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

THURSDAY,
MAY 15, 2003

The hearing was held at 9:00 a.m. in room 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
WITNESSES:

ROBIN GROSS  
IP Justice

MIA GARLICK  
IP Justice

STEVE METALITZ  
Joint Reply Commenters

BILL KREPICK  
Macrovision

DEAN MARKS  
AOL Time Warner

GWEN HINZE  
Electronic Frontier Foundation

REN BUCHOLZ  
Electronic Frontier Foundation

ERNEST MILLER  
Information Society Project,  
Yale LS

KATHY GARMEZY  
DGA
**SESSION ONE: AUDIOVISUAL WORKS AND MOTION PICTURES:**

**DVD - Tethered/alternative platforms**

**DVD - Non-infringing uses**

<table>
<thead>
<tr>
<th>Organization</th>
<th>Name</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>IP JUSTICE</td>
<td>Mia Garlick</td>
<td>7</td>
</tr>
<tr>
<td>ELECTRONIC FRONTIER FOUNDATION</td>
<td>Gwen Hinze</td>
<td>14</td>
</tr>
<tr>
<td>MACROVISION</td>
<td>Bill Krepick</td>
<td>26</td>
</tr>
<tr>
<td>AOL TIME WARNER</td>
<td>Dean Marks</td>
<td>40</td>
</tr>
<tr>
<td>JOINT REPLY COMMENTERS</td>
<td>Steve Metalitz</td>
<td>44</td>
</tr>
<tr>
<td>Questions</td>
<td></td>
<td>50</td>
</tr>
</tbody>
</table>

**SESSION TWO: AUDIOVISUAL WORKS AND MOTION PICTURES:**

<table>
<thead>
<tr>
<th>Organization</th>
<th>Name</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ELECTRONIC FRONTIER FOUNDATION</td>
<td>Gwen Hinze</td>
<td>148</td>
</tr>
<tr>
<td>INFORMATION SOCIETY PROJECT, YALE LS</td>
<td>Ernest Miller</td>
<td>157</td>
</tr>
<tr>
<td>DIRECTORS GUILD OF AMERICA</td>
<td>Kathy Garmezy</td>
<td>171</td>
</tr>
<tr>
<td>AOL TIME WARNER</td>
<td>Dean Marks</td>
<td>179</td>
</tr>
<tr>
<td>JOINT REPLY COMMENTERS</td>
<td>Steve Metalitz</td>
<td>181</td>
</tr>
<tr>
<td>Questions</td>
<td></td>
<td>187</td>
</tr>
</tbody>
</table>

**SESSION THREE: AUDIOVISUAL WORKS AND MOTION PICTURES:**

<table>
<thead>
<tr>
<th>Organization</th>
<th>Name</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ELECTRONIC FRONTIER FOUNDATION</td>
<td>Gwen Hinze</td>
<td>262</td>
</tr>
<tr>
<td>IP JUSTICE</td>
<td>Robin Gross</td>
<td>275</td>
</tr>
<tr>
<td></td>
<td>Mia Garlick</td>
<td></td>
</tr>
<tr>
<td>AOL TIME WARNER</td>
<td>Dean Marks</td>
<td>281</td>
</tr>
<tr>
<td>JOINT REPLY COMMENTERS</td>
<td>Steve Metalitz</td>
<td>278</td>
</tr>
<tr>
<td>Questions</td>
<td></td>
<td>298</td>
</tr>
</tbody>
</table>
MS. PETERS: Good morning. I'm Marybeth Peters, the Register of Copyrights, and I would like to welcome everyone to this fifth and last day of hearings in the Section 1201 Anti-Circumvention Rulemaking.

As many of you know, the purpose of the rulemaking proceeding is to determine whether there are any particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses if they are prohibited from circumventing technological measures that control access.

Today there are three sessions and the very first one will look at audiovisual works and motion pictures. Then we'll go to another part of audiovisual works and motion pictures where we look at public domain, ancillary, and sole source material. We'll end up with region coding.

I think all of you know that the reply comments and hearing testimony and any questions that follow it will form the basis of the evidence in this rulemaking which in consultation with the Assistant Secretary for Communications and information of the
I probably should point out that Jeff Joyner, who is an attorney with the National Telecommunications and Information Administration, is here and he’s part of this process. Mike Hughes is an attorney for the General Counsel of the Library of Congress is here and he, too, will play a role in this process when the Library reviews my recommendation.

The librarian has to make the determination by October 28th. He will have to determine whether or not there will be any exceptions against circumvention during the next three-year period which is October 28, 2003, through October 28, 2006.

The entire record is posted on the Copyright Office websites and that will include the transcripts of all of the hearings. The transcripts go up about one week after each hearing. They will go up uncorrected but each witness will have the opportunity to correct and then we will correct what is up on our website.

Let me introduce the rest of the Copyright Office panel before I go further. To my left is David Carson, our General Counsel. To David's left is Steve
Tepp who is Policy Planning Adviser in the Office of Policy and International Affairs. To my right is Rob Kasunic who is Senior Attorney Adviser in the Office of the General Counsel. To his right is Charlotte Douglass, Principal Legal Adviser in the Office of the General Counsel.

Our goal is to have each panel to be divided into three parts where first you present your testimony. Secondly we ask questions and then if any of you have questions of each other and they have not arisen, then you will have an opportunity to do that.

Hopefully the questions will be difficult and they will be equally difficult for everybody. You should not read anything into any particular question. You should not read anything into the tone of the voice or the facial expression. We have made up our minds about nothing. We are trying to scare you. No.

The whole purpose is to get as much evidence as we can on the record so that we can go back and reflect.

One of the things I want to say is these microphones may be misleading. These microphones lead to the person who is recording the transcript. They do not project voices out so each of you needs to speak loudly so that the people behind you can hear what is being said. If I see them straining, I'll
just go, "Raise your voice."

The first panel is looking at DVDs that are tethered, looking at alternative platforms, and some non-infringing uses. The panel is made up of Robin Gross of IP Justice, MIA Garlick if IP Justice, Gwen Hinze and Ren Bucholz of Electronic Frontier Foundation.

On this side of the table we have Bill Krepick of Macrovision, Dean Marks of AOL Time Warner, and Steve Metalitz. If you were here, you saw him a lot yesterday. He is representing many copyright owners and his comment is known as the joint reply comment.

Let's start with the proponents and let's start with IP Justice. I don't know how you're going to divide it up.

MS. GROSS: Mia will deliver the testimony.

MS. PETERS: Okay. Good.

MS. GARLICK: Good morning. IP Justice welcomes this opportunity to testify to the Copyright Office about the adverse impacts Americans are experiencing in their ability to enjoy DVDs in non-infringing ways.

The cause of this adverse impact is the
access control technology employed by the movie industry to DVDs. The magnitude of this harm warrants the recommendation by the Copyright Office over the exemptions proposed by IP Justice in its submitted comments to permit circumvention in order to view a DVD on an unsupported player.

We are mindful of the reasons given in the last rulemaking for rejecting any exemptions in relation to DVDs. IP Justice, therefore, wishes to emphasize four important procedural factors in relation to this proposed exemption. These procedural matters are important because they shape the substantive findings of the rulemaking.

First, we wish to remind the Copyright Office that it's responsibility is to users and not to copyright owners. Congress introduced the anti-circumvention measures to encourage copyright owners to make their works available digitally or, in the words of the last rulemaking, the measures were intended to be used for facilitating.

The responsibility of the Copyright Office in this rulemaking is not to repeat Congress' logic but to protect users and ensure access, not availability of protected works such as DVDs. This did not occur in the first rulemaking in 2000. In
that rulemaking the Copyright Office gave undue preference to the interest of copyright owners and in doing so improperly reconsidered the interest of copyright owners.

Second, the structure of this rulemaking as interpreted by the Copyright Office effectively precludes it from achieving its purpose. The Copyright Office insists that the exemptions be defined according to class of work. Adequate protection of user rights requires that the exemptions be dropped with reference to the type of user and the circumstances of use.

For example, if a person watches a DVD at home, they are not infringing the copyright owners public performance right. But when they watch a movie in a cinema, the public performance right is implicated.

Third, the Copyright Office has set an unduly high evidentiary standard given the nature of the harm it is supposed to protect against. This led to one of the Copyright Office's conclusions in the first rulemaking that all allegations of harm were hypothetical in nature.

However, the adverse effects experienced by users are likely of their very nature to be
individual and discrete, difficult to measure and quantifying. This does not detract from the existence of such harm and it does mean that the Copyright Office should accept as sufficient evidence news reports and principled analyses of the likely harm which take into account the interaction of the circumvention measures with the limitations and exceptions for users under traditional copyright principles.

It also means that the Copyright Office should give the comments and testimony supplied by ordinary individuals as much, if not more, weight as the views of corporations.

IP Justice urges the Copyright Office to be mindful of the context in which this rulemaking occurs. This is important in three respects. To begin with, the context of this rulemaking is very different to the first.

Then the prohibition on access circumvention had not yet taken effect. Three years later restricted access DVD technology is more prevalent. Thus, the extent of the impact on users must be greater because the anti-circumvention measures are broader than copyright.

The second important factor the Copyright
Office should take account of is that the impact of any exemption will necessarily be limited. Acts of circumvention of access controls are by their nature inherently noncommercial and personal. Anyone who seeks to take advantage of an exempted act of access circumvention must be highly technically literate.

A person cannot require a circumvention device or service from a third party, nor make it available to someone else because to do so will infringe the anti-trafficking provisions of Section 1201.

This means that only a limited number of people are likely to be able to avail themselves of any of the exemptions. Thus, the impact on the copyright owner of any exemption will be limited.

Third, we would like to remind the Copyright Office that despite Hollywood's promise during the last rulemaking that Linux DVD player would be forthcoming, it has three years later proved to be vaporware. This means that a significant and growing proportion of the population are unable to access the DVDs they have purchased.

Against this background, IP Justice makes the following four substantive comments. First, we provided evidence in our submitted comments of the
need to bypass an access control in order to view a
DVD on an unlicensed system.

Second, the Copyright Office held in the
last rulemaking that users do not enjoy an unqualified
right to access works on a particular machine or
device. This holding was inverted and misguided. It
is the copyright owners who do not have the right to
dictate technology design. Technology is a stable
article of commerce.

Indeed, Section 1201(c)(3) clearly states
that the anti-circumvention provisions do not require
the design of any particular technological device.
Users have a right to choose between technology
platforms. As a result, competition can occur among
technology providers to provide the best design, a
finding which restricts consumer choice, impermissibly
extends the copyright owner's monopoly.

Therefore, the Copyright Office cannot and
should not dismiss evidence of user harm based on
technology preference. It has never been the lure of
this country that copyright creates a right to dictate
the technology choices to the consumer.

DVDs are the personal property of their
owners and use restrictions by the movie studios
interfere with the owner's ability to use her property
in lawful ways. It is not the burden of the DVD owner
to prove that she has the right to view a film she has
paid for. On the contrary, any impingements upon the
rights of the owner to lawful enjoyment of her
property must be justified by the law.

Third, in the last rulemaking the
Copyright Office incorrectly equated works available
in DVD format to those which are in analog format. In
doing so, the Copyright Office ignored the innovation
which digital technology makes possible. DVDs are not
the same as VHS.

DVDs consist of numerous features that are
not conceivable in analog format. They may contain
audio in different languages or subtitles, the ability
to jump between scenes, and additional commentary or
information by actors and directors.

Furthermore, the movie studios have little
incentive to continue to distribute VHS tapes in the
future when DVDs give them total control over what the
individual can do with the movie.

Fourth, and finally, there is no evidence
that user freedom of platform choice harms DVD
copyright owners. A person who wishes to view a DVD
on a platform of their choice is still a legitimate
consumer. They must purchase the DVD prior to viewing
it.

The copyright owner is still compensated for that DVD. Tethering, however, allows a copyright owner to extend the monopoly and extract greater monopoly rents through its licensing of DVD software and hardware.

This is the reason why copyright owners are reluctant to give consumers choice in their technology platform. This is the reason why the movie studio is content to ignore the platform preferences of legitimate consumers.

The Copyright Office's duty is to the interest of consumers including those who wish to enjoy the DVDs they purchase on Linux or any independently developed and, thus, unlicensed DVD player. Thank you.

MS. PETERS: Okay. Thank you.

Gwen.

MS. HINZE: Thank you for the opportunity to testify at today's hearings. In my comments this morning I would like to firstly talk about the scope of the exemption that EFF has sought. Secondly, to address some of the comments that have been made in opposition to the exemption that we have sought in the joint comments.
The Electronic Frontier Foundation has proposed an exemption for audiovisual works released on digital versatile disks that contain access control measures that interfere with the ability to control private performance, including the ability to skip or fast forward through promotional material.

We are seeking an exemption to allow DVD owners to eliminate un-fastforwardable advertisements or, in the alternative, to take all necessary technical steps to defeat the user operation, or UOP, blocking feature to permit consumers to fast forward through these commercials on DVD content that they have lawfully acquired.

Copyright owners can use the UOP blocking technology to mark certain portions of a DVD in a way that disables the fast forward functionality of a user's DVD player when the DVD is inserted into a user's player.

This prevents viewers from fast forwarding through that content. Most, if not all, DVD CCA licensed DVD players respond to UOP blocking measures incorporated into DVDs because DVD manufacturers are required to produce DVD players that detect and respond to UOP blocking commands as a condition of obtaining a license from the DVD Format/Logo Licensing
Corporation.

The use of this technology by copyright owners to create zones of a DVD which consumers cannot fast forward through clearly impedes a non-infringing use by a consumer. Copyright owners do not enjoy any exclusive rights over private performance in a consumer's living room.

It is not one of the exclusive rights granted to copyright owners under Section 106 of the Copyright statute. A consumer does not infringe any copyright right when she uses the fast forward function on a DVD player to fast forward through commercials on a DVD.

However, copyright owners are effectively able to use UOP blocking to control what content viewers watch prior to a feature presentation and, therefore, can place a restriction on private performance.

This restriction on private playback is implemented through a set of interlocking licensing schemes for DVD players which in turn are premised on the use of an access control measure, CSS or content scramble system.

The use of the UOP blocking in this way also effectively removes the long-established
limitation on copyright owner's distribution right in
the first sale doctrine recognized in Section 109 of
the Copyright statute.

There is nothing in the legislative
history of the Digital Millennium Copyright Act that
indicates that Congress intended to upset the
historical Copyright balance struck by Congress in the
Copyright statute or specifically to expand Section
106 or override Section 109.

An exemption is justified here to remove
this limitation on consumer's private performance and
to prevent copyright owners from using an access
control and the legal sanctions of Section 1201 to
control consumers' lawful uses such as fast forwarding
that fall entirely outside copyright owner's exclusive
rights.

The opponents of this exemption have made
three main arguments. First, the joint comments
submitted by the MPAA and the other joint commenters
claim that EFF has failed to meet the burden of
establishing that the use of this technology has had
a substantial adverse impact on consumers' non-
infringing use.

The joint commenters argue that the fact
that we have identified, and I quote, "Only a handful
of titles” with such technology means that we have not met this burden and that any harm caused to consumers is a mere inconvenience.”

I have three comments in response. First, I would like to address the standard of proof required. Unlike the motion picture industry represented here, it is not possible for consumers to provide comprehensive figures for the numbers of DVDs released in the United States which have UOP blocked for fast forwarding for two reasons.

First, affected DVDs are not labeled so a consumer can only learn that a DVD has blocked fast forwarding if he or she inserts it into a DVD player and is not able to fast forward.

Second, even if individual users are aware that a DVD contains content that cannot be fast forwarded through, there is no centralized place or method for recording and collecting this data.

It would be fundamentally inequitable to require consumers to identify every single title affected in order to meet the threshold burden in this proceeding. Such a standard would undermine Congress' intended purpose as stated in the Commerce Committee Report to provide a fail-safe mechanism to protect consumers' non-infringing uses.
In our view, it should be sufficient proof if the record contains evidence of a qualitative adverse impact on a user's ability to make a non-infringing use of a work and evidence that a number of DVD titles carry that feature.

Second, as to proof of current substantial adverse effect, the evidence on the record in this proceeding clearly establishes that it is not just a handful of titles that are affected. Sixty-six individual consumers submitted comments to the Copyright Office in this proceeding in support of our exemption. These comments describe their first-hand experience of encountering non-fast forwardable promotional material on over 40 popular titles.


An assessment of the substantial adverse impact on consumers requires consideration of both the number of titles which may contain UOP blocking, and the number of units of each of those titles that has
been sold to consumers.

All of the titles I mentioned are extremely popular and were high-volume sellers. According to the 2002 year-end sales report from Video Business in 2002 Monsters, Inc. sold 11.8 million units, Ice Age sold 7 million units, Lilo Stich sold 6.6 million units, Beauty and the Beast sold 4.3 million units. In total there are, just with those four titles alone, 29.7 million units in consumer households that may have been affected by the inability to fast-forward through commercial advertising. This is hardly an insignificant impact.

Third, in assessing the impact of these technological measures on non-infringing use, the nature of the harm to individual consumers must be taken into account. In the case of each of the 66 consumers who filed comments with the Copyright Office, the harm was significant and rose beyond a mere inconvenience.

They were simply not able to avoid the objectionable material. The harm was redoubled when they were not able to prevent their children from viewing the objectionable material on various Disney titles.

A number of parents commented that they...
had specifically purchased DVDs as a means of controlling their children's exposure to commercial advertising and were understandably upset when they couldn't fast forward through that material. That is not a mere inconvenience.

The second argument made our by opponents is that the problem is amenable to a market solution and, therefore, does not warrant granting an exemption. In support of this argument they have pointed out that 99 percent of the DVD releases of Tarzan, one of the titles referenced in EFF’s December comments, are no longer being released by Buena Vista Entertainment with unskippable commercials.

They also state that Buena Vista changed that three years ago in response to market feedback. Even if it is true that 99 percent of the Tarzan releases do not contain unskippable ads, which of course it's not possible for consumers to verify, there are 1 percent of the presumably millions of Tarzan DVDs sold which contain unskippable material.

In addition, the 66 comments filed by consumers in this proceeding indicate that the practice is still going on and has not stopped voluntarily. The bulk of the comments submitted list
For instance, commenters complained that on titles rented or purchased as recently as January 2003 including About A Boy, The Red Violin, Baby Dolittle's World of Animals, A Knight's Tale, and Universal's The Bourne Identity, they were not able to fast forward through promotional material. DVD publishers clearly have not decided to stop releasing DVDs with promotional material with disabled fast forwarding despite consumer’s complaints.

It is unclear that DVD publishers would have any business incentive to do so. It is precisely for this reason that we believe it is appropriate and justified for the Copyright Office and the Library of Congress to step in and grant an exemption to allow consumers to lawfully bypass non-fast forwardable commercials.

The third argument made by our opponents is that, and I quote, "It is far from clear that this feature is an access control within the meaning of the statute." Given that the DVD CCA claims trade secret protection for its multi-tiered licensing scheme, EFF has not been able to view the various license terms to determine exactly which technological protection measures on the DVDs are invoked in disabling fast
forward functionality on a user's DVD player.

The joint commenters' use of "this feature" presumably refers to UOP blocking. If so, it misconstrues our argument. We do not claim that UOP blocking is an access control and we have not sought an exemption to circumvent UOP blocking.

Our argument as explained in our submission is that given that UOP responsiveness appears to be a requirement for a DVD CCA licensed DVD player it would be impossible for a consumer to override the UOP blocking response on their DVD player without circumventing CSS.

This is because the interlocking set of licenses from DVD CCA and the other DVD licensing entities are premised on the use of CSS. It is the act of circumventing CSS that would put a consumer at risk of legal liability under Section 1201(a).

It's the position of the copyright owners in litigation in two law suits, the Remeirdes case in the 2nd Circuit, and as recently as March 2003 in the opposition papers filed in the 321 Studios case which is before the court this morning, that CSS is an access control for the purposes of Section 1201.

The fourth argument I would like to address is an argument about availability of works.
There is no credible evidence that the use of unskippable or un-fast forwardable advertising is integral to any business model that benefits the public. It is not at all clear that the ability to embed unskippable content meaningfully encourages the distribution of creative works that would not otherwise be made available.

A threat by copyright owners to withhold content if they are not able to insert mandatory commercials on DVDs seems implausible. If the exemption were granted copyright owners would continue to have the ability to insert ads but consumers who had the know how would be allowed to avoid viewing these.

Finally, I would like to emphasize that the exemption that EFF is seeking is narrow. It is narrowly tailored to permit consumers to make a non-infringing use of DVDs that they have lawfully acquired.

The exemption would only permit users to eliminate mandatory advertisements on DVDs or, alternatively, to take all necessary steps to defeat the UOP blocking response on a DVD player for the limited purpose of giving consumers the ability to fast forward through advertisements.
This exemption is not an invitation to copyright infringement. First, to the extent the copyright owners are concerned about potential copyright infringement they would still retain all rights and remedies currently available to them under copyright law including the ability to bring a suit for infringement.

Second, as Section 1201(a)(1)(D) makes clear the Librarian of Congress can only grant an exemption to permit non-infringing uses of a class of works. Finally, copyright owners can control the scope of any potential adverse effect of this exemption by limiting the number of DVD releases that contain unskippable content.

In balancing the harms here, any harm to copyright owners from granting this exemption is minimal since the exemption would only apply to a limited number of titles and since copyright owners could control the scope of impact of the exemption by limiting releases containing unskippable content.

By contrast, the present harm to consumers who have acquired these disks without any way to know prior to purchase of their unskippability, and without any way to restore control of their private non-infringing use, is substantial. Thank you.
MS. PETERS: Thank you. Let's go to this side of the table. Let's start with Mr. Krepick.

MR. KREPICK: Thanks very much. Macrovision Corporation, one of the world’s leading suppliers of copy protection and digital rights management technology, recommends that no exemptions be granted for any of the 50 requested submissions of copyrighted works under the DMCA, general ban on circumventing technologies and devices.

On February 20, 2003, we submitted a detailed statement to the Library of Congress Copyright Office outlining our opposition to any exemptions under Section 1201 of the DMCA. I would refer the rulemaking proceeding participants to that submission for additional detail.

Essentially we believe that the current anti-circumvention provisions of Section 1201 of the Act have not resulted in any material adverse effects on consumers, educational institutions, consumer electronics manufacturing, PC manufacturers, or any other class of content users or distributors. In fact, we believe the reverse has been true.

Since the enactment of the DMCA the unbridled success of the DVD business from both a hardware and software standpoint is the best proof
supporting both strong copyright laws and anti-
circumvention provisions to help content owners manage
and distribute their content in the new digital world
in which we operate.

As way of background, Macrovision has a
unique perspective on the subject matter as we are
neither a content owner nor a hardware manufacturer.
Rather, we are an independent technology supplier that
has developed flexible copy protection and digital
rights management solutions to help content owners
distribute their digital content in a secure manner
while retaining a variety of enabling features that
will allow consumer to time shift and space shift
content that has been acquired legitimately.

From our standpoint it is important to
note that those who are arguing to exempt certain
classes of copyright works under Section 1201 refer to
anti-copy protection trilogy of fair use, first sale
document, and the Sony Betamax case.

In aggregate, these conditions are
deposited as evidence that consumers have been granted
special entitlements, or even legal rights, to make
any number of copies of digital content or to play
digital content on any number of devices, or to use
any type of illegal circumvention technology to gain
access to content for their own purpose.

I am not a lawyer and I realize this anti-copy protection trilogy evokes a tremendous amount of case law discussion laced with plenty of emotion, but I believe that rules for licensing and distributing digital content entered a whole new realm in the 1990s and ushered in a brave new world of digital copyright law.

Some proponents of copyright anarchy suggest that copy protection, access control, digital rights management technology should be circumvented wherever consumers are not able to freely copy and distribute content with the same "ease and versatility that they have historically exercised and the rights they retain under copyright historical balance."

That's from some comments that IP Justice submitted on December 17th, 2002.

The problem with this misguided thinking is that is it based on the perception that copyrights historical balance is the same in the year 2003 as it was in 1990. This is just not the case. With tremendous technological advances in PCs, optical disk burner devices, digital compression technologies, and the Internet, the historical copyright balance is tremendously off kilter and the copyright owners are
at a severe disadvantage when it comes to controlling their digital content.

The digital world has eclipsed the old familiar analog copyright domain and exposed digital content to mass misappropriation. Sadly, many consumer activists and hardware manufacturers are blind to this new technological reality and have not accepted the fact that content owners need to license their content with more controls than they have in the past. Otherwise, they will not have any content to license in the future.

It should be clear that when a content owner licenses access to their digital content, they are allowed to establish rules for usage and those rules may cover certain types of format and playback devices. For example, DVD or video cassette, MP3, cable broadcast TV, video on demand, etc. And certain privileges with respect to public or private performance and certain provisions with respect to copying or not copying by way of example.

Before the advent of the Internet pier-to-pier file sharing services, ubiquitous optical disk burners, and video encoders that could easily transform and compress analog video to digital video, it was easy to say that if a consumer bought content,
they were at liberty to employ it with impunity.

This no longer pertains in the digital world since the digital domain is essentially without borders. Essentially, digital technology has exposed content owners to having their content ripped off literally and distributed by both professional pirates and casual consumer copiers.

In order to resolve this untenable situation, we believe that several steps must be taken. First of all, we believe there should be more cooperation from both the hardware and content community.

We believe there should be deployment of new generation of copy protection and digital rights management technologies. We believe that the copyright laws should be strengthened and legislation that support copyright protection and DRM technologies. Finally, that worldwide enforcement of such laws that encompass the physical world of optical disk and the online world of the Internet.

Through these hearings we believe the Copyright Office is in a unique position to independently gather data and assess the current state of affairs with respect to digital copyright statutes.

Moreover, we believe that you can send a
strong message to content owners, hardware manufacturers, consumers, and congressional representatives that we need to strengthen our digital copyright laws and not weaken them by giving out exemptions to bypass or circumvent various copy protection, access control, and digital rights management technologies.

We have read through the submittals including those from AOL Time Warner, DVD CCA, the Interactive Digital Software Association, the MPAA, RIAA, and the Software Information Industry Association. We find that these documents are well researched, well articulated reflecting views that are very much in line with our position.

We know that the Copyright Office is dealing with a tremendous volume of input but we encourage the Copyright Office to carefully consider these submissions before making a decision on the DMCA anti-circumvention exemptions.

We also encourage the Copyright Office to consider expanding its view and enroll in the broader area of copyright law and legislation and to help our various legislators formulate the appropriate copyright law amendments and digital media laws that favor stronger copyright protection reforms in order
to shift the copyright balance more toward the content owners and away from the consumer activists and the hardware manufacturers and the PC companies.

I'll talk a little bit about the four or five classes of copyright works that we have comments on. The first is copy protection for DVD. The argument is made that consumers have a right to make backup copies of DVDs for their own personal libraries.

The only precedent for this seems to stem from the early days of unreliable computer floppy disks when PC and software manufacturers realized that hardware and storage technology was somewhat unreliable. Fast forward now to the late 1990s and optical disk formats are extremely durable and reliable and there is little need for backup.

In the video markets Macrovision's copy protection technologies have been used on video cassettes dating back to the 1980s and on DVDs from the inception of the format in 1997.

Consumers have become quite accustomed to the fact that they not only have an FBI logo on the cassette or the DVD warning against unauthorized copying, but the vast majority of content has been copy protected and the consumers have not been allowed
to make any copies.

In the music space there has been no such copy protection available until last year so consumers came to believe they were entitled to make copies of all of their music CDs. The entitlement situation in music space has no legal basis and has simply grown out of the unchallenged consumer habits formed over time because of the absence of copy protection and DRM technology.

Macrovision's Mark Belinsky addressed copy protection in the music market yesterday in his testimony. We believe that whether one is discussing CDs for audio or DVDs for video, the content owners should be the ones who set the licensed terms for the use of their content. If they want to allow copies, they should be able to charge a higher price, or they should be able to simply prevent copying if they so choose.

If they want to allow content to be played on certain PCs or certain playback devices, they should have the right to set those license terms. If consumers don't want to buy the content under such restricted conditions, the free market mechanism will provide ample feedback to the content owner regarding the advisability of selling content under such
restricted terms. In short, we believe there is neither a need nor a legal precedent for any circumvention exemptions in the DVD area.

In the area of access controls, the arguments made in favor of allowing circumvention of access controls run very much parallel with the arguments to circumvent certain copy protection controls.

In these instances opponents argue that digital rights management technologies can be used to prevent consumers from gaining access to legitimately purchased content and other formats, or on other devices that they might own.

This argument cuts to the central issue of who owns the content and who has the right to license it with certain restrictions. The content owner may choose to license their video for DVD CSS format only, or they may well choose not to support it on MPEG 4 or the DVX format.

If the consumer cannot find a legitimate authorized version of the video in any format other than CSS, then the consumer should not have the right to transcode the video from CSS into MPEG 4 or DVX.

It is as simple as buying into the proposition that content owners have control over
their content with the right to license it in certain
formats for certain distribution channels, for certain
time windows, and for certain operating system
platforms. There is no valid reason to exempt anyone
under Section 1201 to circumvent any access control
technology.

In terms of tethered content, the argument
is made that there are legitimate needs to move
content from one PC to another and that copyright law
has never been construed to allow authors to prevent
a content owner's freedom to access lawfully purchased
content where and how they choose.

Arguments are made that consumers want to
play content, music or video, on other devices in the
car or other portable devices and somehow this want is
translated into an entitlement. Although this
transportability or space shifting, device shifting,
feature is desirable, content owners are not legally
bound to supply these features.

In fact, if they do supply these features,
they need assurance that the content will not be
shared with the world over pier-to-pier networks or
through unauthorized optical disk copies. Macrovision
has DRM technology that can allow the end user to move
content between devices, but the technology is
designed to give the content owner control over the contents licensing or usage rules.

If a content owner chooses to license content and to tether to a single PC, that is the content owner's right. If the consumer chooses not to buy the content with that restriction, then the consumers can look for competitive products with more liberal usage rules. The free market economy can dictate success.

Again, there is no reason to bypass the copyright law or to require an exemption under Section 1201. Content that is digitized and downloaded to a PC or other digital device exposes content owners to huge risks in ways unimaginable just five years ago. The copyright laws must be strengthened and not weakened in this regard.

The next comment I have is on stifling innovation. Consumer electronics and IT companies and consumer groups frequently make the point that strong copyright laws tend to stifle innovation because they essentially put manufacturers in a straight jacket with respect to innovation.

If this is so, why have sales of DVD hardware and DVD disks been the fastest growing consumer electronic success story ever? Certainly it
was not because there were copyright control handcuffs that restrained innovation for the manufacturers. The argument that copyright protection standards would stifle innovation is hollow to the core.

In fact, if anything the content community can argue that actions by copyright anarchists will do more to stifle innovation than the implementation of copyright protection and DRM technologies since the unabated proliferation of pier-to-pier file sharing, circumvention software, and unlicensed compression formats will force content owners to reduce investments in new programs due to revenue deterioration.

The hardware companies cannot continue to turn a blind eye toward the content owner's plight. They must be part of the solution and not part of the problem. The U.S. has the most robust content development business in the world accounting for some 5 percent of our gross domestic product. The harm to our society will come from weak or compromised digital copyright laws, not from stronger, more targeted laws.

A few comments on regional coding. The argument is made that consumers should be able to bypass regional controls that are built in the DVD and PC game console devices since consumers may want to
import games or videos from one region of the world and play them in a device that is designed to play content that is coded for another region.

Macrovision does not have technology in this space, but we are sympathetic to the content owner's plight in that they built their advertising marketing and distribution strategies and campaigns for a given title around different release dates in different parts of the world.

There are a variety of reasons for this but suffice it to say that the content owners have valid business reasons for wanting to control the timing of the releases of their product in different parts of the world.

When the regional coding systems are hacked, or the hardware is chipped, it is a clear case of contributory copyright infringement since content owners' copyright licenses are violated with respect to specific terms, dates, time periods, locations, and formats for release.

Often times Macrovision's copy protection technology is hacked along with the regional coding. Even CSS encryption hacks. The content owners then find themselves in double or triple jeopardy situation where one hack has multiple infringing and
circumventing components. Again, we believe there is no valid reason for regional coding exemptions to be allowed under Section 1201.

The last comment that I have is on the nonskippable or unskippable DVD or TV advertising features. The argument is put forth by those who want a special exemption to circumvent the nonskip features for DVD or TV advertising relates to an assumption that consumers should be able to modify the content and/or the playback devices that they legally acquire.

What is again left out of this equation is the notion that the content owners have the right to package their content as they see fit and to license the right to use it according to specific terms, one of which might be to require viewing or listening to the program with integrated advertising.

Rather than allowing consumers to bypass the content owner's packaging by endorsing circumvention, the appropriate action by the Copyright Office would be to allow the market place to determine the outcome and to have consumers vote with their pocketbooks regarding whether they want to buy or rent programs with built-in nonskippable advertising.

Macrovision as a technology provider understands that certain technologies can be
implemented to prevent ad skipping and we would encourage the Copyright Office to affirm that these technologies should be added to the category of legally protected digital copyright control technology under the DMCA and they should have no circumvention exemptions either.

Thank you very much for the opportunity to present this.

MS. PETERS: Thank you.

Mr. Marks.

MR. MARKS: Good morning. My name is Dean Marks and I'm Senior Counsel, Intellectual Property, for AOL Time Warner. Thank you very much for the opportunity to appear before you today. It hardly seems like three years have passed since the last time I appeared before you up at Stanford. I had to throw away my shirt from that last appearance having been grilled so hard by David Garson.

Anyway, here we are again today. Because AOL Time Warner has already submitted written reply comments, and because you have already heard from another AOL Time Warner witness, Shira Perlmutter, at the recent hearings in Washington, I will not take the panel's time to repeat or further endorse statements that we have already made.
Instead, I just wanted to make the following very brief observations about the DVD market. In 2000, the year of the last hearing for this rulemaking, there were approximately 13 million households in the U.S. with DVD players. By year end 2002 that number had risen to over 40 million.

In 2000 182 million DVD disks were sold into the U.S. market. In 2002 the number of disks sold in the U.S. was 685 million and nearly 1 billion are projected to be sold in 2003.

