 you find that the adverse impact is de minimis, then
14 you should not recommend an exemption. It doesn't
15 necessarily mean that if only six people can do it,
16 is necessarily de minimis. But I think it's a
17 factor that you would want to take into account.

18 MR. KASUNIC: But isn't the question
19 there whether the adverse effect is causing an
20 adverse effect on noninfringing uses?

21 MR. METALITZ: Yes.

22 MR. KASUNIC: Not on whether people if
23 there is an exemption they will be able to
24 accomplish it? If this is a theoretical exemption
25 anyway in some instances, if so many people will not

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1 be able to accomplish, take advantage of the
2 exemption because of the technological savvy that
3 would be required to effect the exemption, can we
4 use that technological hurdle as a barrier to
5 finding the exemption in the next 3 years?

6 MR. METALITZ: Well, I think the problem
7 with that reasoning is that it seems to say that the
8 stronger the encryption, the lower the bar to
9 recognizing an exemption. If you had an encryption
10 that only two cryptographers in the world were
11 competent to break, does that necessarily mean that
12 the harm of recognizing an exemption be de minimis?
13 So I don't think it really correlates necessarily
14 with the number of people who are able to do it.

15 I think the focus has to be on what
16 substantial diminution of the public's access to or
17 the availability of this material for noninfringing
18 uses is attributable to 1201(a)(1) as a causation
19 element in here as well. And if in fact it only
20 impedes a very few people from taking an action
21 that, according to the testimony today, hasn't
22 resulted in any reports that would fall within this
23 category of noninfringing during the past 3 years,
24 then I think that's a relevant issue for you to look
25 at in deciding whether the statutory standard has

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1 been met.

2 MR. KASUNIC: Well, the last thing I
3 just want to clarify, I raised this in Washington
4 but since it was in your reply comment, I just
5 wanted some clarification.

6 What authority do you believe that we
7 have that -- at one point of your reply comment you
8 mentioned that if we do find an exemption, it should
9 be limited in some way. And where do you find that
10 we have authority either placing conditions on an
11 exemption such as requesting permission from the
12 company beforehand, how would that be possible in
13 terms of designating a particular class of work that
14 we could fashion such conditions or such limitations
15 on the exemption?

16 MR. METALITZ: That's a big question
17 that I'm sure we'll be returning to during the day
18 and tomorrow. I think the primary way in which this
19 exemption if you decide to recognize it, ought to be
20 limited is by shaving down the category of works to
21 which is applies so that it only applies to
22 censorware, whatever the right definition of that is
23 and I'm sure Mr. Tyre can do a better job than I can
24 of giving you one, and that it not apply to all
25 these other types of security related and other

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1 lists of websites that would appear in filtering
2 software.

3 Now the reply comment does mention this
4 issue of consent or whether there's a likelihood
5 that access to this information would be granted or
6 whether there's in effect an exhaustion requirement
7 that someone using the exemption would have to first
8 ask for permission. I think that's probably better
9 looked at in terms of trying to decide whether
10 there's a basis for an exemption at all. And the
11 testimony I heard, and I don't know that this is
12 correct, that basically it's very easy for someone
13 to get at least one free bite at this database
14 without going through decryption. It seems to
15 relevant to me and it indicates that perhaps means
16 other than an exemption would help to cure whatever
17 adverse impact you find in this area. But,
18 obviously, that's a contested issue before you and
19 people's views are going to differ on it. But I
20 think that that's where that evaluation would best
21 fit.

22 MS. PETERS: Okay. Thank you.

23 Charlotte, do you have a few questions.

24 MS. DOUGLASS: I do.

25 MS. PETERS: Okay.

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1 MS. DOUGLASS: I have one question here,
2 Mr. Tyre, and one to Mr. Metalitz.

3 We talked a little bit, a lot actually,
4 about whether or not it would make any sense to
5 request permission from different companies because
6 you wouldn't be able to get it. It seems to me that
7 when we met in April there was talk from Mr. Burt of
8 probably maybe an industry wide agreement or an
9 industry wide consensus that there might be a
10 possibility that they would be in a position to give
11 you the lists. But you've read the testimony as
12 well. Is it your sense that an industry wide
13 agreement would be also as useless as asking company
14 by company. If for example, Mr. Burt represents a
15 number of say the nine big -- did that make any
16 sense to you?

17 MR. TYRE: I do understand the question.

18 MS. DOUGLASS: Okay. Okay.

19 MR. TYRE: And with respect, I think it
20 slightly misstates what he said.

21 MS. DOUGLASS: Okay.

22 MR. TYRE: And I actually can't see if
23 he's sitting here behind me or not, but I almost
24 hope that he is.

25 MS. DOUGLASS: I don't see him.

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1 MR. TYRE: But first off, he made it
2 very clear that in this context he was speaking only
3 about his own company, N2H2. He was not speaking
4 about either of the two companies that joined him in
5 the joint reply, 8e6 Technologies and BSafe Online.
6 And he certainly was not speaking on behalf of any
7 of the various other censorware companies such as
8 WebSense, SmartFilter, SurfControl. WE've all heard
9 the list beforehand.

10 What he said, as I understand it, is
11 that they've had some internal discussions, never
12 resolved, within N2H2 that maybe if a reputable
13 research organization such as Consumer Reports came
14 to them and maybe if they agreed to an NDA, and
15 maybe if they agreed to certain other factors, then
16 they would let them have it.

17 MS. DOUGLASS: Okay.

18 MR. TYRE: There is zero chance on the
19 face of the work on this earth that regardless of
20 how reputable I might be in your eyes or in anybody
21 else's eyes, that Mr. Burt would consider me to be
22 reputable. There is zero chance that I would agree
23 to sign an NDA. Because what's the point of it if I
24 sign an NDA? That's a nonstarter.

25 MS. DOUGLASS: Okay. Thank you for

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1 clarifying that.

2 Now, Mr. Metalitz, if an entire
3 community of users consisted of a group, say, of
4 about ten people all of whom sought to do what was
5 more or less clearly noninfringing work and they all
6 experienced the say problem, would you say in your
7 estimation that this ten person group is an
8 insignificant number by definition or could this be
9 in light of the importance of the indispensability
10 of the research that they're doing and the
11 entireness of the community, could be that be
12 considered?

13 MR. METALITZ: I don't think there's any
14 litmus test or any magic number below which it's
15 automatically de minimis. I think you have to look
16 at the type of noninfringing use that they're
17 talking about. And my impression, anyway, is that
18 they're really talking about criticism and comment,
19 the types of reports whether they're formal reports
20 or not or critiques of these various products. And
21 I think that output is probably what you should be
22 looking more than the number of people that have
23 contributed to the output. But, again, this type of
24 fair use, and I'm assuming this is fair use, like
25 any type of fair use for purposes of this proceeding

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1 is not necessarily the case that the goal needs to
2 be the preferred or optimal means of access in order
3 to make fair use of the material. So you have to
4 consider whether this is sufficiently available
5 through other means that don't require conduct
6 that's covered by 1201(a)(1) in order to justify the
7 exemption. I don't think there's any magic number
8 or any per se rule that would flow from that.

9 MS. DOUGLASS: Sure. I was just getting
10 at the sort of numerical calculus.

11 Thank you very much.

12 MS. PETERS: Okay. Comment?

13 MR. CARSON: Yes. Just wanted to
14 clarify something.

15 I didn't mean to be unfair to you, Mr.
16 Tyre. So the comment I made about how you perhaps
17 ought to think about and get back to us with a more
18 strict definition of what censorware is or what it
19 is that you want us to exempt aside from the current
20 one, which is this list of websites that are blocked
21 by filtering software. But the same goes for you,
22 Mr. Metalitz. You're the one who is proposing we
23 narrow it down. I think it would serve your
24 interests if you come up with the best definition
25 you can come up with with what you think we ought to

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1 be narrowing it down with, understanding that when
2 you're doing that you're not necessarily asking us
3 to exempt anything at all, but if we're going in
4 that direction what is it you want. We'll look at
5 what you've both given us and we'll decide whether
6 to do anything, and if so how to narrow it down, if
7 at all.

8 MR. METALITZ: We'll certainly do that.

9 MS. PETERS: Thank you very much.

10 The first panel is concluded. We'll
11 take a 10 minute break and be back starting at
12 11:15. We're already significantly behind.

13 (Whereupon, at 11:05 a.m. a recess until
14 11:23 a.m.)

15 MS. PETERS:

16 The second panel is looking at literary
17 works, malfunctioning, damage, obsolete
18 technological protection measures and issues related
19 to research and security.

20 And the panel is Brewster Kahle
21 representing the Internet Archive, Barbara Simons
22 representing the Association of Computer Machinery,
23 George Ziemann representing --

24 MR. ZIEMANN: I would this time say that
25 I'm just representing myself.

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1 MS. PETERS: Okay. All right. Fine.

2 And Steve Metalitz who was on the last
3 panel representing the Joint Reply Commenters of a
4 large number of copyright owners.

5 And we're going to go in that order. And
6 because of time difficulties, I'm going to say for
7 the beginning round -- try. I'm not saying you
8 must. Try to restrict your comments to 10 minutes
9 in the opening round. Okay.

10 Let's start with you.

11 MR. KAHLE: Thank you for inviting us
12 down. Appreciate the opportunity to be here.

13 My name is Brewster Kahle, I'm the
14 digital librarian and Chairman of the Board of the
15 Internet Archive. It's a 501(c)(3) nonprofit
16 library located in San Francisco. We really
17 concentrate on digital works. So the issue is about
18 preserving digital works. We're open to academics,
19 researchers, scholars and the general public. Some
20 of our collections are available over the World Wide
21 Web, but at least all of our collections are
22 available for those that come to our facilities and
23 our libraries to do things in-house that often
24 cannot be shown over the World Wide Web.

25 All of our services are available for

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1 free. There's no fee for anybody to use this. And
2 we're open to the general public.

3 We maintain a broad collection,
4 including websites, website movies, books and
5 digitized books both, musical holdings and a growing
6 collection of software, which is the subject of the
7 conversation today.

8 Researchers come from all over the world
9 to learn about digital archiving, so we have sort of
10 a research focus in that way, but also doing the
11 real work and people come to use the collections in
12 our facilities.

13 We're supported by foundations Sloan,
14 Markel, Kale Austin Foundation, government, Library
15 of Congress, National Science Foundation in kind
16 donations HP, Amazon. So in some of the replies and
17 back and forth, there's a little sort of who are
18 you, and so I hope that that sort of gives you an
19 idea.

20 This is what we look like, our building
21 in San Francisco, some of the people that are
22 working on preserving the materials, and this is a
23 fellow doing work at one of the public access
24 terminals.

25 The problem that this is all about, is

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1 basically media is degrading. Formats become
2 obsolete and the platforms change. It makes our job
3 as librarians to record our digital cultural
4 heritage extremely difficult. And we're doing our
5 best to adapt our profession, our field to be able
6 to take the materials that are not just digitized
7 materials that are now in our holdings, but also
8 things that were born digital and born to not
9 necessarily last the ages. They're born for a
10 particular commercial exploitation and then they go
11 into our hands. And that's the sorts of works that
12 we mainly try to deal with.

13 Preserving these things are really
14 important. I got somebody last week, the staff, so
15 what, who cares about this stuff? And I think it's
16 critically important. Tens of thousands of people
17 spend 20 years, so since the PC came out there's
18 been a proliferation of commercial packaged software
19 in games, CD-ROMs that really sort of bring software
20 and content together and it's been a new expressive
21 media, but also really great stuff is in. So it's
22 not just to look at history, it's actually pretty
23 nifty material.

24 We've been learning a lot about how to
25 preserve these, and it's a fairly new field the

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1 whole digital preservation area. In fact, the
2 Library of Congress thing is really to push this
3 thing forward. We've found that it's critical to
4 both copy the materials and to gain access to the
5 materials to be able to do preservation. Without
6 copying and creating access, even if it's in-house
7 access for researchers, historians and scholars,
8 we're out of luck. Many of us probably had
9 experiences going and backing up software and
10 thinking that we're all safe. And then when you turn
11 back to it, it turns that it wasn't there in the
12 first place. So we think it's important.

13 What I'm here to talk about two
14 exemptions on the 1201(a)(1). The first is a
15 literary and audiovisual works embodied in software
16 whose access control systems prohibit access to
17 replicas. So that was our first major one. We
18 think of it as a very narrow exemption, it's these
19 sort of software titles on a very specific project.

20 The other exemption is literary works
21 including computer programs, databases protected by
22 access control mechanisms that fail to permit access
23 because of malfunction, damage and obsolescence.
24 This is a much broader exemption which is starting
25 to become useful in certain circumstances. And so

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1 I'd like to speak on both of those areas.

2 I thought a quick sort of overview, and
3 quick is the operative word here, of some of the
4 titles that we have here. So this is Apple Writer
5 II. If you remember floppies that look like this.
6 When was the last time you tried to read a floppy
7 like this, though? They're non-trivial. This is
8 Apple Writer 1.1. The National Archives are starting
9 to get digital materials from the White House, for
10 instance. And if we don't go and save things like
11 Writer Apple 1.1, then we may have troubles in the
12 future.

13 DOS. It's IBM original DOS. These are
14 some of the early programs that were done by
15 amateurs. This is an interesting title because it's
16 when the convergence of the personal computer and
17 the film industry happened; when Ephemeral Films is
18 a seminal title off the Voyager CD-ROM collection.

19 Lotus 123 that really propelled the
20 whole personal computer.

21 Just slipping through just some of the
22 materials that we have. This is when we tried to get
23 text on computers. This is "Shogun" is one of the
24 first trying to do books and computers together.
25 Kind of clunky, but important for people seeing the

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1 progress. If we can't have access to the actual
2 software and just the packaging, that would be
3 tragic.

4 Early Quicken.

5 VisiCalc came before 123 and was the
6 first spreadsheet program. I feel quite honored to
7 be able to even hold one of these packages into my
8 hand. It's a sealed package, never opened of
9 VisiCalc.

10 Tetris, the original Tetris. Soviet
11 Challenge, original works.

12 Simms City, when we first started to
13 have simulation in the educational environment. Now
14 simulation is a basis of a lot of work in high
15 school and junior high school. But this work is
16 absolutely seminal in its worth.

17 One of the questions is, is do we do in
18 terms of being able to support these and be able to
19 use them.

20 Robocop 3 is interesting because its
21 content is a 3D immersive, but it's also got that
22 famous dongle problem. This is, I guess, the access
23 control that was really talked about a lot 3 years
24 ago of making it so that we have bypass those access
25 controls to be able to make these available.

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1 And this is sort of a chart of just 16
2 of these titles. And what it is we're advised by our
3 lawyers we're not going to be able to save. We can
4 save one of these 16, all the rest of them have
5 access control that make it so that as we understand
6 it we would be violating the law if we were to
7 circumvent the access controls to be able to
8 preserve these titles by making copies, which is
9 relatively easy, and to be able to access them and
10 play them, make sure that we have them in accurate
11 form.

12 So, I find this tragic. These materials
13 are entrusted to us. These aren't easy to come by.
14 And they're rotting in our hands.

15 I'd like to hit a couple of comments
16 that were done by an esteemed colleague Steve and
17 some of the other comments and sort of try to answer
18 a few of these.

19 First, preservation requires both
20 copying and access. If we do just one -- it's not
21 like books. You know, it used to be that you kind of
22 put a book in a basement and go back in 50 years and
23 you'd still have a book in the basement and you'd be
24 able to read it. That's not the case with these
25 things. I mean, trying to get technology to work in

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1 the current day is hard enough. Trying to get
2 technology that worked in the past is extremely
3 difficult.

4 The reply seen no evidence of damage.
5 They spoke in hypothetical issues that maybe if
6 original access controls could be circumvented that
7 there might be problems. I think we've got concrete
8 areas where damage is happening and I think we could
9 move forward from that.

10 The uses that were talked about in some
11 of the briefs actually were done before 1201, so
12 they were doing just fine before 1201 so why do we
13 think that things are happening worse or better
14 since 1201?

15 The use is still protected under the
16 Copyright law. We're regulated just like everybody
17 else within the sort of 108 work. We are a library.
18 So the use is protected. While we have done some
19 copying of these materials, it's been with signed,
20 written permission from the copyright owners. And
21 those are a couple of the offerings that we had on
22 our website. All the rest we have not touched. And,
23 actually, I'm kind of scared of touching these. I
24 don't know if we're ever going to be able to read
25 them.

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1 The last point is what we're trying to
2 do is difficult. We're trying to go and resurrect
3 these old platforms based on emulation and other
4 mechanisms. It's non-trivial, so it's not for the
5 light of heart. If this exemption were out there, I
6 don't think that we're going to have a flood of
7 hundreds of thousands of people going and doing
8 this. But by having these organizations, these
9 libraries and archives do this, it can effect
10 hundreds of thousands in the educational and
11 research domain that are trying to learn from our
12 past without damaging the market for those.

13 So we need both of these exemptions to
14 further our chance of preserving these, the narrower
15 class, which is the software embedded type materials
16 and circumventing that we think of as critical for
17 these sorts of materials.

18 There were arguments about actually what
19 we need these are copy controls as opposed to access
20 controls. Well, there might be copy controls, but
21 there seem to always be access controls. And as I
22 understand the law, it's very straightforward. If
23 we circumvent the access controls, we lose. It's
24 not that it's a fair use, there's not Section 108.
25 We just lose. And that means that we cannot

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1 preserve these materials, and we're about to lose PC
2 software and games.

3 This makes no sense. Time is not on our
4 side. These things are rotting. Stanford, the
5 Internet Archive; a lot of these materials came from
6 Stanford, the Charles Babidge Institute, the
7 Computer History Museum; we all have collections
8 that are rotting in our hands.

9 We believe we know technologically how
10 to perform our job function. What it is is we need
11 to be allowed to do our job function and preserve
12 these materials before it's too late for future
13 generations.

14 Thank you.

15 MS. PETERS: Okay. Thank you.

16 Ms. Simons?

17 DR. SIMONS: I think that I was seated
18 with Brewster so that I would be made to feel at
19 home. This is what my desk usually looks like.

20 Good morning, Mr. Peters and
21 distinguished representatives of the Copyright
22 Office. Thank you for the opportunity to testify at
23 this important hearing as part of the Copyright
24 Office's anticircumvention rulemaking proceedings.

25 I'm Barbara Simons. I co-chair USACM,

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1 the U.S. Public Policy Committee of the Association
2 for Computing Machinery.

3 ACM is the leading nonprofit educational
4 and scientific computing society of nearly 75,000
5 computer scientists, educators and other information
6 technology professionals committed to the open
7 interchange of information concerning computing and
8 related disciplines.

9 And I should also add, ACM is also a
10 publisher. We have a large digital library which is
11 online.

12 USACM, which I founded in 1993, serves
13 the ACM membership and community by providing
14 policymakers, courts and the public with a deeper
15 understanding of computer and Internet issues and
16 their convergence with legislative and regulatory
17 initiatives. I'm a fellow of ACM and of the
18 American Association for the Advancement of Science,
19 and formerly served as President of ACM and
20 Secretary of the Council of Scientific Society
21 Presidents. I earned my Ph.D in computer science
22 from a school up the road there, UC Berkeley.
23 Worked at IBM Research for many years. And have
24 authored numerous technical papers. I have been a
25 consulting professor at the University of California

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1 Santa Cruz and Stanford University.

2 My statement today represents the views
3 of the USACM to underscore the importance of this
4 rulemaking proceeding to the computing community.
5 My statement has also been endorsed by the Computing
6 Research Association, an association of more than
7 180 North American academic departments of computer
8 science and computer engineering, industrial
9 academic laboratories and affiliated professional
10 societies.

11 USACM has found Section 1201 of the DMCA
12 to have substantial negative impacts on the conduct
13 of basic research in the U.S., particularly in
14 cryptography and other computer security areas. The
15 section interferes with many legal, noninfringing
16 uses of digital computing and prevent scientists and
17 technologists from circumventing access technologies
18 in order to recognize shortcomings in security
19 systems, to defend patents and copyrights, to
20 discover and fix dangerous bugs in codes and to
21 conduct forms of desired educational activities.

22 The following are just a few
23 illustrations of legitimate activities currently
24 prohibited by Section 1201.

25 A financial institution receives a

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1 digital object protected by code obfuscation using
2 means other than encryption. Employees of the firm
3 suspect it contains a highly destructive computer
4 virus or worm. The only way to find out if these
5 suspicions are valid is to circumvent the
6 obfuscation techniques to see what the code actually
7 does. Because the code including the possible virus
8 qualifies as an original work of authorship, the act
9 of circumvention is prohibited.

10 A contractor employs software technology
11 from a third party in a system widely used by law
12 enforcement. In the course of use the serious flaw
13 or bug is discovered that makes the system fail
14 unexpectedly. The third party could be unresponsive
15 or, worse yet, suspected of being a front for a
16 crime organization not trusted to fix the software.
17 Whatever the case, because the software is protected
18 as an original work of authorship, no reverse
19 engineering or circumvention is allowed to fix the
20 flaw in a trusted manner.

21 A firm wants to test a computer system
22 before purchasing it to ensure that it is
23 trustworthy and secure or to check for patent and
24 license violations in the code itself.
25 Circumventing a technical measure without the

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1 product's producer's permission is prohibited.

2 Scientists and educators are prohibited
3 from teaching many of the standard security
4 techniques to investigate security risks because
5 these same techniques can be employed to circumvent
6 copyright protection mechanisms.

7 A copyright owner might suspect that a
8 user is infringing his code. The only way to test
9 his assumption is to bypass the encryption scheme of
10 a suspected work to access the material. Bypassing
11 the encryption scheme is prohibited.

12 ACM submitted a declaration in the
13 Felton case, and I'd like to quote from part of that
14 declaration because those concerns remain all too
15 relevant. This was written in 2001, so some of it
16 refers to an event which has already occurred but
17 hadn't occurred then.

18 "Research and analysis, i.e. the
19 evaluation of the strengths and weaknesses of
20 computer systems, is essential to the development of
21 effective security both for works protected by
22 Copyright law and for information in general. Such
23 research can progress only through the open
24 publication and exchange of complete scientific
25 results. ACM is concerned that Sections 1201

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1 through 1204 of the DMCA will have a chilling effect
2 on analysis, research and publication as the results
3 of litigation itself or of the threat or concern
4 about potential litigation.

5 ACM is also concerned that application
6 of the DMCA to the presentation of publication of
7 scientific papers could result in the departure from
8 the U.S. of the information security community for
9 conferences and publications. If conference
10 organizers cannot afford to take the risk of
11 publishing papers, such as the papers ACM expects to
12 be submitted for it's November 5, 2001 workshop as
13 described below, those conferences may be held in
14 other countries where the risk of liability is
15 lowered. Such a result would have a negative impact
16 on this country's leadership in research in that
17 area.

18 ACM's particularly concerned about the
19 potential implications of the DMCA for its then
20 upcoming November 5, 2001 workshop on security and
21 privacy and digital rights management, the DRM
22 workshop. Part of the description of that workshop
23 states: "This workshop will consider technical
24 problems facing by rights holders who seek to
25 protect their intellectual property rights and

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1 consumers who seek to protect their privacy and to
2 preserve access they now enjoy in traditional media
3 under existing Copyright law."

4 Like many other ACM workshops, ACM plans
5 to publish the papers accepted for the DOM Workshop
6 as proceedings. ACM is concerned that the
7 publication and presentation of technical papers on
8 many of these topics, especially papers on
9 watermarks, encryption, authentication, access
10 control systems and threat and vulnerability
11 assessment could raise problems under the DMCA. We
12 are concerned that ACM along with its conference
13 workshop organizers and member authors will be open
14 to the same threats and run the same risks of legal
15 liability as will Professor Felton, his coauthors
16 and organizers of the Information Hiding Workshop.

17 ACM is also likely to sponsor other
18 conferences that may be effected by the DMCA.
19 Virtually all conferences that discuss the security
20 of digital information may be subject to threats
21 under the DMCA because such conferences consider the
22 strength and weaknesses of various technological
23 protection measures that could be applied or are
24 actually being applied to protect copyrighted works.

25 ACM has earned the reputation of

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1 choosing strong scientific papers through a peer
2 review process without regard to political or
3 commercial pressure. It's reputation as a leading
4 scientific and technical organization could be
5 substantially damaged within the scientific and
6 technical community if it failed to publish a
7 properly submitted and peer reviewed paper because
8 of commercial pressure or the fear of litigation.
9 Any restriction that the DMCA may impose upon the
10 publication of the scientific research will keep
11 foreign researchers from attending our conferences
12 in the United States with a potential loss of ACM
13 members and of revenue for membership, conference
14 participation and publication.

15 We are concerned that some of our
16 members, intentionally or not, may censor their
17 submissions to avoid potential DMCA problems. If
18 that were to happen, the quality of the ACM papers
19 and presentations would be hurt and the scientific
20 community as a whole could suffer substantial
21 damage.

22 Beyond the possibility of DMCA problems
23 at the November DRM workshop, ACM may continue to
24 face potential problems in the future. ACM has long
25 published papers in fields addressing the

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1 circumvention of security and technical protection
2 measures. Unbiased, objective research in the
3 fields of computer and data security has always
4 included research into the weaknesses, as well as
5 strengths of security measures. ACM could adopt a
6 policy of steering clear of papers that could
7 subject it to liability under the DMCA, but that
8 could only be done at the risk of sacrificing its
9 mission and damaging its reputation as a scientific
10 organization.

11 In sum, as long as Sections 1201 to 1204
12 of the DMCA could be interpreted to reach scientific
13 and technical publications, ACM and its members are
14 concerned they will face a continued risk of
15 litigation and liability."

16 That's the end of the quote from the
17 declaration.

18 Unfortunately, the concerns ACM
19 expressed in the Felton declaration are no longer
20 hypothetical. A few days ago in preparation for this
21 testimony I posted a note to USACM requesting
22 personal experiences from people who have had
23 problems with the anticircumvention provisions of
24 the DMCA. I received 3 responses, all of which are
25 quoted below with permission.

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1 One of the people with whom I
2 communicated is Dutch computer scientist Niels
3 Ferguson. Ferguson withdrew a paper detailing
4 weaknesses in the HDCP content protection system
5 from the very ACM DRM workshop referred to in the
6 declaration, and instead wrote a paper entitled
7 "Censorship in Action, Why I Don't Publish My HDCP
8 Results Which Is Included In Your Packet."

9 He also made the following comment to me
10 in email. "Since my experiences with my HDCP paper,
11 I have stopped doing research on the security of
12 cryptographic systems that protect copyrights. There
13 is no point in doing research if I cannot publish my
14 results. I've spoken to several other experienced
15 cryptographers and many have come to a similar
16 conclusion. Of course, this lack of research almost
17 guarantees that the copyright protection techniques
18 will be easy to break and that works will be pirated
19 for years to come. We know from experience that
20 systems designed without public review are almost
21 always weak. Without public review there is no
22 security and without security the pirates will
23 thrive."

24 A second communication was from
25 Professor Dr. Andreas Pfitzmann of -- I can't

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1 pronounce this -- Technische Universität in Dresden.
2 Professor Pfitzmann was on the program committee of
3 the Information Hiding Workshop at which Professor
4 Pfitzmann was supposed to have presented his paper
5 initially. I now quote, and the English is because
6 I think he's a German speaker, so it's a little bit
7 not quite correct.

8 "I do not know how much inside knowledge
9 you have about the Felton which started the
10 Information Hiding Workshop which accepted that
11 paper for a presentation where not only Felton and
12 his coworkers, but also program committee chair Ira
13 Moskowitz and general chair John McHugh has been
14 threatened personally. In a later case, the
15 employer was willing to take the legal risk.
16 Finally it was mostly the European members of the
17 program committee who voted to not exercise any
18 influence whether to present or not to present that
19 accepted paper, but to leave that decision
20 completely to the authors. And it was the decision
21 to let no American share the scheduled section for
22 the Felton paper, but a European citizen, me.

23 For the workshop it worked out very well
24 in the end by a lot of publicity and probably this
25 paper got even during the workshop so many readers

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1 as no other paper. But when accepting to chair that
2 session, which I did not know whether the paper
3 would be presented or not, it was quite clear to me
4 that this could mean staying in the U.S. for quite a
5 while. Since I am working as an advisor for the
6 German government concerning privacy and security, I
7 was quite optimistic that it would work out well in
8 any case for me personally, since I expected so much
9 help by Germany in the EUS could be, but it somehow
10 looked strange that mainly the Europeans were in
11 charge of helping to maintain basic liberties, e.g.,
12 to speak about the freedom to discuss research in
13 the U.S.