Between 2000 and 2003 the average retail price of a DVD in the U.S. dropped by more than 10 percent. The decrease in price of DVD players and DVD ROM drives has been even more dramatic. DVD players are now available for under $100 in the U.S. and DVD ROM drives are widely available for under $40.

Perhaps of even greater interest to the panel are the following facts. In 2000 less than 4,000 titles were available in the U.S. market on DVD. As of April 2003 over 22,000 titles are available on DVD in the U.S. In 2000 less than 300 Japanese anime titles were distributed in the U.S. in DVDs playable on U.S. Region I DVD players. As of April of this year that number has grown to over 1,400 anime titles.

In 2000 approximately 600 foreign language
feature films were distributed in the U.S. on DVD by distributors serving the U.S. DVD player market. That is, Region I players, Region I disks. As of April of this year the number of such DVD foreign language feature film titles distributed in the U.S. market, again for Region I players and disks, had risen to over 1,700 titles.

The source for these facts and figures is this DVD release report which is a published report and this is one revised as of April 23, 2003. If it is of interest to the Copyright Office, I would be happy to submit this for the record.

These facts demonstrate that in the intervening years since the last rulemaking proceeding, access to works via the DVD format has grown dramatically. The technical protection measures used to protect copyrighted works on DVDs from unauthorized access including the regional coding access control and, and this is critical, the associated legal regimes and legal protections that go along with these technical protection measures, have been crucial to giving content owners the requisite security to release their works on DVD on this high quality digital format.

Indeed, these technical and legal
protections have not served to stymie access to works. Quite to the contrary. They have materially contributed to the stunning success of DVD and the increased availability and access to the U.S. public of an ever growing, ever richer variety of works including foreign works.

In the final rule issued in the prior rulemaking proceeding, the Copyright Office found that, "It appears that technological measures on DVDs have increased the availability of audiovisual works to the general public, even though some portions of the public have been inconvenienced."

The facts outlined above indicate that in the intervening three years the preservation of the legal integrity of the DVD technological measures has led to a virtual explosion in the availability of audiovisual works to the U.S. public.

The request for exemptions sought in this current rulemaking proceeding with respect to DVD are by in large similar to the ones sought in the previous rulemaking. The rationale articulated by the Copyright Office and the Library of Congress in 2000 for rejection of these requests still applies today.

Indeed, I believe the rationale is even stronger today because many, if not all of the non-
infringing uses sought to be achieved via the exemption requests, can actually be satisfied through means that do not involve circumvention conduct.

Today these non-circumventing means are available more inexpensively and with less burden to users than they were in 2000. I'm sure we will get into all of these issues in greater detail so I will leave off here and look forward to your questions. Thank you.

MS. PETERS: Thank you.

Mr. Metalitz.

MR. METALITZ: Thank you very much. Good morning. It's a pleasure to be back here with you again. I'm going to make just very brief general comments and then we will get to the questions which I know we are eagerly awaiting.

Some of these comments apply, I think, also to some of the discussion in the last panel yesterday afternoon because I think the thrust of most of the proposed exemptions that we are hearing about this morning really boil down to the ability to platform shift or to move between formats or between devices, among devices, and so forth, which is similar to the issues that were discussed yesterday about CDs.

I just want to make three general
observations about this. First, there is really nothing new in this issue. If you look at the history of copyright markets, there is nothing new about copyright owners deciding to release their material in fewer than all the formats that are available in the market place. There are many examples, some of which we site in the reply comments.

The law has never required copyright owners to make their material available to every format for every machine or device that exist in the market place. Certainly nothing in Title 17 has ever required this. The DMCA did not change that. This is the backdrop against which we have to look at these claims for exemption.

Second, I don't think we should indulge in the presumption that what is necessary to be done in order to platform shift is non-infringing activity. To the contrary, I think the general rule is that it would be infringing activity.

In most cases platform shifting involves making a copy and, obviously, that implicates the reproduction right and you would have to look at whether any applicable defenses were there. We shouldn't assume that platform shifting activity is non-infringing.
Third, I think there is strong evidence and what Mr. Marks has summarized is a very good example of it, that the release of copyrighted material in a way that is not playable on all formats or on all platforms can be a use facilitating strategy. There is really no better example than the explosive growth of the DVD.

When you think about all of the different formats that have been floated or tried or introduced over the years, and I'm not thinking here primarily of audiovisual works but in software and everything else, the landscape is littered with the failures of these different formats.

What is really astounding about DVD is how successful it has been, how the public has embraced it, and how it has increased the availability of all these titles to the public really in a manner that is unprecedented.

But the same argument could be made as far as software that is linked to a particular machine or device or a database that might be accessible only from devices on a particular university network operating under a site license.

The issues are not really that different in all those circumstances and they demonstrate that
the strategy of making copyrighted material available without necessarily catering to every single format in the market, or every single platform in the market, can be a useful facilitating strategy and just what Congress was intending to encourage in the DMCA.

I've given my speech yesterday about the digital cornucopia so I won't repeat that but I think this is really part of that feature. I think to evaluate these claims for exemption, I would, of course, encourage you to look back at what you decided in the year 2000 where many of these issues were ventilated.

I think you will conclude when you do that that the proponents not only have to convince you that you made the wrong decision in 2000, which certainly the testimony you've heard here suggest it. The proponents are taking on that burden.

They also have to show that even if you were wrong then, you are still wrong now under a circumstance in which the availability of the product and the availability of alternatives, as Mr. Marks referred to and I'm sure we will get into in more detail in the question and answer period, the availability of alternatives is also increased that would enable people to gain access in a myriad of ways
to this material. I think that makes the burden that much more difficult.

I do want to say a word about the unskippable DVD advertising issue. I have to say I find this puzzling. I kind of think if you looked up de minimis non curat lex in Black's Law Dictionary you would find a citation in Ms. Hinze's testimony.

I think to think that because you might have to wait 30 seconds to access or to see the movie that you've gotten on DVD, to say that rises to the level of substantial adverse impact as cognizable in this proceeding. I find it hard to get my mind around that.

I think the other point that came out clearly today is that the inability to skip DVD advertising to the extent it occurs, and I think there is a dispute about the extent, whether it's in more than a handful of cases, but to the extent that it does occur, I think the EFF testimony makes it clear that it is not due to an access control. I think if you look at the definition of access control in the statute, I think that is the right conclusion.

Their argument appears to be that although the inability to fast forward in some circumstances is not an access control, it is part of the licensing
requirements for an access control and, therefore, you should be allowed to circumvent the access control, in this case CSS, in order to overcome this inability to fast forward. I think that is what they are saying here.

I think this is a classic example of the tail wagging the dog, or perhaps, to put it a little more graphically, it's an invitation for the copyright industries to trim their fingernails with a chainsaw.

They are basically saying that because people have to wait 30 seconds to watch the movie, they should be entitled to strip off all protection from these movies, put them in the clear, and let anything -- remove all the protections that CSS provides. I think that is taking this argument a little bit too far.

And, again, the argument that the unskippable ads don't benefit the public, I think we could conceive that and still point out that as the Copyright Office found -- is recommended and the Librarian found, the availability of CSS very much does benefit the public. The use of CSS on DVDs has been a substantial factor in increasing the availability of copyrighted material for non-infringing uses.
I don't think the EFF can have it both ways here. If the problem is something that is not CSS, then perhaps they could be asked. I think there was a reference to that in Mr. Krepick's testimony about how you would deal with that problem without inflating it to the much larger issue of CSS.

Again, I appreciate the opportunity to provide these general observations and I look forward to your questions.

MS. PETERS: Thank you very much. Let me start by trying to get something clear. I think I know it but I want to verify it. When, in fact, there is an exception granted and somebody can circumvent an access control, say, for example, if, in fact, one were granted and it involved a DVD so it was CSS, when you circumvent at that point you strip off all the protection so now is it a DVD that is in the clear? Or when you circumvent it is there still protection attached to it?

MR. MARKS: Let me try and answer that because the CSS system involves several different functional components. There's the encryption, the CSS encryption. It's called the contents scramble system which is the 40 bit encryption on the disk which scrambles the content.
There are flags on the disk that indicate the regional coding which is separate and apart from the CSS encryption itself. There are something called the APS trigger bits, and Bill can correct me if I'm getting this wrong with the macrovision, which are the bits that trigger macrovision being applied to the content when it travels out the analog output. Each of those, while they are required under the CSS license, are separate functional components.

Therefore, I don't think it's necessarily the case that circumvention of CSS is required to address one of the components. For example, the UOP, which I frankly do not consider an access control technology, that you have to say in order to address something with the UOP it requires circumvention of the CSS encryption itself. I do not believe that is the case.

MS. PETERS: Okay. Let's take the UOP. At the end of the day they have made their case turning that button that says on, do not fast forward off. What do they have to circumvent?

MR. MARKS: Right. As far as I understand it, and this is something that I think, frankly, we would need to look into some more. I don't believe there is any requirement of the CSS license as to how
the UOP functions as far as my review of the CSS license goes although it's mostly been the content provider license rather than the hardware adopter license.

There is nothing in the CSS license that requires, you know, in linking the encryption or in decrypting the CSS encryption system you must not allow consumers to fast forward if this certain code is in there. I don't believe there is any nexus between the CSS encryption nor the license for the CSS encryption that details obligations about what can and cannot happen with the UOP.

There certainly are obligations that flow from the CSS license, for example, as to whether the compressed content once it's decrypted can be made available on a user accessible bus, for example.

There are all sorts of robustness and compliance requirements as to what a hardware manufacturer needs to do to treat the content once it's decrypted. I do not believe there are any requirements dealing with this fast forwarding issue.

MR. MARKS: Okay. I'm going to go over here. Yeah.

MS. HINZE: First I would like to make it clear if there was any doubt about what I said before.
My opening remarks included a statement that said EFF is not contending that UOP blocking is an access control. I would like to make that clear.

MS. PETERS: But you said --

MS. HINZE: Our argument is that there is a condition of a license which requires this. What’s required for instance, for someone to take the benefit of our exemption would be a modification of their DVD player. Now, DVD CCA licensed players include a number of different licenses. One of them is a CSS license.

The particular feature, UOP, as I understand it -- again, I would like to preface my comments by pointing out that the entire licensing regime is subject to trade secret protection and it’s something that EFF has not been able to review -- that from various sources, including Jim Taylor, who is a DVD expert and is the author of this book "DVD Demystified" and runs the most technically comprehensive DVD online information.

According to his understanding, and according to other sources we have been able to see publicly, the requirement for UOP blocking responsiveness is something that is in the DVD Format/Logo Licensing Corporation license. In order to get
access to the trade secrets and the DVD trademark to put on your silver box, you need to respond to UOP blocking. That's what your DVD player has to do.

For instance, there may be two ways to meet our exemption. The first one would be to take your DVD CCA licensed DVD player and modify it to turn off the UOP feature. As we understand it, because of the condition of the licenses and because each of the licenses, in turn, are premised on the use of -- licenses and this set of interlocking licenses are premised on the use of CSS.

Our understanding from what we've been able to find out publicly is that it does involve a CSS violation in order to get under the envelope and into the actual player.

The second way you might be able to achieve our exemption would be to create your own player. You could, for instance, if you were technologically savvy enough you could create your own software player to do this.

The problem with that is that the copyright owners on the other side of the room have made a stated position in litigation that playback of a DVD on a nonauthorized, non-DVD CCA licensed player is a violation of Section 1201(a). From that point of
view an exemption would be required for a consumer to
do what I just said.

MS. PETERS: Let me just step back a
minute. Both sides say that the UOP is not an access
control. The only thing we have authority to even
consider is an access control. If, in fact, it's not
an access control, I don't see how we help you.

MS. HINZE: The two examples I've given
you of the way --

MS. PETERS: But our basically saying that
you can circumvent, we can't say you can circumvent
anything.

MS. HINZE: In either case it's necessary
to circumvent CSS. CSS is an access control. CSS is
regarded as an access control by the copyright owners.
They have stated that position in the Remeirdes case
in the 2nd Circuit Appeal briefs that they filed and,
as I said, most recently in March 2003 papers in the
321 Studios case they have made their position that
CSS is an access control.

The Librarian and Copyright Register in
the 2000 rule also addressed the nature of CSS as both
an access and a copy control. Because it requires a
CSS violation. In this case, in order to actually make
the UOP modification, a circumvention of CSS would
require an exemption.

MS. PETERS: Okay. I'm going to go to Dean. The question I'm going to have over here is this side of the table seems to basically in a lot of what it's advocating is that fair use, whatever your reasoning is, that licenses that are put in place by content owners should be overridden. I'm coming back there but think about that while I go over here.

MR. MARKS: I just wanted to raise a point of clarification because I believe, as Ms. Hinze who just spoke, when she mentioned that as far as her understanding goes that the UOP functionality and responsiveness as a requirement of the DVD format license, that may well be the case.

If that is the case, that adds to my clarification of the situation because the DVD format license is quite separate and apart from the CSS license. They are two completely separate licenses. They are administered by completely separate licensing organizations.

CSS, which is the access control technology license, which is administered by the DVD Copy Control Association, is separate and apart from the DVD format license.

My understanding is that you can take a
DVD format license and not take -- in fact, I'm quite sure of this -- need not take a CSS license if what your desire is is to put content onto a DVD in the clear without any access control technologies. There is no requirement by the DVD format license that you take a CSS license in order to put content out and make content available on DVD.

There is another case, and I'm not positive about this so I state this as an uncertainty and I will try and find out whether this is the case or not. I am not sure that you are even required to take a DVD format license in order to put content onto DVDs. I believe the format license is tied to the DVD logo. If you want to use the DVD logo, you must take a format license. If you are prepared to pay the patent holders who license the DVD patents for the format itself, you can do so without taking a DVD format license. I believe that is the case. I will check on that and get back to you.

MS. HINZE: May I comment on that?

MS. PETERS: Sure.

MS. HINZE: My understanding is that the DVD Format Licensing Logo Corporation license actually gives access to --

MS. PETERS: Can you speak up?
MS. HINZE: Sorry. The DVD Format Logo Licensing Corporation license gives access to two things. One is the logo and the second thing is the trade secrets, that are involved in the DVD technology. I am not in a position obviously as a nonindustry spokesperson to know whether or not it is a requirement.

What I would like to point out to the Copyright Office is that the EFF made assiduous efforts to try to find whether such a player exists on the market whether there is, in fact, a DVD CCA licensed player that advertises nonresponsiveness to UOP blocking.

We were not able to find that. We can't verify that it's not an actual requirement to not take a DVD CCA license -- I'm sorry, DVD Format Logo Licensing Corporation license.

We believe, based on what we have seen available publicly, that it is a requirement and that requirement as part of the interlocking set of licenses is premised on the use of CSS as, if you like, the outer layer that surrounds the box. Therefore, in order to modify a UOP feature that is included in a box, by virtue of that license would require a violation of CSS.
MS. PETERS: Thank you.

Steve.

MR. METALITZ: Even if we assume that what was just said is true, it's hard to see how the first scenario that Ms. Hinze described about disabling the UOP blocking is a violation of 1201(a)(1). It might be a violation of some of these licenses.

MS. PETERS: Right.

MR. METALITZ: But if it's not a violation of 1201(a)(1), then it's not part of this proceeding.

MS. HINZE: Well, I guess my response would be if it's clear that violating CSS is not a violation of 1201(a)(1) in the first of the two responses I gave, modifying an existing DVD CCA licensed player, my understanding is that the copyright owners have had the stated position that circumventing CSS is, in fact, a violation of 1201(a)(1).

My second suggested way that this exemption might actually take place in practice would be for someone to build their own unlicensed DVD CCA, software version of the DVD player which wouldn't respond to UOP blocking.

My understanding of the copyright owners’ position based on, as I've said, the two lawsuits
where they have made this their position, is that any playback of the DVD in a non-DVD CCA authorized player violates Section 1201(a)(1). That is, as I understand it, the position that was taken in both the Remeirdes case in the 2nd Circuit and in the 321 Studios case currently pending in the court.

MR. MARKS: I think, with all due respect, there is a little confusion going on because --

MS. PETERS: That would not be hard.

MR. MARKS: You are absolutely correct that the copyright owners do take the position that circumvention of the CSS encryption system is a violation of 1201(a) and is a circumvention of an effective access control technology. We agree on that.

I think we also agree on the fact that UOP responsiveness in and of itself is not an access control technology. Where there seems to be some area of disagreement and confusion is whether it is possible to circumvent the UOP without circumventing CSS.

My view, but I am a lawyer and I'm not an engineer and I will try and find out something about this, is that it is possible to defeat the UOP without circumventing CSS, but I don't know that for sure.
What I do know is that this notion of interlocking licenses and requirements built one on the other I do not believe to be the case because the licenses are separate.

If UOP responsiveness is required by the DVD format license, then the argument or complaint is with the DVD format license, not with CSS as an access control technology, which is licensed by the DVD CCA.

I wanted to just make another point of clarification.

The content owners and others do take the position that if somebody builds a DVD player that is not licensed through the DVD Copy Control Association which decrypts CSS encrypted DVDs, that that is an unauthorized activity, is an illegal activity because those devices aren't authorized to get to the decryption keys and, therefore, those devices are violative of the anti-circumvention device provisions. But anyone is free to build a DVD player that can play non-encrypted DVDs, non-CSS encrypted DVDs. The CSS license doesn't control that.

MS. PETERS: Can you consider what we were just talking about as a follow-up question and actually come back to us with clearing up some of this uncertainty?

MR. MARKS: Yes. And if I may, I would
like to enlist the help of the DVD Copy Control
Association which also testified and submitted
comments.

MS. HINZE: Can I just make one final
reply before we go onto another topic, which I'm sure
we will do.

MS. PETERS: Sure.

MS. HINZE: In response to Mr. Marks' last
comment, I just wanted to make clear that the source
for my statements --

MS. PETERS: Can you --

MS. HINZE: Sorry. In response to Mr.
Marks' most recent statement about the position that
copyright owners have taken in the Remiirdes case and
in the 321 Studios case about playback of a DVD on a
non-DVD CCA licensed player.

The statement that I am making about
playback comes from, as I said, the 2nd Circuit Appeal
briefs in the Remiirdes case. The particular cite for
the statement I am relying on is in our comments.
It's in note 43 of page 62 of the appellant's reply
brief.

The statement is related to playback.
Now, perhaps what Mr. Marks is saying is that would in
practice look like decryption because in order to play
the content of a machine, you would need to decrypt.

In either case, just to make it clear for the record, the stated position as I understand it, and I have not heard anything different from that based on what I've just said this morning, is that playback of a DVD on a non-DVD CCA authorized software or hardware DVD player violates Section 1201.

MS. PETERS: I had a question about this side of the isle which had to do with tethered DVDs or space shifting, those kind of things, which appear at points to violate licenses. I just wanted a comment on how you view the various licenses that come attached with a lot of the material in digital form.

MS. GROSS: I can address that. What these licenses do is they have the -- they control who can manufacture DVD players, the kinds of features that people can make -- people can use, the kind of experience that people can have.

These licenses are the mechanism that control this and then the CSS is what bypasses or prevents people from getting through those licenses. I think it is really important to talk about -- when you were talking about overriding license terms, consumers never see a license.

Consumers are not licensees. Consumers do
not -- are not parties to any contract. Their rights haven't been restricted legally in any way. The manufacturer of the DVD player and the technology company may have license agreements between them but that's between them.

The consumer is not obligated to follow the agreements in their contracts. They are not a party to those agreements. I'm a little confused when you're saying overriding licenses. People who aren't a party to contracts aren't -- they are not overriding the contract. They are simply not a party. They are engaging in activity outside of the scope of the license.

MS. PETERS: Okay, but now you purchased a DVD and it's tethered to a machine and you want to basically untether it. When you buy a CD and it's clear that it's tethered to a machine, you as the consumer know that.

MS. GROSS: I'm a little confused. What do you mean you would know a CD is tethered but a DVD is not?

MS. PETERS: Frequently when you purchase something -- like I'll take it away from the DVD. I'll take the e-book -- you know that it's limited to a particular machine.
MS. GROSS: Well, when you say you know it is limited, do you mean you have signed an agreement that says it is limited or do the copyright holders wish for it to be limited?

MS. PETERS: No.

MS. GROSS: I think that is an important distinction.

MS. PETERS: My understanding with the e-book reader is that you know it has to be played on a particular device.

MS. GROSS: Why would you know that if you haven't signed any contract? If you have always received books and read them however you please, what would legally require you to only watch or view something on a particular device?

MS. PETERS: Because you are told that this plays on this machine or other ones or when you put it in your machine this is the machine it will play on. You're raising it as a labeling question. You are basically saying that there is nothing that you purchase in the digital arena that you ever are told or know is limited in any way.

MS. GROSS: Why would I know something is limited unless I have agreed for it to be limited? I mean, my point is that the copyright holders may wish
for something to be limited. They may wish that I may
only view something on a particular device but that
doesn't mean I know I may not do otherwise.

MS. PETERS: Okay.

Do you want to say anything about that?

MR. MARKS: I just sort of think as a
matter of frankly practicality going to your CD
example, you know, when CDs were first being
introduced and consumers bought CDs, I mean, they knew
they couldn't be playable on turntables. If you
wanted to buy a CD and enjoy an CD you had to buy a
new playback device. I mean, similarly those people
who were early adopters of Beta, Sony Betamax players,
knew that as VHS came onto the market that the VHS
tapes were not compatible with the Betamax players
even though they were both analog video cassette
recording and playback devices.

I think that is just sort of a natural and
a given that when a particular format is delivered to
the market, particularly a physical format but,
frankly, an electronic format too as in your e-book
example, that it isn't necessarily playable on every
playback device or playback methodology that a
consumer may have available or may have in their
homes.
MS. PETERS: Ms. Gross, we were talking about sense here. When you buy a particular thing, isn't it common sense that it's not going to play on every single thing?

MS. GROSS: There's a big distinction between knowledge and a legal requirement. It's true that I could buy a record and it's not going to play on my cassette tape, but I could make a copy of it and play it on my cassette tape. So, it's not some legal requirement that I can't put that music on another form media. It's just the way the technology has worked in the past. It's industry custom. It's not a legal requirement.

MS. PETERS: If, in fact, your thing that you brought on the record is also available on tape, what gives you the right to convert it from a disk to a tape?

MS. GROSS: Well, I think the 9th Circuit Court of Appeals in the Diamond Rio case made very clear that space shifting your music from a CD or from any type of technology to another is well within the personal use fair use rights of individuals.

MS. PETERS: That case dealt with digital and the fact that there's an exchange for no liability for consumers because the manufacturers actually pay
for the equipment and the tapes. So, it's a no
liability issue in Chapter 10.

I wasn't really talking about digital per
se in this case.

MS. GARLICK: I would also just like to
point out that we are actually talking about access to
content in particular formats --

MS. PETERS: Right.

MS. GARLICK: -- not necessarily the
availability of the content as we mentioned in our --
in our sort of written testimony that we gave early.
It is also a different type of content by virtue of
the different type of format.

So, in that respect, we would submit that
it's not directly comparable to say oh, I can have it
on a cassette tape or I can have it in a digital
format.

MS. PETERS: I'm not sure I get that
distinction, but okay.

I'm going to pass it at this point and go
to you, David.

MR. CARSON: Okay. The first question
really relates probably to everything we're going to
talk about this entire day, but let's -- let's get it
out in the open now.
Mr. Metalitz, I think you, too, Mr. Marks, but I especially recall you, Mr. Metalitz, talking about how successful the DVD format has been, how many people have DVD players, how many DVDs are on the marketplace. We refer -- you refer to the digital cornucopia and so on and that's all well and good, but I'm wondering if that doesn't create a problem as well and the problem is this.

Three years ago you'll recall, one of the things we said when we were talking about DVDs was well, to the extent that some people have come forward with problems presented by DVDs and some of the restrictions you have with DVDs.

The fact that all this stuff is available on VHS certainly makes those problems not such problems and that's one of the reasons why we don't really feel we need to worry about it. Certainly not the only reason, but one of the reasons.

Can we say today particularly looking forward to the next years starting this October 28th that that's still going to be the case? It's my impression that that's not going to be the case, that we're no longer going to be able to say it doesn't matter because this stuff is also available in other formats. Because it may well not be and doesn't that
make us have to look a little harder at some of the
other issues that are being raised because of that.

MR. METALITZ: Well, I think you raise a
good question and first specifically with regard to
the demise of VHS, I think it, like so many other
demises, it has been somewhat exaggerated. It's still
a $10 billion business this year and -- or in 2002 and
it's not going to disappear in -- by 2006.

But, I don't think that's really -- as you
pointed out, that's not the only reason why you
reached the conclusion that you did in 2000. It may
not have been the most significant reason, but I think
the best example I can give is the demonstration that
Mr. Attaway gave for you earlier this month in
Washington in which he demonstrated that -- he used a
digital camcorder viewing the screen on which a DVD
was playing to make a excerpt from a DVD film and have
a digital copy that could then be used for all the
fair use purposes and so forth that -- that were at
issue there and that are at issue at some of these --
in some of these requests for exemption.

So, the fact that something -- let's
assume that -- that "Spiderman" was not available in
VHS. That fact alone certainly did not make it any
less available for -- for noninfringing uses. Because
as he demonstrated, you could get a copy that probably, in fact, is a higher quality copy than what you would get by copying the VHS tape and you can use that for fair use purposes assuming the copy is within the scope of the fair use privilege and for forth.

It's just as available for that purpose even if it were not in VHS and as we demonstrate in our -- in our testimony, there -- and particularly when you get into public domain materials, there are a lot of titles out there that are available in DVD that were never released in VHS. So, to say that -- if the focus of this proceeding is on availability of copyrighted material for substantial noninfringing use, I think the conclusion is that also without regard to the availability of the VHS the growth of the DVD has increased that availability.

VHS obviously still remains important and it probably will remain important at least in some segments of the market for quite some time to come.

MR. MARKS: I agree with everything Steve has just said and I just wanted to add a couple of other points which is if you look at noninfringing use in terms of access and access just to viewing the content, because I agree with everything Steve has just said about fair use copying or taking clips that
now with digital camcorders and analog camcorders being widely available and being available at lower prices, query whether it costs more to buy a camcorder to camcorder off a DVD than to buy a second VHS. Just sort of do the editing that you would need to do to take clips from a VHS. It's probably fairly equivalent now.

But, in terms of the -- just viewability, it seems to me that with the decrease, the dramatic decrease in price in play-back equipment both in DVD drives and in players, the barrier to viewability and to use of DVD even if you had always used VHS has really gone down. So, that as the market evolves and if the market eventually does evolve to where movie titles are made available only DVD and not on VHS, there really isn't this barrier to access problem. I believe the CD/LP model is very relevant here.

You know, for awhile CDs actually took off rather slowly and for awhile, both formats were in the market and now, I think it's pretty difficult to find LP records of -- you know, certainly to the degree that titles are available in CD. Frankly, I believe that the market will eventually move that way. I don't think it's going to happen in the next three years, but I anticipate that, you know, perhaps over
the next ten or 15 years that may well be the case. But, I think by that time with the -- with the prices and the wide availability of the equipment, access just is not an issue.

MR. CARSON: Anyone else want to address that? All right.

One of the people on that side of the table, but I don't recall who, in their testimony mentioned that well, it's three years later and we still don't have a Linux-based DVD player. Now, we certainly had some conversations about that three years ago and we certainly had some statements that it's just around the horizon. Is it? I mean where are -- where are we with that? Why don't -- do we have a Linux player out there and if not, why not?

MR. MARKS: I'll take that one. There -- when last time around we talked about and both -- both at the hearing and then in my follow-up letter to the copyright office that we were aware of two licensees-- CSS licensees who were producing Linux compatible players. One was Sigma Designs and the other one was Intervideo.

I tried to do a little bit of research on this and as far as I know, Sigma Designs is no longer producing their hardware solution. Intervideo is
still producing their LIN DVD software solution, but they make that software solution available only for integration by hardware manufacturers like computer manufacturers or set top manufacturers. It's available on an OEM basis rather than as a off-the-shelf software solution to individual users.

In going on to -- to the web, I found -- and it was an excellent public announcement but in a I guess a message discussion group from an IBM engineer, this was in April of 2001, announcing that IBM had on its IBM Thinkpad T22 for its Linux model that they had included the LIN DVD software in its model so that now this Linux IBM Thinkpad was able to play DVDs back, you know -- in compliance with -- with CSS.

So, it's there, but it does not appear to be there as an off-the-shelf solution that you can just buy in a -- you know, at Circuit City as a stand alone consumer software solution.

MR. CARSON: So, if I already have a computer. I'm running the Linux operating system. As a practical matter, there's not really anyway I can watch a typical commercially produced DVD on my computer. Is that correct?

MR. MARKS: As a practical matter, that
probably is correct if all you have is your Linux system just as if you were -- had your laptop computer and all it could run was Windows whatever version, Windows 98, that could not support a windows DVD solution. Actually, Intervideo is one of the leading producers of the Windows compatible DVD player software and if your computer was limited such that it could not take the new Windows operating system that was necessary in order to play WIN DVD, yes, you'd -- you'd have to upgrade your computer as well.

MR. CARSON: And I gather the only other option I'd have would be to somehow circumvent CSS so that I could watch it on my computer. Is that -- is that accurate?

MR. MARKS: The other option would be you could buy a DVD player at, you know, less than 100 bucks or your could load -- you know, decide to load a different operating system and -- and even use a -- if your computer or laptop didn't have a DV drive built into it, buy an external DVD ROM drive.

MR. METALITZ: Or use both operating systems. I mean you could have both operating systems on one --

MR. MARKS: Oh, of course, you can have --

MR. METALITZ: -- machine and if --

MR. METALITZ: -- and if -- you can --

MR. CARSON: Let's assume that I'm stubborn and I'm devoted to Linux and I'm going to watch it on my computer because that's the way I am.

MR. MARKS: Right.

MR. CARSON: And so, I -- what I do is I -- one way or another I circumvent CSS and watch it on my computer now. Did I just engage in an infringing use?

MR. MARKS: I think you have engaged in a violation of 1201 --

MR. CARSON: Well, that wasn't the question. Have I engaged in an infringing use of a copyrighted work?

MR. MARKS: Have you engaged in a -- when you have bought the copyright work and you're viewing it just --

MR. CARSON: On my computer running Linux?

MR. MARKS: -- on your computer and assuming you're not making a copy when you have circumvented and have loaded the computer -- and have loaded the disk onto your computer, assuming that you've not made a copy on the hard drive and I'm not talking about a buffering copy, I mean --
MR. CARSON: Right.

MR. MARKS: -- a copy that's subject to being further reproduced, I would say as far as a copyright violation, you probably have not violated the copyright law. But, Steve?

MR. METALITZ: No, I would agree with that. You violated 1201(a)(1), but you may not have violated the copyright. All those are independent causes of action.

MR. CARSON: And ordinarily, there would be no reason for me to make a copy of the motion picture itself if all I want to do is watch it on my Linux-based PC. Right?

MR. MARKS: I think that's correct.

MR. CARSON: Okay.

MR. MARKS: I mean the problem we've had with that and well, this may not be exactly relevant, but in reading the transcript from the folks who were testifying from 321. It appears that often when CSS encryption is stripped away and even when, for example, a backup copy is made, that copy is made in the clear and that's what's of great concern to content owners because you then have a digital clear copy that can be subject to further unauthorized reproduction and distribution.
That frankly is really what the fear is for content owners. It's not that an individual circumventing in the privacy of their own home to merely watch the movie on their Linux player is a threat. It's that when that content is circumvented and in digital format in the clear, the fact that it's so easily subject to further unauthorized copying and distribution, is -- is the threat that -- that concerns us.

MR. CARSON: Sure. I understand that. But, at least in terms of what 1201 says and what the past we have here brings --

MR. MARKS: Right.

MR. CARSON: -- help me out here. Because it sounds like what we just walked through is the situation where one can fairly say that the prohibition on circumventing an access control has adversely affected me and my ability to make a noninfringing use of the copyrighted work. Isn't that true?

MR. MARKS: I guess I would say frankly it's mere inconvenience because you have all of these readily available non-burdensome alternative like loading the Windows operating system on your -- on your PC or using a player that's, you know, non-...
expensive.

So, I would really characterize it as a mere inconvenience rather than a substantial adverse harm.

MR. CARSON: So, it's an adverse impact but a trivially adverse impact.

MR. MARKS: Perhaps. Right.


MS. GARLICK: Excuse me.

MR. CARSON: Oh, yes, I'm sorry. By all means. Yes.

MS. GARLICK: I'd just like to make two comments. The first is that this continued presumption of a connection between accessing on an unauthorized player and then further unauthorized copying, that seemed to me a very considerable presumption and sort of describing most of the consumers as pirates which I think we would challenged.

And the second is also the description of this as a mere inconvenience. If you've invested in a particular format such as Linux or some other kind of format, it's not a mere inconvenience to not be able to have played DVDs that you've purchased.

MR. CARSON: Well, you can get a DVD
player for 59 bucks or less now. So, how much of an
inconvenience is it?

MS. GROSS: Well, if you could write a
software player for free, that's a lot of money to a
teenager.

MS. GARLICK: And also, I mean how many
devices do you have to purchase these days just so
that you can have the rights that, you know, you
otherwise would have? I mean the shopping list is
growing at the moment.

MR. MARKS: One response here that I think
sometimes gets a little bit overlooked when we're
talking about the Linux or the open source software
operating system issues is that DVD is the first
audiovisual format, you know, physical media
audiovisual format that's playable in the computer
environment in the first place. I mean VHS wasn't
playable. Super 8 movies weren't playable. Betamax
tapes weren't playable. It is the first, you know,
physical media on which motion pictures are delivered
that is actually playable in the PC environment.

My feeling is that, you know, that should
be welcomed by PC users and the fact that it may not
be playable on every single operating system does not
mean that the content industry should somehow be
penalized by, allowing the circumvention of what is viewed as a critical access control measure because they've actually made the work available for the PC platform but not for every single operating system.

MR. CARSON: I'm glad you mentioned that. Because that reminded me of an analogy come up with that I wanted to ask you about.

You talked about beta versus VHS, LPs versus CDs and let me just try out a distinction on you because it's one that I find myself tempted to make. When we were talking about those old issue VHS, beta, and so on, you're talking about incompatible formats, different formats.

It wasn't that the CD was designed not to be played on a turntable. Just that it was a new technology and there was a new kind of device to play. Nobody was going out of their way to make something which might have been played on a turntable unplayable on a turntable and yet, isn't that what we have here. In other words, you've got a DVD. You've got a DVD drive on a computer but with running limits.

MR. MARKS: Right. Right.

MR. CARSON: The only reason you can't play it on a Linux is not incompatible format, but it's because there are licensing requirements which
say if you've going to have DVD drive that is -- that
has a technology license, it can't play that. There's
no technological reason why it shouldn't be able to
play it. A decision has been made to disable it from
playing it.

    Now, isn't there a distinction there?

    MR. MARKS: I'm glad you're asking the
question because, in fact, your premise of if, in
fact, the CSS playback capability was unavailable or
blocked from being made available to the Linux
operating system, then I think there may be -- there
-- I don't want to necessarily concede it, but there
may be some -- some greater weight to the argument.

    The fact is that that CSS license is
available to folks who want to produce software
players for the Linux operating system. The fact that
there is a software player available for the Linux
operating system, the fact that it is CSS licensed,

    that it is included regularly on things like IBM
    Thinkpads that are running the Linux operating system
    shows that it is possible. There is no blockage here.

    The fact that the market may not be robust
    enough for manufacturers to say there's enough
    economic incentive here for me to go and take a CSS
    license to produce a software player for Linux -- for
the Linux operating system, that may be a market problem, but it's not a licensing requirement problem. The CSS license is open for anybody running an operating system provided that they conform to the requirements of the CSS license.

And the fact that this LIN DVD player is out there in the market and has been out there for quite some time shows that it's perfectly possible to make a DVD software player that is -- that both complies with the requirements of the CSS license and is compatible and can be used on the Linux operating system.

MR. METALITZ: Can I just add to that?

I think if you back -- taken it in a slightly broader context, I think you'll see the distinction between things that are designed not to run on particular formats and things that just happen not to run on particular formats isn't quite so sharp.

Because if you look historically, copyright owners have in many cases made the decision that they were going to release something. They could have released an LP for example in 1980 or '85. You could decide to release an LP -- recording as an LP and as a CD. It was technologically possible to do it, but there were copyright owners who made the
decision not to do it.

They might have made the decision because they really wanted to reach the market of CD enthusiasts and they didn't want to reach the market of LP enthusiasts particularly or they thought in the long term it wasn't going in that direction or they could have made the opposite calculation.

Many people in the 1980s objected to the kind of sound they were getting from CDs and they thought LPs were better and richer for certain types of music and some labels made the decision we're only going to release this audio file recording on LP. CDs were available. We could make the decision. But, we're deciding no. We don't want this to be played on this platform.

This was a market decision and over time the market evolves and some of these decisions become less viable as a marketplace alternative and we're seeing -- I think yesterday you had testimony about how in the audio field we can look forward to a certain amount of contention along different formats in the years ahead.

So, you know, copyright owners may be well faced with this type of decision in the near future, too. But, that has always been a marketplace
decision. The law has never dictated what that
decision would be. The law has never told copyright
owners you must release on all formats, you must
release on specified formats.

MS. GROSS: Could I make a comment to that
point?

I think that there's some obfuscation
going on here with respect to requiring copyright
owners to make something available in all formats that
distinction between -- with someone who simply owns
something and wants to try and access it in another
way. Making that a crime to take it upon themselves
to make this system work with what they've got.

That's a difference between requiring them
to make it -- make everything available and somebody
simply taking it upon themselves to make what -- to
make their property inter-operable with their system
and that seems to be a big point of confusion and
obfuscation throughout this entire proceedings.

If I could go back to this idea of well,
you could just download a Windows operating system
onto your Linux box. For a growing number of computer
programmers, Linux is sort of a political issue.
There's a very -- there's a growing concern about the
Microsoft monopoly, the lack of security in the
systems and for many people, it's more than a political issue. It's almost a religion. Really a growing number of people.

So, if you're telling them to switch your operating system, you're telling them to switch their religion and I think you have to take a step back and think about that.

MR. CARSON: Well, that's not quite what they're saying. I think they're saying, you know, have a dual booting capability. Maybe the only time you ever run Windows is when you want to watch movie. They're not saying you have to switch.

MS. GROSS: Well, but they're saying so just use this religion for these circumstances.

MR. CARSON: Well, we believe in the establishment class here. So, don't worry about --

MR. MARKS: Or - support your religion by buying an updated Thinkpad that has the Linux DVD player in it, you know. Then you're buying from IBM. I'm sure the --

MR. CARSON: Anyone else on that topic before we move on? All right.

MR. MARKS: Could I -- could I make just one more comment while we're on this -- the -- the licensing of hardware and playback systems and the
rest because I had thought there was a comment made
this morning and if I had misunderstood it or misheard
it, my apologies.

But, that the -- that I thought I heard
that content owners derive some sort of financial gain
from the licensing of the different platforms for CSS
or the different hardware solutions for CSS and I just
wanted to make sure that if I correctly heard that
comment to just say that that is not the case. The
content owners do not gain any financial revenues or
any other sort of revenues from the licensing of CSS.
The licensing of CSS is conducted by the DVD copy
control association which itself is a nonprofit

So, I just wanted to make sure I cleared
-- cleared that up.

MR. CARSON: Okay. Thanks.

Ms. Hinze, you made a reference to -- I
think it was Ms. Hinze, yes, to the first sale
doctrine, but you didn't really elaborate on it and I
was just wondering if it -- I don't think you
elaborated on it anyway because I wasn't quite sure
what the reference was all about. So, I just want to
give you an opportunity to explain what you were
talking about.
If you want me to pay attention to it, here's your opportunity.

MS. HINZE: Well, I think it sort of got taken over by the discussion about how our exemption would actually work in practice. That's why I haven't -- not worry about it. But --

MR. CARSON: You've got to --

MS. HINZE: Sorry.

MR. CARSON: We're having some access problems here.

MS. GARLICK: We can find someone to circumvent those for you.

MS. HINZE: My point was that there's nothing in the legislative history of the DMCA that suggests that what Congress was intending to do at the time that they enacted the DMCA in 1998 was rewrite the copyright balance.

The particular exemption that EFF has sought relates to essentially what is a private performance issue. It's not one of the copyright rights. Fast forwarding through material or pressing a button to fast forward on DVD players through material is an issue about private performance. It's not one of the six exclusive rights granted to copyright owners in Section 106 of the Copyright
Statute.

And my point about the first sale doctrine was that we recognize already in the copyright law a balance. We carefully balance the rights that are given to copyright owners with the rights that are available to the general public to make use of works. One of the rights we recognize in existing copyright law is a limitation on the exclusive right of distribution and that takes the form of the first sale doctrine in the United States as recognized in Section 109.

MR. CARSON: But, you're not finding a connection between the first sale doctrine and fast forwarding pass commercials I assume. That's why I was -- that's why I just wasn't following.

MS. HINZE: I think the context of my statement this morning was that the rights that are given to copyright owners are circumscribed. We recognize limits on those and the particular activity in question that we had sought an exemption for on the EFF side of the table is an exemption that would govern rights in -- activities that are not exclusive rights. I think my --

MR. CARSON: Let me give you just an example of how the rights of copyright owners are
limited. It wasn't an example that was tied to --

MS. HINZE: In our December comments, we have pointed out that the first sale doctrine does put a limit on what copyright owners can do after the sale of their works. But, my point this morning is merely that -- this by way of illustration of the circumscribed nature of the rights of the copyright owners and the fact that the particular activity in question for which an exemption is sought is outside of that exclusive list of rights.

MR. CARSON: Okay. Now, some questions for this side of the table on the question of fast forwarding pass commercials.

First of advertisements, first of all is it still the case that some DVDs released by some studios still do have the ability to fast forward pass advertisements disabled or is that a -- is that a thing of the past?

MR. METALITZ: I'm not aware of any that are doing it. I think the evidence that I gave earlier in the statement -- in the reply comments was that the studio that is involved in many of the titles that are listed there, not all, has stated that 99 percent of its releases do not have that feature at this point in response to marketplace pressures.
I can't sit here and tell you that no --
that no motion picture studio has ever released or is
not now releasing a single title that disables that
feature. I just don't know.

MR. CARSON: The statement you just made
allows the possibility that 1 percent of current
releases still have it. Okay.

Since I think you probably represent all
the major studios, if you could come back to us with
some more specific information on current and
anticipated future practices that may or may not be
relevant, but it would be useful to know.

Mr. Marks.

MR. MARKS: I just wanted to speak because
I can speak only for my own company, but I went back
and checked with my company and as far as Warner Home
Video is concerned which is the video division of AOL
Time Warner that releases DVDs, I was informed that
they have never disabled the fast forwarding
functionality and have no intention to do it.

MR. CARSON: I think Mr. Turnbull
testified to that in Washington as well.

Now, maybe I'm asking the wrong people,
but I'll ask it anyway. Why shouldn't consumers be
permitted to fast forward pass those ads at the
beginning of the DVD? Anyone want to testify to that?

MR. METALITZ: It may be that they are. Because as I understand, the claim for exemption here, the feature or the capability, let's put it that way that disables the fast forward button in certain circumstances is not an access control technology.

MR. CARSON: Okay. But, that's not my -- my question isn't whether or not it's an -- it's a more -- it's a much more general question which is assuming that at least with some releases consumers aren't able to do it for whatever reason, why shouldn't they be able to do it?

MR. METALITZ: Well, one reason that they might not be able -- that maybe they shouldn't be able to do it is if it's against the law and I'm trying to say that from what I hear here it is not against the law. At least, it's not against Section 1201(a)(1) for them to do that if, in fact, the technology is as it was represented here.

MR. CARSON: Okay. Let's talk policy. And assume it is against the law. I don't know whether it is or it isn't yet.

MR. METALITZ: Assume it isn't the law.

MR. CARSON: If we're trying to figure out whether there is a noninfringing use here that people
are being deterred in their ability to engage in, well, I guess the first question is is it a noninfringing use to skip pass the commercials on a DVD or is that somehow an act of infringement?

MR. METALITZ: I don't know that it's an act of infringement, but I think the issue that's raised here is what would have to be done in order for them to skip pass.

MR. CARSON: Sure. We'll get to that.

MR. METALITZ: And that may involve a lot of other things besides this UOP --

MR. CARSON: Sure. We'll get to that, but the first thing I'm trying to understand is if we're being asked to permit people to do something that you don't want them to do and if the purpose of our being asked to do that is the argument that people should be able to skip pass these advertisements, what I'm trying to hear is if the people who are saying don't do that -- do you have any arguments as to why people shouldn't be able to skip pass those advertisements or are you just going to abandon the field on that one?

MR. METALITZ: I don't have any arguments as to why they shouldn't be able to do it, but I would note that in other contexts this may be the subject of litigation in public context where -- particularly
where skipping through parts of what's on the DVD may result in the creation of a derivative work. It is -- that is -- is potentially infringing.

MR. CARSON: Leaving that issue aside, I don't see the -- I don't -- I don't consider this as an infringing activity.

MR. METALITZ: Okay.

MS. HINZE: May I just --

MR. CARSON: Please.

MS. HINZE: This is a different. I believe Mr. Metalitz is referring to the Clean Flicks -- I believe Mr. Metalitz' last comment is a reference to the Clean Flick case that is currently before the courts.

As I mentioned, our exemption doesn't require that it be something done to the DVD itself. That -- may be one way to do it, but actually as the discussion this morning has proceeded what we have been discussing is a modification of the DVD player.

Just to clarify for the record that the Clean Flicks situation is a different situation to the one in issue in the conversation we had this morning.

MR. CARSON: Right. Now -- yes.

MR. METALITZ: Just to enter into this policy debate that you sort of opened up with respect
to advertising. I think we have to think of the
different windows of exploitation here and I want to
be very careful here because this now is purely as a
policy matter rather than a copyright matter or a DMCA
access control matter.

I think there are some concerns from the
content industry that if ad skipping in the context,
for example, of commercially supported television
becomes so frequent that, in fact, the revenue model
for commercially supported television where it's
available free to the public may not be sustainable
and as a policy matter, do we want free over the air
broadcast television to go away. I think you could
say no, as a policy matter, we do not and, therefore,
we want to have certain controls on the ability to
completely skip ads.

I think, and this is my own personal
opinion, in the context of a DVD where there is a
price paid for the piece of media, I do not see that
same policy argument having as much weight and,
therefore, I do not consider it either as a copyright
matter or a noninfringing use to be able to fast
forward the ads or frankly, I don't see a great policy
justification to prevent the fast forwarding of ads on
a DVD itself.
MR. METALITZ: I would just add on the policy side of this, I have no disagreement at all on the legal side.

Mr. Marks is describing the current business model for distributing DVDs. Someone may have a business model that's different. They may even want to give away their DVDs to have an advertiser supported medium and we've seen this happen along the line in broadcast everywhere else. So, in that sort of sense, it could have a policy implication.

MR. MARKS: I agree with him. I agree with that.

MR. METALITZ: As to -- as to current models, I don't think it does.

MR. CARSON: Nobody's arguing we're paying less for our DVDs because of watching commercials.

MR. METALITZ: That's right.

MR. CARSON: Okay.

MS. GROSS: I just wanted to address the point that we heard earlier that it's a mere inconvenience to have to watch 30 seconds worth of commercials. I think that really doesn't address the main criticism which is that parents are very concerned about the amount of advertising and the type of advertising that their children are exposed to and
parents want some kind of control here and these
restrictions prevent them from being able to fast
forward these -- through these commercials.

So, to say oh, it's just a mere
inconvenience because you have to sit there for 30
seconds, that's not the point. The point is the
information that goes into these children's minds and
the impact it has on the children as time goes on.

MR. METALITZ: I would agree that's a
legitimate issue. I just don't see that that's a
legitimate issue for this proceeding.

That whole question of advertising in our
society raises a lot of questions and you could get
into product placement and every -- a lot of other
issues that are legitimate subjects for policy, but in
terms of a substantial impact on the availability of
this material for noninfringing use, I don't see that
the 30 seconds that we're talking here is a
substantial impact. That's the only reason I bring it
up in this proceeding.

MR. CARSON: And -- and while we were
going through the testimony earlier talking about the
skipping and it is a mere inconvenience or not, I just
went through all the comments we got from the members
of the public up here just to try to refresh my
recollection as to what they were saying and I've got
to say most of them use the words inconvenient,
avoiding.

It didn't really sound like a substantial
impact to virtually any of these folks. I think two
people talked about not wanting their children to
watch commercials and I wish we could bring them in
here because I'd like to know where their kids watch
TV because we're not going to solve the advertising
problem in this -- in this proceeding I can assure
you.

MS. HINZE: If I could just respond to the
30 second skip. I actually wanted to point out some
concrete information that the Tarzan disk that was the
subject of our comments The Tarzan disk has in -- had
in fact four minutes of unskippable material and every
single time a parent put that disk -- that Disney disk
into the DVD drive, the parents plus the children
would have to sit through four minutes of commercials.
So, just to inject some reality back into the
conversation here, it's not really a matter of 30-
second skips. I guess that's the point I would make.

The more important point that here I think
is that what we're talking about is a noninfringing
use. There's issues about burdens of proof and
substantial adverse harm, but the second aspect of the inquiry this morning is a focus on whether the conduct that -- for which we are requesting an exemption is, in fact, an infringing use of the --

MR. CARSON: Nobody here is arguing that it is an infringing use.

MS. HINZE: Right.

MR. CARSON: It sounds like most of the arguments are over whether there's a substantial adverse impact --

MS. HINZE: Right.

MR. CARSON: -- on the one hand or a mere inconvenience on the other. I know the folks on your side of the table have problems with the notion that it has to be a substantial adverse impact. Let's assume for the moment that that's the standard you're stuck with.

MS. HINZE: Or a distinct measurable and verifiable --

MR. CARSON: Yes. Yes. Okay. Right. Now, if that's the standard --

MS. HINZE: Right.

MR. CARSON: Just one last chance before I pass the baton onto someone else. Assume that's the standard and tell us why you've met it this time
around on this particular issue.

MS. HINZE: There are 66 consumers who have filed comments with the Copyright Office in this proceeding. They've given direct first-hand experience of their inability to be able to fast forward through things. They may have used the words mere convenience, but their point is they have been upset enough about this incursion into their private living room to contact the Copyright Office and file comments --

MR. CARSON: My God, if that were -- ban everything. We get people upset about all sorts of things. All right.

MS. PETERS: All right. Ms. Douglass.

MS. DOUGLASS: One question. Mr. Krepick certainly won't feel left out. You don't mind. Right?

I note in your comments and discussions about fair use and it's always kind of refreshing to hear that fair use from content owners and those allied therewith and the -- you talk about perceived tensions with circumvention provisions. Earlier in -- last week sometime, one of our witnesses said that computer science experts really couldn't tell perhaps the to experts couldn't figure out how to actually
implement fair use.

So, I guess to all of you how is fair use going to play out in an access controlled world? Are you going to have to decide what's fair use in the first place and then be your brother's keeper, your user's keeper and decide, you know, are they -- what would they want to do. What kind of access do they want? What is the market telling us? Are you going to have to decide for users what fair use is going to be in the 1201 world?

MR. KREPIK: Well, I think that, you know, the technologies that we deal with with regard to rights management in the new world, I guess one of my points was is it seems like a lot of the discussion is still centered around ten years ago, you know, when there was VHS cassettes and there were different formats and I think that, you know, the fact is that we are in a new digital age and we do have technologies which have been used to varying extents so far by both the software publishers as well as the music industry and some -- and the video industry has gotten into it with their movie link and, you know, being able to distribute content digitally over the Internet.

And these rights management technologies
actually have a lot of flexibility in them. I mean you can, you know, allow people to use it for a certain period of time. You can allow people to make a certain number of copies.

But I think it gets to the point of Mr. Carson which is, you know, why are we in the situation where we take, you know, we tend to take away certain -- it seems we take away certain rights that the consumers have and I think it's because, you know, on the other side of the equation, it's so dangerous to let this material out in pure digital form, unencrypted form that you've got to have some control mechanisms there.

And our feeling in these control mechanisms will evolve over time. That, you know, what is out there today may not answer all of the "fair rights", you know, kinds of situations that people may want, but it's not clear that the content owners want to give somebody the absolute right to make copies anywhere, to use it on any platforms, et cetera, et cetera as we talked about this morning.

Our position is that these technologies are very flexible. But, the technologies themselves need to be protected because if they're not and if, you know, hackers have the ability to break any of
these things anytime they want indiscriminately, then,
you know, that's kind of the end game in terms of the
content owners being able to distribute this stuff.
So, you know, that's where we are.

And I'll describe an example which
probably nobody in the room may know, but it's all
over the press today and that is we had sold Intuit,
basically a DRM solution for Turbotax. Both ourselves
and Intuit were taken to task throughout the media for
implementing a DRM system which locked the Turbotax
software to a particular PC and did not allow people
supposedly to move it from one PC to another. Now, I
can tell you that our technology does allow you to
move it from PC to another.

It turned out that probably both Intuit
and ourselves weren't as smart as we should have been
in anticipating a lot of situations particularly at
Christmas time when people bought new computers. They
bought new hard drives. They wanted to move their
Turbotax application from one to the other and they
wanted to do it easily.

I can tell you that it can be done. I
don't think either of our companies did it in the
right way. So, it was a very painful learning
experience and Intuit announced yesterday that they're
actually not going to use DRM on Turbotax in the packaged retail media software next year. However, they will be using it on the Internet downloads, the electronic distribution and on other of their products.

So, again, it's a painful learning experience for all of us because this is all new territory. We are trying as best we can to give consumers the kind of access rights that they want, the flexibility that they want and I -- and I think it's just premature, you know, to point fingers at the technology and say all you're trying to do is totally control distribution. You're going overboard. You know, you're always accusing the consumer sort of in advance of trying to make copies.

Well, the fact is maybe there's 66 consumers who wrote to the Copyright Office and complained about fast forwarding, but in the Intuit case there were 20,000 consumers that tried to gain access to their software for free because they got a hold of a registration number and they tried to hit the website to get free software. So, 66 versus 20,000 gives you some idea of the number of consumers that given stuff is free, you know, they will go after it and given stuff is free, that's end game for all
the content owners.

So, that's why we're so passionate about saying, you know, don't blame the technology. The technology has a lot of robustness. It's got a lot of flexibility. This is a new era. It's a new age and we have to think a little bit differently than we did back in 1984 when the Bahamax case was around and you said, you know, we're just dealing with a particular physical format.

MS. DOUGLASS: Mr. Metalitz wants to say something and then Ms. Gross.

MR. METALITZ: Just I have very little to add to what was just said. Just that technology isn't going to dictate what's fair use. Fair use is determined by the courts on a case-by-case basis and the frustration the technologists feel that was expressed in the testimony you referred to is precisely that. It's very difficult to design something that will give you fair use in every situation and not allow uses that are not fair use.

That's not really the whole question here. I think this example demonstrates how market forces have a huge impact on what people do and can do and can't do with copyrighted material without regard to whether it's fair use and the example I would give
besides what was just referred to is if you look at
the evolution, it's been a very rapid evolution in the
-- in the rules or the capabilities of the music
downloading services over the last six months or a
year that they've been taken off. The legitimate
music downloading services and what people -- what
capabilities people can get through their services
compared to what it was six months ago in terms of
saving material to the hard drive, in terms of saving
it to other devices, in terms of disseminating it.

How, you know, in the absence of an
agreement, a lot of those uses would not be fair uses,
but the market is impelling the content owners and the
distributors to serve the market needs by allowing
this -- including this within the scope of their
license. So, I think this is the evolution we're
going to see and, of course, the courts will decide
whether a particular unpermitted use is a fair use.

MS. DOUGLASS: So, the evolution that we
see is actually a shift between the user being able to
make the first crack at what fair use would be to the
copyright owner making the first crack of what fair
use is going to be in terms of use.

MR. METALITZ: Yes, and then the market
ultimately determining where that balance is going to
MS. PETERS: Or consumer expectation being met by the market as opposed to fair use.

MS. DOUGLASS: Okay.

MS. GROSS: It seems like the presumption underlying much of this discussion is that the customers are infringers and the copyright holders will be these benevolent dictators who will permit us fair uses in certain circumstances that they feel is appropriate, but let's remember fair use is lawful, but unauthorized use.

So, if we're talking about replacing fair use with a system that only permits authorized use, we're eliminating fair use completely. This is a distinction between liberty and license and it's important to the consumers.

MS. DOUGLASS: Yes, Mr. Marks.

MR. MARKS: Yes, I just wanted to add just a couple of things to what had been said because I think sometimes the fair use issues and the access issues get confused.

I mean as I understand fair use, there is a presumption with fair use that access to the work in the first place has been authorized. There's always the typical, you know, example that's given know, fair
use to quote an excerpt from a book "does not give you the right to break into the bookstore and steal the book."

The notion is that there is an authorized access to the work in the first place and then fair use allows you to do just as Ms. Gross said certain unauthorized acts of reproduction, public performance quoting, and things of that nature. And so, it seems to me that the advent of access control technologies in the marketplace end up facilitating a greater availability of works to people in different formats or in different methodologies whether it be on a physical media or on a pay-per-view or on a limited download or a permanent download or a broadcast.

In each of those different medias and channels, there may be an opportunity for fair use and so, when we speak of authorized access, I don't think that should necessarily translate into that means the content owners are trying to prevent any unauthorized uses or prevent any fair uses. Let me give some specific examples.

A DVD, that's controlled by access technology. Can that DVD be played in the classroom for educational purposes? You bet. Are the content owners going to object to that being played for? They
will not and, in fact, there's an exemption for that under Section 110.

The example that Fritz Attaway was trying to describe, you know, in his testimony in Washington, he was saying assume a child is doing a book report on "Spiderman" or a report to their classroom and they copy an excerpt on a camcorder of a small portion of the movie, Fritz said it and I would agree with him, that's probably a fair use and we are not seeking to prevent that. So, I do think it's important to try and keep this distinction in mind between access and fair use.

MS. HINZE: I wonder if I can make a comment here. I appreciate this doesn't actually go to EFF's exemption, but I'm a little disturbed by what I'm hearing because I feel it is perhaps not a completely accurate reflection of the fair use case law in this country.

And I just feel it might be appropriate to note here that in the Campbell case the court made it very clear that a fair use does not involve a prior authorization and to the extent that Mr. Marks' comments appear to be suggesting the opposite of that, I just wanted to note the court was quite specific in pointing out that periodical fair uses were a clear
category of fair uses where the court recognized that it was not necessary to obtain the prior authorization of a copyright owner in order to make fair use.

And while as I said this doesn't directly go to the exemption that we're seeking in this proceeding, I would want the record to reflect what the reality is of the case law in this country regarding fair use and regarding this argument that fair use somehow requires lawful access to be negotiated before a person can make a fair use of a work. I don't believe that that is an accurate statement of the law.

MS. PETERS: You going to --

MR. MARKS: Yes. Yes, I just wanted to say to Ms. -- is it Hinze? Hinze?

MS. HINZE: Hinze.

MR. MARKS: I'm sorry.

MS. HINZE: Hinze.

MR. MARKS: Yes, I agree with her statement and absolutely, you know, in the Acuff Rose case the court had said the fact that, you know, the 2 Live Crew had sought a license to parody the Pretty Woman song and had been denied the license as irrelevant to whether or not the use they made was a fair use. I absolutely agree with that.
And what I was trying to say is fair use doesn't mean that you have the ability without authorization to get access to a physical copy of the work.

MS. PETERS: Right.

MR. MARKS: In that case, they were parodying the song themselves.

MS. PETERS: Right.

MR. MARKS: There was no access to the physical copy of the work that needed to be authorized in the first place. So, I absolutely agree in terms of parody, in terms of commentary, criticism. You can, for example, quote, you know, lines from a film without having to have necessarily seen the film itself. Someone could have told it to you. So, yes, there are certain types of fair uses that don't involve access to the physical copy of the work at all.

MS. PETERS: Right. Thank you. Thank you. Steve.

MR. TEPP: All right. Thank you. Mr. Marks, you may have already answered this in response to one of Mr. Carson's questions, but I want to get back to it for just a moment regarding the fast forwarding inhibition, un-skippable, whatever you want
to call it. Why is it, and maybe Mr. Metalitz is the right person to ask as well because you've said AOL Time Warner is to do this, why do studios do it? It sounds like it's just a matter of generating advertising revenue. You can guarantee an advertiser that they're going to get eyeballs. Is that what it's all about?

MR. METALITZ: That may be. I think that's a reasonable speculation, but I don't have any first-hand knowledge of that.

MR. MARKS: And I unfortunately don't either because we don't as studios tend to talk to each other about what our marketing practices are. So.

MR. TEPP: Okay.

MR. MARKS: I'm sorry. But --

MR. TEPP: Then we can ask a follow-up question to give me a chance to follow up on that, but--

MR. METALITZ: I would just say as our testimony indicates that one studio at least that had that policy on some of its releases encountered a lot of consumer resistance and either doesn't do it anymore or does it much less than they were doing in the past. So, I just want put that on the record.
MR. TEPP: And as Mr. Carson suggested, we're certainly going to follow up on that as well because that's an important question. But, I want to juxtapose that benefit with the concerns that have been raised and most articulately I think recently by Mr. Krepick about the dangers of having in the clear copies of audiovisual works on DVDs and I'm assuming in reaching this question, I'm assuming that it is necessary to circumvent CSS in order to deal with the UOP issue that prevents fast forwarding.

We're going to -- more on that as well. The impression I got from Mr. Turnbull in the Washington hearing speaking for the DVDCCA was that pretty much all the functionality issues coating, fast forwarding, etcetera were encrypted within the CSS umbrella and that the only way to deal with them was to first decrypt under CSS. I'm not saying that's a fact. That was my impression. We'll get information from you later.

Let's assume for this question that's the fact. If we have an exemption going forward that allows circumvention for the purpose of turning off the UOP or turning it on whichever is the right phrase so that the consumer's can fast forward, it sounds to me like then studios are going to have to weigh the
benefit of the advertising revenue with the danger that people are now going to be able to circumvent the CSS and having their copies.

If that's the case, given what has been described, it sounds like the obvious choice will be we're not going to block fast forwarding anymore and so, there won't be the downside and the consumers will get what they want.

If -- if that's a reasonable scenario, doesn't that mitigate in favor of an exception and I'm interested in your comment on it.

MR. METALITZ: Well, that's an interesting argument. I think it does -- if you assume that it's the role in this proceeding for the office to inject itself into these market decisions and take decision away from the marketplace and by granting exemptions only for the purpose of influencing behavior in the marketplace.

I think this kind of underscores why the solution is so disproportionate to the harm that -- or the substantial adverse impact and this is I think what raises the concern because, again, if you tell people it's okay to clip your fingernails and they start -- they come in with chain saws the next day, you have to be concerned about this and if the only
way to clip your fingernails is to use a chain saw, then you have to worry about all the other -- all the other mayhem that may -- that may follow from that.

I don't think I have anything to add to that.

MS. HINZE: Might I respond to --

MR. TEPP: Of course.

MS. HINZE: -- that.

MR. TEPP: In a loud voice please.

MS. HINZE: In a loud voice. As I think I've said a couple of times this morning there are perhaps several ways in which this exemption the Copyright Office and the Library of Congress might consider granting this exemption. There are several ways in which this exemption might work only one of which involves "putting content into the clear" which as I understand the comments that have been made this morning means making -- somehow physically changing a DVD, the physical disk.

The vast majority of what we've talked about this morning is modifying a DVD player. That doesn't involve any modification of any content on a disk and the scope of exemption that -- the Copyright Office and the Library of Congress could consider in
order to affect a remedy if you like for consumers in this situation is a limited exemption circumventing CSS on a player in order to modify, i.e., disable the UOP blocking response on the DVD player or I guess the converse of that, allowing consumers to build their own player which doesn't respond to UOP blocking. It's not the case that there would be this vast majority of in the clear works.

I just wanted to make it clear that I actually don't think that's what's required as a matter of technology.

Secondly, it's already a capability that exists. To the extent that there's a concern that I'm hearing about CSS decryption being the source of copyright infringement. I think it would be fair to say and -- that that concern already exists and it's quite separate from the ability of consumers to -- to make a noninfringing use of material they've lawfully acquired which is the subject of the exemption here.

To the concern that there is an ability to circumvent CSS and for instance post information “in the free and clear” to use the words of the other side of this room, that's already going on and it's inappropriate to bring that to this discussion about the exemption. Because as I understand what the
Copyright Office's role to be in this process and what the Library of Congress can do under 1201(a)(1)(D) is only grant an exemption that will cover noninfringing uses.

It's not the case that the rest of the Copyright Law regime goes away. The full set of rights and remedies that are available under Chapter 5 to copyright owners will continue to exist and to the extent that the harm is already happening, it's not going to be impacted by granting this very limited exemption that will only apply as I said to a modification of a DVD player.

MR. TEPP: Sure.

MR. METALITZ: Could I just add two sentences to my answer? I think the other problem with that which -- that suggestion is that in all the discussions that we've had over the last three years about what constitutes a particular class of works and how you would define it, it sounds as though this would be and I'm oversimplifying here that you could circumvent CSS in order to go in and disable UOP or enable. I don't know which is the right verb there and then get out and make -- don't do anything else.

So, it's extremely dependent on the behavior of the user rather than -- and I think it's
as the Copyright Office concluded in 2000, that's very hard to fit in the concept of the particular class of works which Congress asked you to identify.

But, again I proceed on -- we're proceeding on some assumptions here about what would be required and the alternative assumption is that what is involved -- since what is involved here is not an access control technology, it may not be within the scope of this proceeding at all.

MS. HINZE: Could I just respond one more time?

MR. TEPP: Of course.

MS. HINZE: Just to be clear, my comments just now were an explanation of the way in which an exemption might work. I am aware that in the 2000 proceeding, the Copyright Office and the Librarian issued a very clear statement about what is required for a class of works.

In the comments submitted by EFF and in my oral testimony this morning, I listed a class of works. I identified a class of works which is based on a Section 102 class and the class of works which we have listed clearly fits within the class definition as identified by the Librarian in its 2000 rule making.
The way in which an exemption might work in practice is the point of my conversation this morning and as to the question about whether circumventing CSS which is, I understand, what would be required in order to turn off UOP blocking in a player. As to whether or not that is, in fact, circumventing CSS is a violation of an access control measure. I think that issue is clear. I think that the issue for which the Copyright Office has sought further information is a question about whether it's necessary to violate CSS in order to turn off UOP blocking on a player.

MR. TEPP: Okay. Yes.

MR. MARKS: Can I just add one thing? I think that that's right. There is that question for further factual information as to whether it's necessary to circumvent CSS in order to turn off the UOP function that controls fast forwarding and we will certainly try and investigate that to get an answer.

But, I thought I heard a statement that circumvention for CSS was already occurring in order to make fair uses or was necessary to make fair uses and if I heard that correctly, I just wanted to dispute that statement. Because I think part of what we're trying to say and part of what this inquiry is...
directed towards is whether the prohibition of circumventing an access control technology is adversely affecting the ability of users to make noninfringing uses and I think what some of the testimony Fritz gave and some of the testimony that we're trying to give today is to say, in fact, protecting the integrity of the access control technology and not permitting a circumvention still enables these fair uses to be made.

You don't need to circumvent the access control technology in order to make a clip of the movie to use in a documentary. You don't need to circumvent it in order to play it for a classroom. You don't need to circumvent it in order to have comment and criticism.

So, I want to be very clear that I do not accept the premise that circumvention of CSS is already happening as a causal necessity in order to make fair uses.

MS. HINZE: I'd just like to make clear for the record in case there was some confusion about what I said earlier.

I did not actually refer to fair use. What I pointed out was in response to a comment about a concern that I was hearing in relation to our
exemption that somehow there was some causal nexus between our exemption and copyright infringement and that was the context in which I made my previous statement.

MR. TEPP: Okay. Let me try and move on a little bit. We spent some time earlier talking about whether the UOP itself was an access control. There was agreement that alone it's not. There is uncertainty or disagreement possibly about whether or not it's necessary to circumvent CSS in order to change the UOP.