14 After experiencing the threat to the
15 Information Hiding Workshop mentioned above, I would
16 argue to exempt the organizers, program committees
17 and session chairs as well as publishers assigned to
18 the conferences and workshops. As long as this is
19 not done, we decided to avoid the U.S. for
20 Information Hiding Workshop, and I personally
21 successfully argued to hold the successor of PET
22 2003 not in the U.S., but in Canada.

23 In addition, it caused me to argue to
24 stay with Springer Valic, a German publisher as the
25 publisher and not to switch to ACM with regard to

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1 PET 2004 as we wanted to stay as far away from U.S.
2 jurisdiction as possible."

3 The third communication was from
4 Professor David Wagner who was in the computer
5 science department at UC Berkeley.

6 "We looked at the HDCP, a copy
7 protection system designed for us in, I am told,
8 high definition TV sets. We very quickly found it
9 had serious security flaws. We wrote a paper and
10 submitted it to a scientific workshop. Then we
11 realized that we were running right down the same
12 path the Felton group did and, hey, we'd better be
13 careful.

14 I then spent the next 2 months on
15 conferring with our university lawyers checking out
16 whether it would be safe to publish our paper. As it
17 happened, we got lucky this time on 2 counts. First,
18 the university agreed to indemnify those of us at
19 Berkeley against any civil liability if we were
20 sued. Kudos for the administration. I can't say
21 enough good things about them for their support of
22 us.

23 Of course, the DMCA also comes with
24 felony prohibitions on certain violations, and we
25 were on our own in that respect. The university

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1 can't help with this criminal liability. But civil
2 liability was probably the more likely risk.

3 Second, we talked with the engineers at
4 Intel who designed the HDCP and they turned out to
5 have very enlightened attitude about the whole mess.
6 They thanked us for our work and told us they would
7 not sue us. Had this in any other company, though,
8 things might have turned out differently.

9 Based on these two positive signs, we
10 felt comfortable enough to publish and our paper
11 appeared in the very same ACM Workshop on Security
12 and Privacy and Digital Rights Management 2001. We
13 were very fortunate. Nevertheless, it was not a good
14 experience. I spent more time talking to lawyers
15 than I did doing the actual research. We changed the
16 way we wrote our paper. We changed the way we
17 interacted with our researchers before our paper was
18 published. And we wasted a lot of time on the legal
19 aspects.

20 The DMCA is troubling. After spending
21 many hours with lawyers examining the implications
22 of the DMCA, I personally have stopped doing work on
23 copyright protected systems due to the legal
24 overhead and uncertainties. For instance, the
25 encryption research exemption doesn't cover 1201(b)

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1 activities along with all sorts of other oddities,
2 with which I'm sure you're very familiar. I cannot
3 in good faith ask students I advise to take on
4 uncertain risks at this time. I consider this a
5 perhaps caution, but not irrational response to the
6 DMCA.

7 Yes, you may mention my name and all the
8 situations at the hearing. This is public
9 information. In fact, it was featured as a cover
10 story in the *SIAM News*."

11 The fundamentally flawed approach of
12 Section 1201 criminalizes multiuse technologies
13 rather than penalizing infringing behavior. During
14 the current rulemaking proceeding we urge that a
15 distinction be made between circumvention for the
16 purpose of obtaining infringing access to a work and
17 circumventing for the purpose of developing new
18 techniques to protect computer systems and networks
19 against attacks, negligence, malfeasance and
20 vandalism or to advance the continued innovation of
21 software and digital computing.

22 USACM recommends that the Library of
23 Congress provide an exemption to Section 1201 that
24 permits access to and dissemination of information
25 about computer programs and databases that are

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1 protected by CTP access control mechanisms in order
2 to recognize shortcomings in security systems, to
3 defend patents and copyrights, to discover and fix
4 dangerous bugs in code and to conduct forms of
5 desired educational activities.

6 I would like to request permission to
7 submit additional material to my testimony later.

8 And I thank you for the opportunity of
9 appearing before you today.

10 MS. PETERS: Thank you.

11 Mr. Ziemann?

12 MR. ZIEMANN: Okay. First of all, I
13 would like to read -- if I send an email to the
14 Copyright Office, what I get back on the screen says
15 "The mission of the Copyright Office is to promote
16 creativity by administering and sustaining an
17 effective national copyright system." And yet today
18 we are here to talk about how closely we are going
19 to define the scenario at the beginning of
20 "Fahrenheit 451." We already have the music police.
21 We might just give firemen the flame throwers,
22 because that's what is happening.

23 As a copyright owner I want him to have
24 my copyrighted material. I don't understand why
25 anyone would not. Then if so, why did they create

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1 it in the first place.

2 I would also bring up just the issue of
3 what an oxymoron the phrase "intellectual property
4 owner" is. No one owns intellectual property. They
5 may the right to commercially sell it. But once an
6 idea is a book, that intellectual property belongs
7 to the world. E-MC² may have been Einstein's
8 theory, but we all own it now. John Lennon's "Day
9 Tripper" song, he wrote it, somebody owns the
10 copyright. But if the public didn't accept it as
11 something that they wanted, it would be worthless.
12 It wouldn't matter.

13 And taking even just that example, a
14 couple of years ago I went to the Rock and Rock Hall
15 of Fame and saw the original lyrics to "Day
16 Tripper." That is the copyrighted work, I believe.
17 That and the original sound master recording. Not
18 my copy of it, which I have one, is worth maybe \$5.
19 It worthless. But that piece of paper that it was
20 originally written on, even if it's in public domain
21 now, is valuable. It's worth more than any of the
22 copies. Okay.

23 Mr. Metalitz is here to represent the
24 intellectual property owners. I would question: (a)
25 how they came into possession of so much

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1 intellectual property. They certainly didn't create
2 it all. They contractually took possession of it.
3 In the music business alone you cannot get a
4 recording contract without relinquishing copyrights.
5 You may be able to if you're powerful and have some
6 influence and can get a special contract, but talk
7 to any of the big people. They don't own their music
8 anymore. This does nothing for the creators. It
9 does nothing to promote creativity.

10 And then the next point I would like to
11 make is that the Copyright Office is on the verge of
12 becoming as irrelevant as the record industry. Okay.
13 I can make my own CDs now and sell them. I've done
14 it. I don't need a record company to do it or to
15 promote it. Okay. They're no longer necessary.

16 I've sent in a copyright, filled it out
17 wrong. And so I have to fill it out correct again.
18 If I don't, you won't register the copyright, but
19 you'll still put a copy in the Library of Congress.
20 So that's all I wanted in the first place. And so
21 do I even need a copyright now? And if I do get a
22 copyright, I'm going to sell it for \$1 to Leonard
23 Lessing's Creative Comments Foundation so that no
24 one else can become the intellectual property owner
25 of my copyright.

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1 I don't see how the DMCA is doing
2 anything for any creativity anywhere. And if that's
3 what the purpose of the Copyright Office is, you're
4 certainly not promoting creativity any longer. And
5 if you don't adapt, you too will become irrelevant.

6 My next question is if this gentleman
7 decides to go ahead and bypass copy protection, what
8 are you going to do to stop him? Nothing? You have
9 no authority.

10 I would actually say that this entire
11 hearing is in a very appropriate venue. It is moot
12 and that's what we're in the Moot Court.

13 And one other point that I would like to
14 make is in reference to how the DMCA is being used
15 to twist things. The record industry's big cry is
16 how piracy is destroying them. In the past 5 years
17 the record industry, according to the RIA statistics
18 has given away enough free physical goods to finance
19 the war in Iraq. At a minimum it's \$2.5 billion
20 dollars a year.

21 The Internet came along and gave them an
22 opportunity for free promotion, and what are they
23 doing? Exactly what I believe the Assistant
24 Treasury of Commerce -- I've got it in my notes
25 here, but I -- is that they're creating a pay-per

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1 use society. Exactly what the original document
2 that I was referring to here was warned that you
3 don't want to happen. And they're creating a total
4 monopoly in the process. They're definitely
5 antitrust if anybody would even care to try to
6 question it.

7 When I first wrote to come before you, I
8 thought that there was a purpose and I question now
9 what difference this all makes. If we want to copy
10 books, if the world wants to copy books and music,
11 what are you going to do to stop us? You're going
12 to sue each one of us individually? Good luck.

13 Right now to even make up what they give
14 away in free goods the record industry at the rate
15 of \$15,000, which is what they appear to be
16 settling, would have to prosecute 448 successful
17 cases a day just to break even without incurring any
18 additional court costs or attorneys fees. Not going
19 to happen. You can't stop it.

20 I think it's ridiculous that somebody
21 has to come here and argue why a library should be
22 allowed to have copied of copyrighted materials.
23 It's ludicrous. The fact that he even has to come
24 here and ask.

25 That's all I have to say.

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1 MS. PETERS: Thank you, Mr. Ziemann.

2 Mr. Metalitz.

3 MR. METALITZ: Thank you very much.

4 I'm going to talk mostly about the
5 exemption for works protected by malfunctioning,
6 damaged or obsolete access controls which several
7 proponents, it's an existing exemption that they've
8 asked me renewed. I will mention again, as I did in
9 the first session, that of course this has to be
10 done on a de novo basis for the burden of
11 demonstrating the need for this and complying with
12 the statutory criteria is on the proponents. And
13 there's not been very much evidence submitted in
14 this proceeding up until the time of the hearing, so
15 we're kind of playing catchup here.

16 But this really breaks down into main
17 examples that I'd like to at least briefly discuss.
18 One is the dongle situation which you've had
19 extensive testimony from Mr. Montoro from Spectrum
20 Software and the other is the issue that Mr. Kahle
21 has raised, although he has another formula of a
22 potential exemption, but the issues raised by the
23 Internet Archive.

24 Let me just talk about the dongle
25 situation. Let's stipulate that dongles break

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1 sometimes. They don't always work. For only work for
2 finite period of time. Then what? The question is
3 what can the user do then? I mean, there are
4 potentially four situations, I think, and I think
5 the problem that many of our organizations have with
6 the existing exemption that we hope can be rectified
7 if this exemption is recognized again, has to do
8 with confusion among those four situations.

9 In one situation, the vendor or the
10 copyright owner or the dongle manufacturer will
11 replace the dongle for free or at a minimal cost.

12 The second situation, they will replace
13 it but at a substantial cost.

14 The third situation, the vendor or the
15 copyright owners can't be found or is unresponsive
16 to a request.

17 And the fourth situation, the user
18 doesn't bother trying to find the copyright owner or
19 anybody else responsible, just goes ahead and
20 circumvents or, I suppose, potentially goes to Mr.
21 Montore's company.

22 Now, the problem is that I think as the
23 exemption now reads all of these behaviors are
24 equally sheltered by the exemption. All of them
25 could fall, potentially, within the exemption even

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1 though I believe the Librarian only intended that
2 the third situation be covered, the situation in
3 which the vendor can't be found or is unresponsive.

4 In terms of the documentation of which
5 situation is occurring, Mr. Montore submitted an 89
6 page document that I have taken a brief look at. And
7 what I gathered from those documents is that there
8 are many work arounds that are available in this
9 situation. And some of them are made available by
10 the copyright owner or with the authorization of the
11 copyright owner. And it's not clear to me the
12 extent to which there is a problem here or a
13 substantial adverse impact on the availability of
14 these works for noninfringing uses that isn't
15 resolved by copyright owners themselves or by users
16 seeking assistance that is granted either by the
17 copyright owner or with the approval of the
18 copyright owner. So I think the record is still
19 sparse on that point.

20 Also, I think there's very little in the
21 record about the applicability of this exemption to
22 any works other than computer programs, even though
23 the existing exemption also covers databases and
24 other literary works. And there's nothing in the
25 record until we get to Mr. Kahle's situation about

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1 access control mechanisms other than dongles.

2 I think the bottom line is that without
3 further definition of this exemption, it's hard to
4 see how the record in this proceeding would support
5 a conclusion by the Librarian, at least at this
6 point, that this exemption ought to be recognized
7 for an additional 3 years.

8 I think part of the problem that we see
9 with the existing exemption is a lack of definition.
10 It depends on the three adjectives that are
11 operative here; malfunctioning, damaged or obsolete.
12 The first two are not defined and I think there's a
13 real need to have some type of objective test of
14 when either of those situation applies.

15 Now, obsolete, I'm going to get to that
16 in a little more detail when I talk about Mr.
17 Kahle's submission, but it's defined by reference to
18 or at least there is a reference in the final rule
19 to the definition in Section 108(c).

20 I think it is probably more realistic to
21 talk about something that's not supported or an
22 access control technology that's not supported
23 rather than necessarily obsolete. And I think that's
24 the thrust of the 108(c) definition, although that
25 definition has to do with formats and not with

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1 access controls.

2 So if the problem that is demonstrated
3 by the record is the third scenario that I posited,
4 the one where the copyright owner or any other
5 responsible party can't be found or isn't
6 responsive, then it would seem that the exemption
7 should apply only in cases of obsolete, that is to
8 say unsupported access controls. And that that be an
9 additional requirement along with evidence of
10 malfunctioning or damage as measured in some
11 objective fashion.

12 Let me turn now to the Internet Archive
13 submission, which I think raised a number of
14 important questions. Some of these I believe were
15 addressed by the Librarian in the ruling in 2000.
16 That ruling said that the exemption that you
17 recognize for malfunctioning, damaged or obsolete
18 access controls would not cover situations such as
19 those described by certain libraries who expressed
20 the fear that they would be prevented by 1201(a)(1)
21 from reformatting materials that are in obsolete
22 formats. If the materials did not contain access
23 control protections, but were merely in an obsolete
24 format, 1201(a)(1) would not be implicated.

25 As I understand the situation with the

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1 Internet Archive, those two sentences describe their
2 situation. The question is are the controls that are
3 preventing the use or the verification of the copies
4 that Internet Archive is able to make, are those
5 copy controls or are those access controls? And I
6 think we raised that question in our submission, and
7 perhaps we can find out a little bit more about that
8 today. Because ordinarily one would expect that
9 something that produced a copy but which was
10 nonfunctional, would be viewed as a copy control not
11 as an access control.

12 So the first question about the Internet
13 Archive submission is really whether it's within the
14 scope of this proceeding at all.

15 Then there's several different concepts
16 of obsolescence that I found in this submission that
17 I think we have to try to sort out. First, I mean
18 in a sense a lot of the content that is in those
19 packages is obsolete in a certain sense. "The 1996
20 College Guide" that is referenced in the testimony,
21 I can testify as the parent of a child who was
22 looking for colleges, that information is obsolete,
23 particularly the tuition levels, and no one should
24 rely on it.

25 But there may be other types of product

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1 that's not obsolete, and there's certainly an
2 important niche market in the entertainment software
3 industry for Legacy games, games that people want to
4 play in the same way that they played them on their
5 Omega and their Commodore 64; they want to play them
6 on newer platforms. So this is not necessarily a
7 category that's without any commercial significance.
8 That's one type of obsolescence.

9 And then there's the question of an
10 obsolete media or an obsolete format. I think the
11 testimony refers to the necessity to move content
12 from a format before it degrades, such as CD-ROM,
13 and from a medium before it becomes unintelligible
14 and the example of PNG was given. That, I think, is
15 the kind of obsolescence that is frustrating the
16 Internet Archive.

17 And then the third thing that could be
18 obsolete is the access control. But the submission
19 from the Internet Archive said these access controls
20 are not obsolete, nor are they malfunctioning and
21 damaged and that's why they want to have a broader
22 exemption.

23 So we turn to the proposal that they've
24 made for literary works and audiovisual works that
25 are protected by access controls, the original only

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1 access controls. And I think there's a lot of
2 questions about whether that proposal can meet the
3 criteria of the statute for a particular class of
4 works. It's an extremely broad proposal. It starts
5 with two entire categories of the categories listed
6 in the Copyright Act, literary works and audiovisual
7 works. It potentially encompasses a very broad range
8 of access controlled technologies. And some of these
9 technologies may well be in use today. The fact
10 that an original only access control, if it is an
11 access control, was used on VisiCalc or on Microsoft
12 Basic and that's frustrating these preservation
13 activities, doesn't mean that an access control also
14 meeting that description isn't in use today on a lot
15 of much more current products. And I think in many
16 of the submissions you have from the SIAA you have
17 some examples of reasons why copyright owners might
18 use that type of access control today, such as for
19 controlling beta testing and personalized versions
20 of works and for privacy protection.

21 I think the final point I would like to
22 raise about the proposal from Internet Archive is
23 the question of whether access to these materials is
24 available through other means that would not require
25 circumvention of the original only access control if

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1 it is deemed to be an access control.

2 We've suggested a couple of these in our
3 reply comments. In some cases the content can be
4 preserved in other forms, in analog forms or through
5 screen shots and other ways. But what really struck
6 me as I looked at the demonstration or the
7 presentation that Mr. Kahle made, was whether access
8 to a lot of these materials can't actually be
9 obtained through agreement with the copyright owner,
10 which of course is another form of noninfringing
11 use. Obviously, this isn't going to apply to
12 everything, but I know the Microsoft Corporation is
13 still in business. I believe IBM is still in
14 business. I think Rick Prellinger, the author of the
15 Ephemeral Film Collection I know is still in
16 business. Apple is still in business.

17 And I wonder to what extent the problems
18 that the Internet Archive is experiencing can be
19 resolved in that fashion and thereby reduce the
20 necessity for any exemption in order to facilitate
21 access for noninfringing purposes to these
22 materials. So I hope that that is an issue that
23 perhaps we can have some further discussion about.

24 I'll just a word about the security and
25 remediation issues that Ms. Simons raised. Again,

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1 this is an issue that was before the Copyright
2 Office and the Librarian in 2000. And I believe the
3 conclusion then was that in this proceeding the
4 Librarian had to move with particular caution when
5 asked to redraw lines that Congress had already
6 drawn to define a permissible exception for purposes
7 such as encryption research and security testing. I
8 think that advice certainly applies as well today.

9 Ms. Simons read into the record again
10 the capsule descriptions that were contained in the
11 ACM's submission in the initial comment round. And,
12 obviously, there's a lot of questions that could be
13 asked about those scenarios. But nearly all of
14 them, it would seem, are addressed either by other
15 existing exceptions to Section 1201(a) (1) that
16 already exist in the statute or through other means,
17 such as consent and agreement. So we could go
18 through those, and perhaps there is more information
19 that could be added as to where those scenarios come
20 from and why it's perceived that Section 1201(a) (1)
21 presents a problem in that area.

22 I can't really comment on the 3 email
23 submissions that she received in the last few days
24 regarding concerns that some researchers have about
25 the impact of Section 1201(a) (1) on their research.

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1 Obviously, those concerns are deeply felt. I don't
2 know what the legal basis for those concerns is, but
3 we certainly take a look at those. But I think in
4 the final analysis this is a situation that Congress
5 considered at great length in the process of
6 enacting the DMCA. It drew up a rather detailed
7 exemption or two exemptions for security testing and
8 for encryption research. And if those exemptions are
9 not achieving the purpose for which Congress
10 intended, because Congress clearly intended to
11 encourage the further development of encryption
12 research, then it may be that Congress is the forum
13 in which that line drawing should be revisited and
14 not this proceeding.

15 Thank you.

16 MS. PETERS: Thank you very much. For
17 time's sake, I'll only ask a few questions at this
18 point and give my fellow panelists a chance.

19 Mr. Kahle, I'm trying to understand the
20 scope of the exemption that you're looking for and
21 to identify exactly what the problem is. The
22 difference between the format that may be obsolete
23 and what you referred to as basically embedded, I
24 guess, computer programs that you have to get around
25 in order to actually gain access to it.

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1 All the things that you showed us, and
2 the 16 works but only one of them could be used.

3 MR. KAHLE: Right.

4 MS. PETERS: Do those works all
5 basically have some embedded software that makes it
6 so that they're no longer accessible? If not,
7 what's the problem with the 15?

8 MR. KAHLE: The problem for some of these
9 materials, I don't know, take Ephemeral Films, we
10 can make a copy of the bits that reside on this
11 aging media, though there's software embedded with
12 the content that does certain checks to make sure
13 that, for instance, the CD-ROM is in the CD-ROM
14 player. And if you're running this on an emulator,
15 you can fake it out, circumvent particularly code
16 around those issues to sort of make it think that
17 everything is fine. But if you do not do that, it
18 will not play.

19 These softwares are a little bit
20 different. Let me see if I can try to answer that.
21 There's this constant migration --

22 MS. PETERS: I'm trying to get at the
23 access control. Just the access control

24 MR. KAHLE: The access controls are
25 often original only access controls in this era of

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1 software where it requires that you have a physical
2 floppy in a floppy drive to be able to run. It's
3 not that the bits are accessible. It's that it does
4 certain checks to make sure that you have the
5 original in your possession.

6 MS. PETERS: Okay.

7 MR. KAHLE: That's the case of some of -

8 -

9 MS. PETERS: Take the 5 1/4 floppy disk.

10 MR. KAHLE: Yes.

11 MS. PETERS: You've got it, but you
12 don't have the equipment to play it? I still don't
13 totally understand what it is in that floppy that
14 makes it nonaccessible.

15 MR. KAHLE: Okay. Sorry.

16 It's not that the floppy may not -- this
17 floppy, if we found an Apple II from that era and we
18 put it in, it could play.

19 MS. PETERS: Okay. Right.

20 MR. KAHLE: And that would be terrific.
21 That would be a huge step forward.

22 What we're trying to do is migrate these
23 materials onto more stable media.

24 MS. PETERS: Right.

25 MR. KAHLE: Currently that's hard

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1 drives. If we were to do that, make a replica. We
2 have the original, we want to make a copy that
3 functions the same way as an Apple II running an
4 Apple Writer program, then that whole environment of
5 the emulator of the underlying Apple personal
6 computer as well as the hard drive version of the
7 bits that were on the floppy, all have to act as if
8 were the original.

9 MS. PETERS: Okay. But I'm still hung
10 up with where the access control is.

11 MR. KAHLE: The access control is when
12 the software on the floppy goes and says is this
13 floppy in the floppy drive.

14 MS. PETERS: So there's a piece of code
15 that says I don't play unless I'm in a floppy
16 player?

17 MR. KAHLE: Often. Often. In a majority
18 of the cases here, that's the case.

19 MS. PETERS: And in the others?

20 MR. KAHLE: There's a dongle that sort
21 of checks to make sure you have that.

22 MS. PETERS: Okay. A dongle.

23 MR. KAHLE: Does it have the CD. There's
24 certain things it checks certain things about the
25 drivers. There's these sort of couplings --

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1 MS. PETERS: Okay. Because these are
2 really all before the era when we talked about
3 technological protection measures. So these are
4 things that were done way back when, but just put in
5 -- I don't know. I don't know why they were put in.
6 But they effectively now preclude getting access to
7 them, is that what you're saying?

8 MR. KAHLE: As I understand it, these
9 measures were done by software companies, and I
10 worked for some of them, were done so that people
11 were forbidden to access the materials on the disk
12 unless, for instance, you had a physical copy or you
13 had the right set of configurations.

14 MS. PETERS: Okay. And the same issue
15 is with regard to -- not to software. We're talking
16 about software mostly. But with regard to games,
17 video games?

18 MR. KAHLE: Games are often also these
19 sort of software/hardware combinations as distinct
20 from, say, audio CDs or DVDs that have data on the
21 disks and the sort of protections and such tend to
22 be build into the players. These things are sort of
23 this mush of content and software that plays through
24 computer programs. I'm sorry, I'll try to be
25 concrete.

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1 MS. PETERS: No, that's all right. I
2 still am struggling with what it is we're trying to
3 do. Let me just switch it -- because maybe other
4 people can ask what I'm trying to get at more
5 effectively.

6 Your original category was literary
7 works and audiovisual.

8 MR. KAHLE: Yes.

9 MS. PETERS: And what you talked about,
10 however, was software and like games, which is a
11 much narrower category. Is your focus mostly on
12 software and games or is as broad as --

13 MR. KAHLE: The pieces here are sort of
14 a representation of a class of some of the types of
15 things we're dealing with. We think of these as
16 audiovisual materials and literature. They just
17 happen to be rendered with computers. You know, this
18 is probably the best example of the sort of
19 literature. It's a --

20 MS. PETERS: It was a book.

21 MR. KAHLE: -- book. It was a book. This
22 is the computer version of it, and here's a sort of
23 screen shot of a sort of dorky, you know, early bad
24 colored graphics that they could view in those days.
25 But they're trying to render a book on a screen.

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1 Okay. Maybe not great. But at last seminal in terms
2 of early.

3 And movies, audiovisual works as well as
4 software and games that sort of have all of these
5 components.

6 So if I could figure out some other way,
7 they seemed, at least to a layman, qualify. They're
8 just of the computer generation.

9 MS. PETERS: Okay. I'll still struggle
10 with my question.

11 MR. KAHLE: Sorry.

12 MS. PETERS: Maybe I'll come back.

13 MR. KAHLE: I apologize.

14 MS. PETERS: No. It's my issue that I
15 haven't quite figured out.

16 I'm going to let the rest of the panel
17 ask questions while I try to figure out.

18 MR. KAHLE: Right.

19 MR. CARSON: Okay. I'm having the same
20 problem the Registrar has on whether or not these
21 original only access controls are truly access
22 controls. But I'm not sure I know how to ask the
23 question any better to get an answer. Maybe it's our
24 problem, not yours in terms of our not quite getting
25 what you're saying. But I'm not entirely sure we're

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1 talking about an access control and I'm wondering if
2 you can sort of make the case as to how this
3 qualifies under the statutory definition of a
4 technological measure that controls access to a
5 copyrighted work?

6 MR. KAHLE: It may be that those words
7 mean something different to a lawyer than it does a
8 layman. You know, I've been reading some of this
9 stuff and some of it's pretty -- anyway.

10 MR. CARSON: Whatever you were going,
11 you're absolutely right.

12 MR. KAHLE: But these materials, the
13 design and the implementation of these measures were
14 put in place to keep people from accessing these
15 underlying works if you had a copy of them on
16 another medium.

17 You can copy these things, you just
18 can't access them. You have to blow through the
19 access protections to be able to run them. You
20 might be able to save the bits on the floppy or the
21 CD-ROM exactly as it was. But you can't play them in
22 a new environment.

23 MS. PETERS: But nobody can see them and
24 nobody can hear them?

25 MR. KAHLE: Right. No researcher can

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1 even -- we as librarians can't even find out whether
2 we did our jobs right. And I have a thorn in my side
3 about this because we were trying to in a different
4 circumstance archive websites for the Library of
5 Congress. And we didn't go back and look if we were
6 doing it right. And we blew it. And when I find
7 this out, we do it over and over again. If we don't
8 actually check our work to make sure that the
9 functioning real environment on a migrated version
10 and in versions that don't rely on the physical
11 media or having an Apple II; we need to move this
12 stuff forward and be able to access this stuff and
13 be able to use it and expose it to researchers or I
14 think we'll fail. I actually know we will fail.

15 MS. PETERS: Could I ask, what is it if
16 there's some kind of an exemption --

17 MR. KAHLE: Yes.

18 MS. PETERS: -- what is that you will be
19 able to do that will in fact make it accessible?

20 MR. KAHLE: Okay. Good. What we're
21 looking to do is make a copy of the bits that are
22 stored on these media into a more stable
23 environment, hard drives currently. And then couple
24 with other emulation software that is written
25 independently or together to try to get that to

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1 function and be able to live in the new world kind
2 as if it were the old world.

3 So as if you were sitting in front of an
4 Apple II. We want to have a replica so that we have
5 this in the physical form, we can look at the
6 packaging. Then you can go to a modern computer and
7 go and say what would it have looked like if I had
8 this dongle and had an Atari something or other.

9 MS. PETERS: What does it take in order
10 for you to do that? In other words, you said you
11 replicated it. You got all the bits but now you
12 can't see it and maybe you can't hear it. But how do
13 you -- what do you do to that work? What are you
14 circumventing? What are you getting around?

15 MR. KAHLE: If we are trying to take
16 this floppy from Lotus 123, we believe we know how
17 to actually read the old PC Jr. and make a verbatim
18 sector for sector copy onto a hard drive. Then we
19 need to emulate and have software around that
20 transcription of the floppy to emulate and fake out
21 this software to make it believe that it is still
22 inside an IBM PC Jr.

23 MS. PETERS: So, but what is it
24 circumventing? It sounds like you're adding
25 something that will make it do what it could have

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1 done before.

2 MR. KAHLE: We are trying to make it do
3 what it did before by --

4 MS. PETERS: Are you taking the bits
5 from before and doing something to them?

6 MR. KAHLE: No. We're going to try to
7 run them. And by running them in this fake
8 environment we have to specifically go out after the
9 techniques that the publishers used to try to keep
10 piracy from happening and defeat that. We have to go
11 out and find every piece -- and there are sorts of
12 creative things that they did in this early PC era,
13 most of which are gone now. But of jumping around -
14 - and we have to go and circumvent their intention
15 to keep us from running this off the original work.