Again, assuming that it is, just for the sake of argument, is it the position of the content owners that because the UOP is not the access control we can't consider that -- can't consider any adverse affects on noninfringing uses by the UOP because it's not the direct affect of the access control. In other words, can we consider indirect adverse affects?

MR. METALITZ: Well, actually, I think the statutory charge is to consider the impact of prohibition. Section 1201(a)(1) circumventing access controls and what's the impact of that on noninfringing uses?

If what is preventing people from skipping advertising is not an access control measure, then
1201(a)(1) doesn't apply and, therefore, there could be no impact. If on the other hand the theory is that somehow CSS is preventing this indirectly, then I think you have to look at the -- you have to look at these other questions about how substantial is the impact on noninfringing use and what would be the affect of the allowing the exemption. It says --

MR. TEPP: It doesn't get us in the ballpark though.

MR. METALITZ: Yes, it gets you into the proceeding.

MR. TEPP: Right.

MR. METALITZ: And then you have to do the--

MR. TEPP: Okay.

MR. MARKS: I would agree with that --

MR. TEPP: Okay.

MR. MARKS: -- analysis.

MR. TEPP: Great. Let me come back to this side again and ask about since we do appear to be talking about a noninfringing use, everyone seems to agree with that and we may depending on the -- the technology be talking about an indirect result of the inability to circumvent an access control. We have to look at the different factors here and one of the
factors that we've been asked by the content side to focus on is the fourth, the affect on circumvention on the market for value of the copyrighted works and particularly the potential piracy.

On this side, we've heard an objection to that saying no, no, consumers are not criminals and just because you've got some works in the clear doesn't mean you're going to have piracy.

I generally agree that people are law abiding, but we have to consider things like -- well, let me ask you this. In light of what we've seen on pier to pier networks, for example, Napster, where people infringed copyrights because it was there and because they could. What is your response to that as a model for concern on this side as to how in the clear copies could very well become a source of massive infringement?

MS. HINZE: Well, first I think maybe there is some confusion. As I've said, I don't know, there seems to be a focus here on copies in the “free and clear” and as I understand what you're saying there, you're talking about somehow making the content in the free and clear and what I have been discussing this morning is a modification of a DVD player.

MR. TEPP: Well, you've been discussing
both and it's not at all -- it's not a clear answer as to whether or not we can issue an exemption --

MS. HINZE: Right.

MR. TEPP: -- that would mandate one versus the other.

MS. HINZE: I -- I -- yes.

MR. TEPP: And if we can't then don't --

MS. HINZE: Right.

MR. TEPP: -- we have to consider the potential harm of in the clear copies.

MS. HINZE: I guess my response was to point out that it's not necessarily going to involve in the -- "free and clear" copies. But I do take the point that you're raising here that to the extent that the Copyright Office is able to shape an exemption that may not be within the scope of what is permissible. That may not be within the scope of what is permissible.

What I would say in response to the concern about digital piracy is this. We've heard a lot this morning that CSS and the legal sanctions of 1201 as applied to the protection of CSS is the reason why we had a rich digital world, why we have more DVDs available.

What I'd say is the history of CSS over
the last four years does not actually show that the availability of CSS and the legal norms that support it have actually been the great legal protection that the copyright owners presumably had sought.

What I mean is this. Since 1998 when DVDs were first released, the content has been produced and released on CSS protected DVDs. Within several months of CSS protected DVDs going into the marketplace, CSS was circumvented by a groups of hobbyists, most famously a teenager.

For a number of years, the MPAA has made the point, the Motion Picture Association of America has made the point that a number of releases which are DVD releases are available in an unencrypted form, on P2P networks and this is notwithstanding the fact that they have had CSS protection for the last four years.

What I would say is if as seems to be the argument that I'm hearing that the necessity for legal protection of CSS is the fact that this -- is what would be required in order for content owners to continue to feel comfortable about releasing work on DVD format into the marketplace, CSS has been spectacularly unsuccessful in protecting content. That's happened irrespective of whether or not an exemption is granted in this particular proceeding.
You would expect if copyright owners were as concerned as they are arguing here about the protection that they require in order to make their works available, that they would have abandoned the CSS format, the CSS-protected DVD format as their medium of release. But, in fact, there's a greater move to release things purely on DVD or primarily on DVD in terms of new releases.

So, I don't think it's a complete statement of the motivations of the studios to say that the need for CSS and the need for legal protection for CSS is the full picture here.

I guess that's one comment I would like to make probably of a more general nature.

The second comment I'd like to make is as I said, that the exemption here is a limited exemption. It will apply to a limited number of people, yes. I don't think that means that it will not be a worthwhile exemption, but it will by necessity apply to a group of people who can make the modification of the DVD player or do whatever is necessary to make content available that doesn't have the advertisements in it.

It's a limited exemption by its nature and the availability for piracy, if that's the words that
the other side of the room would like to use, is a capacity that already exists and -- granting an exemption to a limited number of consumers to allow them to make a noninfringing use of the work they've already lawfully acquired, paid money for, doesn't seem to me to be encouraging piracy. There seems to be a disconnect between those two arguments.

We're talking about a class of people who by definition have lawfully acquired content and are not in the same category as people who are downloading a movie for free from the Internet.

MS. GARLICK: If I could just back up those comments and just briefly point out in -- we always seem to get back to this threat of Napsterization. That at issue in Napster really was a commercial enterprise that was facilitating mass infringements and as we addressed in our testimony earlier, the nature of -- as Gwen just highlighted, the nature of any exemption is going to be quite personal and limited and not commercial and so, in that respect, we would say that that favor weighs in -- that factor weighs in favor of the exemptions proposed.

And also given the widespread availability among many of the DCSS, we've already heard testimony
about how fabulous the DVD industry currently is and so, that fact would suggest that the availability of a certain mentioned technology has not actually impaired on the business model of the industry.

MR. TEPP: I can see this side wants to respond again.

MR. MARKS: I would like to respond to this issue about the hack and not the -- the availability of the hack has not, you know, stymied the birth of the DVD market and, therefore, I think a conclusion that is implied is that circumvention shouldn't be a problem and should be permissible because the existence of the hack of CSS, DCSS has not impeded the growth of the DVD market and what I -- where I think there's a major disconnect there is that we agree CSS was hacked. Any content protection technology, access control technology or copy control technology runs the risk of being hacked and almost surely any of them will be. That's the raison d'etre of the DMCA in the first place because technological measures in and of themselves are not bulletproof.

What you need to achieve the correct balance is the technological measure and the legal mechanism and legal protections that go with it.

CSS was hacked. The program DCSS was
posted on the Internet. Did the content owners sit by and say oh well, no problem? Of course not. We brought a lawsuit against to establish under the DMCA that DCSS was an illegal circumvention device.

Why is that important? We think it's important because people -- we think the ordinary consumers will think twice about downloading and obtaining a product or device that has been found to be illegal by the court -- to engage in activity using that device that is found to be illegal by the court. That's very, very important in establishing these legal norms and principles in terms of whether the circumvention device and activity is permissible or not.

So, we believe that, in fact, the fact that DCSS has been found by a court to be an illegal device actually dissuades many ordinary consumers and citizens from obtaining or using it. That's first off.

Second of all, it's important to note that DCSS has not had an impact on the DVD player market. DCSS can't be downloaded into DVD players and, therefore, that has no influence at all in how DVD -- licensed CSS DVD players function. They still decrypt properly and they still protect the works the way
they're suppose to do in accordance with the license.

Similarly, even though the DCSS hack can be downloaded to affect the use in the computer environment, all the computer ROMs that come onto the market, the DVD computer ROMs that are licensed by the DVD Copy Control Association to do CSS decryption continue to function in the way they are supposed to do under the license. It's only when a hack has been downloaded that the encryption is defeated.

So, in fact, the existence of CSS technology, the existence of the legal protections of the CSS technology, have, in fact, continued to offer a strong degree of protection to the copyrighted works on DVDs themselves. One of the best demonstrations of that is if it were completely useless, then the studios would not continue to encrypt their works with CSS and, in fact, all the studios have, in fact, continued to encrypt their movies on DVDs using CSS.

And finally, I just wanted to respond to the point about well, if, you know -- if it wasn't a problem with this hack or if the -- I'm sorry, if the hack was really so problematic and the defeat of the technology was so problematic, wouldn't the studios have stopped distributing their movies on DVD or frankly perhaps a more likely scenario, wouldn't we
have changed the encryption method. Well, you know, believe it or not the studios actually have a concern for their customers out there and we would recognize that if we were to start encrypting our DVDs disks with a new encryption system and abandon CSS, those disks would not be playable on the 40 million DVD players that have been sold into consumer households. We think that would not be a particularly consumer friendly proposition and rather than telling consumers go out now and throw away the DVD player that you bought a year ago, a month ago, a week ago and go buy something else, we think it's a much more user friendly and consumer friendly proposition to say, you know, that this circumvention is illegal, the circumvention device is illegal, and it should be kept away from the market as much as possible.

MS. PETERS: Thank you. Even though there are additional questions, I think that it is necessary and proper that we take a short break. People here are all, you know, stuck here. So, we need to take a refreshment or whatever break.

Why don't we resume at five of 11:00. Take ten minutes and then we'll finish this panel and start the next.

(Whereupon, at 11:43 a.m. off the record
MS. PETERS: We're going to resume and Steve has some additional questions, at least one additional questions, but we're going to go to Rob and then back to Steve. So, Rob.

MR. KASUNIC: So, I -- one question for Mr. Krepick who I understand has to leave soon. So --

MS. PETERS: Well, he has a phone call.

MR. KASUNIC: Okay.

MR. KREPICK: At 12:30.

MR. KASUNIC: In some of your responses you mentioned don't blame technology and about the painful learning experience with the Intuit situation and my question whether -- you also said that one hack has -- can have multiple affects and I wonder isn't that something that is a result of the design of the technology?

Is it necessary for instance, the way this may work with CSS in the code, the UOP code, that if it's nested within CSS, then that creates the problem that we may be facing. Isn't there other ways to design this technology so that we have basically distinctions between copy protection measures that control use and copy protection measures that control access to the work so that you could circumvent one
without circumventing the other?

MR. KREPICK: Well, like there -- I suppose there are a lot of design parameters that you could use. Are you talking specifically about the UOP and the CSS or just sort of in general the way we --

MR. KASUNIC: Well, I guess in both. You said don't blame the technology. Well, why not?

MR. KREPICK: Well, I think in terms of the technology, first of all, I think everybody recognizes that it's a very difficult challenge to even come up with technology that can protect digital content. I think everybody realizes that no matter what you come up with that any kind of encryption scheme can be hacked whether it's a simple, you know, two bit kind of solution. In fact, the simpler the solution, obviously the easier it is to hack and I would contend that the simpler the solution the more protection that you need under the copyright law if you believe that it's important to have these kind of technologies to help protect content in this digital world.

And I think the whole point is that, you know, every little kind of nick of the blade from the standpoint of gaining access to content no matter how limited the exemption might be, every little nick
potentially can put out widespread damage because all it takes is one copy in the clear to be able to proliferate that on a pier to pier network and so, you know, I think we are in an era where the consequences of having, you know, these access control mechanisms or these copy protection mechanisms, the consequence of having exemptions given, having them broken is huge compared to what it might have been ten years ago and that's just because you're getting content in the clear.

What I was trying to say before about don't blame the technology, we are trying to come up with as flexible solutions as possible which will allow, you know, we don't like to use the term fair use because we're technology guys. We're not lawyers. I don't know all the subtleties of fair use.

But, I do know that consumers, you know, believe that they have certain entitlements. They look for certain features and so, we try to come up with satisfying as many features as possible and again, space shifting, time shifting, whatever without even getting into a definition of whether it's fair use or not.

So, in the process of coming up with that, you have to design a system that is relatively
flexible. Usually when you design a system that's relatively flexible, it means there's probably a lot of holes that can get into it for people who -- if they have nefarious, you know, means or intent that they're going to be able to basically break whatever system you come up with. So, at the end of the day, every one of these systems can be broken and that's where the danger is and that's where I think we need not only -- so, I keep arguing for stronger copyright laws because I think it's the only way that you're going to really ultimately, you know, kind of save the content owners.

Because at some point -- just look at the music industry. I mean you can compare. Fortunately, video is higher band width. You know, it's much more difficult to kind of transport video. The music industry is getting killed today because it's low band width. It's easy to transfer files. You know, their revenues have declined while fortunately the DVD revenues have increased dramatically and part of the reason is the size of these files, but part of the reason I believe is also the technology that's been used.

I'm not sure if that answered --

MR. KASUNIC: Well, partly but not fully.
I guess there are certain -- I understand that there's problems out there and we understand that there's a need for protection for copyright owners to put works out digitally, but we also have congressional distinctions for some things that copyright owners can do under the DMCA and some things that are suppose to be left in a separate category under the -- this way there are no prohibitions on the active circumvention under 1202 or 1201(b). There's no prohibition on the conduct there.

That would be the situation that I think Ms. Gross was talking about where it's not up to technology companies to decide what is or what isn't a fair use, but for consumers to have the ability to make their own fair use determination and if they're right, they're noninfringing. If they're wrong, they're infringing and that's the way the congressional distinction was made.

So, why not have the technology follow Congress' distinction and the access controls in one place and not have them envelop the copy protection measures in a way that really prevents this act from operating the way it was suppose it?

MR. KREPICK: I guess I can't speak to kind of the way it was suppose to operate. I think we
believe that we're trying to provide all of the tools possible to the content owners to allow them in essence to control the content, but at the same time to provide some flexibility to the consumers for so-called enablement of features.

You know, it is a matter of security. I mean if you can intertwine some of these features, certainly that makes it more difficult to be able to hack them. So, there's a reason why, you know, when some of these features get put together they get imbedded and intertwined because that does make it more difficult to hack them.

MR. KASUNIC: Maybe I could put this to Mr. Metalitz and Mr. Marks.

In terms of that issue, is it -- certainly the more they're intertwined the more difficult it is. In fact, it's not just difficult but it's impossible because they're prohibited under 1201(a), but there's nothing that would prevent for copy controls from making them as sophisticated as possible. So, it's extremely difficult for any consumer to ever be able to circumvent it, but it's another question to put a wrapper around it of an access control so that you can never circumvent it without also circumventing the access control which is something that we're faced
with here of having to determine whether there should be an exemption in order to be able to accomplish that.

MR. METALITZ: I'm not sure what you're asking. Is the question whether there should be some obligation to design the technology in a way that conforms more clearly to the different statutory categories and that if that obligation is not met, then that's a factor weighing in favor of allowing circumvention?

MR. KASUNIC: That sounds fair.

MR. METALITZ: I think Congress addressed this to a limited extent in this discussion in the legislative history about the importance of not having a congressional definition of which particular type of technology was used. In other words, there were proposals that went before Congress that said well, this only applies to -- the only access control we're going to protect is encryption and Congress rejected that approach and said no, anything that -- and took a functional approach and said anything that does control access to a work is subject to 1201(a). Anything that controls or that inhibits the exercise of an exclusive right of the copyright owner comes under 1201(b) and Congress was not going to get in the
business of dictating which technological approach should be applied.

MR. KASUNIC: But isn't it common sense that if they made that distinction, they were making a distinction that you should be able to do one but not the other. So if you put one inside the other and you can't do the other, the copy control measures, the act doesn't make sense any more.

MR. METALITZ: Are you talking about particularly in the context of CSS or just in --

MR. KASUNIC: Maybe. I don't know. We're still trying to figure out how CSS works in order to determine that. If the UOP code or, as we'll get to later, region coding are you can not circumvent them without circumventing CSS, then yes, CSS would apply. But it applies to probably hundreds of other ways things could be done or are being done and that we're, I'm sure, going to be faced with more and more.

MR. METALITZ: I'm not sure I understand either of those examples because we know UOP standing alone is not an access control and we know it's not a copy control. We know that region coding -- the Copyright Office found that region coding is an access control. Now, there is a question of how closely it's integrated with CSS and, therefore, what would be the
impact of allowing circumvention of region coding? Would it have an impact on CSS? And I assume the same question could arise about UOP, even though that's not an access control. But that's a separate question from this issue of access control versus copy control.

MR. KASUNIC: Then let's turn it into a hypothetical where we have a copy control, unquestionable copy control within an access control. Is that legitimate? Should it be legitimate? Should we able to exempt if we can not accomplish circumvention of that copy control?

MR. METALITZ: No, because again, Congress provided certain circumstances in which it was permissible to circumvent access controls, even some circumstances in which it's permissible to make available tools for circumventing access controls. In the hypothetical situation you're talking about, when that occurs, once you arrive at that point, you're able to circumvent the copy control. I don't see how it renders the statute a nullity or makes it not make sense because neither 1201(a) nor 1201(b) is an absolute. 1201(b) has no conduct, no circumvention, prohibition -- well, what's wrong with the active circumvention, as you pointed out, the 1201(a) has it with exceptions and when the exceptions apply, then
you get to the -- in your hypothetical situation, when the exceptions apply, then you get to 1201(b) and you can do your copy control circumvention. So again, I'm treating this as a hypothetical because I think in the instances we're talking about here, UOP and region coding, there's no question there's no copy control really involved in -- but we'll be coming back to that.

MR. MARKS: This came up four years ago and was the subject of an exchange between Mr. Carson and myself, and I was trying to explain how CSS worked and I frankly don't think at that time and even as I reviewed my transcript last night from the hearing I was necessarily that successful and hopefully was more successful in subsequent speeches and presentations. But it's not hypothetical with the CSS system. There is a real example here, and so I want to address it head on, which is that under the CSS system, under the CSS licensed, there is a requirement for a manufacturer for a CSS licensed DVD player or CSS license DVD ROM drive that goes into a computer, that when the CSS encrypted content is decrypted and it is sent out an analog output, that if the trigger bits from for Macrovision have been placed into the DVD disk, the CSS encrypted disk, that the player must
turn on the Macrovision and, if you will, Macrovize the signal as it goes out the analog output.

Macrovision, in my view, is clearly a copy control technology. It is not an access control technology, in my view. If asked the question, and I will just save you the time of asking me the question, is it a violation of 1201(a) if somebody circumvents the Macrovision itself on the analog output to get an analog signal in the clear free of Macrovision, my answer would be it is not a violation of 1201(a). I hope that helps.

MR. KASUNIC: The only other question I have for right now is in terms of CSS, one thing that came to mind in Mr. Carson's queries was is CSS a computer program?

MR. MARKS: You stumped us.

MR. KASUNIC: All right. Okay. Let's assume it's -- it looks to me like when I look at the definition that it may very well fit that definition. If that's true, then why might not for the Linux situation 1201(f) not be applicable in terms of making one computer program interoperable with another computer program creating a created computer program that would allow interoperability with --

MR. METALITZ: That came up in the DCSS
case and the court held that it was not because you're not trying to get a computer program to interoperate with another computer program. You were trying to get an audiovisual program to interoperate. At least that's my recollection of Judge Kaplan's decision. So for DCSS, that's been addressed in the courts. I don't know whether Judge Kaplan considers CSS a computer program or not. I'd have to go back and look.

MR. KASUNIC: Yes, I'm not sure. I think that's the part that they didn't consider. They were considering the audiovisual work interoperability, and this has come up in our static control LEXMARK issues, and it's an interesting question to ponder. That's all.

MS. PETERS: Okay. Thank you.

MR. TEPP: I think this should be the last question and we can all take a break.

MS. PETERS: No. We're just going to switch panels.

MR. TEPP: Sorry. Anyway, to the IP Justice folks, earlier Mr. Metalitz said that we should not assume that platform shifting is not infringing. If it's infringing, then I think we all recognize that you're not in the ball park with an
exemption that we can recommend to the librarian, so I wanted to give you all a chance to respond to that statement and make the case, if you believe it is, that it's non-fringing.

MS. GROSS: Sure. Well, reverse engineering for purposes of interoperability has been an exception, fair use exception under copyright for a while. The Diamond Rio case made clear that format shifting, space shifting as the court called it, was exactly the type of fair use, personal, non-commercial use that fair use is supposed to protect. Providing people to have the ability to watch their property, their CDs or DVDs, on the equipment that they own is a non-infringing use. They've paid for the right to view that movie. They never signed any agreement or any restrictions that said they can't do it in this way or the other way.

So absent any copyright law principle or other legal principle that would prohibit them from doing those activities, it seems to me it's very clear that it's their property and they're not otherwise infringing the law. They've absolutely got the right to space shift, format shift, time shift, as courts have traditionally held.

MR. TEPP: The Register -- you cited
Diamond Rio earlier and the Register pointed out that case was under the Federal Home Recording Act.

MS. PETERS: It's under the Diamond Rio case but with regard to sound recordings, there is no liability when you're using a sound recording player. But when you're using a computer, it's outside of Chapter 10.

MS. GROSS: I think we can look at the Betamax case where somebody had to time shift their movie to watch it at a later time. It's the same concept as format shift, space shift, particularly in today's world where there are so many different kinds of technologies that are being created. People have the need, more need now than ever to be able to achieve interoperability between the systems and they will need to be able to space shift, to format shift, in order to do that. It's not an infringing use. If you, in fact, make a copy for that fair use space shifting format shifting purpose, the courts have been clear in saying that's lawful.

MR. TEPP: Okay. So you're suggesting that the Sony decision should be extended to format shifting as well as --

MS. GROSS: That's what the 9th Circuit Court of Appeals tell us.
MR. TEPP: Okay. Is there a response to that?

MR. METALITZ: Well, the principle of copyright law that Ms. Gross is searching for is the exclusive right to reproduction, which would apply in many of these cases. I'm not saying necessarily in every case but many instances of format shifting and platform shifting involve making a complete copy of the work and so you have to look at whether any exception applied, any non-liability exclusion such as in the AHRA applied in limited circumstances. We've cited the MP3 case in our submission. Basically, these are non-transformative uses if they're exact copies and often they would not be within fair use.

So I'm not suggesting that in every case an infringement is involved. I don't think we can indulge in the presumption that space shifting, format shifting, platform shifting are inherent in non-infringing uses.

MS. GARLICK: If I could just make one comment in relation to the MP3.com case. That was, again, we're talking about a commercial enterprise that was providing a space shifting service to a multitude of people and that's not what we're talking about here. We're talking about individual instances
of a legitimate purchaser of a DVD who may want to view that DVD on a variety of different devices that they own, and that's in no way comparable to the MP3.com case.

MR. METALITZ: It's quite comparable. It's not exactly the same but, in that case, MP3.com's argument was that the patron, their customer, had bought a copy of the CD already and they were just providing a locker service for them so they can space shift and get at it from different places. So it's not--

MS. GROSS: But the court said had they done that themselves, they would have been within their rights. It was because of this commercial service that's the third party doing it that reached around the legality.

MS. GARLICK: Yes.

MR. METALITZ: I think the court concluded that that's a fair use.

MS. GARLICK: No one has concluded but no one has excluded it either and, in that instance, it was the commerciality of the service which precluded a fair use finding.

MR. TEPP: So it looks like we've got to do some more analysis. Thank you.
MS. PETERS: Anyone else?

Okay. I want to thank this panel very much. It will give us a lot to chew on, and I call the next panel. What we're planning to do is just get the testimony from the next panel, then break for lunch and then come back and do the questions afterwards. So thank you very much, Mr. Krepick.

The second panel is going to be looking at ancillary and sole source material and public domain material, and those who are testifying is, once again, EFF with Gwen Hinze and Ren Bucholz. They've been joined with Ernest Miller for the Information Society Project at the Yale Law School. They will be followed by Kathy Garmezy of the Directors Guild of America and then Mr. Marks from AOL Time Warner. Finally, Mr. Metalitz who is representing a large number of content providers. So let's start with EFF. You're getting your workout today. Just remember to keep your voice up.

MS. HINZE: Thank you again for the opportunity to testify at today's hearings. EFF has sought a narrow exemption for audiovisual works and movies that are in the public domain in the United States and that are released solely on DVD format where access to the content is prevented by content
scramble system and possibly other technological protection measures.

First, I'd like to address the applicability of Section 1201 to these works. EFF believes that Section 1201(a)(1) does not apply to public domain works because they are not titles protected under Title XVII. However, there is legal uncertainty about this, particularly as to the application of Section 1201 to compilation DVDs containing public domain works bundled with copyrighted works.

Therefore, to the extent that the Copyright Register and the Librarian of Congress consider public domain works released on CSS-protected DVDs to be within Section 1201's scope, we have requested an exemption for this class of works. The creation of a healthy and rich public domain for the benefit of all society is one of the core principles underlying copyright law, as recognized by the Supreme Court in Twentieth Century Music Corporation v. Aieken and numerous other cases. The public domain is an important source of ideas, information and cultural exchange.

With the transition to DVDs and away from VHS tapes as the predominant medium for releasing and
viewing movies in the United States, public domain movies are now beginning to be released only on DVD format. As public domain works, the material is not subject to copyright law and consumers' use is, by definition, non-infringing. However, consumers' use of these works is inhibited where the public domain material is released on a DVD with CSS protection. An exemption is therefore required to allow consumers to exercise the full range of rights in this class of public domain material and preserve the constitutionally mandated copyright balance.

Opponents of this exemption have made three main arguments. First, they have argued that EFF is mistaken in arguing that public domain works released on DVDs subject to CSS protection will become less available to the public. The joint commenters argued that the copyright owners will have no incentive to re-release public domain material on DVD in the absence of a legal regime that prohibits circumvention of technological measures governing access to these works.

In support of their argument, they quote from a section of the Register and Librarian's 2000 final rule discussing the availability of copyrighted content for alternative minority operating systems
such as Linux. This argument is irrelevant to the question of whether copyright owners should be entitled to use technological measures and the legal norms of Section 1201 to preclude access to public domain works. An important, indeed fundamental, distinction exists between the case in issue and the quoted comments on playability on alternative playback systems. Copyright owners do not have copyright rights in public domain works. The joint comments’ claim to use a facilitation proceeds on the mistaken reliance on copyrights that DVD publishers do not control.

If studios choose to release or re-release a public domain motion picture on a DVD, they may do so in order to obtain revenue from the sale of the physical DVD, but they do not thereby obtain copyright in the public domain motion picture. To argue that a major studio requires technological protection measures backed by legal norms to give them an incentive to release works in which they do not hold a copyright is either factually false or else amounts to an inappropriate attempt to assert private rights over a public asset. It's factually false since motion picture studios are and will continue to re-release these works in order to obtain revenue, as
they have done on VHS for many years, even though it's a public domain work and they don't hold a copyright in it. Studios will continue to release public domain works, as I said, as they have done for many years on VHS format and, in the same way, book publishers have successfully continued to publish the works of Shakespeare, even though they don't hold the copyright in those works.

Granting an exemption to commit circumvention by consumers who have already purchased a public domain DVD has no impact at all on a copyright owner's profit from the DVD and does not impact any copyright they own. The existence of legal sanctions for circumventing technological measures, controlling access to works that they don't own copyright in, can not have any bearing on a studio's decision to re-release a public domain movie on DVD.

The situation is no different where copyright owners have a thin copyright. For instance, where they choose to release a compilation DVD with a public domain work bundled with works in which they do hold a copyright. In either case, the copyright owner would obtain, at best, a thin copyright in the non-public domain elements but does not thereby obtain copyright in an uncopyrightable public domain work.
As recognized by numerous cases including the Supreme Court's decisions in Harper and Row v. Nation Enterprises, Feist Publications v. Rural Telephone Service and the 9th Circuit's decision in Sega v. Accolade, the public continues to retain the right to access the uncopyrightable parts of that compilation. An exemption is required to allow consumers to exercise their right of access and to prevent copyright owners from using technological protection measures as a boot strap to extend their thin copyrights over public domain works.

Second, our opponents claim that this exemption confuses access and copy controls. This claim was based on two misunderstandings. First, about the merged nature of CSS as both an access and copy control, as recognized by Judge Kaplan in the Corley case, and as recognized by the Register and the Librarian of Congress in the 2000 final rule.

Second, a misunderstanding about the applicability of Section 1201 to public domain works. Even if Section 1201 applies to a DVD compilation which includes public domain and copyrighted parts, the requested exemption will permit circumvention only for the purpose of accessing and copying public domain works within the compilation. Since public domain
works are not copyrighted or subject to copyright law, there is no prohibition in copyright law on copying a public domain work once access has been granted through a permitted circumvention of the CSS measure which controls access to that work.

Third, our opponents have argued that we have not met the burden of proof on proponents of establishing a substantial adverse impact on consumers. I'd like to make two comments in response to this claim. First, as I noted in a previous panel, if interpreted as the joint commenters have suggested, the standard of proof would raise serious questions about the equity of this rulemaking process. It is simply not feasible for consumers to provide an authoritative listing of every public domain motion picture available only on DVD.

As a result of considerable effort by EFF and a team of researchers including reviewing and cross-checking several sources, several databases and including a review of records held by the Library of Congress, EFF was able to identify and provide evidence of nine public domain motion pictures that are currently available as solo works only on DVD and not on VHS format. The joint commenters have not disputed that claim. They have instead argued that
this is an insignificant number of titles and that
there are alternative sources available for these
movies in existing VHS compilations, so an exemption
shouldn't be granted.

The fact that nine titles have been
released as individual works solely on DVD is evidence
of current actual harm to the public interest.
Whether or not some of them may exist in a compilation
in an unprotected format does not detract from the
fact that, while the evidence before the Copyright
Register in the 2001 rulemaking was that there was no
evidence of works being released solely on DVD format,
that is not the case before the current proceeding.
Public domain works are now being re-released solely
on CSS protected DVDs. Since these works are in the
public domain, the public is harmed by the fact that
consumers are currently precluded from accessing or
using them by virtue of technological means. That
harm occurs irrespective of whether there's an
alternative unprotected source. Public domain works
are unique. They're not fungible. Precluding the
public's access to one version of one of them harms
the public interest and upsets the careful copyright
balance. And this is true, even if the work might
exist in another format.
In the next three years, this trend is only likely to increase as DVDs overtake VHS as the most common format for home viewing and as the existing stock of VHS tape deteriorates. My colleague Ren is displaying a graph showing the comparative sales of DVDs versus VHS tapes over the last three years. DVD sales overtook VHS tape sales in 2002. The pie chart that Ren is currently showing is DVD rentals versus VHS rentals for the last three years, and DVD rentals overtook VHS rentals in March of this year.

As DVD players continue to penetrate the market and DVDs replace VHS tapes over the next three years, public domain movies will increasingly be released or re-released only on CSS protected DVD format. This is already occurring. Ren is currently showing a slide which quotes a Warner Home Video executive announcing this year that Warner decided in January to phase out releases on VHS because, and I quote, "For us, VHS is dead."

Finally, I wish to emphasize that the exemption we have requested is narrow and does not permit widespread copyright violation. If a consumer went beyond the scope of the exemption and sought to reproduce or otherwise infringe the copyrighted part
of the DVD compilation, the copyright owner could bring an action for infringement and would continue to have the full range of copyright infringement remedies currently available under Chapter 5 of Title XVII.

Thank you.

MS. PETERS: Thank you, Mr. Miller.

MR. MILLER: Thank you for giving me the opportunity to discuss this exemption. The exemption we've asked for is the ancillary audiovisual works distributed on DVDs using the content scrambling system of access control. I'm going to extend our initial comments and respond to the reply comments in three main arguments.

One is to emphasize the distinction between access and copy controls and why this, in the case of CSS, supports an exemption. Secondly, to focus on the limited scope of this rulemaking process and why the reply comments by those opposing this exemption are non-responsive to the scope of this rulemaking and lie outside and should be disregarded. And finally, to look at the balance of harms, the harms to the copyright industry providing this exemption which are negligible and the severe harms that implicate core First Amendment values to consumers without this exemption.
First on the question of access versus copy control. This is a critical distinction and the copyright industry has done very much to try to muddy the waters of this, not only in the reply comments but also in the testimony you've heard here today. They've had some success in confusing the courts in the 2nd Circuit, and I've discussed this in depth in our initial comments. There was no direct rebuttal from any of the reply comments. Furthermore, I gave another option to the Copyright and Librarian of Congress that they could determine that CSS is not an access control device but merely a copy control device and does not, therefore, have to be decided because any use would not be a violation of 1201(b) and would not be a violation of 1201(a) since it's not a 1201(a) device. Again, there was no rebuttal to this in the reply comments and this was an argument that was not brought up in the 2nd Circuit and one that the Librarian of Congress could clearly rely upon to make a separate determination.

What is this distinction between 1201(a) and 1201(b)? 1201(a) applies to access control devices and you are not permitted to traffic in these devices, circumvention devices, nor are you permitted to use it for whatever purpose with slight exceptions
for schools and libraries in particular circumstances. 1201(b) is merely copy control devices in which you're not allowed to traffic but you are allowed to use for non-infringing purposes. If you use it for infringing purposes, you are guilty of copyright infringement which is a separate violation of the 17 USC.

What this means is that the intent of Congress is that there is a clear distinction between these two types of devices. They mean to prohibit illicit access and trafficking in circumvention devices but not to inhibit fair use. In fact, they clearly state that the DMCA is not to change the balance of fair use at all. Let me give you an example of what Congress was thinking about. The analogy that's often used by the copyright industry is that of breaking into a book store. An access control device keeps you from breaking into a book store and then stealing the book.

This is not what is happening in the case of CSS. It's more analogous to the fact that you go into the book store, buy a book, the book has shrink wrap on it. You take it home, rip off the shrink wrap. Now, to some extent, the shrink wrap is acting like an access control device. Obviously, you can't access the book without tearing off the shrink wrap.
But it's not getting towards the intent of Congress, which is to permit the illicit access in the first place. When you legitimately purchase a DVD, you have gained legitimate access in giving good credit and faith to the copyright owner.

Another example would be a database. Congress did not want people to begin to decrypt databases and access them online without paying for them, and that is precisely what they are attempting to do. If you interpret the DMCA in this way, that CSS is not an access control device, the fact that it's an encryption measure is a necessary but not determinant element of a 1201(a) device, and CSS does not meet that standard. But even if it doesn't, even if it is an access control device, the government recognized and put forward this idea that they would see a separation between the two. The government recognized, the Congress recognized, that there may sometimes be a combination, that access control and copy control devices may sometimes be merged but they thought, according to legislative history, that this would be a rare case. If you hold that CSS is in fact a copy control and access control device, then you are now making what Congress thinks the rare case to be, the pair -- case since CSS on DVDs is probably the
most widespread consumer digital protection device.

This is the decision that the court made in the 2nd Circuit that was made by the judge. It is both a 1201(b) device and a 1201(a) device, which was what was upheld by the 2nd Circuit. What this means is that if I try to make a non-infringing copy from a DVD directly copying the bits on the disk, I am making a violation. Maybe I'm doing a five second clip for criticism or commentary. That would not be infringement. It is a violation. Not only is it a violation, but it could possibly have criminal sanctions and heavy civil fines. This was not the intention of Congress. Congress did not intend people who are using non-infringing uses to be sent to jail or to suffer large civil liability.

The muddying of the water goes further than just the courts but to this very testimony and to the reply comments that they provided. The copyright industry wants it both ways. They want to say that CSS is a copy protection device here and that we're not harming the copy protection. You don't need an exemption. But they're calling it an access control device in courts. In fact, in the reply comments from the joint reply comments, they admit that when the Blogcritics are discussing some of these ancillary
works on the DVDs, they have access to a works. Well, they don't have access as far as the courts are concerned. The court said this doesn't count as access because if they had lawful access, then there wouldn't be any need for circumvention.

They also claim that the activities that we're asking for in this exemption fall under Section 1201(b) of the Act. I concur. However, they also fall under 1201(a). That follows that if CSS is a 1201(a) device, then use of it is not only a 1201(b) violation but also a 1201(a) violation. They're trying to muddy the waters and have it both ways.

Now, to the extent that the joint reply comments recognize that there is a right of access, the Blogcritics already have access and they seem to imply that it's legitimate access, then there's also no harm to them in giving an exemption, which is going to be my second point which is going toward the limited scope of the exemption that we're asking for.

This rulemaking has a very limited scope. The reply comments are extremely vigilant with regard to requests for exemption arguments that lie outside the scope of this rulemaking. Were I to make such an argument, they would jump on it in a heart beat and say, outside the scope, can't consider it. But they
are not so vigilant with regard to their own arguments. I have discussed this in detail in our initial comments and these were not directly rebutted in any of the replay comments.

In the limited scope of this rulemaking, the Library of Congress is not to consider adverse impacts to consumers that flow from sources outside the prohibition in 1201(a)(1). These are not to be considered. Similarly, it seems to me and logical and within a wide reading of the statute that adverse impacts on copyright industry that flow from factors outside the explicit exemption are also not to be considered. So when the DVD CCA in their reply comments tells us that the creation and possession of copy control devices or circumvention devices harm the copyright industry, this is not to be considered.

First of all, creation and possession of circumventing devices is not illegal at all under 1201(a) or (b). Secondly, any harm that flows from that lies outside the exemption because the exemption says nothing about creation or possession because that lies entirely outside the scope of 1201.

Trafficking. If I were to ask for an exemption for trafficking, there'd be no question you can't provide it. Why then is the copyright industry
permitted to claim all these harms that come from trafficking these devices? If you give an exemption that says I can use the device, that doesn't give me the right to then traffic in the device and give it to all my buddies and all my friends who then do illicit things with it. So to the extent that any of the harms that they're claiming come from trafficking, then they should be disregarded.

Infringement. Once having given an exemption, the Library of Congress can only give an exemption for non-infringing uses. If you give me an exemption so I can make a non-infringing use of ancillary works on DVDs and I take a five second clip and I put it in my review of the movie, that's perfectly legitimate. That would normally be considered a fair use. However, if I then take the making of documentary and make multiple copies of it and then begin selling them at the local swap meet, that would be a non-legitimate use and would not fall under the exemption. Not only would I be liable for copyright infringement, I would still be liable for a 1201(a)(1) violation since I was given no exemption to infringe. So I'd be hit by the DMCA and by copyright.

Finally, the Library of Congress is not in the business of handing out anti-circumvention
devices. If you give the exemption, you will have no effect on how many of these devices are available. If people have the devices already or are able to create the devices or get access to these circumvention devices, an exemption from the library is not going to turn them into pirates. If they're already pirates, if they're already infringers, then an exemption from the Library of Congress, whether you give one or not, is not going to have any impact to it. If they intend to do illegal things, they don't need an exemption. This exemption is only for those who would otherwise have lawful uses but are deterred by the fact that they have civil and criminal liability. So any harms that flow outside of this very limited scope should be disregarded.

Finally, let's look at the balance of harms since there's going to be a balancing test. There are negligible harms to the copyright industry. First, as argued above, most harms lie outside the scope of this rulemaking. Second, this exemption is a particularly limited scope. We're not allowed to make non-infringing uses. We already have a fair use. Now, to the extent that any of our uses are going to be non-infringing, they're going to be non-infringing for two reasons. A) they're not a violation of
copyright at all. They're not infringing whatever or B) they're going to fall under an exemption which is most likely going to be fair use. Fair use has a balancing test, a four part test, that the courts are supposed to balance. The last part of the test and considered the most important by the Supreme Court is the commercial impact on the copyright industry.

So to the extent that a use is considered a fair use, then by definition that commercial impact on the copyright industry is going to be minimal or outweighed by the other factors such as transformative use, such as the amount copied, etcetera, etcetera. So the Library of Congress doesn't even have to take the commercial impact on the copyright industry at all since the fair use already takes the commercial impact into balance already.

Finally, there's no challenge to CSS. The Library of Congress isn't getting rid of CSS. We're not asking you to get rid of CSS. CSS will still be out there, still going to be on DVD players. It's only going to be used for particular small uses for ancillary works.

Now for the harms to the proponents of this exemption. First of all, there's no denial by anybody in any of the reply comments that many
important works that are absolutely critical to commentary and criticism such as outtakes, commentaries, behind the scenes, alternative endings, are available. They're available on most wide releases. They're becoming increasingly available. In fact, this is a perverse argument in response. They say because these works are becoming increasingly available and more commercially important, that is a reason to deny the exemption. This is perverse to the extent that there's this more important step that we need to comment, we need the criticism. That's more reason that we need the exemption, not to deny the exemption. Were we to follow this logic, it would mean that they would be encouraged to put out more and more simply to prevent people from commenting on it.

Secondly, they make an argument about marketing and that the fact that the CSS exists, it means increased availability of these ancillary works. This is not a good argument for two reasons. First, there are other reasons that they make these works available. It makes DVDs more attractive. It means they want to sell more DVDs. We're not taking that away from them. We're only making fair uses. We're not taking away their ability to sell these outtakes, to sell these commentaries and stuff like that. Were
I to start selling the commentaries, I would be guilty of infringement and could be punished.

Secondly, Congress was not concerned with the diminution to the market as a whole. Congress was concerned with the diminution of use to individual users of a particular category. So even if we're increasing the amount of ancillary works of the market as a whole, the fact that it's being restricted to particular individual users is what Congress was concerned with, not the market as a whole.

Now, when it comes to the fair users we're talking about, there's absolutely no denying that commentary and criticism come under the fair use banner. Not only are they paradigmatic examples of fair use, they are core First Amendment values. Commentary and criticism are what the First Amendment are all about. Without the ability to do this, this is a severe harm. Furthermore, we have to realize that without an exemption, criminal sanction exists for this and, from a First Amendment point of view, when you have criminal sanction, there's a distinct chilling effect that must be weighed in consideration of whether or not this exemption is to be given.

Now, they're going to mention that they don't prevent explicit copying. You can still copy
and quote to a certain extent. However, exact quotation is absolutely critical. What they are promoting is that there's a right to paraphrase, not a right to quote, to take something that's murky and not there. It would be as if I'm talking to Shakespeare and I want to quote Shakespeare but I have to say, to exist or not to exist, that is the query. It's a paraphrase but it just doesn't quite get the same punch as "To be or not to be." And so exact quotation is absolutely critical to commentary and criticism.

To say that you can get other ways and you can go through an analog digital conversion and convert it back to analog and digital again, that's going to be degradation. That's not going to be exact quotation.

Furthermore, they say that there's no explicit right to have it to the most general ability to get the most exact copy and stuff like that. Well, there may be no explicit right within the First Amendment. That's under dispute because fair use is key to the First Amendment. Copyright law would not be constitutional without a fair use exemption. Now, the extent of that fair use exemption is up in the air and no court has decided that. But to a certain
extent, fair use is necessary for copyright law to be constitutional.

Finally, they say that there's a diminimis barrier. If you want to make copies, well, are you free to do it, even though there's Macrovision? You can still use videotapes and these digital recorders and record the TV screen and stuff like that. First of all, that's not as easy as it looks or as it sounds. If you've ever tried to videotape your television set, you see those little bars. You have progressive scan and duel scan and interlaced video and stuff like that which creates artefacts. That is an digital to analog, analog to digital conversion which creates additional artefacts in videos on the screen and at some point it's pretty darn expensive. Well, for the people in this room or the people at the other table, maybe buying a $400 or $300 video camera is pretty darn cheap but for a lot of the people who are posting on Blogcritics, that's very expensive and you run into a grocery shopping list of things that you have to buy in order to do this.

Again, Congress is looking at the impact to individuals of a particular use, not to the mass. Maybe to the mass market, most people can do it, but
there are particular individuals and our initial
comments point out these individuals, this is a very
large barrier to them. And so this is not merely di
minimis.

And finally, the copyright industry can't
have it both ways. They're claiming these massive
harms if you give this exemption. But then they say,
well, it's easy to copy it. If it's easy to copy it,
then pirates will certainly have the ability to do so.
It will certainly be on P to P networks without the
exemption, whether you give the exemption or not. But
it is a barrier to those law-abiding citizens who
don't want to violate the law, who are afraid of the
civil liability and the criminal liability. They
can't have it both ways. Either it's easy to copy and
quote, in which case there's no harm, or it's not. I
say that it's not that easy to quote, it is easy
enough for the potential pirates to do so, and the
critical First Amendment values inculcated here and
implicated are absolutely critical which is why we
suggest that the Library of Congress provide this
exemption in the next three years. Thank you.

MS. PETERS: Thank you.

Ms. Garmezy.

MS. GARMZY: Madam Register and
panelists, my name is Kathy Garmezy and I'm the Director of Government Affairs for the Directors Guild of America or DGA, as we're known. I thank you for inviting us to appear before you today to discuss DGA's position regarding potential exemptions to access control technologies. Having listened this morning, I should say I'm neither an engineer nor a lawyer, but I hope that the perspective of the creators of these works will prove helpful and important in your deliberations.

In short, DGA is opposed to any easing of the prohibition on circumvention of access controls with respect to what are called ancillary materials included in DVDs. The Directors Guild represents over 12,600 directors and members of what are called the Directoral Team who work in feature film, television, commercials, documentaries and news. The DGA protects and advances their economic and creative rights working for their artistic freedom and fair compensation for their work.

Film and television are indigenous American art forms which filmmakers have raised to their highest quality of creativity and popularity. Our goal is to ensure that this craft continues unabated for the benefit of the millions of film and
television viewers world-wide and that our members continue to earn their living giving their talents to a craft they love.

Because consumers no have instant access to the content our members create, the debate over this access has often obscured the voice of the creator. In fact, the discussion usually focuses on the rights of those who possess the technology, the transaction between who owns the product and those who download it, or the cost to the consumer and the consumer's right. This assumes that the creators are not stakeholders in these decisions or that the value to the creator disappears as soon as their work is created. In both instances, nothing could be further from the truth. There are very real economic and creative consequences for our members.

It is against this reality that I come before you today. -- measures on DVDs should not be eased or eliminated with respect to ancillary materials. DGA is in a unique position to speak to the importance of these works on DVDs, works which now comprise a highly regarded and increasingly sought making of sequences, discussions and visual explanations. That is because this material in most instances is the work of our members. If access
control measures are circumvented, this material, the product of our members' works, will be able to be freely traded over the Internet. Since access is the focus of these hearings, it is our position that this type of material is more readily available to consumers because of technological protection measures, not in spite of them. That is true, both of the exponential growth of DVD availability and the so-called ancillary material which is created by our members.

Film makers as the individuals whose creative vision is the film itself has a great stake in how that film is shown in DVD or other re-use formats. First and foremost, they want the film to be shown as they originally intended it to be seen by audiences in the theater and, secondarily, on well-produced DVDs and videos but not at present over the Internet. Second, since ancillary works are now being incorporated into most DVDs, film makers are rightly concerned that those materials also remain protected.

These ancillary works are not simply materials casually tossed out. Whether an interview or a making of film, the director is actively involved in the creation of the DV text and the visual elements that surround the film itself. The director's voice
and that of the other collaborators on the film, the
other creative talent, is not a mere recitation of how
the film was made. It is a communication between the
director and the audience. It provides the director's
perspective, historical and personal, on what the film
maker does with his or her craft. In other words, how
they create. It is in effect an oral history,
historically enriching and preserved for future
generations and, therefore, deserving of protection
and encouragement.

In fact, as DVDs of older films are also
released with these ancillary materials, directors go
back and painstakingly review their production
materials and the process that went into making the
film so that they can document their vision in a way
that was not accessible to the public at the time they
originally created their work. This is a very unique
and exciting process for our members and for audiences
and one that should not be taken lightly. What
they're creating is not free material nor do these
ancillary materials just exist in thin air. Directors
carefully create and produce them. They do so because
they want the audience to have the benefit of their
knowledge and their insights as film makers. They do
not do so so that Internet critics or others can take
this material, potentially alter it and post it on
their website or use it in any way an individual deems
appropriate, even if that was not the use or the image
or the context the director intended.

The very historical value of these
ancillary materials to the public and the care that
goes into making them is all the more reason that they
deserve the full copy protection afforded by
technology. Without the security of knowing that both
the ancillary audiovisual materials and the movie
itself formatted in digital form will not be available
for broad, illegal piracy, the desire of members to
make such works, just like the interests of producers
in distributing them, would be severely diminished.
Our members are all too aware that when their work is
not protected, it is easily altered and exploited so
that it no longer resembles what they created while it
still carries their name on it.

The ultimate loser in this equation is not
only our members who bring their talent and hard work
into putting their creative vision on the screen, it
is the public who have shown a very clear appetite for
this material on DVD. Their popularity and that of
re-released of DVDs is demonstrated by the fact, as
others have said here today, that more material and
more film titles are available each year. Who would have believed that the existence of access control measures, copyright protections has fostered the popularity of DVDs and the accompanying wealth of information about film making.

In fact, those calling for an exemption, the Internet film reviewers known as broad critics, have amply demonstrated themselves that they can get access to and use this material with the existing technological protection measures in place. It used to be that critics could often only see certain films at film festivals or even then they were only able to talk about a film or write about the filmmaker's perspective. Today, not only the films but the director's voice, the voice of the original creator, and the images they choose to share are widely available to and incorporated into the work of film critics. The burden of proof rests on these Internet critics to demonstrate how their ability to engage in common criticism is hindered just because they can not copy and post these ancillary materials on their websites. We maintain that they have more access to information they need than ever before.

Circumvention not only adversely affects the value of the copyright creative work to the
producer of the copyright holder, equally important is the fact that this diminished economic value also flows through to the creators. Directors' economic rights are dependent on the premise that the work will be protected from copyright infringement or unauthorized alteration of their work.

In short, our members' compensation and pension benefits depend on residual revenues from the work they create. Residuals are fees paid to them for the re-use of their motion pictures or television production. Our industry residual system, which is over 40 years old, is designed to provide appropriate compensation to our members whose contributions to these works are so fundamental that without them they can not be produced. In 2002, the DGA collected and distributed in excess of $200 million of these residual to its members. This money represents bread and butter income and that is a reality in our industry made all the more necessary because the creative talent industry operate on the concept of free lance employment. This residual income from the rebroadcast of high end film and television productions is critical to our members because it ensures that their economic interests are protected when they are remunerated for the re-use of a work
they created. These payments for the work they completed support their families and go into their pension plans, as I have said. Unfettered access to our members' copyrighted works -- and this includes the ancillary works -- takes this income directly out of our members' pockets.

In concluding, the reasoning the Register relied on in 2000 to recommend the rejection of their proposed exemption for these ancillary audiovisual materials is still valid today. Many of these works would never have been created but for the prospect that they would be distributed on a DVD protected by CSS. This increased volume and the sophistication of these ancillary materials just since the 2000 rulemaking is a direct result of the rapid growth of the DVD market and the belief of our members that including these materials along with their feature film enhances the viewing experience of the public and their understanding of the art of filmmaking.

We hope our members will be able to continue to provide their vision and insights unfettered by a fear that they will not be protected, and again I thank you for the opportunity to appear before you.

MS. PETERS: Thank you.
Mr. Marks.

MR. MARKS: Thank you. I have no prepared opening remarks for this particular panel and so I wanted to, just if I may, take an opportunity to just very briefly respond to some of the remarks made by Mr. Miller.

To the content industry, we share the view that comments and criticism are core First Amendment values. We seek neither to diminish nor to prevent comment, criticism and the free exchange of ideas. They're core First Amendment values and studios and media companies I think seek to promote those values by putting out works and encouraging exchange of ideas and commentary about them. But what this inquiry is going to and what the crux of this inquiry is about is whether there's a need to grant exemptions to the prohibition of circumventing access controls because there's an adverse impact on non-infringing uses.

So when we look at the fair use, when we look at fair use in terms of comment, in terms of criticism, in terms of educational use, in terms of quoting, is our access control technology is preventing those fair uses and, in particular, in this case, is CSS technology preventing those fair uses? I would argue the answer to that is no. If you make,
as Fritz Attaway demonstrated in the Washington hearings, a reproduction of a DVD by camcording it, I believe that is enough to satisfy a fair use concern.

Mr. Miller seems to believe that fair use guarantees the right to engage in mechanical copying for a non-infringing purpose that is of identical quality to the original. That may be Mr. Miller's interpretation of what the fair use doctrine requires. It is at direct odds with what the courts have held, and I would like to quote from the 2nd Circuit in Remeirdes where it said quote, "We know of no authority for the proposition that fair use as protected by the Copyright Act much less the Constitution guarantees copying by the optimum method or the identical format of the original."

Mr. Miller may disagree with that interpretation of fair use but that is the law as interpreted by the courts and, therefore, I do not believe that the existence of the access control technology of CSS does cause adverse impact on the various fair uses that Mr. Miller describes which we as the content industry agree are vitally important and should be maintained. Thank you.

MS. PETERS: Mr. Metalitz.
MR. METALITZ: Thank you. I think my colleagues have covered most of this issue. In the interest of time, I'll just very briefly raise a couple of points.

With regard to the ancillary works, I think Ms. Garmezy had demonstrated a lot better than I can why these should have the same protection as the principal feature on the DVD. Back in 2000, you gave this issue honorable mention. You said perhaps the best case for actual harm in this context was with respect to the ancillary works, but you ultimately concluded that it appears that the availability of access control measures has resulted in greater availability of these materials. This is footnote 13 of the 2000 final rule.

All I can say is I think that's an understatement. I think what the testimony here today shows is not only has it resulted in greater availability of these materials, some of these materials wouldn't even ever have been created without the availability of the DVD format and the DVD format would certainly not have achieved the prominence it has without the CSS features. So here we're talking not just about greater availability but actually greater production which I think is what Congress was
trying to encourage certainly in the Copyright Act and
I would say as well in the DMCA.

So availability of these works in the pre-
DVD era was zero. Now these works are available to
tens of millions of people. I think by any
calculation the conclusion that you reached in 2000
remains viable.

Mr. Marks has pointed out what the 2nd
Circuit said about CSS. The 2nd Circuit also reached
some conclusions that CSS was an access control.
Congress reached some conclusions about 1201(a)(1)
that there could be liability, even the absence of
infringement. I think Mr. Miller argues quite
eloquently on the other side of all these propositions
but we're acting within a context of now that the
Congress has enacted and decisions that the courts
have made, I think that's really the context within
which this proceeding should be operating.

Of course, Mr. Attaway's demonstration has
already been referred to here as evidence. I'm still
a little uncertain as to what era our joint reply
comments made when they asserted that the broad
critics seem to have access to all of these movies.
They're watching them and describing them in great
detail in the postings that were included in Mr.
Miller's submission, so it seems to me they have access. We're prepared to assume that it's legitimate access. But if they believe that they need an exception to the access control provisions in order to actually excerpt the material and post it on the site, I think the record here demonstrates that that is not necessary in order to promote values of comment and criticism.

Turning very briefly to the public domain. Here again, I think it's a situation where the record clearly shows that over the past three years public domain films have become more accessible to more people with more titles in more ways with more commentary, with more material that will help put them in context and increase people's enjoyment of them than ever before. So it's a little hard to see. I mean we would say, I suppose, the glass is half full. Not every public domain film is available and there are real issues about preservation and so forth that need to be tackled, but it's hard to see that the glass is leaking and draining, which is the viewpoint that EFF has brought to the table here. I think, by contrast, there's been an explosion of this material that's available.

And the issue of availability on VHS which
was a factor obviously in your footnote 13 and also in the PD area, I think we've already addressed that, that we don't think that's the determinative factor. Many of these titles were never available on VHS and so it's hard to see why, because copyright owners have made the decision and others besides the major studios obviously, have made the decision to put public domain material out in DVD format, the result of that should be that protection against circumvention is limited. It seems as though that's kind of providing a perverse incentive to making this material available.

And, of course, this material, by definition, if it's in the public domain, in many cases, the source material is available, as you all know, within the Library of Congress and if people want to put it out without compilations of public domain material that don't have any CSS protection on them, they're free to do so and the library actively encourages that and makes prints available and so forth and I'm sure for some of these titles there are multiple versions out. I can't give examples but if you look analogously at the print market, we know that there are 100 different versions of Leaves of Grass and many of these other public domain materials are out in multiple versions.
I'll just conclude. I don't want to conclude on a picayune note here, but the question of these famous nine titles that the crack research team at EFF discovered that were not available in VHS and we pointed out in our counter-filing that in fact five of them were. We found that. We didn't have a crack team working on it. We had one person go on the Internet for about 45 minutes one Saturday afternoon and we located these. These are mostly Laurel and Hardy titles. Along Came Annie. Actually, it's Along Came Auntie. We gave the correct title of this work. And many of these other Laurel and Hardy pictures. There was also a very well known documentary by Pier Lorenz, The River. That's out in VHS.

So what the EFF filing says is at the date of submitting these comments, the commenting parties were able to identify nine public domain works that are now available only on DVD format and not in VHS format. We agree that there's not a burden on them to identify a republic domain title that is affected by their exemption, but we think that when they list titles and claim they're not available in one format, they should be accurate about it and that's the only reason that we tried to correct that in our reply comments. As I said, I don't think that the
availability on VHS is determinative here. What I think should be determinative in this case is that with the advent of DVD, including the CSS functions, the result has been that public domain film material is more available to more people than ever before.

I think we're in agreement here that 1201(a)(1) would not prohibit the circumvention of access controls when the only thing lying behind the access control is public domain material. That is often not the case and, for that reason, we think an exemption in this area is unnecessary and, in fact, would be harmful. Thank you.

MS. PETERS: Okay. Thank you very much.

You will all have one hour, and so will we, to think about the questions when we come back. So see you in one hour.

(Off the record at 1:10 p.m. to reconvene at 2:10 p.m.)
2:10 p.m.

MS. PETERS: Now to the final session of our, I guess, seven days of hearings.

MR. TEPP: But we're still on the second panel.

MS. PETERS: That's right. But it's the afternoon session. I hope you all had a nice lunch and are ready to answer some questions. We're going to start the questioning with David.

MR. CARSON: I'm hoping we can clear the air on at least one issue. Is there anyone in front of us who would take the position that when a public domain audiovisual work is put on a DVD by itself and is protected by CSS that the circumvention of CSS in order to do whatever one is doing with it to view that public domain work would be a violation of Section 1201(a)(1), to circumvent CSS to access a public domain work when the only thing that's on that medium is the public domain work?

MR. MARKS: No.

MR. CARSON: No, you don't think it is.

MR. MARKS: I do not think that if it's purely a public domain work which is on the DVD encrypted with CSS, I believe the statute by its terms
refers only to effectively controls access to a work protected under this title meaning a work protected by Title XVII.

MR. CARSON: Mr. Metalitz, I know you were going to the text. Do you agree with that analysis?

MR. METALITZ: I would agree.

MR. CARSON: Okay. So I hope that satisfies you folks. That was your position in the first place.

MS. HINZE: Yes.

MR. CARSON: So whether we say it or not, at least you've got these folks saying it. You may have a chance with us. Who knows?

MS. HINZE: That doesn't relieve the question of the compilation.

MR. CARSON: Well, that's my next question. That's my next question. Thank you for anticipating it. So how many public domain works are you folks aware of that have been released in combination with other copyrighted material on the same medium and protected by an access control such as CSS?

MS. HINZE: I think we looked at the flip side of the coin, so our research was looking at how many works were available on DVD, public domain works were available, stand-alone works, on DVD.
MR. CARSON: Right. By their interpretation, you don't have a problem with that. The one you think there's a real problem with is the compilation one, so it would be helpful to know how much of a problem that is and I'm not sure I saw anything in the record thus far that tells us what's out there in that forum, which is the forum where you really need our help, if in fact you do need our help.

MS. HINZE: Right. Perhaps I can give this by way of a point of quantification. Our comments include the figure of 70 works. The best information we were able to obtain in December was that there were 70 public domain works that have been released on DVD. Now, again I would like to point out that as a consumer organization what we had to rely on were not industry sources there but the Internet Movie Database Pro Service, which is the largest movie Internet database on the Internet and it listed 70 public domain works released on DVD. I'm not aware whether they are in combination or not but that certainly sets sort of the upper limit and, just for the sake of clarification of the record, what I think is on the record -- my clear understanding is this. What we have identified is nine works, public domain works, that are released as pure public domain works.
on DVD. Mr. Metalitz has clarified that five of those are available on VHS compilations and that four of those are pure public domain works only available on DVD and no other format.

MR. CARSON: Okay. Is there any witness in front of us at all who is aware of a single public domain work in audiovisual form that is on the same medium as a copyrighted work?

MS. HINZE: I can answer that question. I couldn't answer the question as to the total number.

MR. CARSON: Okay. Good.

MS. HINZE: I think both of the comments that were submitted by consumers in support of this exemption dealt with that. One deals with the Lumiere Brothers. They were the French pioneers of movies and the Great Works of Film Title I, Volume I includes a public domain with their work in combination with works which, as I understand it, are still subject to copyright. There is also the example of a Charlie Chaplin movie which, as I understand it, is a public domain work that is in a compilation with a series of Charlie Chaplin movies, some of which there is a claim to copyright over.

So I can answer that paint and I don't think it would be hard for me to supplement the record
if it would be helpful to the Copyright Office after
this proceeding but I don't have an upper limit on
that number for today's inquiry.

MR. CARSON: I don't know whether it would
be helpful to the office. It might be helpful to you
to do that.

Mr. Metalitz, you looked at one point like
you wanted to say something else.

MR. METALITZ: I just wanted to make sure
that the record is correct. I don't want to beat a
dead horse over these nine titles, but I don't even
know whether these titles are in the public domain.
I was assuming that they were. We found that they
were available on VHS. I don't know about the other
four titles because we didn't find them so I don't
know what their status is.

MR. CARSON: Okay.

MS. PETERS: All we know is that there are
VHS copies.

MR. METALITZ: There are VHS versions of
five of them.

MS. PETERS: Right, but not the other
four.

MR. CARSON: Mr. Miller, Mr. Marks
actually beat me to the punch on one question I wanted
to ask, but at least in setting down the predicate for, but having done so, you recall the passes from the Corley decision and the 2nd Circuit that he recited.

MR. MILLER: Yes.

MR. CARSON: I gather you would take issue with the 2nd Circuit's analysis there.

MR. MILLER: Well, I'd like to address that issue. First of all, I would take issue with the 2nd Circuit's analysis, but that's not the question before this panel. The First Amendment does not, according to the 2nd Circuit, demand mechanical copying. Now, I -- as a First Amendment guarantee now -- I disagree with that, but that's not before the panel.

However, this does not mean that the First Amendment is silent on the issue. A First Amendment issue does exist. Whether it rises to the question of unconstitutionality or not is a separate issue. Unconstitutionality is a very high burden to meet, but that doesn't mean that there isn't a First Amendment issue at stake. The First Amendment may not guarantee a mechanical copying according to the 2nd Circuit but it does not foreclose the fact that mechanical copying may in fact be fair use. And I would argue that in
fact it is a fair use. AND the question before this panel is whether or not direct copying, mechanical copying, is a fair use. And in the context of commentary, review, criticism and parody, the answer is most generally yes.

Furthermore, we're not asking this panel for a constitutional determination. We're asking this panel to waive a harm of not permitting direct quotation in the balancing between the harm to the copyright industry and in the balance to the harm to the people who want to do direct question. And our argument, which has not been sufficiently responded to, I believe, is that direct quotation is critical.

"To be or not to be" (cough). How much are we going to permit these multiple analog copies that create things? Sometimes you want to look at how a lighting director lighted a scene and some of these variations would be very subtle and they could easily be lost in some of these various aspects and so mechanical copying is absolutely critical to certain types of commentary and criticism and it does identify First Amendment rights. It may not rise to the level of constitutionality but that does not mean that this panel must not balance that harm.

MR. CARSON: So there are First Amendment
rights that aren't constitutional? I'm not following that.

MR. MILLER: There are First Amendment issues, First Amendment values and First Amendment concerns that do not rise to the level of unconstitutionality. Now it may be permissible, for example, for the government, say, to, for example, say that you can't say certain words on television before 10 p.m. That does not mean that there's no First Amendment interest in saying those words. It just means that in the balance between the First Amendment issue of saying particular words before 10 p.m. on television and the balance of protecting children or something, those First Amendment issues are outweighed.

So the First Amendment issues of mechanical copying may not rise to the level of constitutionality, but that is a very high burden. It does rise to the point of balancing the harms to the copyright industry which is negligible with the harms to those who want to comment and criticize on ancillary works. So there's a First Amendment issue there. It may not achieve constitutionality by itself but it's still an interest that must be weighed.

MR. CARSON: You're talking largely in
terms of the First Amendment. Is that what your analysis is based on, the First Amendment as distinguished from fair use or -- I'm a little confused on what you're basing your argument on, I guess. Just if you could clarify that.

MR. MILLER: Well, the First Amendment argument is in response to the 2nd Circuit where they say it doesn't rise to the level of First Amendment.

MR. CARSON: They also say it's not fair use.

MR. MILLER: Mechanical copying is not fair use but I would argue that -- actually, I don't believe that they make that ruling. They say mechanical copying is not guaranteed by fair use. They don't say that mechanical copying may not be fair use. So, for example, I make a pure mechanical copy and it's a five second clip and it's for purposes of commentary and criticism. I think most courts would rule that that is a fair use. Now, whether that violates 1201(a) or not is a different story, but they would say that this mechanical copy was a fair use. If I mechanically copy Shakespeare, assuming Shakespeare wasn't copyrighted, and I wrote "To be or not to be period," that's a mechanical copy of Shakespeare because it's an exact absolute perfect
copy of it. That would be a fair use.

MR. CARSON: So I gather you would say one could reconcile the 2nd Circuit's analysis in Corley with the position you're taking today.

MR. MILLER: Absolutely.

MS. PETERS: Can I just ask a question because it's related. I don't understand your direct quotation comment with regard to a DVD. Are you basically saying that using a camcorder or any other means is not a direct quotation, that you have to somehow copy it --

MR. MILLER: Absolutely, and I think the comments of the other side would say. In some senses and for some purposes, it may be the equivalent of a direct quotation. But remember, when you're doing a camcorder copy of a DVD, you have the DVD which is purely digital which is then converted to an analog conversion. This is going to create some degradation of the signal to some certain extent. This analog signal is then transmitted to the camcorder which may be digital or analog. In the case of an analog camcorder, it's going to be converted from analog to analog and analog to analog transmissions are going to create various effects and be degraded. I mean that's the argument that the copyright industries make
all the time. And then may be converted back to
digital so that Blogcritics can then post it on the
web. So we have multiple conversions that then create
multiple discontinuities and may create different
things.

If you're looking at certain subtle
aspects of it, then you may miss them, whether it's
lighting or the sound is not going to be quite right
because the television has bad sound and then you're
going to the microphone of the camcorder and everybody
knows microphones on the camcorder are really not very
good. This is assuming everything works perfectly and
that, despite any demonstration, is not going to be --
you know, like I said, have you ever videotaped a
party and there's a television in the background. What
do you see? You see these bands because you're
dealing with different sorts of inter-laced video
versus progressive scan video and you have to synch
them just right. Otherwise, you're going to have all
sorts of defects that will really degrade the signal.

So in such cases where there's all these
defects degrading the signal, that's not a direct
quotation. Like I said, that's like "To be or not
(cough).

MS. PETERS: But doesn't it relate to what
the use is? I mean for many purposes, comment and
criticism, it's enough to basically say a comment
about the lighting.

MR. MILLER: For many purposes, that would
be true, but not for all purposes and for many
purposes it would be perfectly great to paraphrase
Shakespeare and discuss the plot in Romeo and Juliet.
I can give you the plot of Romeo and Juliet right now.
I can't give you Shakespeare. For some purposes, just
giving you the plot of Romeo and Juliet and
commentating on that would be fine. But if I really
want to get to the language of Shakespeare, I must
quote Shakespeare directly. The people on Blogcritics
are videophiles. They love movies. They're very much
into the detail of movies. And these people really
want to get to the very heart of it. In fact, that's
why ancillary works are absolutely key because they
are showing the subtle distinctions. This isn't just
hey, the -- are really cool, let's go see it, dude.
This is, you know, look at the decisions that
Warchowsky brothers made in the digital option and how
the cameras moved and the lighting options that they
did here, so they really have a strong need for
mechanical reproduction and direct quotation in order
to meet their needs.
For some people, sure, but we have strong evidence that these videophiles demand for the purposes of commentary and criticism. I mean otherwise what we're saying is well, you know, hey, good enough, murky, sound quality is bad, good enough. I think in the balance that's a harm.