16 MS. PETERS: I've got more about what
17 you're doing, but I'm still --

18 MR. KAHLE: I'm sorry. I feel like I'm
19 being --

20 MR. CARSON: The problem is we have
21 lawyers speaking to librarians/technologists. And
22 whether we can ever speak the same language --

23 MR. KAHLE: I've had that problem.

24 MR. CARSON: This meeting is doomed to
25 failure.

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1 MS. PETERS: He's giving him the law.

2 MR. CARSON: The law. I'm giving the
3 definition. Hold on there for a second.

4 Okay. So we have the definition here.
5 Section 1201(a).

6 DR. SIMONS: Can I make a comment while
7 he's reading.

8 MR. CARSON: Go ahead.

9 DR. SIMONS: Because it was just
10 suggested to me that perhaps what Brewster is trying
11 to do, and Brewster should correct me if this wrong,
12 is somewhat similar to trying to read what's on a
13 DVD by bypassing the CSS encoding.

14 MR. CARSON: Well, that was occurring to
15 me. Yes.

16 MS. PETERS: Right. Okay.

17 DR. SIMONS: So that was not my original
18 idea. It came from behind me.

19 MR. CARSON: Just walk me through. We've
20 got a definition in the statute of when a
21 technological measure effectively controls access to
22 a work. It says: "A technological measure
23 effectively controls to a work if the measure in the
24 ordinary course of its operation requires the
25 application of information or a process or a

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1 treatment with the authority of the copyright owner
2 to gain access to the work."

3 So I gather the key question here may be
4 does this original only access control you're
5 talking about, is this something that is requiring
6 the application of information or a process or a
7 treatment to gain access to the work? And if it is,
8 try to explain to us how that's happening.

9 MS. SELVAGGIO: Can I -- can I --

10 MR. KAHLE: Try to be my interpreter.

11 MR. CARSON: Identify yourself for the
12 record.

13 MS. SELVAGGIO: Yes. Marian Selvaggio.
14 I'm with Wilson --

15 MR. CARSON: Oh, we have a lawyer.
16 Okay.

17 MS. SELVAGGIO: You have a lawyer.

18 MR. KAHLE: Help me.

19 MS. SELVAGGIO: These programs were
20 written so that you could only play them in a
21 particular place.

22 MS. PETERS: In a player. Okay.

23 MS. SELVAGGIO: What Brewster and the
24 Internet Archive are doing is writing code that
25 circumvents that access control so that you can now

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1 get to it without having a player you need. That's
2 the circumvention that they're doing.

3 MR. CARSON: Okay.

4 MS. PETERS: Okay.

5 MR. CARSON: I think I get the
6 circumvention. I just want to make sure I understand
7 the technological measure that effectively controls
8 access to the work is.

9 MS. SELVAGGIO: You can't play these,
10 you can't use them in the ordinary course of
11 business without the proper hardware or the proper
12 exchange of information.

13 MR. CARSON: Okay.

14 MS. SELVAGGIO: Because of these access
15 controls you cannot run these as they were meant to
16 operate unless you have the exact code or the exact
17 hardware that they're requesting. So what Brewster
18 is doing is circumventing that access control and
19 emulating it so that it thinks it has the proper
20 hardware or the proper software and then you can run
21 it as it was meant to be run in the ordinary course.

22 MR. CARSON: All right. Now you talked
23 about an exchange of information, and certainly when
24 you look in the statutory language we're talking
25 about, among other things, the application of

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1 information to gain access. So just elaborate a
2 little bit more what's kind of information are we
3 typically talking about that needs to be exchanged
4 or applied in order to get access to the work?

5 MR. KAHLE: As I understand it, these go
6 in pro particular memory locations to find out are
7 they -- they try running the actual disk. If you
8 had a copy, you would go and run the actual disk and
9 try to do transactions with the original CD or
10 floppy that would be in the hard drive or go and try
11 to communicate with the dongle to go and get
12 particular information from the dongle, information
13 that's key, and does it act correctly.

14 The process, does it spin a hard drive.
15 And if you didn't have -- excuse me. If you had a
16 floppy drive or if you didn't have a floppy drive or
17 a CD drive on these computers, then the
18 communication from the program that's written on the
19 floppy would fail.

20 So there's the information on the
21 floppy. You copy it to a hard drive. It tries to
22 communicate back with the floppy drive or the CD
23 drive, is it there? Hello. If it comes back with
24 no or errors, then it shuts down and you're out of
25 luck.

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1 MS. PETERS: Okay.

2 MR. CARSON: Okay.

3 MR. ZIEMANN: May I interject to this.

4 I'm also a computer programmer. And these things are
5 written to prevent a copy from working.

6 MR. KAHLE: Yes.

7 MR. CARSON: Okay.

8 MR. ZIEMANN: Specifically so that you
9 must have the original in the original machine. If
10 you make a copy of it, it's going to say no, sorry.
11 It's a copy and it's not going to work.

12 MR. KAHLE: And interestingly, just --
13 it shouldn't be interesting.

14 MR. CARSON: Right.

15 MR. KAHLE: Interestingly, a lot of
16 these protections are kind of from the era of the
17 '80s and '90s. A lot of the types of protections
18 that people are doing now aren't these anymore.

19 MS. PETERS: Right.

20 MR. KAHLE: Things are changing.

21 They're doing these license key exchanges. We're
22 going to have issues with all of that as well. But
23 we're sort of sitting around with a bunch of this
24 stuff and we're starting to find that these are
25 enough of issues, that we have to start working on

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1 things from day one. Waiting for them to be
2 obsolete or malfunction, actually, is very scary to
3 us.

4 I'm not sure how we're going to do on this
5 task. Stanford has 19,000 titles of this stuff and
6 they haven't started moving forward with it. But
7 starting to be more proactive, working with the
8 manufacturers, building those relationships but not
9 -- we find when we've tried to write and request
10 information and approval from copyright holders,
11 most of them can't be found even within a year or
12 two of these things being made available. It's just
13 practically impossible.

14 And we have studies of this, of even
15 things from the 1990s, '95, '96, '97 some from
16 Macromedia CD-ROM collection. We wrote to a bunch of
17 the contact information and we tried to find them.
18 And we have very few responses. And we also got a
19 lot of responses from people saying "I'm not sure I
20 can give you that permission," which is sort of an
21 interesting one as well.

22 So unless we have sort of some library
23 of 108 style ability to maneuver, I think we will
24 lose a large percentage if not a majority of all of
25 these works.

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1 MR. CARSON: Thank you. You just
2 answered my next question. So I got two for the
3 price of one.

4 Mr. Metalitz, one of the things you said
5 at page 18 of your reply comments, and this is with
6 respect to the proposed exemption, actually the
7 current exemption for technological measures that
8 are failing because of damage or obsolescence or
9 malfunction. One of your criticisms is that that
10 current exemption is not confined only to those
11 instances in which the provider has demonstratively
12 refused or failed to provide timely relief in the
13 form of assistance to access the work.

14 Now, I'm trying to remember where you
15 were 3 years ago when you were arguing with us about
16 what a class of works was. And I think I remember
17 where we were 3 years ago, and we decided what a
18 class of works was. And I don't recall, certainly
19 an element of what we decided, or an element of what
20 you were arguing ought to be part of the definition
21 of a class of works being referenced to what the
22 copyright owner may or may not be willing to do for
23 you. This sounds like it's getting pretty close to
24 an exemption that looks more upon use and conduct as
25 opposed to a class of works. Am I correct in that?

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1 And if so, how do you reconcile that with what I
2 think you were telling us 3 years ago and what we
3 certainly were saying 3 years ago?

4 MR. METALITZ: Well, I think you
5 essentially in our view you essentially got it right
6 3 years ago in terms of the definition of particular
7 class of works. And I would agree with you that it
8 should not be defined in terms of what the user and
9 the copyright owner have done. But these exemptions
10 have to be defined in some fashion.

11 In 2000 you said well malfunctioning and
12 damaged, everybody knows what that means so we're
13 not going to define it. And obsolete you referred to
14 Section 108(c). And Section 108(c) says that a
15 format shall be considered obsolete -- now this is,
16 you know, maybe responsive to Mr. Kahle's issue -- a
17 format shall be considered obsolete if the machine
18 or device necessary to render perceptible or work
19 stored in that format is longer manufactured or is
20 no longer reasonably available in the commercial
21 marketplace.

22 That describes a situation in which -- I
23 mean, I don't know how you would know that unless
24 someone asked. I don't know how you would know that
25 it's no longer available in the marketplace or can't

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1 be found unless someone went to look for it and
2 wasn't able to find it.

3 What I think was behind the exemption
4 that was recognized, was not so much necessarily a
5 concept of being obsolete, but a concept of being
6 not supported. And that inevitably gets back to the
7 question of whether there's been any effort or any
8 attempt to try to get the copyright owner to support
9 the access control.

10 So I think the solution to this problem,
11 perhaps, is in a clear or more definite or more
12 specific definition of the adjectives that describe
13 the access control that under an exemption would be
14 allowed to be circumvented. And to some extent
15 those definitions may require an evaluation of
16 criteria that have to do with what the copyright
17 owner has done and what the user has done. I don't
18 think that that transgresses the principles that the
19 Librarian laid down in 2000. I think it's a clearer
20 definition of what is the type of access control
21 that can be circumvented.

22 MR. CARSON: So if, for example, and
23 this is a very rough draft of what you maneuver see,
24 but if for example this time around we were
25 satisfied that in all other respects the case had

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1 been made and we were going to propose an exemption
2 to the Librarian and we came up with an exemption
3 along the lines of what we did last time, but we
4 said among the conditions it would be that the
5 access control measure is no longer supported by its
6 maker -- very rough draft, as I said.

7 MR. METALITZ: Yes.

8 MR. CARSON: That would satisfy the
9 concerns you were talking about, although in your
10 comment you were talking about it in terms of
11 whether the provider has refused or failed to
12 provide timely release. The unsupported sort of
13 adjective would be sufficient to deal with that
14 phenomenon, I gather, from your point of view?

15 MR. METALITZ: Yes. I could give a rough
16 answer to your rough question. And that is I think
17 it's a problem of defining what those terms mean.

18 MR. CARSON: Yes.

19 MR. METALITZ: And that definition can
20 include something about whether it's still
21 supported.

22 MR. CARSON: Yes. I get it.

23 MS. PETERS: If you go that way, would
24 that answer Mr. Kahle's problem.

25 MR. METALITZ: Ask him.

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1 MS. PETERS: No, but that's the
2 question.

3 MR. KAHLE: No.

4 MS. PETERS: No? If in fact this is not
5 supported by the original manufacturer so therefore
6 there's an exemption, what more do you need?

7 MS. SELVAGGIO: Well, it depends on what
8 you mean by not supported. If he has the right
9 floppy disk to run this, would that be considered
10 still be supported? You're not migrating the media,
11 you're not moving the data. It's still supported
12 because you can still put it in and run it.

13 MR. KAHLE: Let me take also a different
14 crack at it.

15 Trying to do this work is actually kind
16 of tough. I mean, trying to get this stuff to work
17 even the first time is hard. Kind of having your
18 computer and all, everything sort of set up. I mean,
19 we had it this morning. It's not like putting a DVD
20 in a DVD player. All right. A lot of this stuff
21 seems to be sort of pirated around that sort of
22 world view. That's not what we're dealing with.

23 We're dealing with a lot of different
24 working pieces that we have to get all emulated to
25 work right again. It's extremely helpful if we have

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1 as much time as we can and the programmers are sort
2 of part of the program. IF they're available, how do
3 we go and emulate your new Atari, whatever it is,
4 your game console with the right sets of pieces?

5 If we have to wait for all of the pieces
6 to be not supported, does that mean that it's
7 already too late?

8 There's another characteristic as I
9 understand it in this exemption that causes
10 problems. It's when the access controls start to
11 become obsolete but the underlying -- the access
12 controls might be perfectly operating fine. But
13 we've lost the rest of the media or we've lost
14 abilities to read certain sectors of the drives --
15 of the media. And the whole thing starts to fade.

16 So the idea of putting a time thing,
17 sort of push it off into the future and wait until
18 it's obsolete and then whose going to care quite so
19 much; in this digital realm especially in things
20 that involve the interactions of lots of different
21 computing components, I fear we will just lose a lot
22 more. And when we start to deal with Internet style
23 software, and we've got to start on it immediately
24 because it's got client server pieces -- but that's
25 not the subject today. Three years from now we'll

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1 come back and we'll have a lot more to say about
2 supporting those materials. These are where we have
3 concrete examples and we would like to start to
4 emulate and deal with Windows 98 software, Windows
5 2000 software, McIntosh software of different forms,
6 even those are still currently being sold by the
7 manufacturer.

8 MS. PETERS: Mr. Kasunic?

9 MR. KASUNIC: Mr. Metalitz, on page 41
10 of your reply comment, and this goes to the question
11 of what kind of control are we talking about here,
12 you said that it was less than clear whether this is
13 was an access or a copy control and said that: "A
14 technology which allows copying but which renders
15 the resulting copies less than fully functional
16 should be classified in DMCA terms as a copy control
17 subject to 1201(b) not an access control."

18 So after listening to the description
19 that we heard here, can you make our lives a lot
20 easier and tell us that that's not within the scope
21 of Section 1201 and that he's free to circumvent
22 without an exemption?

23 MR. METALITZ: Well, I'm not sure I
24 could make life easier, but I am struck by what my
25 colleague here said that the real purpose of these

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1 was to prevent someone from making -- at the time,
2 was to prevent someone from making a copy --

3 MR. ZIEMANN: That would work.

4 MR. METALITZ: -- and presumably that
5 would work. And presumably that would -- I may be
6 wrong about this, maybe Mr. Kahle can set me set.
7 Presumably that would mean even a copy that would
8 work in that a original floppy drive. So it isn't a
9 question of emulating the hardware. It's a question
10 of the copy not being functional.

11 In other words, if back in 1985 I had
12 made a copy of that 5 1/4 inch floppy disk and put
13 it into the same machine that I was trying to run
14 the original on, would it work or would it not work?
15 If it would not work, it seems as though it's a copy
16 control.

17 MR. ZIEMANN: On the McIntosh software
18 the first thing that was there was something that
19 you needed an extra piece of software to access and
20 it was called the bozo flag. And if you checked the
21 box and somebody copied it, it just didn't work.

22 MR. METALITZ: Even in the same machine
23 then?

24 MR. ZIEMANN: Even in the same machine.

25 MR. KAHLE: Well, than the -- well,

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1 even, there might be copy protections, but that's as
2 I understand it not the subject. Actually it's the
3 access protections that we're having troubles with.

4 We can copy of lot of these materials.
5 It's the access protection. So whether we're allowed
6 or not allowed to do the copy protections, if we
7 blow the access protections as I understand, bad
8 things happen. And I'm not exactly sure, George,
9 how to answer your question of who they happen from,
10 but these guys say don't do it. So we need to blow
11 the access protections. We have to circumvent the
12 access protections to be able to do our job.

13 Yes, there may be copy protections that
14 we have to deal with as well, but as I understand
15 it, that as not as much of an issue that we have to
16 deal with.

17 MR. KASUNIC: Well, even if this was
18 initially intended to be a copy control, once you've
19 reproduced that and in terms of getting access to
20 that reproduction, wouldn't 1201(a)(1) apply then?
21 Of you could not get access to that reproduction of
22 the work, would there be a Section 1201(a)(1) issue?

23 MR. METALITZ: Well, don't just take my
24 word for this. His would -- what the Copyright
25 Office said 3 years ago.

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1 MR. ZIEMANN: What do they know?

2 MR. METALITZ: To the extent that
3 technological protections prevented the library from
4 converting the format, those protections would seem
5 to be copy controls, the act of circumvention of
6 which is not prohibited by Section 1201.

7 Now, I think in the questioning that Mr.
8 Carson had of Mr. Kahle, I think I can see -- I
9 understand better now how this can also potentially
10 be described as an access control by looking at that
11 definition of access control mechanism. My concern
12 would go toward how bounded this description is of
13 an original -- well, it's called an original only
14 control which, again, to me sounds like what the
15 court said it was in 1988, a copy control. But
16 leaving that phrase aside, I guess I wonder what is
17 the difference between this type of access control
18 that requires checking to see that it's running in
19 the right machine and a lot of access controls that
20 are used today, some of the other techniques that
21 Mr. Kahle talked about, that are used to make sure
22 that the program is being run, perhaps, in the
23 machine to which it was dedicated at the time of
24 registration or to a machine within a certain
25 network. So, for example, it's accessible by anyone

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1 using a computer within a particular university
2 network but not by somebody else outside the
3 university system.

4 A lot of techniques are being used now
5 to make sure that you can't have access to a
6 particular work unless it's done in a machine that
7 has certain characteristics. And part of what I was
8 hearing in the description of the controls here also
9 fit that criteria. So I guess I am somewhat
10 uncomfortable with describing this as an access
11 control until I had a better understanding of how
12 this can be distinguished, this 1980s and early '90s
13 technology, can be distinguished from what is being
14 used today in an access control environment.

15 MR. KASUNIC: Well then isn't it
16 reasonable to understand the Internet Archive's
17 concern since there is -- it's very unclear whether
18 this might be or might not be an access control,
19 then their concern is legitimate in a need for an
20 exemption if we can't -- if the potential for
21 violation for doing what they're doing is there?

22 MR. METALITZ: Well, I'm not saying that
23 their concern is legitimate. I do think there's an
24 argument to be made that much of what is impeding
25 their activities is a copy control and not an access

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1 control. But maybe I don't understand enough about
2 how this technology works to come to any definitive
3 conclusion on it.

4 It also leaves open the question of to
5 what extent -- I mean, I hear what Mr. Kahle said
6 that in many cases these copyright owners can't be
7 found. But on the other hand, when he shows us the
8 16 greatest hits and most of them are from companies
9 that are, you know, still actively being traded on
10 Nasdaq and presumably are accessible, to request --
11 well, I don't whether he's got responses from them
12 or not. But to see the many -- there seems to be
13 many other ways to ensure the availability of these
14 materials for noninfringing uses. And again, I'm
15 assuming that his uses are noninfringing under 108
16 that don't require circumvention of an access
17 control in a way that also could effect both, as he
18 indicated, products that are still currently in the
19 market and techniques, access control techniques
20 that are being used for many different purposes.

21 MR. KASUNIC: Mr. Kahle, do you have a
22 response to that in terms of whether it is easy to
23 get permission or are there other ways of
24 accomplishing your ends?

25 MR. KAHLE: We have found anecdotal that

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1 even if these companies exist, that they may not
2 have the original source code versions that don't
3 have the access controls as part of them such a way
4 that they would be able to donate them to a library.
5 That often -- if you go and show this to Lotus, they
6 go, "Wow. Cool. Great. We'd love -- can we have
7 one back for our library." Because back in that day
8 of -- this is 1982, we were in different building.
9 They don't have this stuff. The publishers aren't
10 librarians. They're out to make a buck. And they're
11 required to, based on how corporate law works. So
12 even if they're around, it's often extremely
13 difficult.

14 There's anecdotal. The requests that we
15 have sent out, and this is a study, show that very
16 few, even the emails on these -- or the physical
17 addresses working. So maybe they've moved. But it
18 starts to become fairly difficult.

19 So I think even if we were -- we were
20 just looking for permission, much less help from
21 these guys on being able to do these things.

22 I think the publishers will do
23 publishing activities, the libraries should do
24 library activities. And protection 108 helps us
25 stay out of their way commercially.

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1 MR. KASUNIC: I just have one other
2 question, and it's changing gears a bit, in terms of
3 the statutory exemptions in line with research and
4 encryption for security research. And also the
5 privacy exemption.

6 And, Mr. Metalitz, you've made the
7 statement about proceeding that we did also make,
8 and I've asked a recommendation about proceeding
9 cautiously where there is congressional exemptions.
10 But it seems, and correct me if I'm wrong, Professor
11 Simons, but this adequately -- or do these
12 congressional exemptions adequately fit computer
13 software? For instance, in the subsection, I guess
14 it's (g) dealing with security -- or (j), excuse me,
15 dealing with security testing does not specifically
16 mention computer programs. And so we'll leave that
17 term completely out of that subsection. And there
18 also seem to be some potential holes, anyway, in
19 terms of privacy research. For instance, one thing
20 that's come up in our comments is spyware, trying to
21 get privacy information that in subsection (i) there
22 is the requirement that there be conspicuous notice
23 on the spyware before you can circumvent to see what
24 it's doing. Are these statutory exemptions too
25 narrow for the present circumstances?

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1 DR. SIMONS: Thank you for asking me
2 that question.

3 It's our view that essentially all of
4 the statutory exemptions that would apply to
5 computer scientists are too narrow. If you look at
6 the security exemption J, it says with the
7 authorization of the owner or operator of such a
8 computer. So that's -- so you first need the
9 authorization in order to do the security research
10 to begin with.

11 So if you happen to be using a program
12 where you -- I mean, if you think about the impact
13 on just computer security in general, I think it's
14 really quite serious. I personally find it somewhat
15 ironic that at a time when we are so concerned about
16 security in general in this country that we have
17 legislation that is hampering security R&D, not only
18 to do the investigation to see how secure software
19 might be, but also to disseminate information when
20 you find vulnerabilities.

21 One of the people I quoted referred to
22 the fact that when this research isn't done, that
23 the pirates will prevail.

24 I understand that piracy, a term I don't
25 particularly like, but infringing behavior is of

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1 concern to owners of intellectual property. But
2 there are many other issues that we need to be
3 worried about. In particular, we need to worry about
4 the security of the information infrastructure. And
5 to the extent that it's insecure, which it is
6 seriously insecure, and to the extent that we are
7 hampered from investigating some of these
8 insecurities and from revealing them, not only does
9 it make this country -- I mean, it makes this
10 country more insecure and it also ironically has a
11 negative impact on the very people who pushed for
12 this legislation to begin with because then they
13 will find themselves using protection mechanisms
14 that they may not even know are insecure because
15 nobody can tell them. But the bad guys will know,
16 right? Some of these things are really extremely
17 fragile.

18 So another way of looking at some of
19 these exemptions because they are so weak, what this
20 bill basically does is it protects weak forms of
21 protection. And it just seems to me that that's not
22 in anybody's interest.

23 I don't know if I answered all your
24 questions. As far as the privacy goes, of course
25 again if there is spyware or some other invasive

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1 type of software, sometimes you can't know it's
2 there without looking. And if you're not allowed to
3 look, then you can't find out.

4 MR. KASUNIC: Mr. Metalitz, do you have
5 any --

6 MR. METALITZ: Well, I think in general
7 the issues that you raise about the scope of the
8 existing statutory exemptions are issues that are
9 best addressed to Congress that wrote these
10 exemptions and, obviously, has the authority to
11 change them and in light of changing circumstances.

12 The job of this proceeding is somewhat
13 different. And I think the need to demonstrate the
14 reduced availability -- or the adverse impact on the
15 availability of materials for noninfringing uses is
16 the touchstone of this proceeding which may not be
17 the same thing.

18 On 1201(i), I'm not sure that I
19 understood the question that you were raising, but
20 it does -- it actually rather closely tracks the
21 spyware concern that at least one of the submitters
22 in the initial round raised. It basically deals with
23 the undisclosed surreptitious collection of
24 identifiable information. And it allows you to
25 circumvent an access control that does that under

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1 those circumstances.

2 DR. SIMONS: But how do you know if it
3 does it without circumventing it?

4 MR. METALITZ: How do you know if it
5 does it?

6 DR. SIMONS: How do you know that it
7 does this without circumventing it?

8 MR. METALITZ: Well, you have to have
9 some way, some evidence or some reason to believe
10 that personal identifiable information is being
11 collected.

12 DR. SIMONS: Right. But suppose you're
13 wrong?

14 MR. METALITZ: It doesn't necessarily
15 mean you have to circumvent in order to find that
16 out.

17 MR. KASUNIC: But if you're wrong,
18 you're in violation, right?

19 DR. SIMONS: Right.

20 MR. METALITZ: In other words, if you
21 think it does collect personal identifiable
22 information and it turns out that it doesn't collect
23 personally identifiable information is your act of
24 circumvention a violation? The act of circumvention
25 is really dedicated to identifying and disabling the

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1 capability. So you're saying if the capability
2 doesn't exist, does that not come within the
3 category of identifying it because it's a nil situ
4 and you haven't identified it? I don't know the
5 answer to that question.

6 MS. PETERS: Charlotte?

7 MS. DOUGLASS: Yes. For Mr. Kahle. It
8 seems tome that there's a little bit of a disconnect
9 between your objectives, which is to protect things
10 for a 100,000 years and this proceeding which is
11 just for 3 years, maybe recurring, but this
12 proceeding. Because it just seems like you are
13 interested in maybe protecting things that may break
14 down, protecting things that essentially are in need
15 of archiving. I'm going a long way around. But I'm
16 having a difficult time also seeing that this is
17 really access protection.

18 What do you want from the Copyright
19 Office? I mean would you be happy if we said this is
20 a copy control and go home? I mean, it's just not
21 clear that it's access control.

22 MR. KAHLE: I'm sorry. Gosh, that's
23 tragic. You know, lay people. Okay.

24 Let me try to answer your preamble
25 before--

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1 MS. DOUGLASS: Okay.

2 MR. KAHLE: So why are we so concerned
3 with the next 3 years when we've got sort of a
4 longer term time frame that we're really trying to
5 deal with? The urgency comes, and this stuff's
6 rotting now. If we don't do our preservation now,
7 we don't get another chance. And I fear that, you
8 know, this stuff's already gone. So, the urgency
9 here for us in the preservation is we've got to act
10 now and please don't put it off another 3 years.
11 Because these floppies are now 20 years old. And
12 they're starting to go. And anecdotal it takes 6
13 floppies to find out that doesn't have a read error.
14 This comes out of the gaming community. So
15 anecdotal I think so that's the urgency.

16 MS. DOUGLASS: Okay.

17 MR. KAHLE: Does that help?

18 MS. DOUGLASS: Yes, it does. I was
19 looking at first effect.

20 MR. KAHLE: Okay. Then real issue that
21 a copy control or access control, what do I want
22 from the Copyright Office? If you think like
23 librarians are conservative folks, and we are, go
24 and ask some of the lawyers that advise us and these
25 guys, especially when the lawyers are working

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1 universities, they go and see endowment. Endowment
2 and they divide endowment by \$10,000 each potential
3 infringement, right. And the answer is often no.

4 We need things to be fairly
5 straightforward for us to be able to do our jobs.
6 And if there's murkiness, we're not a risk taking
7 group. But we're a little desperate at the moment
8 because we're seeing the stuff evaporate. But as a
9 group, Stanford -- you know -- so. That's the --
10 what do I want from the Copyright Office?

11 I was told by our lawyers, these high
12 priced folks that are --

13 MS. SELVAGGIO: This was pro bono.

14 MR. KAHLE: Yes. Another way of looking
15 at it, say thank you. Is tens of thousands of
16 dollars has been put forward by a number of
17 organizations, including these guys, to be able to
18 get here. I don't know how long we can sustain this.
19 I'm not sure how long the premier law firm in
20 Silicon Valley is going to do this stuff pro bono
21 for a library.

22 So we have to try to lighten things up a
23 little bit in terms of how hard this stuff is to do.

24 But what do we want? I'm told that even
25 if you guys don't say "Hey, that's copy protection,

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1 you're just fine. Go nuts, go through it." That if
2 the first time that we think we're blowing an access
3 protection, and these things are designed to stop
4 access, we're liable. And no matter what you say.
5 I mean, it might help us. You know, Judge, here we
6 have -- Charlotte going and say, hey, we're kosher.
7 But that means we'll have to find that out in a
8 court of law. And just the threat of litigation on
9 this stuff is chilling. We just end up with people
10 spending a lot of time with lawyers. So what I'd
11 really like it to make it clear cut. And we're
12 attempting with this verbiage to be actually fairly
13 narrow. I realize that's a fighting term that you
14 sort of hit the ping back and say, "Oh it's broad,
15 it's narrow." The idea is to try to make it so it
16 doesn't cover DVDs and CDs and things. It's the
17 kind of stuff that's got software all wrapped into
18 it. And it's something that's kind of a nice aspect
19 of this, is it's so hard to do the job that we're
20 setting out to do, that it's not like any script
21 kitty is going to go off and blow access protections
22 and post stuff because of this DMCA exemption.

23 This is going to be adopted by
24 institutions that can employ the programmers.
25 Because we can't distribute, as I understand, the

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1 things that we discover on how to circumvent access
2 protections. We have to employ these people within
3 our own organization and we have to then do it on
4 our own materials for in-house use of these
5 materials because of Section 108, because we can't
6 without agreement, have things available. And that's
7 a bunch of "ifs." And I think that that brings it
8 down to be, hopefully, narrow enough that you can
9 grant us if it's got a software access control that
10 we're allowed to circumvent that.