MR. CARSON: Mr. Metalitz, you had your copy of Section 1201 open. I wonder if you could do it again. Go to the bottom of page 179 in the edition that we all seem to have. Just as an introduction to what I'm about to try to engage you in, I take it that a good deal of what you folks are saying in response to what people like Mr. Miller are saying is not so much that the individual act of circumvention by the individual Blogcritic who wants to get that perfect copy so they can show the lighting just as it was, that individual act isn't necessarily the problem. The problem is that what could happen subsequently with respect to the copy, that the copy is suddenly then free and clear and all sorts of other things might happen to it. You're not so much complaining about that one individual act if it just stopped at the use he's talking about. Am I right or am I not right, first of all?

MR. METALITZ: I think that's basically
correct. I mean I think Mr. Miller spent a while demonstrating that a lot of the uses that would be enabled by circumvention would be non-infringing uses, and we're prepared to stipulate that there would be a lot of non-infringing uses. But Congress made the decision, which we very much support, that infringement liability by itself was not enough to deal with the problem and the risks and the uncertainties that are faced in the digital millennium. You don't have to prove infringement in order to show liability under a 1201(a)(1). That, I think, is based on the assumption that many of the things that would happen after a circumvention would be non-infringing but not all.

MR. CARSON: Okay. Well, let's turn to 1201(a)(1)(d) and what that says in pertinent part is "The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to this rulemaking, that non-infringing uses by persons who are users of a copyrighted work are or are likely to be adversely affected and the prohibition contained in subparagraph H shall not apply to such uses with respect to such class of works for the ensuing three year period."

My question is let's assume we find a
particular class of work will be exempted. That happened three years ago, likely to happen somewhere with respect to something this time. What's the effect of that? As I see it, there are three possibilities you may come up with other but I'd sort of like to get your analysis of it.

One analysis would be once a class of works is exempted, anyone is free to circumvent with respect to that class of works. That's one possibility. Another one is once that class is circumvented, anyone who is engaging in a non-infringing use may circumvent but only someone who's engaging in a non-infringing use. Perhaps the most restrictive one that I can imagine would be that once that class is exempted, anyone who is engaging in a non-infringing use that we have identified in this rulemaking as a non-infringing use would be able to do so but nobody else. That's sort of the universe of reasonable or semi-reasonable possibilities I can see. I don't know.

I guess I'd like to know if you've got an analysis of what in fact the correct analysis is. Who in fact is able to take advantage of this exemption once a class is exempted?

MR. METALITZ: This is a question we've
given some thought to and obviously this provision is
not a model of legislative clarity.

MR. CARSON: Unlike the rest of 1201.

MR. METALITZ: Unlike the rest. Right.

But I think that the likeliest outcomes would be
either #1 or #2 in your list. The key phrase, as I
read it, is "Shall not apply to such users with
respect to such class of works." "Such class of
works" is the class you've defined, so we know what
that is. Such users. Persons who are users of a
copyrighted work, if you look at three lines up. I
think reading #2, as you said, which is that this only
applies to people who circumvent and then make non-
infringing uses assumes -- it's almost interpolating
such users and such uses. It's almost interpolating
the concept of such uses because the statute refers to
non-infringing uses by persons who are users of the
copyrighted work. A person is a user for all
purposes. He or she may be making non-infringing uses
and, if the statute said, such users for such uses
with respect to such class of works, then it would be
clear that I think #2 -- I hadn't thought about #3
because I don't think you really have to
comprehensively identify all of the potential non-
infringing uses, but if it said that, I think that it
would be clear that #2 is the right interpretation.

We don't know because there haven't been any (a)(1) cases, at least that I'm aware of. I think the likeliest outcome would be that the courts -- it's likely that the courts would find #2 as to be the correct reading and I think the way it would work is this. If the plaintiff claimed a violation of 1201(a)(1), the defendant would come in and say, look, I was using one of the works in the class identified by the Librarian of Congress and, therefore, I'm such user, I'm a user to whom this exemption applies.

I think then it would probably be incumbent on the copyright owner to say, but wait a minute. You're not making a non-infringing use. You're making an infringing use and, therefore, that the exception really doesn't apply to you.

Now, in that case, there might also be--obviously the claim of the copyrighter would be that there would be infringement liability also. I think if you had a case where it was just a claim under 1201(a)(1), that would be based on a non-infringement. In other words, in the case where there isn't an exempted class.

MR. CARSON: Let's assume for a moment that interpretation #2 is the correct interpretation
and nobody disagrees. Let's just indulge in that fantasy for a moment. If that's the case, what's the big deal? We've identified at least some non-infringing uses that are being deterred by CSS. If we come up with an exempted class and maybe these will be corporate ones, maybe not, all that it's really doing is permitting people who are engaging in non-infringing uses anyway to circumvent. So aren't all these risks, all these dangers you're worried about, really not present if that's how you have to interpret Section 1201(a)(1)(b)?

MR. METALITZ: First of all, I don't think that is the way you have to interpret it. I think that's one --

MR. CARSON: That's my premise.

MR. METALITZ: Let's assume for a moment that interpretation is right. Then you have to try to reconcile this with Congress's decision not to collapse the concepts of circumvention and infringement or act of circumvention and active infringement. Congress obviously -- it's hard to imagine an act of circumvention that couldn't possibly result in a non-infringing use. If your analysis were correct that what's the big deal, that could be said as to just about any claimed exemption. What's the
big deal? If people only use them for non-infringing purposes, there's no liability there and if people use it for infringing purposes, you have infringement liability.

That was not Congress's approach. Congress said after the two year period and subject to the tri-annual review that we're engaged in now and subject to other exceptions that are in the statute, the act of circumvention itself should by itself be a track viability and the reason I think was to encourage the development and the deployment of technological projection measures with the ultimate goal of increasing availability, maximizing public access to these works.

So I think to reconcile this to the structure of the statute, you can't go in with the supposition that as long as the scope of the exception exemption is only limited to non-infringing uses, there's really nothing to worry about. Now, that's a legalistic answer. Let me give the practical answer as well which is we all know that there's a bleed through effect here and there's a very important signalling effect that is involved here and giving permission to engage in acts of circumvention is going to have repercussions in the real world.
I think there was some testimony about this earlier and perhaps there will be later this afternoon in the example of video games where the regional coding function is in some instances, at least, very tightly integrated with the other access control functions and, in that case, you have evidence before and I'm sure you'll discuss it in more detail that as a practical matter, if people are going to be circumventing regional coding, they're almost inevitably going to be using a tool that also circumvents the generalized access control and, therefore, the scope of what's actually going to happen in the real world is going to go far beyond what may be within the narrow legalistic confines of the exemption that you've recognized.

I hope that answers your question. I think from a legal structural point of view, it can't be enough to say don't worry about it because if you have an infringing use, you'll be able to overcome this exemption by some type of rebuttal or some type of counter-evidence in the case. I think as a practical matter it's very important that the exemptions be drawn as narrowly as possible so that they will, to the greatest extent possible, carry out the congressional purpose which is to deal with
situation where you determine and liability determines there's been a substantial adverse impact on non-infringing.

MR. CARSON: Mr. Miller, I think you had something to say in response.

MR. MILLER: Yes. I can imagine several scenarios where you would have a violation of 1201(a)(1) and yet have a non-infringing use. Now, those would not be relevant to the claimed exemption that we're asking for today with regard to CSS for a variety of reasons. The example I would give, for example, would be a database. You have access to a database. You need to use a password. If I create some sort of tool that generates passwords and then gets me access to the database, I may get access then to the database and then make a non-infringing use of that database, but I've gained access where normally I 'd have to pay, that I'd have to pay money to walk through that door. But I haven't paid money because I cut a hole. And that's what Congress is trying to get. So even though I only used the database for a non-infringing use, I think you could still find liability there. We're not asking for an exemption for that purpose.

I can also give another example. For
example, many video games come with certain levels that are public domain on a DVD or a CD and then you have to get a password to unlock the other levels. If I unlock those other levels for fair use purposes, I want to review the game, for example, which would be a fair use, you could still say that that's a non-infringing use but that it's a non-fringing use, therefore, no violation of copyright but you've violated the access control. You got access to the game without forking over the cash. And this is what I believe Congress actually had the intention of doing. This is a proper reading of the DMCA and that, therefore, and is not applicable to the exemption that we're asking for with regard to CSS.

On a second point, as far as the practical answer, well, this is the first time we've heard this argument. It wasn't in reply comments to my initial arguments where I made this argument clear. There's no evidence of this, I think. It's sociological, and I'm not sure that it falls within the scope of this rulemaking that we have to decide, well, are people thieves or not? And I think my argument is to the fact that these tools are already available in the case of CSS. If people want to be thieves, they can be thieves. The Library of Congress isn't suddenly
going to flip a switch and say, well, you have an exemption for particular special uses and turn a bunch of people into pirates. I think that's ludicrous.

MS. PETERS: Steve.

MR. MARKS: I just wanted to make just one sort of very -- maybe it's prosaic -- response to one of the remarks Mr. Miller was making in terms of the example of you have a particular film where the lighting direction was very, very subtle and perhaps unique, something very worthy of commentary and, in that case, it may well be that you can only see that the best and with the greatest crispness in a theater on a 35 mm print of the film.

I think the logical conclusion of what Mr. Miller is arguing is that, therefore, a user who wants to make that sort of fair use to show that clip of the wonderful lighting should be guaranteed access to the 35 mm film print, go into the studio vault, be guaranteed access to it to take that clip because it's the medium that shows the lighting direction the best. I think just sort of as a practical common sense notion, we would say no, that's not the case. Fair use just doesn't work that way.

MR. MILLER: Well, my response to that is my argument doesn't lead to that at all. Given that
I have a DVD, why shouldn't I be able to make the best use of that DVD? That doesn't mean that you guys have to give me a DVD if no DVD exists. It doesn't mean that you have to give me a 35 mm print. It doesn't mean that I have to be given anything but, given that a DVD exists and it's out there, why can't I use it to the best ability that I can if such subtle destinations are suited to my needs and, in many cases, they will be if I'm a videophile.

MR. MARKS: And my answer to that is we do not give you the DVD unconditionally. That's what access control is about. Access control is about you're granted access to the work under certain conditions like playing it on an authorized DVD player that is authorized to decrypt the work. I think you are making the assumption that when a consumer buys a DVD, they automatically, because they've made the purchase, have access to the work under any conditions they so choose as long as the use that they're making is non-infringing and I don't think that's frankly a correct premise.

MR. MILLER: Well, my argument is that, A) I would argue that that is a correct premise and I put a lot of work in and nearly 100 footnotes into making this determination and a proper understanding of the
DMCA and trying to analyze it within that harm text. However, I think beyond that, with regard to fair use, we hear a lot about licensing and terms and everything like that and my understanding of copyright law is that we have copyright law in the absence of terms and licenses. Now, when I buy the DVD, I've never seen a license, I've never seen explicit terms, I've never signed anything and if the copyright industry would provide me with these explicit terms that I agree to when I buy a DVD, I'd be more than happy to read them and make a determination.

But in the absence of specific contractual terms, then copyright law holds and copyright law holds that there's no reason I can't play it on a different machine. There's no reason that I can't make use of it as long as it's non-infringing. Copyright law says as long as it's not violating 106 or some of the other smaller statutes in there, fine. And so the absence of a license --

MS. PETERS: Sort of like your class for exemption. No?

MR. MILLER: Say it again.

MR. TEPP: Okay. Go ahead.

MR. METALITZ: I was just going to say that argument was presented to Congress and that
argument may summarize the state of the law prior to October 28, 1998. Now we have an act of Congress that says that if you meet the criteria, if there's circumvention of the access control measure, there may be liability. So I think that's another element.

MR. TEPP: As long as we're talking to Mr. Miller, let me continue with you. I have a couple of questions. Mr. Miller, in your submitted comment, you acknowledge that Macrovision can be circumvented consistent with Section 1201 in order to capture a copy of the analog output of DVD use and that that could get you a copy of the ancillary works, similar to the camcorder exempt we've talked about. Granted that involves a copy of somewhat less quality than the digital copy right off the DVD if you circumvent CSS.

On the other hand, there are concerns that have been raised by the content industry about copies that are free and in the clear and piracy. I think by any standard Congress took those to heart when they enacted 1201 so we would certainly be in a tough position to ignore those concerns. The statute says we have to consider things that are going to harm the market. So then we're in the balancing test. So what I need to ask you is can you identify for us -- and perhaps I want to say quantify even though we know
that's a difficult thing to do -- how much benefit there is to the Blogcritics that you spend most of your time in your submitted testimony talking about to have a perfect copy off the DVD by circumventing versus a copy that's been captured through circumventing Macrovision or via the camcorder route?

MR. MILLER: Well, it is very hard to exactly quantify it. I won't be able to give you specific numbers personally, but I will be able to give you some examples to have an idea of it. Many of these Blogcritics are college students, are people with very low resources. So to say for them to go ahead and go get a camcorder is a rather large expenditure for these individuals and it may not seem a lot to the people in this room but $400 for a minimal quality camcorder is going to be very expensive, so even if they were to do that.

Secondly, and thanks to the wonderful efforts of Macrovision, it's not nearly so easy to get around Macrovision as many people think. To get the devices, the video correction devices that strip out the Macrovision and improve, you often have to go through quasi-underground sources, deal with ads in the back of magazines. You're not sure who you're dealing with. You may in fact be dealing with regular
pirates. So I find it odd that the copyright industry is saying, well, you can do it by going around Macrovision so go deal with those people in the back of those magazines.

MR. TEPP: You said that.

MR. MILLER: But to the extent -- no, no. Obviously I --

MR. TEPP: You said that in your testimony. Right?

MR. MILLER: Based on -- obviously yes. If Macrovision is a copy protection device only, under 1201(b) it is legal to around it.

MR. TEPP: Okay.

MR. MILLER: It is not, however, legal to traffic in it and I'm not sure that, as a policy matter, we want to encourage people to get these anti-Macrovision devices or encourage them to deal with these sort of things because it's illegal to necessarily traffic in them.

MR. TEPP: Let me interrupt you for just a second because where you're going raises an interesting juxtaposition. You're arguing that it's expensive and possibly against public policy to have people circumvent Macrovision but your solution is to have them circumvent CSS.
MR. MILLER: Yes.

MR. TEPP: Which arguably is also not something that we want to have unless we absolutely need it and which normally isn't readily available without going through something very nefarious but there's some sort of means that aren't in the front of the magazine.

MR. MILLER: Well, the distinction between CSS and circumventing Macrovision is that CSS or DCSS or the circumvention are computer programs whereas circumventing Macrovision requires actual physical hardware which means you have to have some sort of physical contact with somebody which is going to implicate a variety of different issues that you don't get with just downloading from a site in the Netherlands or in Holland. It's not so easy to buy a Macrovision circumvention from Holland or the Netherlands, but I can download from the Holland and Netherlands sites, and I see that as an improvement, particularly since CSS is not illegal in Holland or Finland and so we're dealing with an entirely separate set of issues.

Now, it is a subtle distinction but I think a very critical one. I think the Internet is very different than real space in this sense so I
think that it's much preferable to have people downloading CSS if necessary or creating it themselves. CSS is well known, well understood. You can talk to many cryptographic experts who will tell you exactly how it works. I think that's very superior because that's the other way to get around it is learn cryptography, learn programming, and it's wonderful for our industry.

MR. TEPP: Well, that doesn't sound like a cheap way for a college student to get to a movie.

MR. MILLER: Well, it's cheap in terms of price, costly in terms of time, and college students usually have more time than they have money.

MR. TEPP: But to learn to be a cryptographer sounds like a substantial undertaking.

MR. MILLER: Forty bit keys aren't that hard to understand.

MR. METALITZ: May I have ask one question?

MR. TEPP: Well, no, but if you want to respond, go ahead.

MR. METALITZ: I do want to make it clear on the record that the copyright industry is not encouraging people to circumvent Macrovision which is, I think, what I heard from the other side of the room,
and it's just kind of odd that as long as you download your hack over the Internet rather than buy it from somebody in a trench coat in a dark alley, it's okay. I mean it's cleaner because it's over the Internet. I don't buy into that thinking and I don't think that's relevant to this proceeding.

MR. TEPP: Certainly, while DCSS may be illegal in other countries, it's pretty clearly not here.

MR. MILLER: It's not legal to traffic in it --

MR. TEPP: Let me just get the question out. I think you have raised some interesting points about the relative difficulties of using DCSS versus whatever is necessary to circumvent Macrovision. Okay. But what I want to get back to, I sort of diverted you on this and I don't want to spend all the time on it, what I want to ask you is to focus on the relative benefits of having a circumvented digital copy for the Blogcritics that you've discussed as opposed to a copy attained through a camcorder or through circumventing Macrovision so that we can compare in this balancing test that we're instructed to do the relative benefits of the exception you're proposing as compared to the harms that have been--
MR. MILLER: Well, again I'll return to the fact that to use anything other than your own hardware, to use a free software program that you download off the Internet or obtain other ways is much cheaper than having to buy and set up all this additional hardware. But secondly, I think again, we're dealing with videophiles. People who are very interested in the quality of the video, who are very attuned to subtle degradations in it, and that this is very important to them. I will use an analogy to music.

Many people will not listen to MP3 files which are compressed using a loss in compressions scheme which means they lose some of the high notes and there's a little bit of tinniness and stuff like that, and they refuse to listen to MP3 files. Most people find it perfectly acceptable. They think they're really convenient and stuff, but for them, it just doesn't do it for them. They have to have the higher fidelity. How do you quantify that? For many people, it's worth a lot of money. It's worth a lot of their time and effort and a lot of loss of convenience. MP3s, I can put them in my pocket, take them anywhere. But if I really want the high fidelity, they're not as transportable and they lose
these measures and that's a cost to them. And the
same thing goes with videophiles. The fact that they
have to use these loss E analog, digital analog
conversion schemes and stuff is simply not acceptable
to them. It's a very high cost to them. And I think
for purposes of criticism and commentary, this is
important. These people who have attuned themselves
to the video, to lose their commentary because they
can't get this high quality and provide and share it
with us is a loss to all of us.

MR. TEPP: So you want us to focus on the
relative harm to the connoisseur rather than the
average --

MR. MILLER: I think there's harm to all.
The harm is obviously higher, I think, with the
connoisseur but it's a variable graph.

MR. TEPP: Thank you. I just have one or
two questions for Ms. Hinze on the public domain
issue. I think we've settled with the questions Mr.
Carson asked that the pure public domain work can be
circumvented, the CSS on that can be circumvented
because it's not a work protected under this title.
So now we move into some of the areas of gray about
some sort of mix of the same DVD. I'll pick a movie
that shows a scene at the Louvre, as one of the
commenters suggested, which necessarily have public
domain works in the background. Is that the sort that
you're suggesting? You're going to see the Mona Lisa
there and I'm pretty sure that's PD. So there's a PD
work on a DVD. Does that mean, even though the rest
of the movie is two years old, you can go ahead and
circumvent under the exemption you're asking us to
grant?

MS. HINZE: I just want to get clear that
I am understanding your question. Is your question
directed to a public domain element within a movie
that otherwise is copyrighted?

MR. TEPP: Yes.

MS. HINZE: Is it the visualization of a
public domain element? Well, no. The class of
exemption that we're seeking is for public domain
motion pictures. We have asked for an exemption for
a Section 102 class of motion pictures that are in the
public domain.

MR. TEPP: Okay.

MS. HINZE: Our intention in asking for
that exemption was to seek an exemption for the public
domain motion picture so in a situation where a
compilation DVD includes a motion picture that is
copyrighted and or that there's a claimed copyright
over and a motion picture that is clearly in the public domain, our exemption would give consumers the right to access the public domain motion picture.

MR. TEPP: I appreciate that distinction. Thank you.

MS. HINZE: Could our argument go further? Is that what you're asking or perhaps I'm not understanding your question.

MR. TEPP: I'm not sure that others haven't suggested a broader exemption and I guess what I'm trying to find out from you is do you think there's an argument there or did you craft your exemption more narrowly than others?

MS. HINZE: Our exemption was crafted to deal with a motion picture that's in the public domain, not an element.

MR. TEPP: Did you do that because you felt that the larger exemption couldn't be sustained under the terms of the rulemaking or wasn't necessary?

MS. HINZE: I think we actually wanted to present to the Copyright Office narrow exemptions that fit within the classifications and the determinations that the Copyright Register and the Librarian of Congress made in its 2000 rulemaking. We were conscious in crafting our exemptions to think about
the nature of the class that we would need to present and I think -- I haven't actually given -- I guess the answer to your question is the way we crafted our exemptions was specifically to address a class that would fit within the definition of “class” as we understood the Librarian of Congress and the Register to have defined that term in the 2000 rulemaking. That was the reason why we crafted our class the way we crafted it.

MR. TEPP: Okay. Thank you.

I'm trying to further pursue this line of exactly what it is the class you're proposing would or wouldn't reach. How would you address the following hypothetical? There was a documentary produced about the Wright Brothers first flight and in that there's a 20 second clip of footage of the actual first flight of the Wright Brothers. I don't even know if that exists, but let's assume it does. That footage is clearly public domain so you've got public domain audiovisual work on a DVD. If we issued the exemption verbatim to what you've requested, can CSS be circumvented for that documentary?

MS. HINZE: I actually don't think that that's within the scope of what EFF has requested, so anything I say I guess is in the category of
speculation. But if you'd like me to speculate on the hypothetical, I guess I would like to get clear for my understanding. As I previously said, is that our exemption was crafted to deal with a unit of a motion picture and a motion picture in the public domain. Perhaps I'm not understanding your question correctly.

MR. TEPP: As I read your submitted testimony, Class 4 audiovisual works that are in the public domain in the United States that are released solely on DVDs, access to which is prevented by technological protection measures.

MS. HINZE: Right.

MR. TEPP: Now, this 20 second clip of the Wright Brothers first flight. Let's assume there's no other way to get it but on this DVD. That is --

MS. HINZE: Right. Okay. I understand where your question is going. Perhaps it would have been more helpful if we had said motion pictures per se. I can authoritatively say to you our exemption was targeted at motion pictures as a unit, not at footage within a wider work.

MR. TEPP: Then let's change the hypothetical and instead of a documentary on the Wright Brothers, it's a documentary on the Laurel and Hardy and we have a clip from one of the PD Laurel and
Hardy films.

MS. PETERS: You still have a clip.

MS. HINZE: Sorry?

MR. TEPP: That's exactly the question. What I'm trying to find out is how much public domain material must there be on the DVD in order to arrive at the threshold where you want the exemption to kick in? Any audiovisual work, any motion picture of any length or does that have to be the predominant nature of it? You used the term compilation. Are you suggesting that they're independent works?

MS. HINZE: Our exemption was targeted at capturing a unit of a motion picture which is in the public domain and by that, I mean something like a Charlie Chaplin movie, a work, a motion picture work.

MS. PETERS: You're not talking about parts of a work?

MS. HINZE: No.

MS. PETERS: Right.

MR. CARSON: You know these guys. They'll take two frames out of it and say hah, you can't use it.

MR. MARKS: I hadn't thought about that but thank you.

MS. HINZE: I actually think it's a very
important thing to be clear about and we were careful
in drafting our exemption to make our exemption
request as narrow and as practicable as possible. I
think the key issue here is the fact that public
domain works are being issued in combination with
copyrighted works. That is the key issue here and
what we have heard this morning before we broke for
lunch was an argument about increasing availability of
works by virtue of works being released on DVD and my
concern there is that it is a matter of choice for a
motion picture company to release a DVD that includes
both a copyrighted work and a public domain work.
That is something they can choose to do or choose not
to do and, to the extent that there's an ability for
them to choose to make public domain works available,
or -- to release public domain works and bundle them
together with copyrighted works and put them all with
inside a CSS wrapper so that it now becomes an issue
where someone has to potentially violate Section 1201
to access what was otherwise available as a public
domain work -- in other words, reasonably available
as a public domain work -- I think there's a real
chilling effect on consumers there and our exemption
is trying to get that particular situation exempted.

MR. TEPP: Okay. Let me ask one last
thing and I'll stop. I'm not sure -- and maybe I've
just missed it. I'm not sure I've heard or seen
evidence of this bundling. We had some discussion of
the nine or maybe four or five or whatever it is that
were strictly PD, subject to CSS. Do you have
specific evidence of entire PD motion pictures being
bundled with new copyrightable material, of any
material that's still in copyright?

MS. HINZE: As I stated in response to Mr. Carson's question, I believe that the two consumer
commenters actually, the works that they referred to, the Lumiere Brothers and the Great Works of Film are in this category and, as I said, I believe that there is, based on our searches as of December in our comments, that there are 70 public domain works available on DVD. I would welcome the opportunity to supplement the record by providing exact concrete examples. I believe there are two examples in the record already in this proceeding by virtue of the consumer comments and, with the permission of the Copyright Office, I'd be very happy to supplement the record because I believe that is the situation and that is predominantly the situation.

MR. TEPP: Well, we'd certainly like to get those facts if they're out there. Thanks.
MS. GARMÉZY: I just wanted to say in the case of public domain works, even though the film would be in the public domain, that does not mean that the original creators or the actors in it or their heirs don't have an interest in what happens to the film or how it is utilized or how, particularly for the actors, their image might be used, whether it's in public domain or not.

MR. TEPP: Okay. I assume you're not -- well, maybe this comes from -- that I thought we had unanimity on from the question Mr. Carson asked. Are you suggesting that a purely public domain work alone on a DVD protected by CSS should not be circumventable for the 1201(a)(1)?

MS. GARMÉZY: No, I'm not but I'm just saying that in the case of these compilations, we shouldn't make the assumption that there's not a reasonable protection of these works in the compilation.

MS. HINZE: Could we clarify that? I'm not quite certain --

MR. TEPP: Let Mr. Metalitz go.

MR. METALITZ: It's not directly on that point.

MR. TEPP: Okay.
MR. CARSON: You want a clarification of what she said?

MS. HINZE: Is there a kind of copyright in public domain works? I'm not clear.

MR. TEPP: I thought I heard no but I don't want to put words in anybody's mouth.

MS. GARMZY: No. I said --

MR. METALITZ: I was just going to say that in terms of the supplementation of the record, which I agree would be very helpful, we do have to distinguish the fact that a public domain title is on DVD doesn't necessarily mean that it is protected by CSS. I think we heard that this morning that these are two separate standards and so just to say this title is on DVD, we also have to know whether it was protected by CSS to know whether it even came within the scope of what we're talking about here. Whether that's standing alone, although I think we're in agreement that the statute doesn't reach it if it's bundled with other titles. There obviously may be--that circumstance may exist.

MR. CARSON: When you give us that information, will you give Mr. Metalitz a copy and you'll certainly have an opportunity to advise us which of those titles you come up with are not
protected by CSS.

MR. METALITZ: I can try but I think the fact of the matter is that most of these public domain titles -- I mean if you look at most of the major motion picture studios, they are not primarily in the business of distributing public domain titles. So this was likely to be small distributors and so forth. We can certainly try.

MR. CARSON: Good idea. I mean we've got to get the evidence in front of us. There are burdens of proof here. Sometimes the best we can do is he'll give us the information, you got a chance to respond. We'll do our best.

MR. TEPP: Thank you.

MS. PETERS: Could I just follow up with your questions. Mr. Metalitz this morning talked about the fact that if in fact the motion picture is in the public domain, then it is possible that maybe you can get access to it through the Library of Congress or maybe the UCLA film archive. But I thought I rememberer saying that's not good enough. If in fact the work is in the public domain and if in fact it is available in public archives, doesn't that respond to your fair use concerns?

MS. HINZE: My argument isn't an argument
about fair use. My argument is an argument about the
nature of copyright protection.

MS. PETERS: If in fact you can get a copy
of the work, then where's the problem?

MS. HINZE: The problem is that the work
is in the public domain. The copyright owner is the
public. In that particular category of works, there
is no claim to copyright, as I understand it. My
concern would be that by releasing something that is
in the public domain with a CSS protection on a DVD
that there is an assertion of private rights over
something that is a public work and that, I guess,
the--

MS. PETERS: So you're saying that they
can never combine a copyrighted work with a public
domain work in a package?

MS. HINZE: They can never deny the public
the right. In my analysis, they can never deny the
public the right to access it. They shouldn't be
entitled to use CSS and the legal sanctions of Section
1201 to deny the public the right to access the public
domain elements of that compilation. That would be my
position.

MS. PETERS: To access. That means to be
able to play it?
MS. HINZE: I would actually go further. They’re public domain works, since they're not subject to copyright, the public is entitled to use the non-copyrighted material in all manner of ways. As I said, by definition, these works are not subject to copyright law and the intent of Congress when it struck the carefully constructed copyright balance was that consumers would have the ability to use, not just access, works that are in the public domain.

MS. PETERS: So an example that you raised this morning. It's a public domain work and now ancillary material has been added to it. People commenting on how it was made or the sets, whatever. That's clearly copyrighted footage. It now is combined with the public domain. How does that play out in your proposed exemption?

MS. HINZE: Are there two separate pieces?

That's where I'm --

MS. PETERS: Well, obviously there's the ancillary material that kind of talks about the film, whatever. Doesn't matter what it is. But it's related to the film but it's new. But with this package, with this DVD, there is also the quote, "public domain motion picture." How does your proposed exemption work in that case?
MS. HINZE: To what does it apply?

MS. PETERS: Yes.

MS. HINZE: It applies to public domain works.

MS. PETERS: But you want to be able to circumvent all of it because it's all as a package.

MS. HINZE: The only reason that we are seeking an exemption to circumvent all of it is because a copyright owner has chosen to release it combined with a copyrighted work. If it were released as a solo form, I think we all agree, as far as I can see this afternoon, that there's really no need --

MS. PETERS: So you're basically saying you don't put out any ancillary material.

MS. HINZE: Don't choose to make your business model dependent upon using a technological protection measure to protect something that's actually something you don't own a copyright in. That might be the other way to phrase it.

MR. MARKS: I just wanted to respond a little bit to this with just some practical thoughts perhaps about the access to the public of copies of the work because I think part of the business incentive to take a public domain work and remaster it, restore it, to put it out on DVD, and add perhaps
historical information or get the directors back with
that work to talk about the work is not simply some
nefarious scheme to say, aha, we're going to snatch
this away from the public domain but rather to say
we're going to make an investment to make this work
available to the public and we'd like to get an
economic return on that investment.

And I think there is, when you look at the
overall balancing of availability of works to the
public, I think it's important to balance the issue of
if you're going to allow circumvention of works that
represent compilations of protected works and public
domain works, will the end result be greater access to
the public of these public domain works, more
restoration of these public domain works, or less?
And I just think that's one factor that needs to go
into the equation.

And another issue I wanted to raise is if
you take public domain literary works that are
available in print, and I understand, at least in
England and I don't know if this happens in the U.S.,
but some publishers who specialize in publishing
public domain works do so on paper that has a certain
sort of water mark on it so that if you go to just
mechanically photocopy the public domain work, the
water mark appears and obliterates part of the text and so the copy that you've made is really not very usable.

As far as I know, no one has challenged that that's somehow an illegal activity to engage in because you're trying to frustrate the making of a mechanical copy of a copy of the work. I think some of those same arguments could apply in this case. I think when we speak about public domain works, there does need to be some sort of distinction made between the work itself, which I believe the Register was getting to saying hey, the work itself could be available in an archive, could be available at the Library of Congress, available for people to make whatever fair use they want, versus saying that every single copy of the public domain work must be made readily available for any sort of use that a user wants to make. I think that is sort of blurring the distinction between the work falling into the public domain itself versus whether you can take any steps to actually protect the investment that you've made in distributing and bringing copies of the work out to the public.

And finally I'd like to say, at least in my mind and this is only my opinion, I think the
genius and the value of the public domain, of the fact that works fall into the public domain has much more to do with the public performance of those works, giving theatrical performances of things, musical performances of things, using them as the basis for derivative works and new versions, and that that is really the key input in social value there rather than just slavish consumptive mechanical reproductions for consumption. That's my own personal opinion.

MS. HINZE: Can I respond?

MS. PETERS: Yes. I want to ask a question first. When you make a work available on DVDs, even with CSS, everybody, as long as you have a compliant player, which is everything except maybe some stand-alone Linux systems, you do have in fact access to it. The reason I went to the archive example was because I was thinking you wanted to somehow use footage or something that was there. But it sounds the way that you're doing it is your argument is based on a principle that the fact that it's in the public domain means it should have no restrictions on it whatsoever and it's not really a practical -- you're not after a practical effect that I can't make fair use of it.

MS. HINZE: I'm not arguing for fair use.
Fair use only applies to copyrighted works.

MS. PETERS: Right, so it's all straight.

In principle, a work is in the public domain and, therefore, it should not have any controls on it whatsoever, whether it's an access control or copyright.

MS. HINZE: I'd actually rephrase it from the consumer point of view as going the other way. Consumers should continue to have the right to access it.

MS. PETERS: But if they are, if in fact you go and buy a DVD, you can play it.

MS. HINZE: Perhaps I'll finish my thought.

MS. PETERS: I don't know where the access issue is.

MS. HINZE: Consumers Should have the ability to access and to use. That will mean in the case of public domain works that are not subject to copyright, the ability to copy it. That's certainly not true of any of the other three, of the four exemptions EFF requested in this proceeding. But in relation to public domain works which are not subject to copyright law, yes, that would mean both to access and to copy. So just to be really clear about that,
that is the position for this category of works. And as I said--

MS. PETERS: So every copy that gets put out has to have the ability to use that copy in any way.

MS. HINZE: As I understand it, we have complete agreement that if a public domain work were to be released on a DVD subject to CSS protection and nothing else was on that disk, there would be agreement that there would be no violation of 1201.

MS. PETERS: But if it's the other way. Now it has copyrighted material with it that's entitled to be protected and maybe it's to be beneficial to the public, it also includes a public domain work and now to flip it the other way is they can't protect their copyrighted work if they make the choice to bring the public domain work into that DVD for the benefit of the public.

MS. HINZE: I understand the socially beneficial argument. I have heard that several times this afternoon. My concern with that is that it may actually hide an assertion of private rights over a public asset. I'm not a specialist in English law so I don't know what the situation is there.

MS. PETERS: I'm just getting it straight.
I'm just trying to understand the two sides. You're not going to agree with each other, and we're going to struggle.

MR. CARSON: That leads to my question, probably directed to this side although you folks could conceivably know the answer. Is CSS an all or nothing proposition? In other words, if you want to put CSS on that DVD to protect the ancillary material, does it necessarily also have to protect the public domain material sitting right next to it or can you make a choice, CSS would apply to only this part of the disk which has the copyrighted material and the rest public domain material is free and clear and is not protected by CSS?

MR. MARKS: For my part, the answer is I don't know. I just don't know.

MR. CARSON: You could probably find out.

MR. MARKS: But I will try and find out.

MR. CARSON: Anyone else know the answer?

MS. HINZE: It's a good question.

MR. MARKS: I just don't know.

MR. CARSON: Next is not so much a question as a comment. You mentioned the two reply comments you have from members of the public about the compilations.
MS. HINZE: Yes.

MR. CARSON: I don't think they do it for you. I don't think the record shows anything right now. Fitz Swanson says that the Lumiere Brothers Victorian era film From the Earth to the Moon is on Great Works of Film Volume 1 but from all we can tell from this comment, every single work on Great Works of Film Volume I which could be the first decade of motion pictures is public domain. We just have no information whatsoever to tell us that.

The other comment is pretty much the same situation. It's the Charlie Chaplin Marathon. You tell us some copyrighted works are on that. The comment doesn't, so the record is absolutely barren at this point of a shred of evidence that there are compilations contained in both public domain works and copyrighted works. If you want to persuade us, you haven't begun to meet your burden. You'll get the chance.

MS. HINZE: I appreciate the clarification and, as I said, we will be happy to supplement the record in this regard.

MR. CARSON: Okay.

MS. PETERS: Anything else?

MR. KASUNIC: I want to follow up on what David was just asking. I understand we're going to get some follow up on whether you can separate the CSS for the public domain and not have it on the public domain work and have it on the copyrightable work. But just to sort of phrase it in a different way, this seems to be somewhat in line with, at least the way I see it, the harm that you're posing is that this is again another form of nesting where you have the overall protection covering both and it's just being used as a means to broaden the scope of protection.

I want to also get clarification here, too. It's not your position, is it, that you think that technology can not be used to protect the public domain work so if, for instance, CSS was put on the new material on a DVD but some other form of copy protection or some kind of technology alone that would not fall under 1201(a)(1) was put over the other work or that was not prohibited by the law, technology alone could be used on public domain works --

MS. HINZE: I think -- sorry.

MR. KASUNIC: Go ahead.

MS. HINZE: I think it would depend on the particular technology that was used. There would be no 1201 violation for instance, in the situation
you've given. Sorry... It would depend on the technology which was used, the particular technology in question. In the example you've just given, there would be no violation as I understand what you've said just for this pure copy protection. There would be no violation of 1201(a) in order for a consumer to make use of that work. There might be some issues then outside of 1201 about whether or not there's some sort of burdening of the public interest in prohibiting access to a public work but, as I understand your question, I don't think there would be a 1201(a) issue there. So it would be outside the scope of this proceeding, any concerns that that might raise.

To give you a more thorough answer, I think I would need to know a little bit more about the particular technology at issue and what the impact would be. I think that would be my sort of road map to how to analyze that.

MR. KASUNIC: Let me move back -- please.

MR. METALITZ: I think it's important to remember that 1201(a) doesn't contain any prohibitions on using technological controls. We're talking about under what circumstances are you liable for circumventing it. Now, 1201(k) may in some circumstances where you can put copy controls in a
particular analog situation, and I would not even try
to explain what those situations are at this point
without looking at 1201(k) which I haven't in a long
time. But I just wanted to put on the record that in
some cases 1201(k) will affect when you can put copy
protections on and when you can't.

MR. KASUNIC: Moving back just again for
clarification on the 1201(a)(1)(d) question about the
effect of that in terms of infringing users. I just
want to understand in terms of David's option two
which would be that only non-infringing users can take
advantage of that. Am I right that the result of that
would be -- well, first of all, there would be
copyright infringement if someone was using it for an
infringing purpose but then also that this would be a
violation of 1201(a)(1) as well. Is that right?

MR. METALITZ: Yes. If that analysis is
correct, if that's how the courts read it. Yes.

MR. KASUNIC: Is everyone in agreement on
that? Okay.

Now, Mr. Metalitz, you stated that you're
not aware of any 1201(a)(1) cases and I'm quite
confident that if you're not aware of any, no such
cases exist. Clearly, even though there have been no
cases of that, there's undoubtedly been acts of
circumvention. I'm trying to get at what the reality is of 1201(a)(1) and for this I came across a section of an article that was part of the WIPO conference that Mr. Marks and Mr. Turnbull wrote some time ago. If I can just quote a little section. It says, "For several reasons, a conduct only approach is insufficient. Circumvention conduct is generally not public. Individuals usually undertake it in the privacy of their homes or work places. While the results of such activity such as a software utility program that hacks a copy protection measure may be made public, the conduct leading up to that cracking of the protection system is usually private. It is neither feasible nor desirable to undertake systematic monitoring of private conduct to deter circumvention activity. In any event, most people will not undertake the time and effort to crack the copy protection measure on their own."

So in light of that, isn't it somewhat obvious from the fact that there hasn't been any enforcement of 1201 in the courts and that the trafficking provisions are really the key to protection for copyright owners? Let me just finish the last part and I'll give you all the time you want. This sort of struck me in terms of Mr. Miller's point,
too. Doesn't an exemption that we find or recommend in this rulemaking really only provide a means for honest people to be honest with the caveat that only such honest users that also have the technological ability to actually accomplish this will be able to utilize it? That's the end of my line of questioning.

MR. MARKS: Let me take part of that and maybe other members of the panel will take part of it, since you were quoting from an article that I wrote and I frankly believe that I wrote the passage you quoted from. I can't blame it on Bruce.

I think the statements that were written from which you quoted were aimed at pointing out the importance of having the prohibition, the circumvention prohibition go to devices and why having just a conduct-based only prohibition would not be adequate for the reasons that I cited. That doesn't necessarily lead one to the inexorable conclusion that conduct, prohibitions on circumvention conduct, are useless or are not of any normative validity in and of themselves. I'd like to draw a real life parallel to that because even though there may not have been any 1201(a)(1) litigations brought to date, that doesn't mean there may not be in the future and what I'd like to do is draw an analogy straight from the copyright
law and what's going on frankly with the music industry for a long time with the file swapping and
the copyright infringement that's been going on on peer to peer activities. The music industry took the
course of we would prefer to get at the purveyors of the file sharing software that's allowing this
copyright infringement to take place and put our reliance on contributory infringement cases and
vicarious infringement cases and that had been the approach actually for several years. Because that
approach may not be yielding exactly as useful results as the music industry may have wished for, the music
industry has now begun to actually sue individual uploaders or downloaders for the direct infringement
that they are engaging in.

I believe the same thing could happen some day with respect to circumvention devices where if in fact there is lots of circumvention activity taking place due to the fact that we are unsuccessful in controlling the trafficking in circumvention devices, we may well feel ourselves forced to bring legal actions against individuals who do engage in such circumvention conduct.

MR. MILLER: I would just like to say that this is a very scary proposition and only increases
the need for this exemption. What he's proposing is that the movie industry is going to begin prosecute people under 1201(a) without necessarily having an infringement violation necessarily attached to it, that they will begin enforcing 1201(a) whether it's for fair use purposes or not which only increases the need for an exemption and, if the most likely interpretation of 1201(d) is part two of Mr. Carson's analysis, then this means that people who are making non-infringing uses will be -- he's making an argument that people making non-infringing uses -- if I'm making a five second clip violating CSS in order to review in kind, I will be prosecuted for that under the DMCA, and this is precisely what Congress did not intend. So his argument is, to me, a parade of horribles. I could not have made it more clear.

MR. KASUNIC: Mr. Metalitz.

MR. METALITZ: I think I would say Mr. Marks hit the nail on the head again, as he often does, that this is a tool that may be needed. I would just add really two additional points. First, I think the quote you read -- and I agree with what he said in Geneva four years ago which is that often this would take place in private in the home, etcetera, etcetera. It's easy to conceive situations where it
would not. One example I would give is end user
piracy of business software applications which can be
carried out through the use of 1201(a)(1) in a
business setting and while I think there might be an
argument to be made that if the system's operator of
a company were to strip off access controls so that
people could have access to unlicensed copies and so
forth, arguably there might be an (a)(2) violation but
I think it's clearly an (a)(1) violation and,
therefore, it's possible that legal tool would be used
in that setting which is not private in the home but
in fact somewhat more a public sphere.

The last point I would make is that the
motivation, one of the motivations for enactment of
the DMCA was to bring the U.S. into compliance with
the WIPO Internet treaties and those treaties, it
seems to me, require that there be remedies against
people who circumvent access controls. So obviously
that doesn't dictate the scope of those remedies or
whether there will be exceptions and so on and so
forth, but I think if Congress, because of Congress's
goal to implement these treaties, I think it was
inevitable that there would be some prohibition of the
act of circumvention also.

MS. HINZE: Could I just make one comment
in response to that? I just would like to be clear for the purposes of the record that there's nothing in the Article 11 Copyright Treaty and the Article 18 WIPO Performances and Phonograms Treaty obligations that required the particular scope of implementation that was done by Congress in Section 1201. So just for the record, I would like to make it clear that the wording of those provisions doesn't actually specify a particular form of prohibition. It doesn't actually specify that there needs to be both an act and a tools prohibition in order to satisfy that obligation.

MR. KASUNIC: I just have one other question in response to a comment that Mr. Miller made. I just want some clarification. You said that Section 1201 is not concerned with the market as a whole but is only concerned with individual use. I wonder how you can say that in light of, in particular, I think, Section 1201(a)(1)(c)(iv) that one of the factors that we have to consider is the effect of circumvention of technological measures on the market for a value of the copyright works.

MR. MILLER: Actually, my responses to the argument made in the reply comments with regards to the fact of the benefit to consumers, not to the commercial value of the works. I deal with that
argument in a separate way. The argument made in the reply comments to my initial comment was that the effect, not on the market but on the availability of copyrighted works. What they claim is that they have, because of the existence of these devices, that we therefore have more available. I dispute this in a number of ways.

One of the ways I dispute this is by reference to the House report, #105-551, where it says that the purpose of 1201 is the mechanism that allow the enforceability of the prohibition against the act of circumvention to be selectively waived for limited time periods if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials. They're saying well, the availability of having this copyrighted work will create all kinds of stuff but what your focus is on is whether individual users are being harmed by this and you can selectively waive it for particular classes of works for particular users, a particular class of users, and not to focus on the market as a whole but to focus on whether or not individuals are being harmed, and my argument is that individuals are being harmed here. That's not referring to the commercial market. I have other arguments that I'm
basically saying that their commercial market is not being harmed at all by this exemption. By giving me the ability to do a five second commentary or critical clip of their movie does not create a recognizable or cognizable commercial harm. I may say that DVD stinks and the ancillary works are terrible and don't buy it, but that is not a cognizable harm within the scope of this rulemaking to their commercial interests.

MR. KASUNIC: Do you have any comments?

MR. MARKS: I just can't resist responding to the last comment which is that none of what's at issue today or any of the arguments that we are making today have any bearing or any relation to the notion that we are trying to stop somebody from saying a particular DVD title stinks, don't buy a particular DVD title by AOL Time Warner or any other speech element. Just when remarks like that are made, I can't not respond to them.

MR. MILLER: May I just respond to that. If my understanding is correct, the speakers from the Director's Guild of America was making the argument that directors don't want this exemption because Internet critics specifically might alter it or use it in ways that the individual deems appropriate but the directors do not. So I'm being responsive to that.
Thank you.

MR. METALITZ: If I could just respond to the first part of his answer about individual users. I'd have to go back and look at the committee report, but I think Congress was saying there that we need to look at what is the impact on the availability of these works for non-infringing uses by individuals. They're not necessarily talking about non-infringing use by other entities. But that doesn't mean that if one individual is harmed or suffers an adverse impact that that's enough to constitute or to justify an exemption. I'm not sure if that's what Mr. Miller was arguing or not, but I think the fact that they use the term individual users doesn't necessarily mean all you have to do is find one person who feels that they're hurt and the exemption should be granted.

MR. KASUNIC: I don't think that's what you were arguing.

MR. MILLER: No.

MS. DOUGLAS: The cause that Mr. Miller was saying in his comment was that what you need to focus on is -- and I suppose you say it in the first place -- I guess I'll just ask it this way. Would motion picture producers be less willing to make material available on DVDs if they knew that the
prohibition on the use of circumvention tools would not be in force on the use as opposed to what happens after you let the cat out of the bag? Does that make any sense?

MR. METALITZ: I'm sorry. Could you repeat the question?

MS. DOUGLAS: Would motion picture producers be less willing to make material available on DVDs if they knew that the prohibition on the use of circumvention tools would not be in force?

MR. METALITZ: I think the answer to that question is yes, that they would be less likely to make material available on DVD if 1201(a)(1) were not applicable. Yes, I think the Librarian has found that to be the case in general. That doesn't mean it applies in every single instance and that there can be no exemptions, but I think as a general rule, the answer to your question would be yes, it would reduce the incentive to make these works available.

MS. DOUGLAS: Okay. Yes, Mr. Miller.

MR. MILLER: I'd just like to say the question why would it reduce these incentives? The DGA has argued that among the reasons that it would is because directors don't like having people alter their work or criticize it or parody it, and that is not a
cognizable harm within the scope of this rulemaking body. The other possible harm that I can imagine which the DGA has offered is that it harms the commercial interests, that they will not get the money from this, and it's hard for me to see how permitting non-infringing uses under the interpretation of 1201(d) that we've offered would result in any cognizable commercial harm to their interests. It's not enough for them to say that they will be harmed. They should state how and precisely where within the scope of this rulemaking that harm applies, and they have not made that case.

MR. METALITZ: I think I have to rise to the defense of the DGA here. My problem here goes to the whole thrust of this argument of ancillary works because I can't avoid the suspicion that the reason we're hearing so much about ancillary works is because the Copyright Office said in footnote 13 that maybe that's the thing that came closest to arguing for an exemption. Virtually everything that Mr. Miller said in his filing and in his testimony today could be applicable as well to the principal work, principal motion picture that's on the DVD.

One difference here is that in these ancillary works there tends to be more of an
opportunity for the director to speak with his or her own voice and to present something. By the way, there's also more work for directors to direct making of documentaries which many of these have and have a separate director from the director of the principal film. So there's obviously an economic interest here in the creation of these works and these ancillary works wouldn't even exist were it not for this format in many cases. So I just don't see where the economic interest as well as the other interests of the DGA are not very deeply implicated here.

So ancillary works are a target of opportunity here, I think is what I'm hearing. Most of the arguments again that have been made would apply just as much to the principal motion picture. The problem is you rather forcefully closed the door on that in the year 2000 and you left the door open a crack in 2003 and that's why we're hearing so much about these works and there's such great interest in the directors.

MS. DOUGLAS: Yes, ma'am.

MS. GARMZY: Could I just clarify for the record. I did not say that directors felt that the reason they have these great concerns about the Blogcritics is because they don't like to be
criticized. Clearly, directors are very used to being criticized in print, on TV, in reviews, etcetera. I never said that was the reason for any objection.

MS. DOUGLAS: Might even enhance the interest in the movie itself. But that's certainly beside the point here.

We've heard a number of times that going back to ancillary works, not talking about anybody's motives, that these ancillary works are an additional bonus and that we really ought not be considering ancillary works because consumers haven't even suffered a diminution of material. In other words, this is just gravy. So we're supposed to look back to 2000 and see what material was available to the public and then see whether or not that material has been diminished. What's wrong with that analysis? What's wrong with saying well, this is just additional material that we wouldn't have had in the first place?

MR. MILLER: Well, it's not clear to me necessarily that the way you construe the statute is always to look back to the year 2000. I think there are several different ways to interpret the statute and I think it makes it clear that the Congress did not intend to set the bar at the year 2000 and any works that appear, new media forms, new forms of work
that could be put on DVDs or anything are suddenly just going to be exempt because they never existed before and, of course, the claim will always be well, they never would have existed without DRM. Certainly Congress did not intend that.

So I think what we have to do is look at the present and look at what the standard of the present is. Right now the standard is that these works are going to be readily available. DVDs are hardly issued without them. That in fact, there's marketing for them, that people buy DVDs precisely because its ancillary works are available. It's not simply because of DRM. These ancillary works are on there, not because of DRM necessarily but because the directors want it on there. They want to explain more, they want to talk to their audience.

So we simply shouldn't just take it at face value that well, these works would not exist without DRM. There's plenty of reason and plenty of evidence to show that they would exist whether or not DRM was available or not.

Furthermore, again, I think that what Congress is intending in this statute for statutory interpretation is to look at where bar is at present when you make the ruling, not necessarily what it was.
I mean otherwise, a hundred years from now, we'll be asking can we get an exemption for this wonderful new media form of brain imaging? Well, brain imaging never existed back in the year 2000. Therefore, it never would have existed at the year end. Therefore, it shouldn't be considered. So I think we need to set the bar at the present and the present is that this is pretty standard and it's important.

Just quickly to address the issue of why we chose ancillary works is because of their importance to commentary and criticism. In the Library of Congress ruling, they said well, they meet the burden closer on ancillary works because they're not available on VHS as opposed to other stuff. But that's not the argument I'm making. I'm making an argument about how important they are to commentary and criticism and how that really is key to understanding and working with the movies.

MS. DOUGLAS: Yes, Mr. Marks.

MR. MARKS: I just wanted to respond to the last comment of Mr. Miller. One of the reasons why ancillary works are made available on DVD, one of the reasons, is because with that digital format and the ability to compress and place more information on that format, there is room to place both a movie and
the makings of these commentaries, these additional ancillary works whereas with VHS analog tape it is often a struggle just to fit the movie onto a single cassette. So it's very accurate, I think, to say that the DVD format itself lends to the inclusion of these ancillary works and that these ancillary works are sort of a natural thing for movie studios to do to make the DVD more attractive and to make it something that consumers want to purchase because it's got these added bonus materials. I agree with that completely.

Where I disagree with Mr. Miller is the premise that it's not DRM that's the cause or that has any causal nexus to the ancillary works because where I think he misses the point is that but for -- and I really mean but for -- the availability of CSS to be applied to protect motion picture content on DVDs, none of the motion picture studios would have released their movies on DVD in the first place. I know that from firsthand personal knowledge from having negotiated for two years over the CSS license agreement and even with CSS, several motion picture studios were very reluctant to release the motion picture content onto DVD because of the fear of piracy of releasing their films on a digital format. So I can say with absolute personal knowledge that but for
the existence of DRM and CSS, you would not have
motion pictures released on the DVD format.

MR. MILLER: My only quick response to
that is that that was back in 1995 and I don't think
we have to judge the but fors by the standards of
1995. Otherwise, we'll be trapped in a time warp
where our laws becoming increasingly in variance with
the forward moving of cultured society.

MS. DOUGLAS: Thank you.

MS. PETERS: You have one last question.

Right?

MR. TEPP: Yes. Thank you.

Very quick for anyone who wants to answer.

Is there an independent market for what we're calling
ancillary works?

MR. MARKS: Yes.

MR. CARSON: That's it?

MR. TEPP: That may be enough. Does
anyone disagree or want to add to it?

MR. METALITZ: An independent market for
ancillary works.

MR. TEPP: For the offset in the market
values, I mean they are a part of the value package.

MR. METALITZ: Independent market value?

MS. PETERS: Do you mean separate and
apart from the --

MR. TEPP: Separate and apart from --

MR. MARKS: Yes.

MS. PETERS: From UOB itself.

MR. MARKS: Yes. I can think of a specific example in some of those on some of the films that we've released. I'm thinking back of Robin Hood, Prince of Thieves, perhaps not our most notable work but there was a very popular music video by Bryan Adams which we included in with the film and I think clearly that that music video, for example, in and of itself, has market value and could be sold independently. So I would say yes.

MR. TEPP: And what would the effect on that market value or market be of the proposed exemption?

MR. MILLER: I would say it would have zero effect on the market value of these works because again, I believe in the interpretation of 1201(b) which holds that only non-infringing uses and non-fringing uses, as I said before, are going to have no commercial harm or that commercial harm is outweighed by other interests in the fair use analysis of the four part test.

MR. TEPP: Anyone disagree?
MR. METALITZ: Yes. I would disagree because I think if you establish something as having independent market value, you're basically saying it's got the same kind of value as Robin Hood, Prince of Thieves. It may not be the same dollar amount but it has the same type of value and I think for all the reasons that Mr. Marks has already gone through, CSS and the ability to prevent circumvention of CSS is critical to making those works available.

MS. PETERS: We're going to take a 10 minute break in which people can use any facilities that they need and then the final panel.

(Whereupon, off the record for a 10 minute recess at 3:46 p.m.)

MS. PETERS: The last panel of the last day of hearings 2003 rulemaking proceeding is a historic event and we'll celebrate. This one is region coding. All of the witnesses have been previously introduced so I'm not going to go there. Can I turn to this side of the table and who wants to go first?

MS. HINZE: I can.

MS. PETERS: Okay. EFF. Speak up, Gwen.

MS. HINZE: Thank you. Thank you for the supportive environment. EFF is requesting an
exemption for a limited class of DVDs, foreign audiovisual works and movies that are released on non-
Region One DVD format and are not otherwise available on DVD in the United States. Region coding controls on DVDs currently preclude American consumers from playing foreign movies they have lawfully acquired and lawfully imported into the United States on their U.S. DVD players.

The exemption we have proposed would permit consumers to play these movies. Playback of a DVD is a non-infringing use of these audiovisual works since private performance is not one of the exclusive rights granted to copyright owners by Section 106 of the Copyright statute. As Mr. Attaway of the Motion Picture Association of America stated in his testimony before this rulemaking on May 2, the purpose of the region coding system is to allow copyright owners to control marketing of their works. The region coding system does not and was not designed to protect any of the rights granted to copyright owners by Section 106.

In considering whether to grant this exemption, we are asking the Copyright Register and the Librarian of Congress to decide whether preservation of an existing business model should outweigh consumers' ability to make a non-infringing
use of their lawfully acquired and lawfully imported DVD movies.

The parties opposing this exemption have made four main arguments. First, the Joint Commenters have argued that EFF has not met its burden of proof in establishing harm amounting to a substantial adverse impact on non-infringing uses. They deride the figures provided in EFF's comments for the number of movies from Australia, Japan and India that are not released in the U.S. on Region 1 DVD format in the United States as being “somewhat suggestive of the number of titles in this class and the U.S. demand for them, but they are presented in a way that tends to exaggerate both these qualities.”

However, the Joint Commenters have criticized only the figures provided for Indian movies and have not disputed the figures provided for Region 4 Australian movies or Region 2 Animé works. In terms of actual harm, I note that 124 consumers have filed comments in support of this exemption describing their inability to play numerous lawfully acquired DVD movies that are not available in a Region 1 format. These comments constitute detailed firsthand evidence of non-infringing uses that American consumers are currently prohibited from making due to region coding
access controls.

The Joint Commenters also argue that in order to meet the substantial adverse impact standard of proof for this exemption, EFF is required to show the numbers of foreign movies released on DVDs that will not play on Region 1 DVD players. This would require a showing for every foreign country of the number of foreign movies that are never released in the United States, and a showing that they are released solely on DVDs that are not coded either “one” or “all” or “zero.” If this were the standard of proof that an exemption proponent had to meet, it would negate Congress’ intent in establishing this rulemaking process, namely as the Commerce Committee report stated, To provide a fail-safe mechanism to protect consumers’ non-infringing uses.

It would also raise serious questions about the procedural fairness of this process. The only parties who could physically gather that data are the parties opposing this exemption. These parties have chosen not to disclose this data, even though by doing so they could presumably refute our claims if the scope of people affected is as minimal as they suggest.

EFF submits that the data on the record in
this proceeding, in EFF's comments and in the over 124 comments filed by consumers, is sufficient to prove a present substantial adverse impact on users' ability to make non-infringing uses of their lawfully acquired works.

Our opponents also argue that this exemption should not be granted because American consumers can acquire a VHS version of the relevant foreign movie. As DVDs continue to overtake VHS as the preferred movie distribution medium, this is not a feasible alternative to address the likely harm to consumers in the next three years.

Previously we have provided some information, a printout of the slides that we showed in our previous panel that we would otherwise show but will not due to time constraints this afternoon, which addresses the volume of sales of DVDs versus VHS. As I noted in the previous panel, DVD sales overtook VHS sales in early 2002 and DVD rentals overtook VHS rentals in March 2003. The availability of VHS sources of these works is likely to decrease in the next three years for two reasons.

First, as in the United States, foreign movies are increasingly being released only or predominantly on DVD and retailers are ceasing to
carry or reducing their stock of VHS tapes in response to consumer demand. For instance, our submission cites the 2002 decision of Japanese Animé company Bandai Entertainment to release only on DVD. And as previously quoted in the slide from this morning, Marylou Bono, Vice President of Home Video Marketing for Warner Strategic Marketing in the United States stated that Warner decided in January of this year to phase out VHS releases because, as she put it, "VHS is dead."

I'd also point out on the slide that we showed this morning that Circuit City ceased carrying VHS tapes in June 2002 and in September 2001 Blockbuster reduced their stock of VHS tapes by 25 percent.

The second reason is as VHS tapes degrade, the existing stock of older works on VHS tapes will diminish. Unless an exemption is granted to allow American consumers to view their lawfully acquired DVDs, they will increasingly be walled off from the benefits of cultural exchange offered by foreign movies.

The Joint Commenters' second major argument against this exemption is that consumers are not actually denied access to their lawfully obtained
DVDs because they can purchase alternative DVD players. There are two options available to consumers here. First, consumers can buy a multi-region or all region player. Apart from the fact that these are not easy to find since neither amazon.com nor any of the five major U.S. consumer electronic stores sell these any more, the Joint Commenters have taken the position in several lawsuits that playing a DVD on one of these players violates Section 1201(a) because it goes beyond the scope of the authority granted by a copyright owner.

In the appellate brief in the Universal v. Remeirdes case cited in our submission and most recently in their March 2003 summary judgment papers in the pending 321 Studios litigation, the Motion Picture Association of America and several of the movie studios have argued that the scope of authority given to consumers is limited to playing the DVD on a DVD-CCA licensed DVD player. Since the DVD-CCA's multi-tiered licensing system requires DVD players to respond to a DVD's region coding, multi-region players are not DVD CCA authorized and playing a DVD on them therefore violates Section 1201, according to the Motion Picture Association and its member studios.

I should note here that I was sincerely
surprised to see a statement by Mr. Attaway in his May 2 testimony responding to a question from Mr. Carson which appeared to present a completely contrary position to the public position taken by MPAA and its members in the two lawsuits I've just mentioned in relation to their construction of Section 1201(a)(3)(B). Assuming for a moment that the copyright owners still believe that the playing of a DVD on a multi-region player violates Section 1201, which is what I understood this morning's discussion to be, that leaves consumers with a second option of purchasing up to three region specific players from the relevant foreign countries, paying associated shipping costs, and purchasing a more expensive multi-standard television or a PAL or SECOM to NTSC converter to overcome any questions about incompatibility of broadcast standards and conversion of electricity standards.

I'd like to make two points here. First, this is a significant capital equipment cost to ask a consumer to bear to playback a movie. Second and, more importantly, the consumers' desired use here is a non-infringing use. Playback of a DVD is a private performance. It is not one of the exclusive rights granted to copyright owners under Section 106 of the
Copyright statute. It is also clearly lawful for consumers to import foreign movies on DVD for personal, non-comment use under Section 602 of the Copyright statute. On closer inspection then, the Joint Commenters' arguments distill down to the claim that it is appropriate to impose a significant cost burden on American consumers to enjoy what is a non-infringing use of lawfully acquired media in order to preserve an existing marketing system for these works.

The third argument made by our opponents or by some of our opponents against granting this exemption is that the system of geographic region coding is part of the exclusive right of distribution granted to copyright owners under Section 106 and, therefore, granting an exemption would violate this. This is not accurate. Copyright law does not grant copyright owners unfettered control over distribution. The Copyright statute recognizes a number of limitations on copyright owners' distribution right. Two of these limitations, the first sale doctrine which is recognized in Section 109 and the right of personal importation recognized in Section 602 for noncommercial purposes both support the exemption we have sought here. This exemption would only extend to DVDs that consumers are lawfully allowed to import
into the United States under Section 602 of the Copyright statute.

The Joint Commenters have argued in relation to one of the examples cited by EFF that allowing consumers to play a lawfully imported DVD movie that was currently in U.S. theatrical release would undermine box office profits. However, this is already permitted by Section 602 of the Copyright law. The same argument could equally be leveled at imported foreign VHS tape movies. Congress has already drawn the balance in favor of permitting exactly this behavior and it should not make a difference whether the consumer is trying to play a foreign movie purchased on DVD or VHS.

Nothing in the legislative history of the Digital Millennium Copyright Act indicates that Congress intended to override Section 602 or Section 109 or otherwise to extend the rights granted to copyright owners under Section 106 by enacting Section 1201.

The fourth argument made by opponents of this exemption is a claim to user facilitation and a corresponding warning of reduced availability should an exemption be granted for region coded works. The Joint Commenters state at pages 26 and 27 of their
comments that the use of region coding helps preserve the market opportunity for U.S. distributors to make foreign works available and that foreign titles would become far more widely available to American viewers through U.S. distributors, "so long as the distributors can be assured that region coding access controls are respected in the United States." The same argument was made by testifiers at the May 2 hearings in this proceeding.

In response I'd like to point out first that we are seeking this exemption precisely because many foreign movies are not and have not been released in the United States despite the existence of region coding on DVDs and CSS for the last three years. U.S. copyright owners can control the scope of this exemption by choosing to release a foreign work in region one. Second, there is no sense in which this exemption would deprive U.S. distributors of an economic benefit. U.S. distributors have not lost any profits because the work was not available in the United States. Copyright owners' foreign distributors have also not been harmed economically because they have received the designated purchase price.

Third, the threat that copyright owners will not release content unless there is absolute
legal protection for technological protection measures is not actually borne out by the last three years experience of the content scramble system protection on DVDs. Prior to the introduction of the DVD format, copyright owners argued that they required legal protection for technological protection measures to overcome the threat of illegal copying and to provide incentives to make digital content available. As a result, content released by the major motion pictures on DVD has been protected by CSS since 1998. However, as I mentioned in this morning's hearings, CSS has not been effective at preventing large scale commercial reproduction of DVDs. It was defeated almost immediately by a group of hobbyists and the tools for circumventing CSS are widely available on the Internet and from commercial vendors in the United States.

As the MPAA frequently points out, large numbers of unauthorized copies of motion pictures are widely available for download on the Internet. Given the copyright owners' stated concerns about the need for protection against digital piracy you would expect the copyright owners to have abandoned, releasing content, on CSS unprotected DVDs. But exactly the opposite is true. DVD sales overtook VHS sales in early 2002, as I mentioned, and Warner Home Video is
moving to release movies only on DVD.

My point here is that motion picture studios have continued to make their copyrighted works available on DVD, notwithstanding the ease of defeating CSS. Granting an exemption for circumvention for a limited class of movies owned by consumers who have paid for these works and have lawfully imported them into the United States will not have any bearing on copyright owners' decisions to make content available.

Finally, I'd like to emphasize that this limited exemption does not open the floodgates to widespread copyright infringement. First, the exemption is limited to non-infringing playback of movies and does not immunize infringing behavior. It doesn't include reproduction.

Second, as Section 1201(a)(1)(D) makes clear, any exemption granted by the Librarian of Congress cannot be interpreted to authorize infringing behavior. If anyone were to go beyond the scope of the exemption and make an unauthorized reproduction or distribution of the DVD work, copyright owners would continue to have the ability to bring suit for infringement and the full range of remedies currently available to them today under copyright law. And based
on what we have discussed this afternoon, it would be likely they would be in violation of 1201(a) in that situation.

Thank you very much.

MS. PETERS: Thank you.

Any opening testimony?

MS. GROSS: Mia will present the testimony.

MS. PETERS: Okay.

MS. GARLICK: Good afternoon. IP Justice welcomes this opportunity to testify to the Copyright Office about the adverse impacts on the ability of users to enjoy fair access to DVDs.

Region code restrictions significantly interfere with non-infringing access to and post sale uses of DVDs. The magnitude of this harm warrants the recommendation by the Copyright Office of the exemption proposed by IP Justice in its submission comments.

We wish to make initially four procedural comments, and then we'll make four substantive comments. Although we have touched on these procedural comments earlier today, we feel it is important to remind the Copyright Office of these points in consideration of the region code exemption, because they again impact on the substantive findings...
and also they address the reasons given by the Copyright Office for rejecting such an exemption during the first rulemaking.

Firstly, IP Justice would like to again remind the Copyright Office that its obligations in this rulemaking are to the users. Moreover, the Office's duty is to ensure access to works by users, not the availability of works by copyright owners.

Congress introduced the anti-circumvention measures to encourage copyright owners to make their works available digitally, or in the words of the last rulemaking, "The measures were designed to be use facilitating." The responsibility of the Copyright Office in this rulemaking is not to repeat Congress' logic, but to protect users and ensure access to individual DVDs, not the availability of DVDs generally.

Second, the structure of this rulemaking, as interpreted by the Copyright Office, effectively precludes it from achieving its purpose. The Copyright Office insists that exemptions be defined according to class of work, adequate protection of user rights requires that exemptions be drafted with reference to the type of user and circumstances of use. For example, if a person imports a DVD for
personal use, they are not infringing a on a copyright owner's right to control imports, but if the person imports commercial quantities of DVDs they are.

Third, the Copyright Office has set an impossibly high evidentiary standard, given it requires evidence of substantial harm or likelihood of harm. However, the adverse effects experienced by users are likely of their very nature to be individual and personal, difficult to measure and quantify. For example, it is extremely difficult to measure all of the Americans who travel each year and purchase DVDs overseas intending to play it when they get home. This difficulty does not detract from the prevalence of such harm, it does mean that the Copyright Office should accept as evidence news reports and principal analyses of likely harm which take account of the interaction of the anti-circumvention measures with the limitations and exceptions for users under traditional copyright principles.

Fourth and finally, IP Justice urges the Copyright Office to be mindful in conducting the second rulemaking of two important facts. Firstly, the first rulemaking was conducted when the prohibition on active circumvention had not yet taken effect, and three years later the trend of digital
lockup is more apparent. Thus, the extent of the impact on users must be greater because the anti-circumvention measures are broader than copyright.