11 MS. DOUGLASS: Okay. Thank you.

12 I'm sorry.

13 MR. KAHLE: That's what we want.

14 MS. DOUGLASS: Okay.

15 MR. KAHLE: Just to do our job.

16 MS. DOUGLASS: I have to make a little
17 bit clearer, however --

18 MS. PETERS: Thank you.

19 MS. DOUGLASS: Oh, I'm sorry.

20 MR. ZIEMANN: There's something you may
21 not realize that takes this to the next step is that
22 in the interest of digital rights management, many
23 of the software companies are intentionally
24 attempting to make some things be obsolete. And an
25 example that I have right here is McIntosh tech

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1 manual that my wife, who is a teacher, bought for
2 the purpose of keeping the computers at the school
3 running. But if you put this in a McIntosh, even
4 though it is McIntosh tech manuals that has OS/X in
5 it, it will not recognize that it even exists. But
6 if you go backwards to one previous operating
7 system, it works fine.

8 And so Apple has on its own for some
9 reason decided it doesn't want this particular CD to
10 play.

11 MS. DOUGLASS: On the new generation?

12 MR. ZIEMANN: Yes. OS/X. If I give this
13 to him and he puts it in his machine, it will not
14 see it. And I can say that without ever having
15 touched his machine.

16 MS. DOUGLASS: Well, there's an area of
17 108--

18 MR. ZIEMANN: But is that copy
19 protection or is -- have they made new software that
20 prevents the access?

21 MS. DOUGLASS: Well, if it prevents
22 access the way it says access protection is defined
23 in 1201, then we'd have to say it's access
24 protection. But I don't think we've gotten to that
25 point yet.

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1 But if I can go back just a little bit
2 to--

3 MR. ZIEMANN: I just needed to make that
4 point.

5 MS. DOUGLASS: -- Mr. Kahle. You said
6 broad/narrow, broad/narrow, you know, potato/potato.
7 But it really does seem like we have a broad
8 category, I hate to say, if we're talking about all
9 literary works and all audiovisual works unless it's
10 paired down somewhat.

11 MR. KAHLE: That has software -- better
12 than software. There's a lot of materials that have
13 separate data from the software. CDs, DVDs, VCR
14 tapes. Those are not what we're talking about.
15 We're talking about this sort of -- it's the CD-ROM
16 generation, which I'm tragic report a major
17 manufacturer decided because of the copyright
18 vagaries, they decided to destroy their collection
19 of 10,000 CD-ROMs rather than donate it to the
20 library.

21 The stuff because it's not clear enough,
22 that's not 1201 issue, as I understand it. It is --
23 we've got to make it easier. And you can help
24 greatly, but it's just for this complicated
25 multipiece computer dongles, game players, joy

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1 stick, running over the Internet; all these sorts of
2 odd ball now becoming fairly massive cultural items,
3 those aspects of our cultural heritage are in
4 danger. And if there's someway of restricting it -
5 - that's what we're trying to do.

6 MS. DOUGLASS: I understand.

7 I think I have a question of Mr. --
8 well, Ms. Simons. With 2 Ms?

9 DR. SIMONS: One.

10 MS. DOUGLASS: Oh, okay. I'm sorry.
11 Okay. You note substantial negative impacts on
12 basic research, and you give a number of examples.
13 Are those actual examples or are they hypothetical
14 examples? And if they're hypothetical, do you have
15 any information about the likelihood of those
16 actually occurring?

17 DR. SIMONS: Well, the three quotes I
18 read to you were actual.

19 MS. DOUGLASS: The last -- the ones that
20 you read to us today?

21 DR. SIMONS: Yes.

22 MS. DOUGLASS: Okay. I was thinking of
23 the ones in your statement.

24 DR. SIMONS: Those are hypothetical.
25 But they were mainly to illustrate the kinds of --

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1 the kinds of scenarios where you would like for
2 people to be able to do something which they are
3 prohibited from doing under the DMCA.

4 MS. DOUGLASS: I see. Thank you.

5 And I think I have one question for
6 your, Mr. Metalitz. Actually, this question might
7 have been answered, but you can just say asked and
8 answered.

9 You say that this exemption if it was
10 proved that -- I'm now talking about malfunctioning
11 and dongles. Should be conditioned on meeting
12 objective verifiable criteria. How can we do this?
13 This is what Congress had in mind when it specified
14 a class of works? In other words, how can we write
15 all that in and we're really needing to talk about
16 Congress says give us a class of works.

17 MR. METALITZ: I think you can do it
18 consistent with the guidelines that you laid out in
19 2000, which dealt with a class of works but also
20 made an effort to describe a certain type of access
21 control that was being circumvented. My concern is
22 that that description is too open ended. That, for
23 example, it doesn't address the question of who
24 determines whether is -- or by what criteria one
25 determines that something is malfunctioning or

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1 damaged. And then on the obsolete question, which
2 may perhaps be more accurately unsupported, that
3 also -- you had a cross reference in there to
4 Section 108, but to me that indicates that you felt
5 it was acceptable to limit the types of access
6 controls that could be circumvented by reference to
7 whether they were available in the marketplace.

8 So, I guess my suggestion here I think
9 is compatible with what you decided in 2000 and
10 would simply provide greater clarity, greater
11 definition if you determined that based on the
12 evidence in this proceeding --

13 MS. DOUGLASS: Right.

14 MR. METALITZ: -- that an exemption is
15 necessary.

16 MS. DOUGLASS: Thank you, Mr. Metalitz.

17 MS. PETERS: Steve?

18 MR. TEPP: Thank you.

19 Dr. Simons, you had mentioned earlier
20 your assertion or your belief that none of the
21 exemptions to Section 1201 are sufficient to do what
22 you and others in your organization want to do. I
23 want to focus specifically on encryption research,
24 and that 1201(g). And ask you if you can give us
25 some specifics about what it is you want to do that

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1 you can't do under 1201(g)?

2 DR. SIMONS: All right. Well, just as a
3 general philosophical comment, we were -- we got
4 involved with the DMCA was being debated in
5 Congress, but later in the show. By the time we
6 found out about it, we were told that it was
7 basically written in stone. Found out about it and
8 got upset about the fact that there were no
9 encryption research at all, and started -- and
10 that's how we found out and started pushing for
11 that. And we also talked about security, and I
12 think we may have had something to do with the fact
13 that there's a security exemption in there.

14 I should add that we don't lobby. We
15 were raising the technical issues. We weren't
16 saying how people should vote on the legislation.

17 But as a philosophical view of this as a
18 computer scientist, I was watching this whole
19 process as various carve outs were being discussed
20 by Congress. And it made me quite uncomfortable
21 because -- I mean, I started taking computer science
22 in 1970. Things have changed a lot since my first
23 programming course. And to try to make -- to try to
24 say -- everything is illegal except for this and
25 this and this means that there is probably going to

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1 be other things that come along which you weren't
2 thinking about when you said except for this, except
3 for this. And that's, in fact, what has happened.

4 I truly believe that Congress did not
5 intend to pass a law which would jeopardize computer
6 security R&D in this country, but that's in fact
7 what they have done.

8 Now, getting back to the encryption
9 area. One of the problems here -- well,
10 backtracking a little bit before I answer your
11 question directly. Computer science and computing is
12 still a new field. And there are a lot of people
13 who are working in it in various levels. Some of
14 them don't have credentials. Some of them are young
15 kids who don't have credentials. Some of them who
16 have barely graduated from high school, let alone --
17 so they have no credentials. But some of these kids
18 are really sharp and they really understand these
19 things. And you can imagine that in some cases they
20 might break some sort of encryption scheme.

21 Now, someone that doesn't even have a
22 college degree certainly doesn't qualify under these
23 definitions. Because, as I understand it -- let's
24 see, where is it? They talk about the person who
25 does this and my understanding is that in general

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1 it's supposed to someone who is an encryption person
2 doing encryption research. I'm looking, trying to
3 see if I can find this in real time.

4 So when Ed Felton, for example, was
5 threatened under the DMCA, I mean he's pretty close
6 -- I mean, he's actually not an encryption
7 researcher, he's a security guy. But you could say
8 stuff -- but he knows some encryption stuff. I mean,
9 the very fact that somebody whose a Princeton
10 professor was threatened has an incredibly chilling
11 impact. And so then you go on down the line to this
12 kid somewhere who maybe broke some weak encryption
13 scheme and is he or she going to be considered an
14 encryption researcher? I don't think so.

15 I mean, that's one of the concerns is
16 that by saying what's -- by saying everything is
17 disallowed except for such and such, and such you
18 leave out a lot. And when you're talking about
19 technology, in particular, you leave out a lot. And
20 in fact, even when you're trying to define the
21 technology I think you get into trouble.

22 Just going back to the beginning where -
23 - to 1201 where you they talk about effectively
24 circumventing, what does "effective" mean? I had a
25 lot of trouble with that phrase "effectively

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1 circumventing." To me it doesn't take into account
2 whatsoever how strong something is, how good
3 something is, how hard it is to break. I don't know,
4 for example, if somebody had an encryption scheme
5 that was what I call a "cereal box" encryption
6 scheme where you replace one letter by another. Do
7 you remember? I don't know if you remember those.
8 I'm old enough to remember those.

9 MR. KAHLE: Decoder ring.

10 DR. SIMONS: Yes. Now, one of the
11 reasons that this was a challenge to kids is that it
12 was pretty easy to break, right? Now, if somebody
13 produced a document which was protected by such a
14 scheme and somebody else showed the key, is that in
15 violation of the DMCA? I honestly don't know.

16 And I think when you get to that level
17 of uncertainty, it has an incredibly chilling
18 effect.

19 Now, I know it's not up to you to change
20 the way this law was written, so I'm really just
21 sort of ranking, I suppose, about the kinds of
22 issues that we've been confronted with. And to the
23 extent that you could help us by broadening these
24 exceptions or making them as all encompassing as
25 possible, that would be very useful.

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1 I mean, I still think there's a
2 fundamental flaw. Instead of saying we want to
3 outlaw infringing behavior, we're saying we are
4 outlawing technologies except. And when you get to
5 those excepts when you're dealing with technologies,
6 you run into trouble.

7 I'm not sure if I've answered your
8 question.

9 MR. TEPP: Well, you have and you've
10 actually provided a good segue to my next question.

11 DR. SIMONS: Okay. Good.

12 MR. TEPP: Because I think what you said
13 is fair, that some of your concerns appear to go
14 beyond the scope of what this rulemaking is.

15 DR. SIMONS: I understand, yes.

16 MR. TEPP: And certainly have respect
17 for your views, and they're important issues, but in
18 trying to focus on exactly what --

19 DR. SIMONS: Of course.

20 MR. TEPP: -- Congress has instructed us
21 to do, when I heard your three examples that you
22 described in your opening statement they were all
23 concerned with distributing the results of research,
24 sending out papers, giving lectures, that sort of
25 thing. That struck me as not something that falls

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1 within the act of circumvention, 1201(a)(1), which
2 is what this rulemaking is about, but more likely
3 into 1201(a)(2). And I wanted to give you the chance
4 to tell me I'm wrong. And if so, why. Or if not,
5 tell me exactly what it is within 1201(a)(1) that
6 this rulemaking is about that you're asking of us
7 and why.

8 DR. SIMONS: Well, people said they're
9 not doing research anymore in these areas? That's
10 1201(a)(1). The doing of the research is
11 1201(1)(1). Now, it's true that I think most
12 scientists like to have their work known and
13 acknowledged, and even praised when possible. And
14 so -- and there's definitely a lot of ego in what
15 people do and that's why they do want to publish.
16 But the fact is that the actual work is not being
17 done. And as a result, the systems and all the
18 software that should be being tested is not being
19 tested.

20 I mean, you can imagine for example a
21 scenario in which somebody did the 1201(a)(1) type
22 of work and discovered some sort of major flaw.
23 Now, the dissemination of that information might be
24 illegal under another part of the DMCA. But the
25 fact that there's a flaw, saying that there's a flaw

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1 not be illegal, right? I mean to simply say that
2 there is a flaw without explaining what it is should
3 be, as I understand it, legal. So if -- you know,
4 to the extent that we all want to make our computer
5 infrastructure, the whole information infrastructure
6 more secure and to the extent that we want to
7 encourage people to testings for vulnerabilities and
8 to expose problems and to warn people of problems,
9 then I think that it is relevant.

10 I mean, I also would like to see more
11 broadening of the exemptions. But even being able to
12 warn people that there are problems, I think would
13 fall into this. And I think in the case of the
14 people who wrote me, that their frustration comes --
15 is related to that. Because as scientists they
16 assume, of course, it's not sufficient to someone,
17 you've got to prove it. But there's this middle
18 step of warning which is also not available to us
19 now.

20 Is that answering --

21 MR. TEPP: Well, it's another step
22 towards what I'm looking for. What you're
23 describing is a set of people who are fairly well
24 known in the field, so that's not a problem at least
25 for this part of the discussion. And they find

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1 something. Oh, my gosh, there's something terribly
2 wrong. And I don't disagree with your analysis that
3 they could say I found a flaw. When they say what it
4 is, that's a different question.

5 DR. SIMONS: So.

6 MR. TEPP: So they say, you know, the
7 hypothetical is a well-known researcher does the
8 research, finds the flaw, announces that they found
9 a flaw. The proprietor of the software involved is
10 informed. He says oh my gosh, thank you so much.
11 And the flaw is fixed.

12 DR. SIMONS: Yes.

13 MR. TEPP: That sounds like it probably
14 could fall into a 1201(g) situation. Well, it seems
15 like that could. DO you think --

16 DR. SIMONS: Well, (g) is encryption,
17 right? I mean, there are all kinds of other flaws
18 that have nothing to do with encryption.

19 MR. TEPP: Okay. So that is what --
20 what are you asking us for? That's what I'm trying
21 to get to.

22 DR. SIMONS: What am I asking you for?
23 Well, this is where I could use -- I would like to
24 have you.

25 I guess what I'm saying is that we need

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1 whatever help you can provide us to make it easier
2 for us to do our jobs, to make it easier for the
3 computer security and encryption communities to do
4 what they had been doing before the DMCA was passed.
5 To make sure that people -- that researchers at UC
6 Berkeley, for example, don't have to spend more time
7 talking to lawyers than doing the actual research.

8 I don't know how you can do that. I was
9 hoping that I would come and show you the problems
10 and you would tell me how you could do it. But
11 that's, I'm sure, not appropriate.

12 As an example, Sun -- just to give you
13 an example of what I think is a good kind of
14 situation.

15 Sun Microsystems has a policy where if
16 people find flaws in their software, they give them
17 \$100 or something. And they encourage. And they
18 figure that that makes their software more secure.
19 That's a very enlightened position and it means that
20 people can go and do reverse engineering of various
21 aspects of Sun software and not have to worry about
22 being dragged into court. But other companies don't
23 necessarily have that approach. And as a result, I
24 think, sometimes their software is less secure
25 because they don't get this positive input from the

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1 community. By the way, many of whom are not computer
2 scientists with a capital C capital S.

3 So I don't know to what extent you have
4 the ability to even go back to Congress and make
5 suggestions to them as to things that could be
6 changed or should be changed. But we have a real
7 problem.

8 I'll just tell you a little anecdotal
9 story. I was on the Hill last year with a couple of
10 people from -- the two people who are in our office,
11 the USACM office. And we went into a cafeteria in
12 the House for a snack. And the tables were occupied
13 so we asked this woman if we could sit next to her,
14 and she said yes.

15 And we started talking. She was there
16 to lobby for some sort of medical thing. But we were
17 talking. It turned out she was involved with the
18 committees that were doing the negotiations on the
19 DMCA, like I think between the House and Senate, you
20 know, when they were doing the negotiations. And I
21 suddenly had this insight. I said "Did they delay
22 the implementation of the anticircumvention and
23 anti-dissemination provisions until 2000 because of
24 the Y2K problem?" And she said yes.

25 I didn't get her name. I'm kicking

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1 myself. I did have witnesses, but that was what she
2 said. That they knew about Y2K. And either the
3 people who knew about it thought that this was a
4 unique problem that would never reoccur, or they
5 didn't care.

6 I'd like to think that they thought it
7 was unique, but we as computer scientists know that
8 it's far from unique and that these kinds of
9 problems are constantly reoccurring. And to the
10 extent that you cannot do some of the sorts of
11 reverse engineering and circumvention that was done
12 to solve the Y2K problem because of the DMCA, we are
13 at greater risk.

14 And probably didn't answer your
15 question. I'm sorry.

16 MR. TEPP: Well, we're not computer
17 scientists even with a small C and small S. And so
18 given that there is a burden that has to be met in
19 order to demonstrate a need for any new exception
20 that we're being asked to recommend to the
21 Librarian, it makes our job nearly impossible if the
22 proponents of the exceptions can't articulate an
23 exception for us to consider.

24 MR. KAHLE: May I suggest?

25 DR. SIMONS: Yes.

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1 MR. KAHLE: Would it be acceptable if
2 the ACM were to submit within one week -- potential
3 3 days -- 2 days.

4 MR. CARSON: It's too late, folks.
5 We're way past the point of proposing exemptions.
6 But you've got one in writing. It's in front of us.

7 DR. SIMONS: I beg your pardon?

8 MR. CARSON: You've proposed an
9 exemption to us in writing. It is in front of us.

10 DR. SIMONS: Yes.

11 MS. PETERS: We need to actually end
12 this panel. We're way past.

13 We have to be out of this room at 5:00.
14 That's a given. So we're going to take a 45 minute
15 break and we'll start again at 2:15. Thank you.

16 (Whereupon, at 1:30 p.m. the meeting was
17 adjourned until 2:15 p.m.)

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

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2:20 p.m.

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MS. PETERS: The panel is here, and since all the witnesses are here, let's start. This afternoon we're going to be focusing on sound recordings and musical works that are on copy-protected CD's. And the witnesses are from the Electronic Frontier Foundation, Gwen Hinze, and Ren Bucholz, and from IP Justice, Robin Gross. And then the other side, Steve Marks from the Recording Industry Association of America, and Mark Belinsky, Macrovision.

So let's start with EFF, however you want to divide it up between you.

MS. HINZE: On behalf of the Electronic Frontier Foundation, I'd like to thank you for the opportunity to testify at today's hearing in support of the exemption the EFF has proposed.

My name is Gwen Hinze, I am a staff attorney at the Electronic Frontier Foundation and I'm here today assisted by Ren Bucholz, our staff activist.

EFF has requested an exemption for sound recordings released on audio CD's that are protected

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1 by technological protection measures that
2 malfunction, so as to prevent access on certain
3 playback devices.

4 The proposed exemption would allow
5 consumers to play music that they have legitimately
6 acquired without fear of legal liability under
7 Section 1201. The exemption is effectively
8 identical in scope to the second exemption that was
9 granted by the Librarian in 2000 for literary works
10 that are subject to access control measures that
11 prevent access due to malfunction, or damage or
12 obsolescence.

13 The idiosyncratic and varying nature of
14 the reported malfunctions of various copy-protected
15 CD's, working on some PC's and not other operating
16 systems, suggests that these copy control
17 technological protection measures were intended to
18 prevent unauthorized reproduction but were not
19 designed to prevent playback of music.

20 However, irrespective of the intent of
21 these measures, the practical effect of these
22 malfunctioning copy protection controls has been to
23 prevent consumers from accessing protected music.

24 The inability to access or play the
25 music is due to a technological protection measure

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1 failing to work in the way that it was intended to
2 work.

3 MS. DOUGLASS: I must ask that you try
4 to speak up a little. I can see people are moving
5 forward in the back.

6 MS. HINZE: Thank you, thank you. EFF
7 is seeking a narrow exemption that would permit
8 consumers to take the steps necessary to play music
9 that they have legitimately purchased on the
10 consumer playback devices they own. This is clearly
11 a non-infringing use. Playback is a private
12 performance and does not implicate any of the
13 exclusive rights granted to copyright owners under
14 Section 106 of the Copyright statute.

15 The proposed exemption that we are
16 seeking is narrow. It is limited to restoring
17 playability and would not authorize copying of
18 affected music.

19 I'd like to spend the bulk of my opening
20 statement addressing some of the points that are
21 being made in opposition to our exemption by,
22 amongst other people, the Joint Commenters,
23 represented this afternoon by Mr. Marks.

24 In the Joint Reply Comments filed with
25 the Copyright Office, the Recording Industry

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1 Association of America, and the various other
2 commenters, have opposed this exemption on three
3 main grounds.

4 First, they have argued that the
5 proposed exemption is outside the scope of this
6 rulemaking process because the copy protection
7 technology at issue is not a technological
8 protection measure that effectively controls access
9 to a protected work under Title 17 for the purposes
10 of Section 1201(a)(1) and as per the discussion this
11 morning, 1201(a)(3)(B) of the copyright statute.

12 EFF does not dispute this. As we noted
13 in the comments filed in December 2002, based on the
14 information that we had that is publicly available
15 about the nature and the operation of these measures
16 it does not appear that they require application of
17 information, a process, or a treatment with the
18 authority of a copyright owner to play when they
19 play.

20 And when they don't play, it doesn't
21 appear to be a matter of a failure to apply a
22 particular process information or treatment in order
23 to make that malfunction correct. The blocking of
24 access here is due to the malfunctioning copy
25 protection controls, and it appears to be

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1 unintentional.

2 However, as demonstrated by the legal
3 debate over the status of the content scramble
4 system in relation to DVD's over the last five
5 years, a technological protection measure can
6 control both access to, and use or copying of a
7 protected work.

8 There is uncertainty within the legal
9 community as to whether malfunctioning copy control
10 technological protection measures that inadvertently
11 prevent playback of CD content should be
12 characterized as effective access control measures
13 for the purposes of Section 1201(a)(3)(B). The
14 legal uncertainty here is exacerbated by the lack of
15 public information on exactly how these technologies
16 work.

17 In the meantime, however, consumers are,
18 if they find that they have purchased copy
19 protection CD's that do not play in their playback
20 devices, are left in a legal no-man's-land. Whether
21 or not a malfunctioning copy protection measure is
22 deemed to fall within the technical definition of
23 "effectively controlling access" in Section
24 1201(a)(3)(B), the end result is exactly the same
25 for consumers.

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1 Where the copy protection technology
2 malfunctions, it often blocks access completely and
3 consumers are simply unable to play music that they
4 have lawfully acquired.

5 However, given the doubt that surrounds
6 the scope of the prohibition in Section 1201(a)(1),
7 consumers can't be sure whether they're breaking the
8 law and potentially putting themselves at risk of
9 significant legal liability legally if they try to
10 circumvent the malfunctioning copy protection
11 technology to make the CD play.

12 If the Register were to clarify in its
13 rulemaking that malfunctioning copy controls are not
14 access controls for the purposes of Section 1201,
15 then EFF agrees that the proposed exemption would
16 not be required.

17 However, in the absence of a clear
18 statement about the scope of Section 1201, or an
19 exemption, there's no guidance for consumers or
20 predictability as to what behavior is lawful when
21 they're trying to make a very common non-infringing
22 use of music they've purchased.

23 There is, in addition, a flow-on effect,
24 a consequent chilling effect on manufacturers and
25 software vendors who might otherwise develop devices

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1 or software drivers, for current drives, and current
2 CD ROM and DVD players that would be capable of
3 playing these non-redbook audio CD's. For instance,
4 in the absence of a clear statement or a clear
5 exemption, Apple may be less inclined to release a
6 software update that would permit Macintosh (Mac.)
7 users, a particularly affected group, to play these
8 types of disks on their computer CD ROM drives.

9 The second main argument that our
10 opponents have made is that EFF has not met its
11 burden of proof on these issues. It hasn't met the
12 burden of showing harm amounting to a substantial
13 adverse impact. In particular, the Joint Commenters
14 complain that we have not provided evidence of the
15 number of copy-protected CD's currently in
16 circulation in the United States, and evidence as to
17 the frequency of actual failures of these disks on
18 particular types of devices. I have several comments
19 in response.

20 First, it is not clear at all what is
21 necessary to meet the standard of proof of
22 substantial adverse impact for this category.
23 However, EFF does not agree with the joint
24 commenters' assertion that this requires us to
25 provide exhaustive figures for the number of copy-

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1 protected CD's released in the United States and the
2 failure rate of that technology in particular
3 devices.

4 If the Copyright Register and the
5 Librarian were to endorse that standard as the
6 standard for substantial adverse impact, we believe
7 it would raise serious issues about the equity of
8 this proceeding and the ability of consumers to
9 participate meaningfully in this process. It would
10 certainly threaten to undermine Congress' intent to
11 create a fail-safe mechanism for consumers non-
12 infringing uses.

13 The reason I say this is for these
14 reasons: First of all, consumers' experience of
15 identifying a copy-protected CD is much like playing
16 a game of battleship.

17 Since copy-protected CD's are often not
18 labeled, consumers do not know whether any CD they
19 purchase is copy-protected or not until they insert
20 it into their computer CD ROM drive or their car CD
21 MP3 player, or their DVD player, and then experience
22 a malfunction.

23 In this case, in this present exemption,
24 the only parties in a position to obtain
25 comprehensive information as to the number of copy-

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1 protected CD's that have been released in the United
2 States are those opposing the exemption, including
3 the RIAA and its member record labels.

4 However, they have chosen not to
5 disclose that information in response to the
6 information that EFF has provided even though it
7 could presumably be used to prove that the exemption
8 is unwarranted, if the number of copy-protected CD's
9 actually in circulation is de minimis, as they have
10 suggested.

11 It's also difficult to provide
12 information as to the frequency and type of
13 malfunction of these copy protection measures on
14 particular types of devices. As the 48 consumer
15 comments that were filed with the Copyright Office
16 in this proceeding illustrate, the range of failures
17 that people experience vary dramatically. In some
18 cases, people are able to play one particular song
19 for a small segment, or not play anything at all.
20 In some cases, people experience a complete
21 operating system crash. It happened to my colleague
22 and has been reported to be the case in a number of
23 the comments filed in this proceeding.

24 Given the variation amongst the
25 different types of responses, and the fact that it

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1 seems to be a matter of operating system by
2 operating system, drive by drive, it's a very
3 difficult thing to predict or to qualitatively
4 assess what the frequency or type of failure is.

5 More importantly, EFF considers that the
6 information that's currently on the record is
7 sufficient to establish current substantial adverse
8 impact.

9 At a qualitative level, there is a
10 substantial adverse impact on the consumer.
11 Consumers use is non-infringing use of lawfully
12 acquired material when copy protection technology
13 malfunctions, and they are entirely prevented from
14 playing back something they've lawfully acquired.
15 The nature of the harm experienced here is absolute
16 if there is no playback. It's not merely an
17 inconvenience. The customer receives nothing, no
18 benefit for their bargain.

19 Qualitatively speaking, evidence on the
20 record indicates that a number of copy-protected
21 CD's have currently been released in the United
22 States. EFF identified titles of four copy-
23 protected CD's that had been verified as copy-
24 protected in our December 2002 comments. However,
25 based on news reports and consumers' experiences,

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1 the actual number of affected titles may be much
2 higher.

3 News reports indicate that covert trials
4 of unlabeled copy-protected CD's have been taking
5 place in the United States since 2001. My
6 colleague, Ren, is currently showing a slide with
7 excerpts from these news reports.

8 In July 2001, rovision reportedly made a
9 test release in the United States, including one
10 title that had sold almost 100,000 units. This
11 followed a report in May 2001, which quoted Mark
12 Tokayer, the CEO of Macrovision partner, TTR Audio,
13 as stating that Macrovision and a major or several
14 major record labels had released copy-protected CD's
15 in California. In February 2002, technology company
16 Midbas, which is now owned by Macrovision, announced
17 that it had released 10 million CD's in the United
18 States and Europe. And last month, Macrovision
19 announced its technology had been used on over 100
20 million CD's worldwide, including in the United
21 States.

22 The record industry has officially
23 acknowledged the existence of two copy-protected
24 CD's in the U.S. market. Yet we know from firsthand
25 experience that this is incomplete. One of EFF's

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1 staffers purchased a CD by the group The Donnas,
2 only to discover that it was copy-protected.

3 This disk has not been acknowledged by
4 Atlantic Records as being copy-protected, but if you
5 look very, very closely, you can see a tiny, tiny,
6 tiny logo down at the bottom here, which appears to
7 be a copy protection logo. It's on the actual
8 packaging, not on the disk itself.

9 The disk itself actually says that it
10 will play on various computer formats, including
11 Mac. OS players. In point of fact, it wasn't able
12 to be played at all on the Mac. OS drive in
13 question, which is why this EFF staffer worked out
14 that it was copy-protected and found the logo.

15 This seems to match the experience of
16 hundreds of consumers in online fora who have
17 identified what appear to be copy-protected CD's
18 that have experienced and identified these as being
19 CD's who are not capable of playing on various
20 devices.

21 It's fair to assume that these
22 experiences and those of the 48 consumer commenters
23 who filed comments in this proceeding indicate that
24 the number of copy-protected CD's in the U.S. market
25 may actually be much higher than has been officially

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1 acknowledged by the record industry, and that the
2 number of these disks will increase in the next
3 three years.

4 The increasing copy volumes-- increasing
5 volumes of copy-protected releases will have a
6 substantial and adverse impact on consumers' ability
7 to make non-infringing uses of their works within
8 the next three years.

9 First, record label and technology
10 company statements indicate that there are a
11 significant number of copy-protected CD's that will
12 be released in the United States this year.

13 Second, because of the move towards more
14 modern, multi-format disk players as primary
15 playback devices, such as DVD's/MP3's/CDR's.
16 Combined and X-Box game consoles. Combined multi-
17 format playback devices of these types have much
18 more vulnerability to the current copy protection
19 technologies because the technologies appear to work
20 by exploiting differences between audio CD players
21 and these types of multi-format players as discussed
22 in the report that is cited in EFF's December 2002
23 comments, a research paper by Princeton researcher,
24 John Alexander Halderman. And as I said, the
25 comments point out there has been a distinct move by

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1 consumers to adopt multi-format playback devices
2 such as combined DVD and MP3/CD players. MSNBC
3 reported last year that sales of standalone regular
4 CD players were down 48.1% last year.

5 Ren is showing slides with excerpts from
6 news reports about the expected influx of millions
7 of copy-protected CD's into the U.S. market in
8 coming months.

9 In late March 2003, news reports
10 indicated that the BMG subsidiary, Arista Records,
11 would be releasing SunnComm copy-protected CD's in
12 the United States later this year.

13 In November 2002 the L.A. Times reported
14 EMI Recorded Music Vice President, David Munns, as
15 saying that the 2002 holiday season would be, as you
16 can see, would be the last holiday season without
17 widespread use of copy protection technology on new
18 releases.

19 And technology company SunnComm has
20 stated that it has already installed anti-copying
21 gear in a Bertlesmann subsidiary, North Carolina CD
22 manufacturing plant, and that a sizable proportion
23 of this subsidiary's releases will be copy-protected
24 by the end of 2003.

25 The third main argument made by our

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1 opponents is that this exemption is premised on an
2 incorrect assumption that consumers are entitled to
3 play copy-protected music on any device capable of
4 using CD's as a data storage format.

5 On page 19 of the joint comments, our
6 opponents have argued that "neither the Copyright
7 Act nor the DMCA was ever intended to require or to
8 confer upon users a right of complete compatibility
9 amongst all devices in our media." That was a quote
10 from those comments.

11 They then claim/that the existence of
12 playback devices that can play copy-protected music
13 removes any need for this exemption. I'd like to
14 make several comments in response to that.

15 First, I'd like to emphasize that the
16 nature of the exemption sought here is for non-
17 infringing use of lawfully -- of playing lawfully
18 acquired sound recordings. Private performance is
19 not one of the rights given to copyright holders
20 under Section 106 of the Copyright Act.

21 Our opponent's argument about
22 compatibility proceeds on the assumption that
23 copyright owners are entitled to control playback of
24 a copyrighted work on a user's playback device.

25 However, there's nothing in the

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1 legislative history of the DMCA that indicates that
2 Congress intended to grant additional rights to
3 copyright owners beyond those listed in Section 106.

4 EFF would submit that any opposition to
5 this exemption, which is premised incorrectly
6 on copyright owners. Claim to control rights
7 beyond those listed in Section 106, should be
8 treated with caution.

9 The Second, contrary to our opponent's
10 claim, what is sought here is not a right of
11 complete compatibility for all devices in all media.
12 Instead, the requested exemption would allow
13 consumers to make a non-infringing use of media
14 they've lawfully acquired on devices they currently
15 own and that they would reasonably expect would be
16 able to play that media based on 15 years'
17 experience -- of over 15 years' experience of the
18 audio CD format. After all, what we're talking
19 about here is consumers putting CD's into devices
20 that have previously played CD's, not putting them
21 into toasters.

22 It's certainly true that Congress did
23 not intend to mandate manufacturers to design
24 devices to detect and respond to technological
25 protection measures that were implemented by

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1 copyright owners. That's reflected in § 1201(c)(3).

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However, nothing in the Congressional Record indicates that Congress intended to grant copyright owners the right to control consumers' non-infringing private performance of lawfully acquired content on devices they already own. The existence of some players that can play these disks is not a sufficient reason for deciding to grant this exemption.

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Consumers seeking to make non-infringing uses of works they've lawfully acquired should not be put to the expense of having to purchase an additional player to play protected music. And as I previously noted, the stock of players which can actually play these types of disks is diminishing as consumers are moving towards more modern multi-format players, DVD's/MP3's/CD's players; X-Box game consoles.

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Therefore the existence of alternative players that consumers can currently purchase, but may not be able to easily acquire in three years' time, as these devices are phased out, doesn't protect consumers' ability to make non-infringing uses of these works within the next three-year

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1 period.

2 Finally, in considering the balance of
3 harms involved in granting this exception, I'd like
4 to emphasize that the exemption does not increase
5 the risk of widespread copyright infringement.

6 First, the exemption is limited to non-
7 infringing playback of protected music. Second, as
8 Section 1201(a)(1)(D) makes clear, any exemption
9 that is granted by the Librarian of Congress extends
10 only to non-infringing behavior. The exemption
11 would allow consumers to take steps to restore
12 playability, but would not authorize otherwise
13 infringing reproduction. If any consumer were to
14 step beyond the bounds of the exemption, and, for
15 instance, make an unauthorized reproduction on
16 distribution of a work on a protected music CD,
17 copyright owners would continue to have the right to
18 bring an action for infringement, and would continue
19 to have the full set of rights currently available
20 to them under Copyright law.

21 Finally, I'd just like to address one
22 point that was made in the comments of Mr. Metalitz
23 this morning, when he provided his summary of the
24 factors that the Copyright Office had to take into
25 account. He suggested that in the context of the

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1 Copyright Office's mission, the Copyright Office had
2 to consider the availability for use of works in the
3 class, as identified, and he made a statement to the
4 effect that we have a digital cornucopia of it, if
5 you look at the situation in 2003 as compared to the
6 situation in 2000.

7 We have a rich variety, more works, more
8 different types of works available. And that this
9 is primarily due to the use of technological
10 protection measures backed by the legal sanctions of
11 Section 1201.

12 I'd just like to comment on that in
13 relation to this particular class of CD's and note
14 that -- sound recordings, and note that that's just
15 not true with music. Music has been around in many
16 formats for many years, and the availability of
17 music does not actually have anything to do with the
18 technological protection measures that have only
19 started to be used on what look like CD's in the
20 last two years.

21 In fact, the music format that we know
22 as the CD has been around in existence for over 15
23 years. And so, to the extent that the Copyright
24 Office wants to take into account the consideration
25 about the user facilitation or the availability or

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1 facilitation of any particular technological
2 protection measures, I would urge the Copyright
3 Office to take into account that that is not
4 actually accurate, or not an appropriate factor for
5 consideration in respect of this class of works.

6 Thank you.

7 MS. PETERS: Miss Gross?

8 MS. GROSS: Good afternoon. IP Justice
9 welcomes this opportunity to testify to the US
10 copyright on this about the adverse impacts users
11 are experiencing in their ability to enjoy CD's and
12 other sound recordings in non-infringing ways. The
13 cause of this adverse impact is the technological
14 restriction measures currently being applied, with
15 increasing regularity, to CD's by the record
16 industry.

17 The magnitude of this harm warrants the
18 declaration by the U.S. Copyright Office that the
19 exemptions proposed by IP Justice in its submitted
20 comments. Before speaking to the substantive
21 reasons for our proposed exemptions, IP Justice
22 wishes to highlight four important procedural issues
23 in relation to this rulemaking.

24 First, the Librarians' responsibility in
25 this rule-making is to users and not copyright

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1 owners. In the first rulemaking in 2000, the
2 Librarian gave undue deference to the interests of
3 copyright owners. By doing so, the Librarian
4 duplicated Congress's deference to the interest of
5 copyright owners when Congress first enacted the
6 anti-circumvention measures in 1998.

7 The role of the Copyright Office in this
8 proceeding is not to determine that technological
9 restrictions benefit the public, but to look for
10 ways in which the public is harmed by them, and act
11 to preserve the public's rights under traditional
12 copyright.

13 Congress introduced the anti-
14 circumvention measures to encourage copyright owners
15 to make their works available digitally. Or in the
16 words of the last rulemaking, "The measures are
17 designed to be use facilitating." The
18 responsibility of the Librarian in this rulemaking
19 is not to repeat Congress's analysis, but to protect
20 users and ensure access, not availability of
21 protected works such as CD's.

22 Second, the structure of this
23 rulemaking, as interpreted by the Librarian,
24 effectively precludes it from achieving its purpose.
25 The Librarian insists that exemptions be defined

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1 according to class of work. Adequate protection of
2 users' rights requires that exemptions be drafted
3 with reference to the type of user and circumstances
4 of use.

5 For example, if a person listens to a CD
6 at home, they're not infringing the copyright
7 owners' public performance right. But when they
8 play the CD in a discotheque, they might be. As
9 scholars and civil libertarians have noted,
10 architecture is policy and the structure of this
11 proceeding makes it extremely difficult to obtain
12 consumer protections.

13 Third, the Librarian has set an
14 impossibly high evidentiary standard, given the
15 nature of the harm it is supposed to protect
16 against. The Librarian requires evidence of
17 substantial harm or likelihood of harm but without
18 any guidance as to how to meet these thresholds.

19 The adverse effects experienced by users
20 are likely, of their very nature, to be individual,
21 and personal, difficult to measure and quantify.
22 This does not detract from the existence of such
23 harm. It does mean that the Librarian should
24 accept, as sufficient evidence, news reports and
25 principal analysis of likely harm which take into

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1 account the interaction of the anti-circumvention
2 measures with the limitations and exceptions for
3 users, under traditional copyright principles.

4 Fourth, IP Justice urges the Copyright
5 Office to be mindful in conducting this second
6 rulemaking of two important facts. Firstly, the
7 first rulemaking was conducted when the prohibition
8 on access circumvention had not yet taken effect.
9 Three years later, the trend of digital lock-up is
10 more apparent. Thus, the extent of the impact on
11 users must be greater because the anti-circumvention
12 measures are broader than copyright.

13 The second important factor is that the
14 impact of any exemption will necessarily be limited.
15 This is something which the Librarian failed to take
16 in account in the first rulemaking. Acts of
17 circumvention and access controls are, by their
18 nature, inherently non-commercial and personal.
19 Anyone who seeks to take advantage of an exempted
20 act of access circumvention, must be highly,
21 technically, literate.

22 Even where exemptions to the general ban
23 are granted, a person still cannot acquire a
24 circumvention device or service from a third party
25 nor make it available to someone else because to do

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1 so would infringe the anti-trafficking prohibitions
2 of Section 1201. This means that only a limited
3 number of people are likely to be able to avail
4 themselves of any exemptions. Thus the impact on
5 the copyright owner of any exemption will be
6 substantially limited.

7 Turning now to our substantive comments
8 in support of our proposed exemptions for copy-
9 protected CD and other sound recordings, IP Justice
10 would like to make two comments.

11 First, CD copy protection often serves
12 functionally also, as access restriction technology.
13 The technology restricts the ability of users to
14 play a CD in certain types of technology, for
15 example, a PC. This is a clear interference with
16 access but CD owners are forbidden from bypassing
17 the access control technology.

18 Users are unable to simply enjoy a CD in
19 the privacy of their own home, office, or car, on
20 the platform of their choosing. Instead, the
21 copyright owner dictates the user's personal
22 experience of music, something well beyond the ambit
23 of Section 106 in the copyright act.

24 The focus on Section 106 is on public
25 uses of music and intellectual property. That which

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1 falls outside of the public sphere, the private
2 enjoyment of music, should likewise fall outside the
3 reach of the copyright owner's control. CD copy
4 protection permits copyright owners to usurp the
5 user's private performance right through the use of
6 these technological access controls that double as
7 use in copy controls.

8 The DMCA distinguishes between
9 circumventing access controls and circumventing copy
10 controls. It allows circumvention of copy controls
11 in order to engage in fair use.

12 In passing the DMCA, Congress clearly
13 intended the public to continue to enjoy their right
14 to circumvent copy controls on sound recordings for
15 lawful purposes.

16 So while in theory, consumers continue
17 to enjoy their right to circumvent copy controls to
18 make fair use or to engage in other lawful uses of
19 sound recordings, the law still forbids bypassing
20 access technology. And since it's not possible to
21 bypass the copy controls without also bypassing
22 access controls with these dual use technologies,
23 consumers are prevented from exercising the right to
24 bypass the copy controls on sound recordings in
25 order to make the lawful use of their music.

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1 Secondly, CD copy protection chills
2 innovative personal uses of music. Digital
3 technology empowers people to access their music
4 collection in unprecedented new ways without being a
5 pirate. Purchasers of CD's can space shift or play
6 shift their music from one device to another, for
7 example, to their MP3 player, to go jogging or their
8 home or their car office.

9 CD copy protection technology prevents
10 this from occurring. It treats all users as
11 copyright infringers. The trend of legitimate music
12 purchasers being unable to access copy-protected
13 CD's is well established and will only continue.

14 Surely, the hundreds of comments
15 supplied by individuals complaining of this
16 surreptitious practice during these proceedings
17 established this substantial harm.

18 IP Justice urges the Copyright Office,
19 mindful of the limitations of this rulemaking and
20 its duty to users, to declare proposed exemptions,
21 enabling the lawful enjoyment of music and restoring
22 consumer freedoms. Thank you.

23 MS. PETERS: Thank you. Mr. Marks?

24 MR. MARKS: Good afternoon. My name is
25 Steven Marks and I'm senior vice president of

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1 Business and Legal Affairs for the Recording
2 Industry Association of America. Thank you for the
3 opportunity today to present the views of the RIAA
4 concerning the exemptions that have been proposed by
5 EFF, Public Knowledge, and IP Justice.

6 The proponents case for these exemptions
7 boils down to complaints of a few people that appear
8 to stem from technical incompatibilities, not access
9 controls, relating to a very few number of sound
10 recordings.

11 These complaints do not support the
12 exemption that they request. The proponents
13 themselves admit that their complaints are not based
14 on technical protection measures that are access
15 controls, thereby taking their claims outside the
16 scope of this proceeding.

17 The proponents have failed to present
18 sufficient evidence to support an exemption, even
19 under the most lenient of evidentiary burdens, let
20 alone the extraordinary circumstances that are
21 required here. And the proposed exemption is
22 overbroad.

23 But before addressing these in detail,
24 let me first say a few words about the use of
25 technical protection measures by record companies.

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1 Record companies are focused on
2 providing access to their music in as many ways as
3 possible. They are in the business of selling
4 music, regardless of platform or delivery channel,
5 and are making music available in more formats than
6 ever before. Record companies would like to do
7 this in a way that is not susceptible to easy
8 copying and widespread distribution of further
9 copies.

10 In light of the piracy that has
11 devastated the industry in recent years, through
12 cutbacks in artist rosters, lay-offs, retail store
13 closings, some would say that CD copy controls are
14 necessary to ensure that the industry continue to
15 invest in new artists and continue to bring music to
16 consumers. This is consistent with Congressional
17 intent of the DMCA, to encourage copyright owners to
18 continue to invest in creative works.

19 Record companies understand, however,
20 that success depends upon their ability to make
21 consumers happy and to distribute recordings widely.
22 They realize that locking up content is not a
23 solution.

24 CD copy protection technology is
25 evolving quickly and one can only speculate how

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1 market forces and technological developments will
2 affect the actual application of technical
3 protection measures to CD's.

4 The register of the Librarian should
5 not, on the basis of this speculation, grant an
6 exemption that would deter innovation and thwart
7 efforts to control piracy, but should instead allow
8 the marketplace to work for the coming triennial
9 period.

10 Let me go through the individual reasons
11 why the -- substantively, why the exemptions should
12 be denied. The first is that the proponents simply
13 failed to state a claim for an exemption. The
14 complaint, EFF's complaint, for example, is about
15 the purported malfunction of copy controls, not
16 access controls.

17 Indeed, EFF states that it does not
18 believe that the technology that is the subject of
19 the proposed exemption, quote, "effectively controls
20 access to a work." Having denied an element of the
21 case it is required to prove, EFF's claim should be
22 rejected.

23 EFF proposes an exemption for copy-
24 protected CD's that malfunction to prevent access,
25 but the malfunction of a copy control does not

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1 convert it to an access control. Moreover, EFF has
2 presented no evidence that the copy control indeed
3 malfunctioned.

4 IP Justice has requested an exemption
5 for copying to different platforms or different
6 devices. Aside from the fact that there is no right
7 of access on all devices, as I will explain a little
8 bit later, this proposed exemption is again about
9 copying, not access, and therefore is outside the
10 scope of the proceeding.

11 The proponents have also failed to
12 identify the technologies with particularity, and to
13 establish that they have had or are likely to have
14 substantial adverse effects on use of a properly
15 defined class of works. Instead, they have asked
16 for an exceptionally broad exemption, covering an
17 entire category of works identified in Section 102A
18 of the copyright act. They have also improperly
19 included a broad swath of diverse technical
20 protection measures.

21 The Librarian should resist this
22 invitation to extrapolate alleged problems with some
23 technologies to all current and future technologies.

24 The proponent's exemption is also
25 misguided in that it is predicated on the assumption

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1 that users, or consumers, have an unqualified right
2 to access works on any device of their choosing.
3 The Copyright Office has found that no such right
4 exists, and that diminimus or isolated problems or
5 mere inconveniences do not justify an exemption.
6 There is nothing in the DMCA or the fair use
7 doctrine that's intended to ensure access to every
8 work in every format.

9 Ensuring access on every device is
10 simply not the purpose of this rulemaking, either.
11 The ability to make non-infringing uses, even if not
12 in the preferred or optimal format, is sufficient to
13 satisfy the statutory factor of the availability for
14 use of copyrighted works.

15 Let me take a minute to talk about the
16 evidence itself, of adverse effect, that has been
17 presented by the proponents. They have failed both
18 to meet their burden that today there is an adverse
19 impact or that there is likely to be one in the
20 future. Focusing on the present, there have been
21 125,000 albums released in the last three years.
22 125,000, and only nine have been released in the
23 U.S. that have technical protection measures.

24 Seven of those were by Universal Music
25 Group, all of them were prominently labeled. There

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1 were toll free customer help telephone numbers and
2 web sites. And the complaints of those CD's,
3 according to Universal, were from less than one
4 tenth of one percent of the CD's that were sold.
5 This is generally consistent with complaints about
6 CD's that are released that have no technical
7 protection measures.

8 So that's seven of the nine. Another
9 one was by Music City Records. The tracks on that
10 CD were made available for downloading.

11 And then the final one was by a company
12 called Metropolis. There the CD was imported from
13 Germany, was not a U.S. release. It was an import
14 from Germany. And subsequently, Metropolis made a
15 U.S. release without the technical protection
16 measures.

17 The reply comments identify 45 titles in
18 those comments. Of these 45, 28 were not released
19 in the U.S. with copy or access controls. Four were
20 not even CD's. Five were foreign releases. Five
21 were two vague for us to gather evidence to
22 determine which category they might fall in, and
23 only three of them contained any kind of technical
24 protection measure.

25 The complaints appear to simply be the

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1 result of technical incompatibilities. Despite the
2 sophistication of CD technology, not every disk will
3 play in every machine. That may be regrettable, but
4 it's certainly not the basis for an exemption
5 pursuant to this proceeding.

6 The proponent's have not alleged the
7 problems complained of were even commonplace for
8 those CD's. As mentioned on some of the ones that
9 were sold by Universal, the complaints were less
10 than one tenth of one percent. The
11 incompatibilities or the defects could be from
12 defects in manufacturing, which are clearly not the
13 basis of an exemption. And there's generally no
14 evidence that's been presented that the problems
15 with any of these CD's is any greater than on CD's
16 generally, without any such technical protection
17 measures.

18 The proponent's have also failed to
19 establish that there is likely to be a substantial
20 adverse effect on non-infringing uses. An exemption
21 based on anticipated adverse impact can be only in
22 extraordinary circumstances, where the evidence
23 supporting the exemptions highly specific, strong,
24 and persuasive.

25 They have failed to establish that

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1 adverse impacts are more likely than not.
2 Speculation, conjecture about new releases, are
3 simply inefficient.

4 For example, EFF stated that no record
5 company had renounced technical protection measures.
6 They have presented quotes today, but it is
7 speculation that any of the technologies that may be
8 used -- and we don't know what technologies will be
9 used -- how those technologies will work at all.
10 And again, those were based on copy controls, not
11 access controls, all of the statements.

12 Finally, the speculative allegations of
13 harm are vastly outweighed by the harm that would
14 result from the exemption. The recording industry
15 has been devastated by piracy, which has and will
16 increasingly have an adverse effect on the industry
17 and diminish the ability of the industry to develop
18 new artists and produce new creative works.

19 An exemption of the extraordinary
20 breadth sought by the proponents could forestall the
21 development of technical protection measures for
22 music, and preclude use of technology to fight
23 piracy.

24 As the office has recognized, exemptions
25 are to be made only in exceptional cases. And we

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1 believe the proponents here have failed to meet that
2 burden.

3 There were a couple of things that were
4 mentioned additionally this morning that I'd like to
5 respond to. Just picking up with some of the
6 comments of IP Justice first.

7 There is nothing, so far as we can tell,
8 that places a burden on the Librarian to seek out
9 and favor consumers in this proceeding. This
10 proceeding was set up as a fail-safe and the
11 language from the manager's report and other
12 language specifically says that exemption should be
13 found only in extraordinary circumstances.

14 And therefore, the burdens that exist
15 from the last proceeding, you know, should exist,
16 and we would say are the right interpretation and
17 are not a matter of favoring one side over the
18 other, but merely applying the letter of the law.

19 I think the only other thing I would say
20 on the substantive comments that were raised with
21 regard to copy controls is again, that the
22 statements about interference are purely speculative
23 at this point. There have only been nine releases
24 in the U.S. to date, to the extent that other
25 releases will be made in the future with some

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1 technical protection measures, mainly copy controls,
2 which again, are not the subject of this proceeding.

3 It's simply theoretical, at this point,
4 to say that those copy controls somehow prevent
5 access, even assuming that that would be a proper
6 jurisdiction for this proceeding. There simply has
7 been no showing that more likely than not, that
8 these types of non-infringement uses will exist.

9 I think I'll leave the rest of the
10 comments for (indistinguishable).

11 MS. PETERS: Okay, thank you. Mr.
12 Belinsky?

13 MR. BELINSKY: Thank you. Good
14 afternoon. My name is Mark Belinsky and I'm the
15 senior vice president of the music technology
16 division of Macrovision Corporation. I'd like to
17 thank you and the Copyright Office for the
18 opportunity to be here today, and I'd also like to
19 express my appreciation from Macrovision as a
20 company, being able to provide input to these
21 rulemaking proceedings, both today as well as
22 tomorrow as well, where our president, Bill Krepick,
23 will be present.

24 From our perspective as a supplier of
25 copy protection and digital rights management

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1 technology to the content industries: that is; film
2 entertainment, software, and music for more than 20
3 years; we think that more than anything else, these
4 hearings and indeed, the DMCA itself, are about
5 creating and maintaining a balance between the
6 interests of content creators and the users or
7 consumers of that content.

8 This is admittedly not a lawyer's
9 perspective, but more of a practical perspective,
10 having been an honest middleman between content
11 providers and consumers for more than 20 years.

12 As we enter the 21st century, to us, it
13 becomes very clear that the economic vitality of the
14 U.S., our country, is heavily dependent on
15 knowledge, information, and information technology
16 industries.

17 According to a recent study that I think
18 was quoted in one of the comments submitted for
19 these hearings, the copyright industries alone in
20 the U.S. generated \$535 billion of GDP and that
21 excludes many other IP centric industries.

22 And when you look at the percentage of
23 our citizenry that earns their living by creating,
24 manufacturing, or distributing knowledge and
25 information products and services, and also when you

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1 consider the investments required to create and
2 distribute that knowledge and information, you can
3 quickly come to the conclusion that the content
4 creators' ability to get paid for their creative
5 works is not only important but, indeed, fundamental
6 to their very existence. And by implication, we
7 think fundamental to maintaining the high standard
8 of living that we currently enjoy here in the U.S.
9 as compared to many other countries.

10 Turning a bit more specifically to the
11 topic of music copy protection and DRM, I think it's
12 by now common knowledge, even to ordinary consumers,
13 that recording artists and the music industry are
14 suffering greatly from unauthorized reproduction and
15 sharing of copyrighted music files.

16 I can't help but recall Johnny Cash's
17 September 1997 testimony to the U.S. Congress when
18 he and I both gave testimony for the Commerce
19 Committee's DMCA hearings, about how he was already
20 personally experiencing this phenomenon, and that
21 was more than five years ago.

22 I also think it's quite interesting to
23 note that consumers today accept that when they buy
24 "Shrek" or "Sweet Home Alabama" on DVD, or when they
25 buy Madden Football from Electronic Arts, they don't

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1 have the ability to make copies for their friends.

2 We believe that the same assumption
3 should apply to the latest music releases from
4 Eminem, Avril Levine, or Madonna. Whether you
5 measure the music industry's problem based on the
6 overall declining music industry revenues, the
7 thousands of jobs lost at record companies earlier
8 this year, the bankruptcies of several music
9 retailers, the decline in an average top selling
10 album from 20 million units to 10 million units, or
11 upon the number of music tracks available on file
12 sharing services, like Rockster and Morpheus, it's
13 pretty clear that the balance I described just a few
14 moments ago has shifted to the point where content
15 creators are not able, at least in the music
16 industry, to reap the benefits of their creative
17 works.

18 In fact, in the court of public opinion,
19 it could be argued that many consumers believe
20 copyrighted music is free for the asking or free for
21 the taking. And from our perspective, this is
22 precisely the kind of meltdown scenario that
23 justifies policy initiatives, where government
24 establishes rules of engagement so an industry can
25 continue to provide valuable products and services

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1 to consumers, not to mention provide employment to
2 hundreds of thousands of people in the process.

3 Juxtaposing the importance of the
4 content industries to the U.S. economy, with the
5 growth and development of the Internet as a
6 distribution medium, we think it becomes even more
7 important to keep copyright laws strong, and to take
8 a narrow view and a very cautious view on granting
9 exemptions.

10 As has been pointed out in some of the
11 submissions leading up to this hearing, the music
12 industry has, over the past couple of years, begun
13 deploying technological prevention measures in
14 connection with certain of their sound recordings
15 released on CD's, generally known as copy-protected
16 CD's.

17 The objective of these deployments,
18 including the CD's that are protected using
19 Macrovision's technology, has been to inhibit the
20 unauthorized copying and file sharing of music
21 files, which has become almost commonplace over the
22 past several months, while at the same time
23 maintaining consumers' ability to listen to music on
24 their CD players and personal computers.

25 Up to this point, the general approach

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1 has been to provide two versions of each music track
2 on each CD, one of which plays on hi-fi's, car
3 stereos, and other garden variety CD players, and
4 the other of which plays on personal computers.

5 Within the past few weeks, just within
6 the past few weeks, Macrovision has announced a
7 partnership with Microsoft which will enable the
8 music industry to configure the second of these
9 versions, the second session track, in music
10 industry terminology, to allow consumers not only to
11 listen to the music on their PC, but to rip the
12 music to their computer's hard disk several times,
13 and then to burn CD's and/or export the music to
14 portable devices made by companies like Sonic Blue,
15 Creative Labs, Compaq, Thompson, and others. Some
16 of these very devices that one of the other folks
17 just described as you might use to go jogging. We
18 expect to see the first of these expanded
19 capabilities CD's in the market in the fall of this
20 year.

21 Because of our long history providing
22 commercially viable transparent copy protection and
23 DRM technologies to content toners, we at
24 Macrovision believe we have a rather unique
25 perspective on how technological prevention measures

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1 can be used to create healthy ecosystems that serve,
2 over the long term, the legitimate interests of
3 creators and consumers alike.

4 In reflecting on the 20 years we've been
5 in the business, in particular supplying the film
6 entertainment industry with copy protection, and the
7 ten-plus years we've been providing technological
8 protection measures to the software industry, we
9 believe quite strongly that the music industry is
10 deploying technologies from Macrovision, but from
11 others as well, which will over time recreate the
12 balance between the interests of content creators
13 and consumers.

14 In so doing, we believe that this will
15 ensure that great music continues to be available to
16 consumers and that great musicians and their
17 marketing, distribution, and delivery partners are
18 rewarded for their creative works and/or financial
19 investments.

20 We also believe, in the context of these
21 rulemaking proceedings, that decisions about
22 exemptions to the prohibitions against circumvention
23 should be made taking into account the big picture
24 and with a long-term perspective.

25 As is the case we think in domains

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1 outside (indistinguishable) property and copyright
2 protection, the policy path of least resistance in
3 the short term rarely provides the best long term
4 solution. And if we can agree that we're ultimately
5 talking in a small part maybe, about the economic
6 vitality of the whole U.S. economy, I think we can
7 and will see our way clear to making, or perhaps
8 avoiding, exemption decisions which ensure that the
9 music industry can thrive over the coming decades,
10 however it morphs, to the benefit of not only the
11 industry, but the consumers as well.

12 During the Q and A session, I look
13 forward to answering any questions you might have
14 that I can address, and thanks again for the
15 opportunity to be a part of these hearings.

16 MS. PETERS: Thank you. I'll start by
17 asking two questions and then passing it on. These
18 are for EFF. Just want to make sure that I -- what
19 you're saying. Are you saying that if, in fact, you
20 buy a CD, and it doesn't play on a particular
21 device, then you are taking the position that that
22 is malfunction of an access control?

23 MS. HINZE: Actually, our position is a
24 little bit more nuanced. We're taking the position
25 that this is actually a malfunctioning copy control,

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1 but it's an access issue. But we have actually
2 stated in our comments that we don't -- we have
3 taken the position that, in terms of the technical
4 definition of effectively controlling access--

5 MS. PETERS: You say it isn't?

6 MS. HINZE: Right. We do understand
7 what that definition says, and we're not taking the
8 position that these protection measures satisfy that
9 definition.

10 But what we are saying is that the net
11 effect, from the point of view of a consumer, is
12 that this is an access issue. A consumer has
13 purchased -- lawfully purchased media, and is trying
14 to play it and merely play it on a device that has
15 previously played this type of CD, and is making a
16 non-infringing use of the work. We think that is an
17 access issue, first and foremost, not a copy control
18 issue.

19 My second point is that there is some
20 legal uncertainty in the legal community about
21 whether or not something that controls incidentally,
22 controls access, even if its primary purpose was
23 intended to be a copy control, actually falls within
24 the prohibition in 1201(a)(1). So to the extent
25 there's uncertainty, there's a chilling effect, and

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1 the chilling effect is quite large on consumers.

2 Consumers are the people who have
3 purchased the CD's and who want to make a lawful,
4 non-infringing use of their works, but they're not
5 sure because of the scope of -- they're not sure
6 whether the scope of 1201(a)(1) will prevent them
7 from taking any measures to restore playability.

8 MS. PETERS: Let me just -- let me ask
9 you, Ms. Gross. Do you agree with what she just
10 said?

11 MS. GROSS: Yes.

12 MS. PETERS: So that is your position
13 too?

14 MS. GROSS: I'm sorry. I'm sorry. I
15 was writing something down. Could you please ask me
16 what it is I'm supposed to be agreeing or
17 disagreeing with?

18 MS. PETERS: What I really was, which I
19 didn't pick up all the nuances, what I had said,
20 which I've just been told is not accurate, and I was
21 checking out to see if you agreed it was not
22 accurate or you had a different position, was that
23 when -- was it true that whenever someone bought a
24 CD that basically had a copy control on it but was
25 put in a certain playback device such that it

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1 wouldn't play, that that was considered a
2 malfunctioning access control?

3 MS. GROSS: I think it's even broader
4 than that. I think it's designed not to play in
5 particular devices. There was a report last
6 September on CNN about a Celine Dion CD that is
7 designed to crash your computer if you try to play
8 it. So if you want to call that a malfunction,
9 that's fine, but I think it is designed to
10 malfunction in that case.

11 MS. PETERS: But it was really whether
12 or not it was an access control.

13 MS. GROSS: It's absolutely an access
14 control. It is an access control that may double as
15 a copy protection, but it does both goals. It has
16 both functions of denying access and denying
17 copying. So you could talk about it as either one.

18 MS. PETERS: Now, let me go back to EFF.
19 Based on what you said, what extent does labeling --
20 Mr. Marks basically pointed out that seven, seven
21 Universal copy-protected CD's that were limited with
22 regard to where they could be played. To what
23 extent dos the label respond to your concern for
24 consumers?

25 MS. HINZE: The first thing I'd like to

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1 say is that if the experience that EFF has had in
2 using or trying to use some of the labeled copy-
3 protected CD's is anything to go by, it is direct
4 evidence. We have tried this on a number of
5 different systems the labeling isn't, in fact,
6 accurate. It's certainly -- for instance, if I take
7 the example of The Madonna CD here, it's a very
8 small logo. I'd be happy to pass this around for
9 the Copyright Office panel to have a closer look.
10 But it doesn't actually indicate the presence of
11 copy protection. I It's a little logo. It doesn't
12 actually say, "copy-protected."

13 So, for instance, from the point of view
14 of a consumer who purchases one of these, unless you
15 actually know that that symbol means "copy-
16 protected", you're going to be in the position, as a
17 consumer, of having bought this, and having opened
18 the packaging from Tower or wherever you've bought
19 it, and not knowing that that's a copy-protected CD.
20 So I would say that labeling is part of -- obviously
21 part of the issue here, but the effectiveness of the
22 labeling and what the labeling says is obviously an
23 important point.

24 My second point on, I guess on a more
25 fundamental level, is that I actually don't think

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1 that, by itself, labeling will address the nature of
2 the harm that EFF is attempting to cover by
3 requesting the exemption we've sought.

4 Even if something is labeled as copy-
5 protected, and even if the labeling were accurate,
6 which I think it hasn't been to date, then there's
7 still a situation where a consumer cannot actually
8 play something that they have lawfully purchased.
9 And --

10 MS. PETERS: But if the labeling were
11 clear, that it wouldn't work on their playback
12 device?

13 MS. HINZE: I think then it might --
14 we'd have to look at that a little more closely. I
15 think that if that were the case, you know that a
16 specific statement about what things that people can
17 play it on, and what things they can't play it on,
18 then to the extent that consumers would not be put
19 on notice, that part of the harm would be dealt
20 with.

21 I guess the other part of the harm on a
22 more metaphysical level that wouldn't be dealt with,
23 is if there -- if there's no other format for a
24 consumer to access that particular work on.

25 MS. PETERS: I agree with that. Let's

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1 go back to you, Mr. Marks, and labeling. Universal
2 put out seven. You said they were labels. They got
3 less than one tenth of one percent with regard to
4 having any complaints or issues. Is what's on that
5 record what the label -- is that the label that's
6 used by Universal?

7 MR. MARKS: Well, I don't believe that's
8 a U.S. release.

9 MS. PETERS: Oh.

10 MR. MARKS: Our understanding from
11 Warner is that the Madonna CD was not released in
12 the U.S. with copy protection. It's a foreign
13 release.

14 MR. BUCHOLZ: It was purchased in the
15 East Village of New York City.

16 MR. MARKS: Well, (indistinguishable)
17 you know, could have been imported.

18 MR. BUCHOLZ: Absolutely.

19 MR. MARKS: That doesn't mean it's a
20 U.S. release. So --

21 MS. PETERS: Well, maybe you could tell
22 us.

23 MR. MARKS: I'm not familiar with that
24 particular label.

25 MS. PETERS: Well, but you could tell

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1 us, do you know what the label is that's on the
2 Universal releases?

3 MR. MARKS: I can try and see if I have
4 the Universal one. I think that different countries
5 use different labels.

6 MS. PETERS: You don't have to -- even
7 that. Just what's the general gist of what people
8 say when --

9 MR. MARKS: Here is one that's a
10 Universal release that's pretty prominent. Let's
11 see that. That's the size of it.

12 MS. PETERS: Okay.

13 MR. MARKS: Okay? It says,

14 "This CD is protected against
15 unauthorized copying. It is designed to play in
16 standard audio CD players and in computers running a
17 Windows operating system. However, playback
18 problems may be experienced. If you experience
19 playback problems, return this disk for a refund."

20 And there's no standard for labeling.

21 MS. PETERS: But there are -- I mean,
22 there are two bills that are pending before Congress
23 that would deal with labeling.

24 MR. MARKS: Right. And I think the
25 labeling is not the issue here. I mean the issue

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1 here, again, is access controls and --

2 MS. PETERS: I agree; I agree. My --
3 let me go back over to this from
4 (indistinguishable). Is your position that a
5 consumer basically has a right to buy a CD and play
6 it on any device?

7 MS. GROSS: Yes, that is my position,
8 that if they buy a CD, they do have a right to
9 access that CD on whatever device they choose. That
10 is a different statement from saying copyright
11 holders must ensure access. That copyright holders
12 must make sure that they can provide for entrap-
13 ability.

14 MS. PETERS: Where do they get this
15 right?

16 MS. GROSS: Because they have purchased
17 it. They own it. It is their property. It's
18 pretty elementary. When you buy something, it is
19 yours to do with as you wish as long as you don't
20 violate the other provisions of the copyright.

21 MS. PETERS: But here, you're actually
22 making a copy. Right? In order --

23 MS. GROSS: What do you mean?

24 MS. PETERS: If you buy it in one format
25 and it doesn't play on what you want, in order to

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1 play it, don't you have to make a copy?

2 MS.GROSS: I'm not sure that you would
3 have to. You would put it in your homemade CD
4 player and I don't know that it would make a copy.
5 It might just play it.

6 MS. PETERS: (Indistinguishable) where
7 you thought the consumer had a right to do anything
8 to make it play?

9 MS. GROSS: I assume --

10 MS. PETERS: Like with regard to videos,
11 if it's in a PAL format or CCAM format, you really
12 do have to make another copy. But maybe over here
13 they don't. Right.

14 MS. GROSS: But even if they did make --
15 even if they did have to make that copy in order to
16 make that, in order to play it, they're still within
17 their rights. I mean we have a right to make a
18 personal use copy of something if we need to in
19 order to access that material.

20 MS. PETERS: Where does this come from?

21 MS. GROSS: Fair use. Personal use.

22 MS. PETERS: Great. So that's your
23 interpretation?

24 MS. GROSS: That is my interpretation,
25 absolutely.

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1 MS. PETERS: Yes?

2 MS. HINZE: I'd like to just make a
3 comment if I may.

4 MS. PETERS: Sure.

5 MS. HINZE: Two things. One, I'd like
6 to answer one particular way that you might be able
7 to, for instance, restore the playability of one of
8 these CD's. In EFF's comments, in our detailed
9 comments we submitted in December, we attached a
10 paper by, as I said, Princeton researcher John
11 Alexander Halderman. That's a quite a technical
12 paper from a computer scientist, and he actually has
13 conducted a series of tests on three different types
14 of copy-protected CD's.

15 He talks about two mechanisms that might
16 be used in order -- he actually did some of this
17 work as part of the task of researching on what
18 particular drives and what particular operating
19 systems, Windows 95 or Windows 98 Windows 2000 --

20 MS. PETERS: Um-hmm.

21 MS. HINZE: -- and what particular CD ROM
22 drive things would fail. In order to make some of
23 the multi-session disks actually function, he did
24 some testing with two -- with one particular type of
25 mechanism. He put masking tape, as I understand it,

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1 to cover the second session on the disk so that the
2 CD player was able to read the table of contents on
3 the second session and play the material.

4 Again, the paper is actually quite
5 informative about the nature of this technology
6 based on that information was available. And what
7 one of the things that comes out of the paper is
8 that how copy protection works on any given CD
9 player or any playback device is specific to each
10 particular playback device.

11 So, in response to earlier question
12 about labeling, I guess I would like to point out
13 that it would be extremely difficult, based on my
14 understanding of what is in that paper from a
15 technical point of view, to actually be able to
16 specify on what devices something will not play.

17 So while you say this -- this instance,
18 this is instructive, but The Donnas CD includes a
19 statement that this will actually play on Mac. O/S -
20 The Mac. operating system and on Windows players.
21 The reason it was discovered to be copy-protected
22 was because it didn't play on the Mac. player.

23 So to the extent that labeling may go
24 some of the way to addressing consumer awareness of
25 the particular issue, there are technical limits

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1 that set limitations about what a label can actually
2 say to put consumers fully on notice of the harm
3 that they are about to experience.

4 MS. PETERS: Okay. I actually went to
5 labeling because one of the comments suggested
6 narrowing the category, if in fact, it would not be
7 -- you couldn't circumvent, if, in fact, there was a
8 clear statement with regard to what it would and
9 wouldn't play on. That's what I based it. I
10 apologize. I will read this. It was not attached
11 to my copy.

12 MS. HINZE: The other thing I'd like to
13 do is point out in terms of another popular way of,
14 as I understand it, that people have been restoring
15 the playability of these disks where they don't
16 play, is by using a felt tip marker. A felt tip
17 marker and masking tape --

18 MS. PETERS: Yes, yes. They work well.

19 MS. HINZE: Apparently, they work quite
20 well and they wouldn't, of course, violate the --

21 MR. BUCHOLZ: The tools provision.

22 MS. HINZE: The tools provision in
23 1201(a)(2). So there are ways available to
24 consumers to restore playability such that
25 circumvention would not necessarily -- such that

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1 consumers could do that without violating one of the
2 other provisions in the DMCA.

3 MS. GROSS: Could I just follow up
4 quickly, also with another indication that consumers
5 have a right to listen to the CD that they
6 purchased, which is very clear in the copyright act
7 that the control over the performance by the
8 copyright holders is with respect to the public
9 performance.

10 The private performance, when I'm at
11 home, and I want to play it on whatever device that
12 I choose, that is explicitly outside of their
13 control. It is not a public performance. It is a
14 private performance. It is reserved for the
15 individual.

16 MS. PETERS: Yes.

17 MR. MARKS: Could I make a few comments?

18 MS. PETERS: Yes.

19 MR. MARKS: Picking up with the last
20 one, I think there's a fundamental difference
21 between what is actionable as an infringement and
22 what is a right of the consumer. And as our
23 comments that we filed cited several legal opinions,
24 saying clearly that the law is not that there is a
25 right of a consumer to play on whatever device they

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1 want. I can't buy a CD, for example, and put it
2 into a cassette player. I mean, that's akin --

3 It's really the same issue. I think
4 that -- you know, that one thing that is dangerous,
5 and I think also inappropriate, is to talk generally
6 about copy protection as though it is all the same.

7 It is not. There are different
8 technologies. There's been different technologies
9 that have been used to date, there are going to be
10 different technologies that will be used in the
11 future. And that, I think, is one of the
12 infirmities of the proposal on, from the EFF, and IP
13 Justice, is that there -- it does not specify any
14 particular technology that is an access control.

15 Even setting aside the, "it's a copy
16 control, not an access control," even assuming we
17 could get by that issue, it just broadly sedates all
18 CD copy control, and that is what is so potentially
19 harmful going forward of the exemption, because far
20 from the chilling effect that was cited by EFF and
21 IP Justice, the chilling effect will indeed be on
22 the ability of record labels and technology
23 companies to provide for what they deem to be
24 appropriate and workable copy protection in the
25 future, so that they can make available, you know,

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1 works on a going forward basis and, you know,
2 fulfill the intent of Congress passing DMCA to
3 continue to make music available.

4 MS. PETERS: Okay. Thank you.

5 MR. CARSON: Mr. Marks, let's go back to
6 the first comment you made about there being no
7 consumer right to play a CD, for example, on any
8 device they want to. Let's look at it another way.

9 Let's say there is a CD that has an
10 access control on it that prevents you from playing
11 it on a personal computer, just for example. Let's
12 say Ms. Gross takes it and try to figures out how to
13 make it play on her personal computer, even though
14 the intent of the copyright owner was that it
15 shouldn't play on that personal computer. When she
16 does that, is she engaging in an act of
17 infringement?

18 MR. MARKS: I think it is a -- she's
19 circumventing under 1201(a). MR. CARSON:
20 Okay. Yeah, I think that's probably true but that
21 wasn't the question. Is she engaging in an act of
22 infringement?

23 MR. MARKS: Is she engaging in an act of
24 infringement by accessing? I think that the -- I
25 think it's a 1201 issue, and probably not an

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1 infringement issue.

2 MR. CARSON: She's making a non-
3 infringing use of the work itself?

4 MR. MARKS: Right.

5 MR. CARSON: Okay.

6 MR. MARKS: Because it's an access, not
7 a copy or a distribution or something.

8 MR. CARSON: Right. So in that case, the
9 technological measure that restricts her access to
10 the work, is in fact adversely affecting her ability
11 to make an non-infringing use of the work, is that
12 correct?

13 MR. MARKS: It may -- I don't know
14 whether it's an adverse impact.

15 MR. CARSON: She can't do it. she can't
16 make the non-infringing use.

17 MR. MARKS: She may be able to make a
18 non-infringing use by getting the music in another
19 form.

20 MR. CARSON: But with respect to the
21 particular non-infringing use she is trying to make,
22 what your accepting is a non-infringing use, she has
23 been adversely affected in her ability to do that by
24 virtue of the prohibition on circumvention.

25 MR. MARKS: I'm just -- I'm not sure --

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1 I don't think that that's the test.

2 MR. CARSON: Maybe it isn't. I'm just
3 asking the question and we'll figure what it means
4 later on. I just want to know.

5 MR. MARKS: You know, I'm -- it's a
6 hypothetical, I'm not sure, as I just haven't
7 thought about it in those terms because I don't
8 think that's the test that governs out
9 (indistinguishable).

10 MR. CARSON: Okay, we'll think about it
11 and you can get back to us on that one. You know,
12 one thing I'm not entirely clear on. Is it your
13 testimony that in some cases record companies are,
14 in fact, marketing CD's with the intent that those
15 CD's cannot be played on certain kinds of devices
16 that consumers do use to play CD's on?

17 MR. MARKS: I'm sorry, could you just
18 repeat?

19 MR. CARSON: Yeah. Is it your
20 understanding that record companies at the moment,
21 are, in fact, marketing some CD's with the intent
22 that those CD's cannot be played on certain devices
23 that consumers do use to play CD's?

24 MR. MARKS: Not my understanding. They
25 -- I think that from the label, for example, that I

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1 just read, it said it may not play. I don't know
2 whether that's the equivalent of an intent that it
3 not play. I do think that, in the future, there may
4 be so-called hybrid disks that have different
5 sessions. One session is playable on one type of
6 device, and another session is playable on another
7 type of device.

8 MR. CARSON: Is it that you truly don't
9 know whether that's the intent, or is it that, in
10 fact, it's not the intent, but it may be an
11 unintended side effect. Do you know the answer to
12 that, or is it just you don't know?

13 MR. MARKS: That what's the unintended
14 side effect?

15 MR. CARSON: That it can't play on
16 certain devices.

17 MR. MARKS: It -- well, you know, again,
18 it's -- I'm not sure unintended side effect as a
19 result of a problem with the well that's being used
20 is a problem with the machine that's being used, not
21 necessarily a problem with the copy control. Again,
22 this is copy control, not access control, but --

23 MR. CARSON: Um-hmm.

24 MR. MARKS: -- but what EFF and IP
25 Justice have done is just presume that there was a

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1 malfunction of the copy control, even setting aside
2 the copy control access control issue. Yet there
3 isn't any proof that that's the case, that there is
4 a malfunction. And that's what makes this very
5 different from the dongle exemption last time
6 around. I mean not only was that specifically an
7 access control, but it was specifically a
8 malfunction.

9 Here, there's no evidence at all that
10 it's a malfunction. It may just be of that
11 technical protection measure. It may just be
12 a technical incompatibility between, you
13 know, the well in that machine, or the
14 operating system on that machine and the
15 disk.

16 MR. CARSON: Okay. So I gather you can't
17 say whether any record companies are actually
18 marketing CD's that they intend not be played on
19 certain devices. You just don't know the answer to
20 that?

21 MR. MARKS: I don't know the answer to
22 that right now.

23 MR. CARSON: Okay. And that
24 (indistinguishable) the information you can get back
25 to us?

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1 MR. MARKS: Yeah.

2 MR. CARSON: Okay, I think I've got my
3 two questions, at least some of (indistinguishable).

4 MS. HINZE: Might I just --

5 MS. PETERS: Did you want --

6 MR. CARSON: Oh, I'm sorry, someone
7 wanted to respond to that, yeah.

8 MS. HINZE: I wouldn't mind responding
9 to that now before we go onto other areas.

10 MS. PETERS: Yeah. Sure.

11 MS. HINZE: What I've just
12 heard is a statement that seems a little
13 inconsistent. On the one hand, I've heard that a
14 problem with playback -- I've heard a disconnect
15 between intent and malfunction, and what I would
16 like to say is it seems to us, as untrained
17 technologists but based on views of the trained
18 technologist who wrote the paper that I have cited
19 in our comments, that these malfunctions were
20 unintended.

21 And in any event, they are malfunctions
22 purely because what is happening at the time when a
23 disk is not playing, in many cases, for instance, in
24 the case of a multi-session CD what is happening is
25 that there are two formats of content on a disk.

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1 One is a protected format, and one's an unprotected
2 format. And the error, if you were to put it in
3 those terms, that the user, consumer, experiences
4 when something doesn't play is a substitution error.

5 There has been a problem with
6 substituting cleanly the material that was intended
7 to be -- apparently intended to be, substituted in
8 place of the unprotected material. That looks like
9 a malfunction. I can't think of any other reason
10 why, for instance, it would be the case that you
11 would see a disk that plays on one type of device,
12 meaning a Windows 2000 machine, and a similar type
13 of computer running a Windows 98 operating system,
14 would experience a malfunction. To the extent that
15 there's that much variation between the nature of
16 the errors that have been experienced, on a drive by
17 drive basis, and an operating system by operating
18 system basis -- common sense would seem to dictate
19 that it is not the intent of the copyright owner, in
20 that particular situation, to prevent the music from
21 playing in some format. And what is happening is a
22 malfunction of the technology.

23 Now I'm not technologically enough aware
24 to know particularly where in the chain of playback
25 or table of contents areas or just whether it's an

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1 error being introduced into the sub-channel data
2 with -- channel pay. I think that's -- that little
3 detail is something that the Copyright Office might
4 be able to glean from reading the paper that I've
5 referenced.

6 And I would also draw the Copyright
7 Office's attention to the table that's annexed to
8 that, which gives a listing of the types of
9 particular drives and the particular operating
10 systems that the tests were done on. And it becomes
11 apparent when you look at that, the unintended
12 nature of the malfunctioning, and the reason that's
13 malfunctioning because it's a very inconsistent
14 pattern of non-display of material or non-playback
15 of material.

16 MR. MARKS: I think my point was just
17 that the malfunction -- you can't make the leap that
18 it is the technology that is malfunctioning, that
19 the technical protection measure that is
20 malfunctioning. It could be due to an
21 incompatibility. And you know, so that was really
22 just my point.

23 You know, the question is whether is
24 there a malfunction in the TPM? Not clear that
25 there is. There is no evidence that there is. It

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1 may be. It may be functioning entirely properly as
2 an entire different reason that there is playback
3 difficulty. I mean this is one of the -- this also
4 gets back to the point of, you know, the danger of
5 talking generally when there are different
6 technologies out there. Some of the technologies
7 that may have been addressed in an article may no
8 longer be used. They may have been used on one
9 disk. Out of 125,000 that were released, there were
10 only nine. It may have been used one time on one of
11 those nine disks and may never be used again.

12 Clearly, you know, that nine out of
13 125,000 or that use of that one technology, you
14 know, can't rise to the level of an exemption under
15 the, you know, in this proceeding. And in terms of
16 the future, it's speculative as to what technologies
17 will be used and how those technologies actually
18 work. And therefore, there's simply no way for the
19 burden of it's more likely than not for an adverse
20 impact to result. There's just simply no way for
21 that to be met.

22 MS. HINZE: I'd also be happy to address
23 that now but I appreciate that this is the
24 prerogative for the Copyright Office to direct
25 questions.

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1 MR. CARSON: We've got time here.

2 MS. PETERS: We've got time, yes.

3 MS. HINZE: I've heard so far that --
4 proof that sounds to me like we have a clear
5 statement of agreement on the grounds that there are
6 copy-protected CD's that are currently in existence
7 in the United States. The first time, I might add,
8 I've now heard that there are, in fact, nine titles
9 that have been released in the United States, so I'm
10 happy to have some quantification at long last. I
11 think the relevant point from the point of view of
12 assessing the nature of the harm here is twofold.

13 First, it's not just the fact that there
14 are nine titles that have copy protection, it's the
15 number of the titles, the number of units of those
16 titles, that are in distribution that would give a
17 better sense of the qualitative -- I'm sorry -- the
18 quantitative harm that may be experienced by
19 consumers.

20 I'd also like to point out that to the
21 extent that there are copy-protected CD's in the
22 United States that are not U.S. releases, whatever
23 that means, such as The Donnas CD. And I've also
24 got a CD that I, myself, came across that has copy
25 protection on it. Yes, it's labeled, but it doesn't

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1 play, and it's not a Universal release. To the
2 extent that there are a number of other non-U.S.
3 released copy-protected CD's out there, I would
4 hesitate to limit myself to believing that the only
5 number of copy-protected CD's in the United States
6 are "X" number of units times nine titles. If my
7 experience is anything to go by, and I think it's
8 direct, firsthand experience, the number of copy-
9 protected CD's currently in the United States is
10 actually larger than I think we're getting a glimpse
11 of this afternoon.

12 The second thing I'd like to point out
13 in terms of an assessment of harm is the nature of
14 the harm for the consumer. The consumer has
15 lawfully acquired this particular packaging, and
16 this particular plastic disk, and has a normative of
17 expectation that they're going to be able to play
18 something that they have played on a CD player,
19 their car/MP3/CD player before, that they previously
20 played it on a DVD player, none of which have any
21 capability for reproducing. So there's no sense in
22 which the consumer is at risk of copying in the -
23 the case varies -- if she was intending to get a
24 benefit by trying to make a copy. All they're
25 attempting to do, when they're trying to play this

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1 type of material, is play it. And they have a good
2 normative expectation for expecting that this will
3 actually play in their devices.

4 What we're asking for is a limited
5 exemption for playback, and it's quite an
6 appropriate thing for consumers to expect that they
7 will be able to play this type of plastic disk,
8 whether it's a CD in a Redbook audio format or not,
9 for the purposes of audio standards. They have a
10 reasonable expectation that they ought be able to
11 play it based on their 20 years of using CD's.

12 It's not the case where a consumer is
13 putting a CD into a toaster or a cassette player.
14 The actual, real, situation is someone putting
15 something into a device where they can reasonably
16 expect that there will be playback.

17 MR. MARKS: I have a couple of quick
18 ones. On the quantitative issue, you know, the only
19 thing that I can give you quantitatively was what
20 Universal told us about some of the nine releases,
21 and that was less than one tenth of one percent in
22 complaints, so I would say that there really is no
23 quantitative evidence.

24 And the evidence that was presented in
25 terms of all these other disks above the nine, you

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1 know, again, there were 45 that were referenced in
2 the replies, and only three of the 45 had any kind
3 of technical protection measure. And then finally,
4 just to get back to the very first point, which I
5 think is still the most important point, and that is
6 these are copy controls, not access controls and
7 therefore, outside the scope of this proceeding.

8 MR. CARSON: Isn't it good enough for
9 you? He's saying the copy control, not access
10 control.

11 MS. HINZE: Well --

12 MR. CARSON: Does he have to say
13 anything more.

14 MR. MARKS: No, what I'm saying is that
15 the allegation is --

16 MS. GROSS: (Indistinguishable) for
17 trying to access it, so that sounds like an access
18 control issue.

19 MR. MARKS: The technical -- no, you
20 just -- I thought before, in response to the
21 question, -- I've got it in my notes -- it's an
22 access issue. We would agree it's not a access
23 technical protection measure. I'm not here to say
24 that any particular technology is a copy control
25 versus something else. All I'm saying is that the

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1 proponents have said themselves that they're copy
2 controls, and that's --

3 MS. GROSS: In addition to being access
4 control. We're saying they're both.

5 MS. HINZE: I think there is actually a
6 difference.

7 MS. PETERS: There's a difference of
8 opinion; right.

9 MR. CARSON: There is a difference,
10 right. It means different things to different
11 people.

12 MS. HINZE: But I guess I would like to
13 ask if the RIAA would be prepared to make a
14 statement to the effect that these, for all intents
15 and purposes, will be considered copy protection,
16 not access measures and only copy protection
17 technological protection measures, and if we perhaps
18 were to get a statement from the RIAA, if they would
19 be happy to let us know that they won't take legal
20 action against consumers for a violation of
21 1201(a)(1).

22 Then, you know, I think as I said in my
23 opening statement and as was made clear in EFF's
24 submission, we would be prepared to be happy, to go
25 home at that point.

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1 The point -- from the consumer point of
2 view is that it's not so clear cut. And to the
3 extent there's a chilling effect on consumers, what
4 are consumers supposed to do? They've bought a CD.
5 They're not sure what they can do with it. They've
6 bought the CD but they can't play it. Are they
7 breaking 1201(a)(1) if they try to nature it
8 playable?

9 MR. MARKS: I'm sure they could play it
10 in their audio CD player. There's no question about
11 that.

12 MS. HINZE: And what about --

13 MR. MARKS: As much as I would love to
14 give you that assurance, I just can't. And the
15 reason for that is that we don't -- you know, we're
16 not here to evaluate certain technologies, and most
17 certain technologies is, you know, is addressed as
18 part of the exemptions.

19 MS. PETERS: She's just leaped on) the
20 fact that you said copy.

21 MR. CARSON: (Indistinguishable)
22 go ahead.

23 MR. BELINSKY: Yeah, thanks. I'd just
24 like to add something on the general notion of
25 formats. And that is that I think we're starting to

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1 enter a period where there will be -- forget copy
2 protection and access controls just for a second.

3 There will be multiple formats that
4 physically look exactly like the CD that you saw
5 over there. There's already the super audio CD,
6 there's the DVD audio, there's going to be DVD 9,
7 there's DVD blue laser. In the electronic world,
8 there's the WMA format from Microsoft, there's MP3,
9 Apple's new service uses AAC.

10 And I think that, juxtaposed with the
11 broader availability and broader capabilities for
12 consumers to get access to copyrighted works, I
13 think over the next -- from where we sit,
14 technologists perspective -- over the next three to
15 five years, there will be a multiplicity of data and
16 content formats that will, just as more content is
17 coming available, it will, I think, render the
18 notion that any physical item that is five inches in
19 diameter can be plugged into any particular player.

20 That notion is not going hold true for
21 the next three to five years, I think. And that, to
22 me, is just what you see when you go into a period
23 of rapid technological innovation, is you have a
24 format differences and file size differences,
25 etcetera, and then eventually things shake out again

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1 in the next period of stability, like we've just
2 been through a period of stability in the CD format,
3 let's say, for the last 15 years, where a CD is a CD
4 is a CD. Now things are starting to morph again,
5 and that is ultimately to consumers' benefit, but
6 there's some thrashing that goes along, goes around
7 in the interim period.

8 MR. CARSON: Let's pause here on that
9 then. Are you talking purely about an abundance of
10 new and different, and sometimes incompatible
11 formats?

12 MR. BELINSKY: Yes.

13 MR. CARSON: Or in connection with that,
14 will there sometimes be technological protection
15 measures to allow some of those that will prevent
16 something that is a new format, for example, from
17 being accessed on the standard CD player?

18 MR. BELINSKY: My comment was solely
19 related to the fact that new formats are going to
20 proliferate.

21 MR. CARSON: So you're not -- you're not
22 foreseeing that on top of that, there will be any
23 kind of access controls that make it impossible or
24 difficult to play the new format on an old player?

25 MR. BELINSKY: Not necessarily, no. I

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1 mean, from where we sit, we don't make those
2 decisions. So you know, it's --

3 MR. CARSON: You're not part of the
4 process (indistinguishable).

5 MR. BELINSKY: (Indistinguishable)
6 decides, what business rules, policies, etcetera.

7 MR. MARKS: And I would just go back to
8 one of the first statements I made, which is that
9 record companies want to sell music and they don't
10 want to lock up their content, they want to provide
11 access. Otherwise, they don't have a business
12 because there are certain consumer expectations and
13 you want to sell something that the consumer's going
14 to be happy with.

15 MS. PETERS: Okay, what about Steve?

16 MR. TEPP: Thank you. Mr. Belinsky, you
17 mentioned in your opening statement, the second
18 session, and we've had a little discussion of that
19 previous panel discussing related issues back in
20 Washington. I'm still a little confused as to what
21 functionality the second section gives consumers.
22 So, can you help me out by telling me what can a
23 consumer do with the second section that they can't
24 do with the first section?

25 MR. BELINSKY: Okay. The second section

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1 is in a format and has extra information as part of
2 it that essentially allows the consumer to play the
3 music on a PC. So when you put a CD into a personal
4 computer and you listen to the music, you're
5 listening to the music from the quote, unquote,
6 second section files.

7 MR. TEPP: Yeah.

8 MR. BELINSKY: So it's, it's what gives
9 a copy-protected CD the ability to play music on a
10 personal computer. It's just that it's another
11 aspect of the overall technology used to produce a
12 copy-protected CD that inhibits copying and file
13 sharing and by the same token, allows the consumer
14 to listen to the music on personal computers as
15 compared to garden variety CD players, like stereo
16 systems, boom boxes, you know, CD Walkman's, that
17 sort of thing.

18 MR. TEPP: Thank you. So let me jump
19 back to this side and say, do you -- Mr. Belinsky
20 says even when the first section is protected,
21 you've got the second section, you can play on your
22 PC. Does that solve your problem or do you have
23 some disagreement with the way he's described the
24 reality?

25 MS. HINZE: What I understand is

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1 actually happening when people are experiencing
2 playback errors is that substitution is not actually
3 taking place.

4 So for whatever reason, whether you call
5 it a technical incompatibility or a malfunctioning
6 copy protection, technological protection measure --
7 I'll leave that issue to one side -- the point is
8 that substitution is not actually happening.

9 That may have been the intent of the
10 designers of the copy protection technology, but
11 where it doesn't playback, what is happening is that
12 for whatever reason, consumers are not actually
13 getting access to that second session. And the
14 exemption that EFF has sought would allow consumers
15 to do that, whether it be by -- for instance, I
16 don't want to speculate as to how consumers might be
17 able to do -- but for instance, consumers might be
18 able to do exactly that and get access to the second
19 session where the particular copy protection
20 technology fails on their particular consumer
21 playback device by, for instance, using a felt tip
22 marker or some other way of restoring the
23 playability.

24 MR. MARKS: Mr. Tepp?

25 MR. TEPP: Please.

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1 MR. MARKS: The thing that may help
2 clear up the confusion on this is that, I think what
3 Mr. Belinsky is talking about in terms of disks that
4 may have two sections may not be the same thing as
5 David holding up those audio disks that may only
6 have one section on them. So they're two different
7 products, potentially, that I think is causing some
8 of the confusion.

9 MR. TEPP: Okay. All right. Thank you
10 both. That does clear it up for me.

11 MS. HINZE: Just to clarify, my comments were
12 respective of a multi-section disk, and when I -- as
13 I said, that consumers may be able to access to
14 first section on that disk, the one that they would
15 not -- otherwise not be able to see for reasons of
16 malfunction. I was actually specifically
17 addressing, as I understand it, the type of
18 Macrovision copy protection technology that involves
19 multi-section format, apparently CD's.

20 MR. TEPP: Okay, thank you. So let me
21 come back to this side for a minute, and it sounds
22 like, from the description you've given at least
23 with regard to the dual section disks that there is
24 an intent to let consumers play the music on any
25 device they choose.

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1 MR. BELINSKY: Absolutely.

2 MR. TEPP: Within reason, not toasters.

3 If that's the case, what harm would there be in
4 letting them deal with some sort of technical issues
5 that arise (indistinguishable) those qualified as
6 1201(a)(1) violations we can't seem to get agreement
7 on today, but what harm arises to your industry if
8 there's an exemption that makes it clear they're
9 allowed to do what it sounds like you were willing
10 to let them do in the first place?

11 MR. BELINSKY: I think, from our
12 perspective, looking across multiple content
13 industries and being a technology supplier, it opens
14 up the door for folks to do that on a large scale
15 and then content becomes available on the Internet
16 at no charge. And it has the long term result of
17 damaging, if not decimating, not only the music
18 industry, but the movie industry, the software
19 industry, the pharmaceuticals industry.

20 If an ecosystem can't be created, and I
21 think to create it requires some assistance,
22 particularly in today's technological age, from
23 government, then you could end up doing substantial
24 damage to every creator's ability to profit from
25 their creation and then the investment cycle falls

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1 apart and you don't get nearly as good a music
2 video, prescription drugs, semi-conductors, as
3 you're currently getting today, or you attenuate the
4 progression of those developments. That's what's --
5 that would be our perspective.

6 MR. MARKS: I think the harm is also
7 that what we're talking about and the nature of the
8 question by itself is something hypothetical,
9 something in the future, something that's
10 speculative. There's been no evidence presented
11 that there's been anything more than the diminimus
12 problems with certain technologies, and the proposed
13 exemption is for something much broader that would
14 encompass all technologies that have so-called copy
15 protection, technical protection measures.

16 And I think the harm to the industry is
17 that by doing that, you are stifling the ability
18 potentially to use appropriate technical protection
19 measures, technical protection measures that
20 Congress, you know, envisioned, and encouraged, as
21 result of the DMCA. Because it's -- we're not
22 talking about a -- you know, any specific technology
23 here that is actually causing harm, it just doesn't
24 exist in this record, and therefore, you know,
25 having an exemption that covered all potential

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1 technologies is problematic and harmful, and that
2 would interfere with the ability to actually
3 institute certain types of technical protection
4 measures because we don't know today how they will
5 work.

6 MR. TEPP: Okay, did you have one last
7 question? I'm sorry, go ahead.

8 MS. HINZE: I thought it might be
9 appropriate to respond while we're on this topic. I
10 wanted to make two points.

11 First, the first one is to address the
12 statement that we've sought a really broad
13 exemption, and that it would cover a whole range of
14 technologies. Actually, our exemption is quite
15 narrow. On that I want to point out a couple of
16 features.

17 Our exemption only covers copy-protected
18 CD's that malfunction and prevent access. To the
19 extent that they work and they work now, or in the
20 future, whatever the technologies are, then they
21 would not be caught by the scope of our exemption.
22 Our exemption, as I said, will only catch things
23 that are malfunctioning. So I would actually
24 characterize it as a narrow, not a broad exemption.

25 Secondly, I'd point out that the

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1 statement that we have not provided any information
2 about the technologies at issue is perhaps a little
3 bit of a mischaracterization of the comments that
4 EFF filed in December.

5 EFF listed the four types of copy
6 protection that we are aware about from publicly
7 available information that is currently being used,
8 Macrovision's Catus Shield technology SunnComm and
9 TTR's Safe Audio. We've also mentioned Sony's Key 2
10 Audio system. We have made best endeavors to obtain
11 information about each of those technologies. The
12 Cactus Shield technology in the case of media as
13 with Macrovision, SunnComm's Media Clog, and as I
14 said, the Sony Key 2 Audio system.

15 There is very little available
16 information about that, as I'm sure Mr. Belinsky
17 could point out, a number of these technologies are
18 subject to trade secret protection, and it is
19 difficult, from a consumer point of view, to
20 actually get a clear statement about how the
21 technologies work or any technical data that might
22 be available. Consumers have to rely on testing
23 along the lines of that done by Mr. Halderman in the
24 paper I've referenced.

25 Finally, I'd just like to make one point

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1 while we're on the topic, since it's received so
2 much comment so far. And that is this: The
3 particular copy protection measures that are being
4 used at the moment are, if we are to take the words
5 of the record executives and the technology
6 companies, they are designed to keep honest people
7 honest. They are designed to stop casual copying.
8 They have no impact as far as anyone can tell on
9 large scale commercial copying.

10 So to the extent that one person was
11 able to obtain the content of one copy-protected CD
12 and put it on a P2P Network, for instance, this
13 exemption will have no impact on that. That is
14 already currently happening, and the fact that
15 consumers might have the ability to restore
16 playability to, on disks they currently have
17 purchased which don't have playability, that is a
18 completely separate scenario from what is currently
19 happening and the impact that it would likely have
20 on the existing world of P2P technology and
21 networks.

22 MS. PETERS: Could I note that this side
23 of the table is wanting to say something or is it
24 just facial expression?

25 MR. MARKS: Well, I -- I'm just not sure

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1 what malfunction means in this context. I mean, you
2 know, again, the scope of this proceeding is access
3 controls that, you know, have a substantial impact
4 on what are different uses.

5 And you know, notwithstanding the
6 assertion of IP Justice, it certainly sounds and
7 reads, when you read the documents, like what they
8 are talking about are copy controls, not access
9 controls. And again, there's no evidence that's
10 been presented at all that even those are
11 malfunctioning.

12 So it's just a very different situation
13 even if you could get over that first hurdle, then
14 the dongle exemption from last time.

15 MS. PETERS: I think we understand your
16 different positions.

17 MR. TEPP: Well, let me just sort of
18 pick up a point Ms. Hinze just made and ask you to
19 respond if you care to, and that's my last question.

20 Has there been any correlation between
21 the level of piracy of unprotected CD's and
22 protected CD's? Because Mr. Belinsky made the
23 argument that lay people use an exemption for this
24 purpose is going to facilitate pier to pier, or
25 piracy re-appear. Pier networks and all sorts of

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1 problems, Ms. Hinze says, "No, actually that's not
2 the case." We have some basis for historical
3 analysis. Do you have any information?

4 MR. BELINSKY: Only from the video
5 industry and the reason only from the video industry
6 is we've done tri-annual consumer copying studies
7 for the last 15 years on a nationwide basis, across
8 the U.S., 1008 households generalize
9 (indistinguishable) the U.S. population in general,
10 etcetera, statistically.

11 And what we've found over the last 15
12 years, given that copy protection appeared at the
13 dawn of the VHS format, in about 1985, is that each
14 successive study showed lower and lower consumer
15 copying attempts and lower and lower rates of
16 piracy. And/or -- yeah, piracy and unauthorized
17 sharing of video.

18 And what we attribute that to is kind of
19 a conditioning effect over a number of years on the
20 part of consumers that it isn't okay to buy one copy
21 of The Lion King at Blockbuster video and make 14
22 copies for your neighbors. In the music industry,
23 it's just way too soon to tell. Copy protection in
24 any scale has only been with us probably for the
25 past year to maybe 18 months.

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1 And the vast majority of music CD's
2 still are not copy-protected, despite our success in
3 achieving 100 million CD's, the total annual
4 production of music CD's is way north of a billion,
5 almost two billion on a worldwide basis.

6 So, unfortunately, there isn't the data
7 set to really have any data that would suggest
8 what's happening right now. The only data we have
9 is that if you do take the long view, over time, you
10 end up with a balance between consumers getting
11 great content at great prices, and creators being
12 paid for their investment in their creative works,
13 so unfortunately, nothing to report on the music
14 industry in particular right now.

15 MR. MARKS: I would agree with
16 that. I think that -- I certainly am not aware of
17 any information. I think it's precisely because you
18 really only have nine disks that have been in the
19 market for you know, a certain period of time. It's
20 very hard to draw any conclusions. I haven't heard
21 any specific data or any conclusions from there.
22 The 100 million that Mr. Belinsky was referencing is
23 a worldwide, not a U.S. number you know, in terms of
24 music.

25 MR. BELINSKY: That's virtually all

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1 outside of the U.S.

2 MR. MARKS: Yeah, that sounds right.

3 MR. BELINSKY: And up to this point.

4 MR. TEPP: Okay, thank you.

5 MS. DOUGLASS: Ms. Hinze, it seems like
6 you've been talking about a number of frustrations
7 and I need to (indistinguishable) when people put
8 their CD's into the CD player and it doesn't work.
9 I'm trying to get to the adverse effect -- not
10 necessarily substantial adverse effect, I'm trying
11 to get to adverse effect, you know.

12 From what I hear, is there are only nine
13 titles, like in number of multiplied by however many
14 there are, of, in the industry, of that nine titles.
15 But it seems like everyone wants to see, hear a
16 little bit more in terms of adverse effect.

17 For example, your reply number 59 says
18 that, "He had problems" -- "a problem trying to play
19 his CD in a particular" -- maybe it was a PC. It
20 was a PC, and he said, "Well, it took me a lot of
21 time, but I eventually downloaded a program and
22 indeed I was able to play it."

23 So that concept in my mind at first
24 effect (indistinguishable) or are we saying this is
25 just an inconvenience? It took him a long time, but

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1 he did finally get it. So, you know, you gave four
2 titles that had some problems but I'm not too sure
3 if it adds up to adverse effect in my mind.

4 MS. HINZE: So what I understand you to
5 be asking is, a statement about what the harm is,
6 and whether it may or may not rise to a substantial
7 adverse?

8 MS. DOUGLASS: Yes, yes.

9 MS. HINZE: Right. I think there are
10 various aspects of that question. I think there is
11 some genuine disagreement amongst maybe this side of
12 the room and that side of the room about the number
13 of copy-protected CD's that currently exist in the
14 United States, whether they be U.S. releases or
15 otherwise, so I think that EFF's position would be
16 that there are a number of copy-protected CD's in
17 the United States. Statement one; that's the
18 current position.

19 Statement two; in the future, there will
20 be -- if we can go by the indications of the record
21 industry executives' statements and by technology
22 company statements, there will be, as early as this
23 year, on Arista and BMG releases, there will be copy
24 protection. Then the question is, is it likely to
25 malfunction?

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1 Well, that's an interesting question.
2 It seems to be that there are -- you are looking at
3 reply comments that have been filed by consumers in,
4 48 consumers in this particular proceeding. You
5 have the experience that has been documented
6 elsewhere, people on the Internet who have
7 complained about problems with playback.

8 The nature of the harm is qualitatively
9 significant. If you were one of the people for whom
10 the particular CD you have purchased does not play,
11 it doesn't play. So it's an -- it might be an all
12 or a nothing thing, but I think part of the problem
13 in assessing the nature and the qualitative and the
14 quantitative aspects of the harm here, is that the
15 harm varies. And from my point of view, the harm
16 varies because it's an unintended malfunctioning.

17 But the point is, it's still a
18 malfunctioning, and where it malfunctions to the
19 extent that someone can't play music that they've
20 purchased, they get nothing. They've paid for their
21 particular disk, and they have an expectation that
22 something that they have previously been able to
23 play CD's on will play the CD and yet they receive
24 nothing.

25 So I would say for the people who are

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1 within the scope of that class, that's a fairly
2 fundamental harm. They've experienced no benefit
3 from the bargain they've made to purchase the CD.

4 MS. DOUGLASS: Within the scope of that
5 class?

6 MS. HINZE: Within the scope.

7 MS. DOUGLASS: We're 49, but there's
8 another one besides the -- at least one more in
9 addition to the 48. But on one side I see, you
10 know, 49 problems, and on the other side I hear one
11 tenth of one percent. So, you know, how do I
12 reconcile those?

13 MS. HINZE: Right I'd like to make two
14 apparently inconsistent statements, but let me say
15 this. The number of comments that have been filed
16 by consumers with the Copyright Office in this
17 proceeding is evidence, Direct evidence, of harm to
18 consumers' non-infringing uses. I think that's
19 clear. The fact that there are 48 or 49 comments is
20 not necessarily indicative of the level of harm
21 that's out there.

22 So in terms of a comparison, on one side
23 of the table we have our belief that there are a
24 number of these CD's in existence in the United
25 States. On the other side of the table, you're

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1 comparing a statement from an industry perspective,
2 with an industry representative who has the ability
3 to get an industry-wide feedback on the number of
4 complaints they've received.

5 I guess on this side of the table, as
6 much as I would like to be the spokesperson or as
7 much as any of us here would like to be the
8 spokesperson for the entire American consumer
9 populace, we're not.

10 And in terms of the feedback that
11 consumers have given to the Copyright Office in
12 support of the exemption we're seeking here, I guess
13 I would like to point out part of the reason we
14 suspect why the Copyright Office received comments
15 when it did was because EFF asked people on its
16 mailing list if they had experienced these problems
17 to write to the Copyright Office.

18 We are an organization that has a paid
19 membership of about 9,000 people, and our mailing
20 list actually goes to about 30,000 people. That's a
21 small part of the American population. I would
22 hasten to say that a larger proportion of people
23 probably don't even know that this proceeding is
24 taking place, and that the level of harm that is
25 experienced out there in the population is probably

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1 far greater than the number of comments you've
2 received, with respect.

3 So, in terms of apples and oranges, I
4 think it would be fair to say that the consumer
5 experience is not necessarily -- should not be
6 regarded based on, just on the information that's
7 been submitted to the Copyright Office in terms of a
8 numerical number of comments.

9 MS. DOUGLASS: I'll grant you that.
10 Thank you.

11 MS. GROSS: Can I just follow up on
12 that?

13 MS. DOUGLASS: Mr. Belinsky wants to
14 say something, too. Can --

15 MS. GROSS: Okay. I just wanted to say
16 that you know, it's an interesting argument about is
17 it nine titles? Is it more than nine titles?
18 What's the exact number of comments received in the
19 harm?

20 It seems to me that this is -- should
21 really be a principled argument, a principled
22 analysis. That it is the principle of the idea that
23 when you buy a CD, you have the right to play it. I
24 mean, you know, what gives me the right to throw
25 this book in the air? Why own it?

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1 The same things with the CD, what gives
2 me the right to listen to the CD? I own it, that's
3 the right, so it's the principle. It's not the
4 number of titles that are released, it's the legal
5 principle here.

6 MS. DOUGLASS: Mr. Belinsky?

7 MR. BELINSKY: I just wanted to add one
8 observation, again from our perspective as being in
9 the copy protection business for quite a number of
10 years. There is the notion of the frustrated copier
11 effect that we've seen over and over again in video
12 and in entertainment software, where the existence
13 of copy protection on a video cassette or a DVD, or
14 a CD ROM game brings consumers, quote unquote,
15 complaints, that are consumer complaints arise by
16 virtue of the consumer not being able to make a --
17 an extra copy, when heretofore, before the existence
18 of copy protection, he could.

19 So from the perspective of assuming
20 there's a goal to try and measure how many
21 complaints or how many situations are arising, I
22 think that we would suggest you need to be somewhat
23 careful when you look at the total volume of input
24 that you're getting because our experience, not so
25 much in music again, because it's so new from a

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1 timeline perspective, but in video and in games, a
2 substantial number of the "returns" that came back
3 to Blockbuster video or the video game store were
4 from consumers who were upset that they could not
5 make a copy, not that they could not play their
6 video or run their computer games. So just another
7 data point from the historical perspective.

8 MS. DOUGLASS: So you're saying that
9 consumers are mad and they just sent to the
10 Copyright Office all these problems they were having
11 because they didn't really agree with copy
12 protection in the first place?

13 MR. BELINSKY: I'm not suggesting what
14 the consumers who talked, who communicated with the
15 Copyright Office were saying, but I am saying that
16 we have very direct evidence over the years that
17 consumers have come back to retail stores and said
18 "This product doesn't work." When indeed, what it
19 turned out was, they couldn't make a copy and they
20 were upset about that.

21 MS. DOUGLASS: Okay.

22 MR. BELINSKY: Because they thought that
23 it was their right to make a copy.

24 MS. DOUGLASS: So this product doesn't
25 work then translated into --

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1 MR. BELINSKY: Because of copy
2 protection.

3 MS. DOUGLASS: -- this product doesn't
4 work like it did before, or like I expected it to
5 work.

6 MR. BELINSKY: Yeah, exactly. Yeah, and
7 before I could make extra copies, and now I can't,
8 so it must not work right anymore.

9 MS. DOUGLASS: I see, okay. I just
10 think I have one -- Oh, I'm sorry.

11 MR. MARKS: I would just like to make a
12 couple of comments. I do think, though that what
13 you can take away from the 48 comments is that from
14 the 48, only three of them addressed CD's that had
15 been released in the U.S. that had some kind of
16 technological protection measure.

17 So I don't know whether the other
18 reasons are attributable to some of the things Mr.
19 Belinsky said, but the only record evidence here is
20 essentially that 48. And there's only three of the
21 45 titles that were discussed there that that are
22 actually U.S. released and are recordings that have
23 technological protection measures. And you know,
24 aside from that, I think whatever you might
25 speculate about how many people might complain or

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1 might not, I mean, this is a proceeding that has to
2 go by the record evidence and (indistinguishable)
3 the evidence that we can present is the .08 percent.
4 You know, the evidence that's been presented by the
5 proponents is 48 complaints that detailed 45 CD's,
6 only three of which you know, fit within the scope
7 of this proceeding.

8 The second point that the EFF made that
9 I wanted to respond to about how there will be more.
10 There may be more, but we don't know what technology
11 is going to be used, and we don't know and shouldn't
12 presume that things won't be able to be played back.
13 It is entirely speculative in that regard.

14 Third point, somebody buys something.
15 The conclusion that they get nothing, not clear that
16 that's really the case. A number of things could be
17 returned. Universal had help lines, web sites that
18 held so that people eventually could have a place of
19 -- I don't think we can draw the conclusion that
20 just 'cause you bought something and on your first
21 try or second try it didn't work, that you ended up
22 with zero value for the money that you spent.

23 And finally, with regard to Ms. Gross'
24 comment about you know, let's look at the principle,
25 I think the principle she enunciated is just wrong,

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1 as a matter of law. And you know, that that legal
2 forwarding is cited in there, our papers, I don't
3 know (indistinguishable).

4 MS. DOUGLASS: Okay, just one
5 clarification. The three titles were -- that you
6 mentioned. Is it possible that some of those that
7 were copy-protected; is it possible that some of
8 those could have been non-U.S. copy-protected?

9 MR. MARKS: There were five foreign
10 releases that I found. So it's possible that some
11 of them had taken the logical protection
12 (indistinguishable) that weren't released in the
13 U.S.

14 MS. DOUGLASS: Okay. Thank you. Okay?

15 MS. PETERS: Now you brought with your
16 long list of questions.

17 MR. KASUNIC: I have so many, I may be
18 putting some of these in writing later, but let's
19 just start with -- first, Mr. Marks. You mentioned
20 that it's not clear whether the technological
21 protection measures are malfunctioning, or whether
22 this is some other kind of technical problem. Isn't
23 it -- are most -- prior to copy-protected CD's,
24 understanding the technology right, or essential
25 Redbook CD's, most that were put on the market for

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1 audio emphasis.

2 MR. MARKS: (Indistinguishable)

3 MR. KASUNIC: Okay, so if it -- wouldn't
4 it be one way to make determinations if a Redbook CD
5 worked on these devices, and a -- any kind of copy-
6 protected CD did not work on the device, wouldn't it
7 be pretty safe to assume that the problem was a
8 result of the technological protection measure
9 rather than the consumer's technology, or operating
10 system, there was some kind of glitch in the way the
11 media, the technological protection measure put on
12 the media work?

13 MR. MARKS: I'm not sure that that is a
14 safe assumption, because, based on the number of
15 complaints that we know about, it was essentially
16 the same number that you would get from the release
17 of standard Redbook audio.

18 So, you know, there's no clear
19 indication that the technical protection measure was
20 the result of the problems anymore than it could've
21 been a manufacturing defect or something else,
22 because there was not -- it was consistent with what
23 you normally have in terms of a disk that may not be
24 able to play for any variety of reasons.

25 MR. KASUNIC: But then, isn't there an

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1 important difference in this situation that these
2 are protected by law in terms of making any -- there
3 was full of the problems that people may have had
4 with the Redbook audio, they couldn't make them
5 work. And they wouldn't have any violation of the
6 law.

7 MR. MARKS: I'm not sure I understand
8 the question.

9 MR. KASUNIC: Well, the traditional
10 Redbook CD's didn't have any technological
11 protection they used on them, so if there was some
12 kind of a malfunction on them, people could do
13 whatever they needed to do to get them to play on
14 their particular operating system. If they needed
15 to tweak it in some way in order to get it to play,
16 they could do that, right, without violating Section
17 1201,

18 because there weren't any technological
19 protection measures on the Redbook CD's prior
20 to these nine that are on the market.

21 MR. MARKS: Well, if I -- I guess what I
22 was saying is that they may be able to do that here
23 because it -- they may not be able to make them
24 play, they may not have to circumvent an access
25 control.

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1 MR. KASUNIC: Okay, well then let's go
2 to that. Now, I -- you mentioned that Congress
3 envisioned use of technological protection measures
4 on copyrighted works to enable and facilitate these
5 being distributed. But didn't Congress also
6 envision and encourage use of technological
7 protection measures that had -- that making a
8 distinction between what type of technological
9 protection measure was being used? Didn't Congress
10 envision that you would know if it was a copy
11 protection measure or an access protection measure?
12 And it seems to me here, the way we're talking about
13 this, no one's willing take a position on what is
14 actually out there.

15 So, it's virtually a situation of hide
16 the ball. No one knows what kind of technological
17 protection measure is on any given works anymore.

18 MR. MARKS: We don't believe it's our
19 burden of proof to come in and prove that something
20 was an access control or was a copy control, it was
21 something else. That burden of proof lies with the
22 proponents, so we're not saying hide the ball, we're
23 just simply responding according to the burdens and
24 prima facie cases that have been set forth by the
25 Librarian in these types of proceedings.

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1 MR. KASUNIC: Wait, but this isn't a
2 court of law where the burden of proof is the same.
3 We have to look in terms of, in the broad sense of
4 whether an exemption should be issued, and that
5 exemption would be technologically neutral and would
6 apply to all kind of technological protection
7 measures on the particular class of work.

8 So if it is unclear, then there seems
9 like there may be some sense of potential harm here.
10 Do you know for particular technologies -- we have
11 some particular types of technologies that were in
12 the market, maybe we (indistinguishable) then if
13 there's another question about the future, but when
14 we're talking about the (indistinguishable) as a
15 data shield, for instance, or a media code version
16 1, or a Sunny's Key to Audio, or in any one of
17 those, can you tell me whether it's a copy
18 protection or a access protection measure?

19 MR. MARKS: You know, Mr. Belinsky may
20 be in a better position than I am because I just am
21 not a technology person and don't know the specifics
22 of those technologies. I think the point is that
23 when you're proposing an exemption, you do have a
24 burden there, and whether this is a court of law or
25 not, it's a prima facie case that has to be made

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1 out, and that -- included in that is to demonstrate
2 that there is an access control and that access
3 control is problematic for some reason, or causing a
4 malfunction for (indistinguishable) rely on the
5 download type exemption or something
6 (indistinguishable).

7 MR. KASUNIC: Well, let's assume they've
8 satisfied me, and I think that they've passed the
9 burden in terms of showing that this is an access
10 control. Is there anything that you can offer on
11 the other side that when I'm balancing now, that
12 will lead me to believe otherwise?

13 MR. MARKS: Sitting here, I try, I
14 cannot. I would say, however, that even if you
15 assume that, they have not proven a case that
16 there's adverse impact. It is a diminimus impact.
17 125,000 disks, only nine of which that have been --
18 that includes (indistinguishable) technological
19 protection measure, even if you assume it's access.

20 There's no proof that its been, that
21 there's a malfunction in the access protection
22 measure. There's just no record even on that. But
23 there's certainly no substantial adverse impact
24 under the tests that have been set forth in the
25 evidence that's been presented.

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1 MR. KASUNIC: Well, that leads me to my
2 next question. Which is -- we have a situation
3 where there's -- we have at least 48 established --
4 48 or so, established complaints of problems --
5 identified problems with CD's currently, so, in
6 terms of actual harm of something, where people
7 aren't getting what they want, at least, there is
8 some record?

9 MR. MARKS: Again, that could be just a
10 manufacturing defect. The fact that somebody comes
11 in and files something and says, "I've had trouble
12 playing this disk," may have nothing to do with --
13 there's no nexus.

14 MR. KASUNIC: Well, there are certain
15 CD's, at least, where there seem to have been
16 recurring problems on them, so in terms of proof,
17 (indistinguishable) disk, not all of them, anyway,
18 are just random problems, but there are recurring
19 problems that appear to be recurring in some of
20 those comments.

21 MR. MARKS: I'm not sure what of the
22 three actually occur or not.

23 MR. KASUNIC: But beyond that, isn't
24 safe to assume that although this is obviously for a
25 legitimate purpose, (indistinguishable) controlling

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1 massive unauthorized file trading, that these are
2 being put into the market, won't these protection
3 efforts invariably continue to cause problems on
4 many legacy systems and devices that are out there?

5 There's an extraordinary number of
6 systems and devices that it's going to be very
7 difficult to have full compatibility with down the
8 road when there are many different kind of possible
9 protection systems that will be tried. Isn't it
10 likely that more problems are going to occur, and
11 that at least some of those will be related to a
12 causally related to the technological protection?

13 MR. MARKS: You mean with these
14 particular disks?

15 MR. KASUNIC: No, I'm talking about into
16 the future.

17 MR. MARKS: No, I don't think you can
18 draw that conclusion, because it's entirely
19 speculative to conclude that the technology, if that
20 were used, on these nine disks, are ever going to be
21 used again.

22 MR. KASUNIC: No, I'm not saying on
23 those nine disks, I'm saying any kind of technology
24 that will be used in the future. Isn't it going to
25 be likely that there are going to be some problems

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1 with the many types of legacy systems out there,
2 that you're not going to have full compatibility
3 with everything?

4 MR. MARKS: I don't believe you can
5 conclude that. I think it depends on the technology
6 that will be used. And we just don't know what that
7 technology is today because there are different
8 companies, like Mr. Belinsky's company that are
9 trying to you know, market very good technologies,
10 and different content owners will make different
11 decisions about what technologies to use.

12 MR. KASUNIC: Okay. My last question
13 for you. What harm would an exemption cause in this
14 situation if it was just for an individual being
15 able to create interoperability or compatibility
16 with their device?

17 Given the limitation of that, the
18 possibility that this may occur anyway, whether
19 there's an exemption or not, people taking this,
20 what harm of letting people just be able to play
21 what they have purchased on a device that where
22 there is a reasonable relationship -- we're not
23 talking about playing this on the toaster, but we
24 are talking about playing it on with the reasonable
25 consumer expectation of playing it on some kind of a

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1 CD player?

2 MR. MARKS: Well, I think that, for the
3 most part, those consumers are able to do that. Of
4 the nine, some had been re-released in unprotected
5 form. Probably all of the rest are available on new
6 types of services, like the new Apple service and
7 downloading format, and could be downloaded and
8 played on that very device that they're trying to
9 play the disk on. So I don't think that there's any
10 harm on the other side.

11 I think the harm to our side in the very
12 broad exemption that's been proposed, is that by
13 broadly exempting all CD -- so-called CD copy-
14 protected disks that have access problems, you are
15 interfering with the ability to develop the new
16 technologies that will be used in the future. Which
17 is directly contrary to Congressional intent and
18 directly harmful to the industry's ability to market
19 and to you know, defeat piracy.

20 MR. KASUNIC: If I could just ask one
21 question, (indistinguishable) don't feel left out,
22 that of the EFF and IP Justice. Isn't it likely
23 that the market will correct the situation?

24 It's accepted that these malfunctions or
25 whatever they are, were not necessarily planned, but

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1 are just the early action with the many types of
2 systems out there, and legacy systems existing.
3 Isn't it likely that the recording industry will try
4 to you know, continue to accommodate and make this
5 less, make any problems that are occurring less
6 likely into the future?

7 And wouldn't a market solution to this
8 be preferable to just giving individuals who have
9 the ability to do so, the ability to circumvent?

10 MS. HINZE: I think that's a good
11 question. As I said, I -- EFF's position is that we
12 believe that this is an unintended consequence, so
13 it's a fair question to ask whether or not we might
14 expect to see this ameliorated. I have two
15 responses. One is even if it was unintended, the
16 existing situation is one where consumers can't play
17 things on devices that presumably they were intended
18 to be able to play them on. For instance, the case
19 of multi-session CD's.

20 So even if it wasn't intended, there's
21 currently a problem. Whether or not a market, the
22 market may be able to address that in the future is,
23 I think -- it's difficult for me to speculate on
24 that.

25 Obviously, if it's the intent of

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1 copyright owners to, as they say, to have their work
2 available in as many different formats and as many
3 different devices as possible, you would expect to
4 see that. But the situation that we currently see
5 is that, even if it weren't intended, there's
6 already a significant impact on consumers. There
7 will continue to be a significant impact on
8 consumers for the legacy devices.

9 Even if I am to speculate and look into
10 the future and say, "Perhaps the copy protection
11 technologies will in the future somehow improve
12 their compatibility with a whole range of different
13 devices, and magically those problems will go away,"
14 there will continue to be a set of disks that are in
15 circulation and there will continue to be a set of
16 playback devices that will potentially have issues
17 with those disks. That's not going to go away.

18 I guess I would also like to address the
19 burden here. I've been told that EFF is wrong to
20 speculate, has speculated in the future that there
21 will be harm. What seems likely is that there will
22 be a large volume of copy-protected CD's being
23 released in the United States shortly. That much is
24 clear. It seems likely there will be a significant
25 time lag before any changes exist to the copy

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1 protection technology that's currently being
2 released. It's clear that the current technology,
3 the current group of copy-protection technologies
4 have problems, and that they were unintended.

5 I can't see that the market in the short
6 term is going to be able to address the current
7 problems, and to the extent that the market is able
8 to address the problem going into the future, our
9 exemption would only apply where there is a
10 malfunction. So in terms of that, on the balance of
11 harm and burdens here, well, I would say that the
12 consumers are the ones here who are currently
13 bearing the burden of harm. They have purchased
14 something that they can't use on a device they
15 expect to be able to play it back on.

16 The exemption we're proposing would
17 allow them to play it back, only to the extent that
18 it malfunctions. To the extent that the market is
19 able to ameliorate these problems in the future and
20 improve some of the compatibility issues, even if
21 that's technically possible, our exemption would
22 then not cover the situations where a device can
23 play back the purchased CD. So there is no harm in
24 granting the exemption from that point of view.
25 From the copyright owner's point of view, there will

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1 not be any significant loss from the point of view
2 of having the exemption granted.

3 MR. MARKS: I don't think there's any
4 basis to conclude that any copy-protected CD's that
5 are going to be released in the market in the near
6 future are going to be based on the same technology.
7 I just don't know how that statement could be made.
8 You know, Mr. Belinsky may have some information on
9 what kind of partnerships and deals his company has
10 done, but without seeing business plans about what's
11 being done, I just don't know how that statement can
12 be made. There's just no way, there's no evidence
13 for it.

14 MS. HINZE: For the sake of clarifying
15 the record, I don't believe I said that I understood
16 what the technologies in the future would be, or
17 that they would be based on the current
18 technologies. I was making a statement about the
19 current impact, and the statement -- my statement
20 about the future actually addressed the scope of our
21 exemption and whether or not it would apply in the
22 event that technologies were to improve and increase
23 compatibility.

24 I would just like to add that the --
25 again, refer to the paper that EFF included in the

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1 comments we submitted in December, which makes it
2 clear that the nature of the malfunctioning here is
3 quite complex. It's difficult to get a clear
4 picture of that, exactly what formats will fail on
5 exactly which devices.

6 As I said, it appears to be that these
7 technologies currently exploit differences between
8 the way the stand alone audio CD players work, and
9 multi-format players work. And to the extent that
10 we've seen multi-format players over take stand
11 alone CD players, it's more likely than not within
12 the next three years, there will be increasing
13 problems, because the playback errors -- that type
14 of problem from the point of view of the devices
15 will increase as people switch to these more modern
16 players. So, in terms of these speculations about
17 future harm, I think that should be taken into
18 account.

19 MR. MARKS: I think (indistinguishable)
20 actually be the exact opposite, which is that you
21 will see that .08 percent number go down as the
22 technology is improved. And along with you know,
23 the clear incentives for the content owners to be
24 providing a consumer friendly experience for their
25 buyers.

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1 MR. CARSON: Now that we have a consensus
2 --

3 MS. PETERS: You guys make it so easy
4 for us. I think David has some concluding
5 questions.

6 MR. CARSON: Okay. Let me start with,
7 I'm sorry. Is it Miss Hinz or Hinze?

8 MS. HINZE: I answer to both.

9 MR. CARSON: Preference? I would like to
10 accommodate you. You stated earlier, and it's in
11 your written comment as well, that assuming that
12 what we're dealing with here is a malfunctioning
13 copy control, there is uncertainty in the legal
14 community as to whether that constitutes
15 (indistinguishable) that controls access,
16 copyrighted works, correct?

17 MS. HINZE: Um-hmm.

18 MR. CARSON: And I know that in your
19 written comment you cited one article by Mr.
20 Halderman. I haven't looked at it yet, I apologize,
21 I will. But I mean, first of all, beyond that
22 article, any other sources for that statement that
23 there's uncertainty in the legal community?

24 MS. HINZE: I can't point to a specific
25 legal available source, but I've had numerous

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1 conversations with people who are well versed in the
2 history of Section 1201, and people who've been
3 involved in the debate about the interpretation of
4 the content scramble systems for digital versatile
5 disks and its joint nature as a merged, copy and
6 access control. I think it's --

7 MR. CARSON: This isn't a question of
8 merged copy and access control, you're not even
9 (indistinguishable) as that.

10 MS. HINZE: Sorry?

11 MR. CARSON: You're not even
12 (indistinguishable) this is a case of merged copy
13 and access control --

14 MS. HINZE: No --

15 MR. CARSON: You're saying this is a copy
16 control that inadvertently blocks access.

17 MS. HINZE: That's correct. I would
18 like to, I guess, make two points. One is in terms
19 of our understanding of how to characterize this
20 technology. We are partly handicapped by the fact
21 that there is no information out there.

22 As far as we can tell, there is no
23 application of a process, information or a treatment
24 with the authority of a copyright owner for us to
25 fall within -- for a copy protection technology that

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1 malfunctions to fall within the definition in
2 1201(a)(1)(3)(B) of a technology protection measure
3 that effectively controls access.

4 So in terms of a strict legal analysis,
5 I think part of the reason why there is uncertainty
6 is that people don't feel comfortable that they have
7 enough information to know how this technology is
8 operating. There is very little publicly available
9 information about exactly what is happening. As Mr.
10 Belinsky and Mr. Marks have pointed out, there are a
11 number of different technologies. There has been
12 some work done on each of those but it's like, by no
13 means comprehensive.

14 And as far as we can tell, our position
15 is that it doesn't appear to fall within the
16 definition, as I said, of "effectively controlling
17 access" because there doesn't seem to be an
18 application of a process, information on treatment.
19 But that is based on our limited understanding of
20 what information there is available publicly.

21 MR. CARSON: I guess, Mr. Marks, the
22 point I -- well, it's your burden whether you have
23 the information or not.

24 MS. HINZE: Well, and it --

25 MR. MARKS: Well, the only thing else I

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1 would point out is that there -- my understanding is
2 there are patent applications so those would
3 presumably be, you know, a good source of
4 information as to how the technology works.

5 MS. HINZE: When the patent issues.

6 MR.. MARKS: -- in this department.

7 What was that?

8 MS. HINZE: I said when the patent
9 issues.

10 MR. MARKS: When.

11 MR. CARSON: Now, Mr. Marks, you did
12 talk about the burden of proof and we'll go with --
13 I think we're in agreement at least somewhere along
14 the road you're talking about that we've already
15 said the burden is on the proponent of the exemption
16 but let's explore how far that goes.

17 If we're going to talk about burdens of
18 proofs and presumptions, Lord knows it's been a long
19 time since I've studied that but
20 (indistinguishable).

21 It's been awhile since I've even had to
22 apply the Rules of Evidence but I'm going to
23 give it a shot here. Isn't there a Rule of
24 Evidence that when evidence on a particular
25 issue is within the control of one of the

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1 parties, even if that party doesn't initially
2 have the burden, the finder of fact is
3 entitled to infer, from that party's failure
4 to come forward with any information
5 whatsoever when that information is totally
6 in that party's control, that if that
7 information were out it might be adverse to
8 the party who has control of it?

9 MR. MARKS: I'm not sure we're in
10 control. We didn't -- we're not the technology
11 companies.

12 MR. CARSON: But you are the people who
13 are putting the stuff out.

14 MR. MARKS: That's right but --

15 MR. CARSON: You don't know what they do
16 with it. You just tell them to protect it and they
17 protect it and you're happy?

18 MR. MARKS: Well, I -- you know, I don't
19 know the answer to your -- my -- I don't want to
20 tell you what grade I got in evidence so that would
21 help me explain why I can't answer that. But the
22 short answer is I don't recall the evidentiary
23 standards but, you know, the truth is I honestly
24 don't know to what extent we even have that
25 information about how the specific technology works

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1 anyway. But I don't know what else to say on that.

2 MR. CARSON: Okay. One final question
3 to the people on that side of the table, whether
4 we're talking about a copy protection -- well, let's
5 assume for the moment, because it really was
6 inspired by the EFF testimony.

7 Let's assume for the moment we're
8 talking about a copy protection that just is
9 screwing up and restricting access unintentionally.
10 Let's assume that. Based upon the experience you're
11 familiar with, what would one have to do in order to
12 be able to make one of those CD's that has the
13 malfunctioning copy protection work on the
14 particular player that you want to play it on but
15 you can't play it on?

16 MS. HINZE: This comes not from personal
17 experience like I said, I'm a lawyer. However, I
18 would hate to be at risk of violating 1201(a)(1)
19 since I've not actually heard a clear statement from
20 the other side of the room that they wouldn't sue
21 consumers for attempting to circumvent what may
22 ostensibly be a copy protection measure. Like I've
23 just said, it's not personal experience.

24 But however, my understanding is that it
25 works fairly well to use a felt tip marker to mark

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1 around the end of the table of contents. Partly
2 this is an issue about correct data being put into
3 the table of contents is my understanding on the
4 technological side of how this works. Remember you
5 have -- when we have a CD which has copy protection
6 and it's a multi-session CD for instance, on many of
7 these, it is visible that there is a second session.

8 MR. BUCHOLZ: There's a thin line
9 between -- demarcating the two sessions, the first
10 and second session.

11 MR. CARSON: Can't see it from here but
12 we'll take your word for it.

13 MR. BUCHOLZ: Sure. We can show you
14 after the --

15 MS. HINZE: We'll be happy to show you
16 that. But basically, it's clear where the second
17 session starts. And apparently, it is possible to
18 use a felt tip marker to mark out the table of
19 contents on the section that isn't showing. And
20 what that does is it basically prevents the error
21 from being introduced into the CD reader when it's
22 trying to read the table of contents. So it will
23 see the second session which -- Well, it will see
24 the first -- it will see the session that it can't
25 currently play. That's one way of doing it.

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1 Essentially the same remedy happens if you use
2 masking tape to -- to again to obscure the session
3 that won't play.

4 MR. CARSON: All right. this is the
5 rather celebrate case we all read about a few months
6 ago, I guess, about how you can get by this with a
7 felt tip marker. Am I correct?

8 MS. HINZE: Right, right.

9 MR. CARSON: Is it safe to assume in
10 light of that experience, that we're probably not
11 going to be seeing that particular technology in the
12 marketplace again given now everyone knows how easy
13 it is to get around it?

14 MS. HINZE: I think that would be a
15 question for Mr. Belinsky rather than me.

16 MR. CARSON: Okay, fine. Let's
17 embarrass him.

18 MR. BELINSKI: Oh, this is crazy. I
19 believe that the disk you have and certainly the
20 Magic Marker approach worked in one version of
21 Sony's key to audio technology. I can tell you for
22 sure that that doesn't work with our technology.
23 It's not a very effective technology for that to be
24 the circumvention method.

25 And I can't speak to what Sony's doing

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1 today but I can speak to the fact that that's
2 absolutely not a generalize-able approach that would
3 render our copy protection approach, our copy
4 protection technology inapplicable. So I think that
5 is one example that it was highly celebrated in the
6 press, as you pointed out, and I don't know of any
7 labels, any music companies, not even Sony that
8 continued with that technology.

9 MR. CARSON: Is there any reason to
10 believe that Sony would continue to market that
11 particular technology given the publicity as to how
12 easy it is to get past it?

13 MS. HINZE: Well, again, I obviously
14 can't speak for the --

15 MR. CARSON: Let's use common sense here
16 for a moment.

17 MS. HINZE: Then common sense would say
18 no to that. I mean I would --

19 MR. CARSON: So should we conclude that
20 it's likely that it's likely that's going to be
21 happening in the next three years?

22 MS. HINZE: The -- the --

23 MR. CARSON: That particular
24 technology's going to be deployed?

25 MS. HINZE: You know, I obviously can't

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1 speak on behalf of the technology companies. Common
2 sense would suggest that that particular technology
3 will presumably morph into something a little bit
4 more secure.

5 However, I think the general principle
6 is that there will be -- there will be copy-
7 protected CD's in the future and the technologies
8 will have -- it will be -- there will be a
9 possibility that, for instance, there will be tools
10 available. Obviously, this proceeding can't
11 actually address tools and I'm aware of the
12 limitations of what a the Copyright Office can do in
13 this hearing process.

14 The existence of tools that may be
15 available to assist consumers to circumvent should
16 an exemption be granted and presumably needed, based
17 on the interpretation of 1201(a)(1). It's quite
18 possible that in the future software -- that
19 software companies may, for instance, have incentive
20 for improving the software players of CD ROMs, may
21 have the incentive for also producing more
22 compatible drivers for their players. There's a
23 range of different way that this problem might be a
24 meliorated.

25 It's difficult for me to speculate about

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1 what the tools, that people might use to use them,
2 because as everyone is aware, that the existence of
3 tools or the manufacturing and trafficking in tools,
4 unless they don't fit the three conditions, would
5 violate 1201(a) (2). So the fact that I'm having
6 trouble speculating about how this might work in
7 practice, I don't think actually says anything about
8 arguing about whether or not the exemption should be
9 granted.

10 MR. CARSON: Okay. Let me come
11 (indistinguishable) may because the point of my
12 question really had nothing to do with felt tip
13 markers. It had to do with whether the prohibition
14 on circumventing technological measure that control
15 access is likely to be preventing people from
16 engaging in non-infringing uses over the next three
17 years.

18 And part and parcel of that analysis,
19 seems to me, has to be you're making the case to us
20 that in order to be able to play those CD's on the
21 player you want to play them on, you need to
22 circumvent an access control and there's a way to
23 circumvent an access control that will let you do
24 that.

25 If there isn't, then there's no point in

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1 talking about this. So what I'm really trying to
2 get at is do you have any information that, by
3 circumventing a technological measure that controls
4 access, you will be able to play those copy-
5 protected CD's on players that, at the moment, can't
6 play them?

7 MS. HINZE: Do I have any evidence at
8 all, essentially, is that?

9 MR. CARSON: Do you have any information
10 on -- I don't care about tools. A method, a way.
11 Is this a futile -- if we gave you this exemption,
12 would it be a totally futile act because
13 circumventing an access control wouldn't do you any
14 good?

15 MS. HINZE: Right. I think I understand
16 the nature of the question. As I understand it,
17 there is software that currently is available that
18 allows people to -- that would allow people to make
19 use of this exemption.

20 MR. CARSON: It may or may not violate
21 the 1201(a)(2) is what you're saying I gather.

22 MS. HINZE: I appreciate that but from
23 the point of view of answering your question --

24 MR. CARSON: No, no. What I'm really
25 trying to get at is --

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1 MS. HINZE: Can I cite you examples of
2 software that doesn't violate 1201(a)(2)?

3 MR. CARSON: No, no. I don't even care
4 about that necessarily but let's assume -- let's put
5 that aside for the moment. The software you're
6 talking about, the way it works is by circumventing
7 an access control or circumventing some kind of
8 technological protection measure?

9 MS. HINZE: I'm not sure. I guess, one,
10 that would depend on whether or not this is an
11 access measure, which we appear not to have any
12 agreement about. But two, I'm not personally aware.
13 I just understand that there are tools that --

14 MR. CARSON: Okay. Well, let's ask it
15 another way then. Since the whole premise of your
16 case here is that a malfunctioning copy control or a
17 hyperactive copy control is also serving to block
18 access, whether intended or not, is the way -- do we
19 know, do you know that the way to make that CD play
20 on a particular device is to overcome the copy
21 control? To circumvent the copy control? Is that
22 the solution or is it not?

23 MS. HINZE: Yeah. I think it's a
24 technology by technology thing. As I understand it
25 there are distinct differences between the ways that

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1 the three main -- four main technology copy
2 protection technologies work and I'm not sure that I
3 know the answer across each of the four of those.

4 MR. CARSON: So you're not sure whether
5 we can do you any good, in other words; is that
6 right or --

7 MS. HINZE: I think that -- I think -- I
8 guess my understanding of this is that people would
9 have an incentive for creating tools that wouldn't
10 violate 1201(a)(2) but could be used for exactly
11 this purpose, if they were not, the overhanging
12 threat of a secondary circumvention liability. To
13 the extent that tools currently existing can be used
14 for the current technologies that's largely because
15 the tools have been found by people who have
16 arduously looked into this.

17 People are less inclined at the moment,
18 to arduously look into this because they worry about
19 violating an access protection measure and therefore
20 violating 1201(a)(1). If there were an exemption
21 granted, I think that the flow-on effect would be
22 that you would actually see the generation of tools
23 that don't violate 1201(a)(2), that might actually
24 serve to accommodate some of these purposes.

25 MR. MARKS: Well, then the tools that

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1 exist today, do they address the copy controls or
2 the access controls? I mean I think that that's a
3 key part of Mr. Carson's question as well as -- I
4 think that --

5 MR. CARSON: Well, not necessarily
6 because one of the premises is that you can't tell
7 the different between a copy control and an access
8 control or rather that a copy control is acting as
9 an access control. To buy her case we've got to
10 assume that the copy control is also operating as an
11 access control whether intended as such or not.
12 Right?

13 MS. HINZE: I'd have to think a little
14 harder about that. I mean I think that's
15 essentially what we're saying but I'm not sure about
16 the second part of your question. I would have to
17 think about whether you have to -- for instance,
18 there might logically be a space where you could --
19 if an exemption were granted you could come up with
20 some sort of software that might, for instance,
21 allow you to potentially circumvent the access part
22 but not the copy part.

23 I don't know if that's a -- the reason
24 I'm looking puzzled is I'm not sure,
25 technologically, if that's possible. I don't know

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1 the extent to which they merged as a concept and
2 whether it might be possible to have some mechanism
3 for circumventing one without the other. I think
4 that would be something that would be worked out by
5 people who have a better sense of how these four
6 individual or however many different types of copy
7 protection technologies actually work. I think it's
8 difficult to speculate in the general, in the
9 abstract here.

10 MR. CARSON: Okay. Mr. Bucholz, did you
11 have anything else to say?

12 MR. BUCHOLZ: No, no. I'm fine. Thank
13 you.

14 MS. PETERS: Mr. Belinsky, shed any
15 light on this?

16 MR. BELINSKY: A couple of things.
17 First of all, we're experts at the technology and
18 we're not as expert at mapping the pieces of the
19 technology to the specific definitions in the law so
20 I don't want to go onto thin ice legally and say
21 something that may or may not be correct.

22 But as I do understand the provisions
23 with respect to copy control system having
24 information applied to it to the presence or absence
25 of which controls whether a copy can be made or not,

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1 the technology that we're bringing to market now, in
2 particular, with the second section capability that
3 I described certainly includes that feature or that
4 attribute, where there's information required to,
5 for example, to move the music from the CD to the
6 hard disk so you can play it on the computer without
7 the CD present.

8 There's information required to be
9 present to validate that you're moving it from an
10 original disk to the post-concussion. There's also
11 information required to be present when you want to
12 move it off the computer to a portable device to go
13 jogging with your music. So as I understand the
14 interaction between the technology and the
15 provisions of the law, that would qualify as the
16 technological protection. I mean -- sorry -- as a
17 copy control measure.

18 But it's also the aspect of in the
19 context of the two sections taken together, the
20 information is added to the first section so that
21 the personal computer doesn't see it. And that's
22 where I go onto complete thin ice legally as to is
23 that an access control measure as relates to just
24 the first section or is it because the two sections
25 together is really what, from our perspective,

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1 constitutes the copy-protected CD.

2 Is that just additional information --
3 and we do add additional information to the first
4 section, the so-called red book -- as part of the
5 overall copy protection and technology. That could
6 also look like just another example where extra
7 information is added in so I'm really not capable of
8 parsing it in any more level of detail than that to
9 shed any light on is it copy control, is it access
10 control.

11 My guess is, depending on which prism
12 you looked at it through, you know, and if you
13 wanted to make very detailed arguments you might be
14 able to sustain both arguments at any one point
15 would be my guess, depending on how narrowly you
16 looked at it and whether you looked at the two
17 sections together or just the first section or just
18 the second section. It's just hard for me to say,
19 not being -- not being a legal scholar. That's the
20 best light I can shed on how the technology actually
21 works.

22 MS. PETERS: Maybe after we read some of
23 the papers we may have some more questions.

24 MR. CARSON: Good chance.

25 MS. PETERS: Good chance. Okay. This

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1 was a long session but thank you very much, all of
2 you. We appreciate your being here and helping us
3 try to figure out how we're going to handle all the
4 exemptions that have been requested. So I think
5 you'll hear from us and we'll be back tomorrow
6 morning at 9:00 o'clock, right? Right.

7 (Whereupon, the hearing in the above-
8 entitled matter was adjourned at 4:50 p.m.)
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