The second important factor is that the impact of any exemption will necessarily be limited. This is something that the Copyright Office failed to take account of in the first rulemaking, circumvention of access controls are, by their nature, inherently non-commercial and personal, and as we've discussed earlier today, that arises from the fact that in order to be take advantage of an exemptive act of access circumvention, which is a bit of a tongue twister, a person must be highly technically literate.

Turning now to our substantive comments, of which we have four. I would firstly like to note that it is extremely important that the Copyright Office act now and grant the exemption before users are misled into thinking that they do not have the right to watch foreign purchased movies on U.S. coded DVD players, and before users effectively lose the right to watch foreign purchased movies.

Section 603(a) of the Copyright Act specifically carves importation of movies for personal, non-commercial use out of the copyright owners monopoly. Access controls should not be
allowed to eliminate this consumer right and prevent users from taking advantage of this intentional statutory carve out.

Whatever a user doesn't know to use they will lose. Failure to grant an exemption now will set this process of mis-education in train irreversibly and will render Section 603(a) meaningless for DVDs.

In its first rulemaking, the Copyright Office incorrectly relied on the fact that by purchasing additional equipment a user could watch an overseas coded DVD. This misses the point. Such an attitude entrenches a de facto extension of the copyright owners right to dictate technology. Only the most determined and informed consumers are likely to do so, and then only if they have the disposable income to buy the necessary equipment. This precludes opportunity for demand for and competition in technology design. This overturns Section 603(a)'s right of personal importation, since it effectively bars such activity. In essence, DVD copyright owners are again dictating the technology preferences over consumers and usurping individual rights in the digital media they purchase.

Second, we would note that region coding impedes cultural exchange. At a time when technology
could enable greater cultural exchange through the ability of the American consumers to purchase foreign films through foreign websites, region coding enforces cultural separation. If people are forbidden to bypass these controls we cut ourselves off from the opportunity for worldwide cultural exchange.

The technology has the potential to collapse the distance between people, but the business model of DVD copyright owners seeks to erect artificial walls in order to receive extreme maximized profits.

The Copyright Office should not assist in this process at the expense of users. The framers originally intended copyright to facilitate cultural exchange, but after centuries of manipulation extending both the scope and breadth of copyright it is now being used to justify perpetuating cultural separation.

Third, there is no evidence that the movie industry will suffer harm as a result of a region coding exemption. Just because profits are not maximized in the extreme does not remove the incentives for copyright owners to make content available.

In addition to the highly personal and
non-commercial nature of access circumvention mentioned above, it is the fact that this exemption will expand the global market for DVDs, rather than the market simply being domestic it will be international. Each person who takes advantage of the region coding exemptions will be a legitimate purchaser in that global market.

Fourth and finally, region coding defeats the first sale doctrine as it applies to DVDs. Without a region coding exemption there is no resale market for foreign purchased DVDs in the U.S. Similarly, there can be no overseas resale market for American DVDs.

At exactly the time when the internet opens up the opportunity for people to sell their second-hand DVDs throughout the global village, region coding segments and shrinks the village bazaar. This will further discourage people from purchasing DVDs overseas once they experience these restrictions. It further entrenches the copyright owner's ability to control private enjoyment of all DVDs. It is the user's right to access and freely dispose of DVDs wherever purchased, which the Copyright Office has a duty to safeguard.

Thank you.
MS. PETERS: Thank you.

On this side, who wants to go first?

MR. MARKS: Again, I don't have any formal introductory remarks for this part of the panel. Let me just try and respond by the following.

First of all, in the rulemaking conducted in 2000, the Copyright Office and the Librarian did find that there were legitimate reasons for the motion picture companies to employ regional coding on DVD discs, and I would just like to summarize again some of those rationales for the employment of regional coding.

One is that the rights to exploit a film on video and DVD are frequently granted to different parties in different territories, and, therefore, regional coding assists in the enforcement of this legitimate licensing of copyrights and of distribution rights. And, this particularly happens quite frequently in the motion picture industry, particularly for independent motion picture producers where rights are often sold, pre-sold, before the first frame of film is ever shot, and those rights are often sold to different third parties for exploitations in different territories. So, regional coding really assists in the proper exploitation of
those distribution rights.

A second reason, and one that the Copyright Office and Librarian refer to in the rulemaking, is the fact that there are staggered release windows for the exploitation of a film through the windows of theatrical, home video, DVD, pay for view, pay television, free television, et cetera, and that these windows vary from territory to territory and country to country. So, the regional coding on DVD helps preserve the integrity of those windows so that, for example, if a film has not yet been released in Europe in theaters, but is already on DVD in the United States, that DVDs don't just get simply transshipped to Europe and, therefore, destroy the theatrical window of distribution.

A further reason is the fact that as we distribute our movies in various territories overseas we have to comply with certain local censorship or local version requirements, and the regional coding helps us to make sure we are complying with those requirements.

And finally, there are variations in television formats, NTSC, and PAL, and SECAM, which exist, and the regional coding helps ensure that the discs that are distributed in the regions with those
formats are playable on television sets.

And, I just want to stop there for a moment, because even if you have, for example, acquired a DVD of a French movie in France, and even if hypothetically you can circumvent the regional coding of that movie to play it on your DVD player, if the movie on the DVD has been placed on that French DVD only in PAL or SECAM format, and if your DVD player does not have the ability to transcode the PAL format into NTSC, it will not necessarily play on your television set.

CSS has nothing to do with that. CSS has no requirements as to whether a particular regional DVD player can or cannot have the ability to transcode PAL into NTSC and vice versa, but the fact of the matter is, some DVD players do and some DVD players don't. So, just defeating regional coding in and of itself doesn't necessarily guarantee that the disc is going to play on the particular DVD player that you have in your home.

On the effect of regional coding in general, that was part of the reason I wanted to emphasize the growth in foreign titles that have occurred in terms of their distribution in the United States. Far from there being a paucity of such
titles, there's been an actual threefold growth in terms of just foreign language feature films, and I believe almost a fivefold growth in terms of anime titles that are released now and distributed in the U.S. market on Region 1.

I know Ms. Hinze was speaking about Bande, that Bande was, perhaps, going to stop releasing its anime titles on VHS, but the fact is, Bande, which is included with Pioneer, in this description of the suppliers who supply the U.S. market with anime on DVD, Pioneer, including Bande, is actually the number one supplier of anime titles to the U.S. market on DVD, and currently they are supplying 427 titles. So, I think, in fact, regional coding has is not the end result of depriving U.S. users and consumers of foreign titles, there have been a dramatic increase in those foreign titles distributed in the U.S. market.

Finally, for me, one of the big reasons here about why we should not seek to create an exemption to defeat regional coding to allow people who are individually purchasing foreign DVDs abroad and bringing them home to be able to watch them, is because I think there is a less risky and less burdensome alternative which is, not only perhaps the purchase of a DVD player which may cost $100, and
which legitimately you may have to import or purchase
off the internet, but the fact that you can also do it
via a DVD ROM drive, and any DVD ROM drive that is
purchased the regional coding, even if you buy that
DVD ROM drive here in the United States, and it's
coded for Region 1, the CSS license allows, and the
DVD ROM drive facilitates consumers being able to
reset the regional code five times.

And, the way it works, and I apologize
because it's a little bit complicated, the consumer
can set it five times. After the fifth time that
they've reset it, they do have an ability to reset it
again, but they have to bring the drive to an
authorized dealer or an authorized service
representative, who can then authorize an additional
set of five changes, and then they can bring it back
again for a second, for a third, fourth, and fifth set
of authorized changes. So, you can change it 25 times
in total, but you have to go back for each set of
five. You only get the first five when you buy the
ROM drive itself.

But, the point is, is if you are - some of
the commentaries I've read, I believe one of them was,
was it David Miller - David Carroll, he kept on
referring, for example, to Japanese titles. He
referred to no other titles but Japanese titles. All that would require him to do would be to purchase a $40 DVD ROM drive, set it to Region 2, which he could do himself, then he's set, he can view all of those Japanese Region 2 coded titles here in the U.S. And, it seems to me that if the users have enough disposable income to be traveling abroad to acquire titles to bring back into the United States, it's not very burdensome to ask them to spend $50 to buy a ROM drive to enable their viewing of those titles, particularly, now when the players and the ROM drives cost no more than maybe two, three or four DVD titles in and of itself.

I wanted to also just touch briefly on the Indian language film issue. This had come up in the prior rulemaking, when I made an inquiry through Warner Home Video, where we made inquiries into the Indian market. The information that we were given was that Indian films are, when they are released on DVD are generally coded all region, multi-region, so that they are playable here in the U.S.

Interestingly, in the DVD release report, which is where I've gathered all these facts and figures about the number of foreign language feature films that are released on DVD, none are listed for
the Indian language. Apparently, there are no U.S.
distributors who are in the market selling Indian
language DVD titles for the U.S. market. So, you have
Chinese, French, Spanish, Japanese, Italian, German,
Russian, Korean, Hebrew, Portuguese, but no Indian
foreign language titles.

However, I went on to Netflix, which I
don't know if the panel is familiar with Netflix, but
Netflix is an internet-based rental service for DVDs.
It is a legitimate service. Netflix purchases
authorized, you know, DVDs, and I don't know, I think
they only rent DVDs, I'm not - actually, I'm not
positive about whether they deviate, but I believe
they only do DVD rentals. A subscriber pays, I
believe it's $20 a month, and they are able to get
three DVDs at a time, request titles, get three DVDs
at a time. They are mailed to them with a self-
addressed stamped mailer to return the discs, and when
they return the discs they get their next three
titles. And, it's a very, very popular service.
Everybody I know who uses it absolutely loves it.

I went on to Netflix to see if there were
any Indian language titles, film titles available, and
there are, in fact, over 380 Indian language film
titles available. I cannot say here that they, with
absolute certainty, that they are playable on Region 1 DVD players for the U.S., but because Netflix is a service that serves the U.S. market my presumption is that, in fact, they are playable. We plan to - I mean, we'll probably subscribe, order some, try them on a DVD player to just check it out. I actually sent an e-mail to the Netflix folks saying, gee, I'm interested in subscribing and only have a Region 1, you know, DVD player, will these Indian foreign language titles that you are making available, will they play on it, I didn't get a response. But, I think it's important to try and test that out.

All that is to say is that I do not see regional coding as a big impediment to this cultural exchange and to the growth of foreign language product and titles being made available in the U.S. market, and I fear that if circumvention of region coding is permitted what it may do is allow both people who are very sophisticated and know how to defeat regional coding to be able to do so with respect to their titles that they buy abroad, but the net effect may be that it discourages distribution of the titles by U.S. distributors here in the market, and the net effect could be actually less access to foreign language works than more.
MS. PETERS: Thank you.

Mr. Metalitz.

MR. METALITZ: Thank you, and before the hearing draws to a close I just want to take this opportunity to thank the members of the panel for your attention, your consideration of our views, and the questions that you've posed to us, and also to your fortitude as I speak at 4:30 p.m., on the last day of the hearings.

Just briefly on the regional coding issue, in the decision or recommendation that you rendered in the year 2000, and that was approved by the Librarian, there were really four main points, and you actually discussed this issue in some detail. First, you concluded that regional coding on DVDs is an access control. Second, you concluded that it encourages the distribution and availability of DVD titles in the United States. Third, you characterized the problem of - or rather, the call to circumvent regional coding as confined to a relatively small number of users. And fourth, you noted that there are options available for those users and you listed VHS resetting the regional coding on the DVD player, and obtaining an out-of-region player or player set, where it could be a ROM drive set, to a region other than Region 1.
I would submit to you that your first two conclusions remain just as true today as they were three years ago, and Mr. Marks has already talked about some of the reasons for regional coding.

Your third point, I think the evidence is that this, perhaps, is even a smaller problem than it was three years ago, or rather it affects fewer people, because of for the very reason that Mr. Marks cited, the growth, quite impressive growth, in the number of foreign titles released in the United States on DVD, and particularly strong growth in the area that I think on this record right now is most documented, and that has to do with Japanese anime titles. Some of the submitters have given you a wealth of examples of Japanese anime titles which they wish to circumvent regional coding, but I think we also have evidence now that there's been a dramatic growth in the licensed authorized distribution of anime titles in formats that will play on Region 1 players. So, I think that has to be taken into account.

And, on your fourth point, as to the options that are available, I think it is definitely a - those options are more available today than they were two and a half or three years ago. VHS is still
available in many cases. I don't gainsay the evidence that VHS is declining, but as I said earlier today I think reports of its demise are greatly exaggerated and in many cases it will be an option.

Second, the regional code resetting function that Mr. Marks talked about remains available, and I do want to take issue with the characterization that the joint commenters have ever said that obtaining a multi-region player, a player that's been modified without the authorization, or at least potentially in violation of the obligations of the distributors, to play DVDs from any region, I don't believe we've ever suggested that that's an option because we believe, at least in the United States, that trafficking in that is probably a violation of 1201.

In any case, I've gone back and looked at my submission, and I don't believe we have ever said that, so I'm not sure, perhaps, Ms. Hinze was talking about one of the other comments.

And finally, the option of purchasing an out-of-region player, a player that's set to Region 2 if you are interested in the Japanese titles, or whatever region you are most interested in, I think as Mr. Marks has already pointed out, the cost of that is
much less than it was a few years ago. If you can solve this problem by buying a $40 or $50 piece of equipment and then using it indefinitely to play these titles, it's hard to see the substantial adverse impact on your ability to play titles that may themselves cost almost that much for each individual one, or close to it.

I think looking at the congressional goals here in the context of regional coding, if the congressional goal is to increase the availability for non-infringing uses of, in this case, foreign titles, anime titles and so forth, on DVD, there are really two models to choose from here. One is the model that the proponents of the exemption argue for, I would call that the drip drip model, you can bring in these titles one at a time under Section 602(a) of the Copyright Act, which we don't have any problem with, run off imports, and then you can take them home and on your Region 1 player you can circumvent the regional coding, this would be the effect of the exemption if it's granted, and then you can watch these titles, anime titles or other foreign titles.

And, if you have the connections to either go overseas, or are savvy enough to buy from overseas, and you know how to circumvent this control, then
you'll be able to achieve this objective. That's the drip drip approach.

The alternative approach is what I think we are seeing now, which is at least building up the pressure so we get an honest trickle of these titles into the United States, and the way you do that is to attract U.S. distributors, to encourage people to take on, or rather entities to step in and distribute these titles to people that want to watch them on Region 1 players, get Region 1 titles and distribute them in the United States.

Region coding is very important to achieving the honest trickle solution, because if you are someone contemplating being a distributor for a Japanese title, or Indian title, or another foreign title in the United States, it's certainly more attractive if, in fact, you are only competing against the drip drip, you are only competing against people that are able to circumvent. In other words, your market is there, except for a few isolated cases, a very small niche of people that are maybe circumventing, or illegally bringing these in under 602(a).

So again, if the goal is to encourage the availability, increase the availability in the United
States, you want to have a system that encourages the creation of authorized distribution relationships, regional coding helps to do that as it preserves the market in the United States. And, allowing circumvention of regional coding would discourage that.

If the anime market is as big as many of the submitters say it is, I think it will prove attractive and I think we already see evidence that it is proving attractive to U.S. distributors.

Now, I can't say this based on personal knowledge, we are shadow boxing a little bit here, I have to say, because these decisions are not made by members of the Motion Picture Association, or of AFMA for the most part, they are made by the producers of Japanese anime titles or of Indian producers, and so we don't have - this is not a situation necessarily where we have all of this information, and before I attract a question from Mr. Carson as to whether my grade and evidence was better than Steve Marks grade and evidence, which I'll take the 5th Amendment on, I don't know that we have this information, but as I say, we can certainly try to obtain it, but I think the evidence that Mr. Marks has pointed to here, that Dean Marks has pointed to, shows that there's a robust
market for — there are an increased number of distributors of Japanese titles, foreign titles generally, and Netflix is getting them from somewhere and sending them to customers all over the United States, and I have to presume that those Indian titles are playable on Region 1 players.

Before I conclude, I want to just say a word about the application on the regional coding issue for video games, especially console games, and I think it's easy to confuse the issues here but they are somewhat distinct. It's easy to confuse them first because some of the reasons for regional coding in the audio visual area, the film area, also apply in the video game area, such as the regional status of licensing and the need for localization and so forth. The video game industry doesn't really have the windows issue, the time-related windows issue, at least not to the extent that the movie industry does, and it doesn't have the PAL, CCAM and NTSC issues, but otherwise the reasons are the same, and, to further confuse matters, an increasing number of consoles can serve both as DVD players for DVDs that have CSS, or that have the regional coding that is compatible with CSS, and for video games that are on DVD that are subject to a different kind of access control and use
a different kind of regional coding. The same machine
does both these things. So, it's a little bit
confusing.

But, I think the analysis would be similar
in this case. I would cite one additional factor that
militates against - well, two additional factors that
militate against recognizing a regional coding
circumvention exemption for video games. One is that
there's virtually no evidence in the record of the
need for it, as contrasted with, as I said, some of
the very extensive evidence you have about Japanese
anime titles and other things in the film area. And
second, in at least some of the console systems the
regional coding technology is very tightly integrated
with the platform specific access control technology
that's used that prevents the playing of pirate games.
And again, there is evidence in the record about this,
the statement from one commenter that the easiest way
to circumvent regional coding in video games would be
in a manner that also allows the playing of pirate
games. They also have some evidence from Sony
Computer Entertainment of America that one of the
defendants in their cases said he tried to interest
people in a product that would only circumvent
regional coding and no one was interested. They
really wanted to play the pirate games. That's where the money was, and that's where the demand was.

But, I think the practical result would be that if an exemption were recognized in the console video game area for this, it would very quickly mutate into circumvention, not just of regional coding, but of access control generally. And, I'm not really making a slippery slope argument here, I'm making kind of a quick sand argument. I think if you put your foot down in that area you will sink up to your hips very quickly, because the technology is such that it doesn't make much sense to circumvent regional coding without circumventing the entire shebang. That, again, is another distinction I believe that you should take into account here.

Thank you very much.

MS. PETERS: Okay, thank you.

Let's start with you, Bob.

MR. KASUNIC: Mr. Metalitz, I've got another question for you.

You said in, I think, the last session or in your statement, that we said that CSS is an access control in our last recommendation. The way you said that makes us wonder were we wrong? Is that your position as well?
MR. METALITZ: Yes, CSS is an access control.

MR. KASUNIC: I guess region coding.

MR. METALITZ: Region coding, yes, is an access control.

MR. KASUNIC: Okay.

So, everyone is in agreement that region coding is an access control. Okay.

Regarding, this mostly is in terms of players, and as a result of a follow-up question that we had going back in time again to three years ago, a follow-up question we had about exactly what was involved in the license.

And actually, before I go any further, is the licenses available for DVD Copy Control Association and the various licenses that we've been hearing about, or is that all restricted information?

MR. MARKS: I believe, but it would be best to check with the DVD Copy Control Association itself, but I believe that the licenses are available from the DVD Copy Control Association on their website. You may have to send them an e-mail, giving them, you know, contact information, before they will send you a copy of the license, but I believe the license itself, both from the - I'm trying to remember if
there is a separate content participant license for
DVD, an adopter license, I can't, frankly, remember
for CSS, but I believe the licenses themselves are
available. The specification as to how the technology
works, there's both a procedural specification and a
more detailed technical specification, those are not
publicly available. You actually have to sign a
license agreement, as far as I know, before you get
either the procedural specification or the detailed
technical specification, but the documents are
separate and I believe the license agreement, in and
of itself, is available.

I suggest if you want a complete accurate
answer to that question, that should be directed to
the DVD Copy Control Association, because they will
know the best.

MR. KASUNIC: Okay, Gwen.

MS. HINZE: I appreciate you've already
heard testimony on a number of these issues on May 2
from Mr. Turnbull. My understanding is that the region
playback control provisions and the robustness rules
are actually not a matter of public record, and that
they are actually - there's a claim to trade secret
protection for the specifications, which actually
would clarify some of these issues.
So, the answer is, no, they are not publicly available.

MR. MARKS: Yes, and I agree, and that's probably the case. I was drawing a distinction between the license agreements and the procedural specifications and technical specifications. And so, yes, I believe the license agreements themselves discuss the regional coding requirements, but they certainly don't discuss how they are implemented.

MS. HINZE: I believe the relevant information is in the robustness rules, which is not public information, but I'm sure that the record from May 2, and the statements made by Mr. Turnbull, will provide better information about that.

MR. KASUNIC: Well, we may have a follow-up question then for Mr. Turnbull on that.

Regarding the letter, though, we had asked for some follow-up information after the last hearings in Stanford, and in response you stated that, "The CSS license contains no prohibition on licensed manufacturers of playback devices from selling any device in any country around the world. Thus, for example, an equipment manufacturer that makes DVD players coded for Region 1 is not prevented by the CSS license from selling such Region 1 players in Europe,
which is Region 2."

One question that comes up --

MR. MARKS: I was just saying, that
language sounded familiar.

MR. KASUNIC: Oh, good.

MR. MARKS: Sorry.

MR. KASUNIC: I wasn't making it up.

MR. MARKS: Sorry.

MR. KASUNIC: Does the CSS license, and I think we've sort of heard this, but does the CSS license permit manufacturers to sell region free or all region players?

MR. MARKS: That I can say the CSS license does not permit.

MR. KASUNIC: Okay.

Then, does that mean that Region free players are - well then, they are unlicensed players to the extent they exist, and I think it's safe to say that they do, and therefore have no authority to circumvent CSS?

MR. MARKS: Let me give a little bit more detail on that. First of all, because this can be a confusing area, I wanted to before I answer your question back up a little bit, because --

MR. KASUNIC: Just don't make it more
confusing.

MR. MARKS: Pardon?

MR. KASUNIC: I said just don't make it more confusing.

MR. MARKS: I'll try not to. I'll try not to, but I think it's important to draw the distinction, and I frankly wanted to do this even to correct my esteemed colleague, Mr. Metalitz. There are differences in the way you, under the CSS license, regional coding is treated for DVD players, which are the stand alone consumer electronic devices and the DVD ROM drives, which are, basically, configured for computer use. For the DVD players the regional coding is set and it is not permitted to be adjusted by the consumers, it's supposed to set in a robust way, such that the consumer cannot adjust the regional code setting on a DVD player. That contrasted with a DVD CSS licensed, DVD ROM drive, whereas I described there is an ability for the consumer to reset the regional coding setting on that.

So, I just wanted to make that point of clarification.

On your question, specifically, that does the CSS license permit the manufacturer of DVD players, CSS licensed DVD players that are multi-
region, the answer is no. What is then the source of a lot of these players that actually are in the marketplace, which are multi-region players? As far as I understand it, the majority source is players that leave the manufacturing plant that are, in fact, properly manufactured in compliance with the CSS license agreement, such that they are set for a single region, and then the third party after market, I don't even know what you would call them, but I will call them tamperers for the sake of this hearing, take those, purchase those machines, reconfigure them so that they are multi-region, and then resell them on the market, so that, in fact, for the majority of activity which is occurring, which is causing these devices to be region free instead of properly conforming to the CSS license, that activity is being undertaken by third parties who have no contractual privity with the DVD CCA and, therefore, have no license obligations under the CSS license agreement.

MR. METALITZ: And, I stand corrected to the extent that I suggested otherwise. I defer to Mr. Marks.

MS. HINZE: And, if I could just add for the sake of clarifying for everybody here my statement, my statement to the effect that the joint
commenters had a position that playback on a multi-region player was unauthorized under Section 1201 goes like this, (1) a multi-region player, for the reasons that Mr. Marks has just identified, is a non-DVD CCA licensed player, and I'm quoting here from the statement from the reply brief of the plaintiff/appellants in the Remeirdes case, which the short quote is, "Authorization by the studios upon ...," I'll add here, "... upon purchase of a DVD, “has been limited to accessing DVD content by authorized equipment.” In other words, playback of a DVD on a non-authorized player is a violation of 1201. That's my understanding.

MR. CARSON: What you just read didn't say to me at all that it's a violation of 1201. That's your gloss on what they said, isn't it?

MS. HINZE: I'm reciting why I said that my understanding of their position was that playback of a DVD on a non-DVD CCA authorized player was a violation of 1201, I was explaining my statement, based on the two pieces of information.

MR. METALITZ: Mr. Carson, if it helps, I wouldn't disagree with that characterization. My concern that I raised was that I thought that Ms. Hinze had said that in this proceeding we had said
that one option that's available to people that want - it's in lieu of circumventing regional coding was to acquire and use a multi-region DVD player.

MR. CARSON: Let me make sure I understand what you just said. Are you saying that you agree that it's a violation of 1201(a)(1) to use a multi-region player?

MR. METALITZ: Yes.

MR. CARSON: Okay. Okay, good, great. Now we understand it.

MR. MARKS: If it helps for the record, I agree too.

MS. HINZE: I would just like to clarify.

MR. CARSON: Please.

MS. HINZE: My agreement was agreement that was what - that was the proposition I was making, not that I agree with that legal proposition but that's my understanding.

MR. MARKS: No, that's understood, and I thought, I don't know if this is helpful, but I thought it might, you know, and maybe I'm trying to do a preemptive strike against Mr. Carson here and I'm sure it won't work, I'm sure it won't work, but let me just run through, at least in my mind, my analysis as to why I believe that the use of a multi-region player
can constitute a violation of 1201(a)(1), and my analysis goes as follows, is that 1201(a)(1) is a prohibition on circumvention conduct. I believe that circumvention conduct includes conduct that is based on the use of a circumvention device, even if that circumvention device is available in legitimate channels of commerce. I do not believe that the 1201(a)(1) prohibition is limited to conduct that you undertake completely confined to your skill set and your hands or knowledge. That, I believe, is too narrow of an interpretation of circumvention conduct.

I believe circumvention conduct also includes the use of a circumvention device. So, if one accepts that premise, I'm not saying you necessarily do, but if one accepts that premise, which I do, then the question is, is a multi-region DVD player a circumvention device?

In my view, because a multi-region player, for the part or component that deals with regional coding, that part or component is designed, primarily designed, to defeat, avoid, bypass regional coding, and because I think regional coding is an effective access control measure I conclude that the multi-region DVD player is, in fact, a circumvention device, and that is how I arrived at the conclusion that the
use of a multi-region player does, in fact, constitute a technical violation of 1201(a)(1).

MR. METALITZ: I would not necessarily follow that reasoning, but I would reach the same result.

MR. CARSON: Could you repeat your question on that, Rob? Maybe I'm not recalling clearly, maybe I'm incorrectly recalling what I thought I heard at the hearings in Washington, but I thought one of the arguments that I heard against an exemption that would permit people to circumvent CSS, for example, if they needed to, in order to get to the region coding to do what they needed to do to get around the region coding, with the availability of multi-region players, and you can always do that, so why do you need to circumvent. Am I wrong in that?

MR. KASUNIC: I thought that's what we heard Mr. Attaway say.

MR. MARKS: Well, I believe, I mean I read the transcript recently, I didn't necessarily hear that exact explanation, but what I did read in the transcript was when the question, I believe you posed the question, Mr. Carson, to Mr. Turnbull, is the use - when an individual uses a multi-region player, are they violating Section 1201(a)(1), and I believe Mr.
Turnbull responded, "No, I believe they are not violating Section 1201(a)(1)."

I would say 80 to 90 percent of the time I agree with Mr. Turnbull on things, but I happen to disagree with him in this particular instance.

I will say I think it's a difficult argument, and I can see arguments on both sides. I don't think it is as clear-cut a case as, for example, the studio 321 software, which I think clearly is a circumvention device.

MR. KASUNIC: Well, since we have a slight difference of opinion there, and, Mr. Metalitz, you said you would agree with the result, but I'd like to hear how you get there.

MR. METALITZ: Section 1201(a)(1) is not dependent on the use of a circumvention device. Section 1201(a)(1) covers the act of circumvention. And, even if the thing that you use to circumvent is not a circumvention device under 1201(a)(2) it doesn't matter.

So, I'm not troubled on this question about whether a multi-region player is a 1201(a)(2) violation.

MR. KASUNIC: Okay. It doesn't matter whether the device is a violation.
MR. METALITZ: That would be my interpretation. If you are just looking at (a)(1).

MR. KASUNIC: Correct. Right, right, okay.

Well, going back then into - are you finished, Dave?

MR. CARSON: No, I was not finished.

MR. KASUNIC: No, I know you have more.

MR. MARKS: I'm sure you do.

MR. KASUNIC: Dean, you said that there's no privity then with the manufacturer, or with the, I guess, tamperer, was that it?

MR. MARKS: Yes, a third party modifier.

MR. KASUNIC: Okay, no privity, so when they modify that licensed player then they are creating a device and anyone who sells a copy. Okay.

Does - now this - this has been a long day, so excuse me if this - does CSS - is this one of the questions we're going to get further information on, does CSS need to be decrypted in order - or maybe this actually goes along with the UOP, it has been a long day, does CSS need to be decrypted in order to get to decrypt the region coding?

MR. MARKS: Right. I knew this question was coming, and we are not sure, to tell you the truth. I believe, from talking with some of our
engineers, that, in fact, the regional coding codes
are examined prior to decryption of the content on the
DVD disc, so that you insert the disc into a DVD
player and one of the first things it checks for in
the header or information is, what's the regional
coding, and if you have a Region 1 player only, and
it's some disc that's coded only for Region 2, it
goes, okay, well I won't play this, and it doesn't
even get to the point of beginning to decrypt the
motion picture content on the disc.

What I do not know, and this is why, and
I'm not an engineer, obviously, but what I don't know,
and what we will try and find out is, is the regional
coding flags themselves also encrypted with the CSS,
and I just don't know the answer to that question, and
we will try and find out.

What I can say, with a fair degree of
certainty, is the way Mr. Turnbull described the
implementation of regional coding, and how the
regional coding functionality is separate from the CSS
encryption functionality, is accurate, and the fact
that the license, CSS license, does not dictate
exactly the manner in which regional coding must be
implemented or - well, must be implemented, it rather
only says it must be implemented in a robust fashion,
but DVD player manufacturers, ROM drive manufacturers, have a variety of different methodologies by which they implement regional coding recognition, and that is accurate.

MR. KASUNIC: Okay. So, you are going to get us more information.

MR. MARKS: I'm hoping DVD CCA will do that, but I will certainly do all I can as well.

I have a lot of homework assignments from this hearing.

MR. KASUNIC: Does anyone else have any other information on that? Okay, let me just plow through.

I think, actually, this might be something that Mr. Tepp is going to get into more, but it's in my list so let me - if you don't need to - well, it's your position that the region coding then as an access control you would need in order to, if you have a device that would not read that that would be bypassing or avoiding an effective technological protection measure that protects access to work. Okay.

What is region coding enhancement, and how does that differ from standard region coding?

MR. MARKS: Frankly, I've not heard of
region coding enhancement, so I don't know what it is.

   MR. KASUNIC: It looks like somebody has.

   MS. HINZE: Region coding enhancement is a further layer of protection that is currently being deployed, mainly on Region 1 titles, and what it does, as I understand it, it's a query-response system that - sorry, it's a query response system that a DVD player will - This will be a very untechnical description because I am not a technologist, clearly, As I understand it, basically, the DVD player, there's exchange of information between a DVD disk for a particular region and a DVD player. And, in simple terms, the DVD disk asks the DVD player what region it is, and sequentially asks the same question, and if the DVD player comes back and multiple flags are turned on in the DVD player allowing it to play the six relevant regions, then a region code enhanced disc will not play.

   As I say, primarily, as I understand it, it's being used on Region 1 titles at the moment, and again as I understand it based on a statement actually made by several motion picture companies, my understanding is it was introduced primarily to stop Region 1 disks being played in other countries outside of the United States.
MR. KASUNIC: Mostly on these multi-region players?

MS. HINZE: Mostly in Europe, as I understand it.

MR. KASUNIC: Okay.

Why don't I pass it on for now. I think that's all I have right now.

MS. HINZE: Perhaps, I could just clarify, what that means in practical terms is, if you have a multi-region or a full region, however you want to describe it, if you have a player that would play multiple regions. A disk which has, as I understand it, a disk which has RCE on it will not play. So, there is no - it's not the case that there is - because as I understand it there are ways to reset a region if you have a player that is able to manually reset to a single region, if even it's been previously clipped, for instance, to be six region. If you can reset it back to one region then the disc will play. But, as I said, as I understand it, it was introduced as a challenge to multi-region players.

MR. KASUNIC: So, is what you are saying - I'm sorry, if you have this on the DVD ROM drives, you have the ability to change a limited number of times, and now I didn't realize 25 times the region, will
that - to your understanding is that going to be affected? If you switch that, is the region code enhancement going to be picking up those changes and may be fooled by it?

MS. HINZE: I will be honest here and say that I don't think so, but I'm not sure. It would be misleading for me to say that I have the answer to that 100 percent under my control.

MR. KASUNIC: Okay.

Well, any information you could - further information, some more homework, that you could get about region coding enhancement would be helpful.

MR. MARKS: Okay.

MS. PETERS: Mr. Tepp.

MR. TEPP: Okay, Mr. Marks and Mr. Metalitz, I want to go back and roll up our sleeves a little bit on this question, whether or not region coding is an effective technology or protection measure that controls access to a work, because I'll be very blunt, I'm not sure it is.

Let me start by asking this. What happens if I have a DVD disc with a Region 1 flag on it, I put it into a DVD player that does not look for that flag, simply doesn't look for it, will I be able to watch the content on the DVD?
MR. MARKS: Yes.

MR. TEPP: Okay, that's what I thought.

Given that --

MR. MARKS: I mean, but for this region code enhancement stuff that I frankly don't know anything about.

MR. TEPP: Okay, I saw that mentioned in one of the comments as well, and that's an interesting next step, and it's an interesting counterpoint to region coding.

MR. MARKS: Right.

MR. TEPP: We haven't talked about that in the past.

Let me focus on traditional region coding, if I can use that term -

MR. MARKS: Okay.

MR. TEPP: - for the moment.

If a DVD player that doesn't look for and recognize a region coding flag will play the work, how can it be said that that flag, in the ordinary course of its operation, requires the application of information for process of treatment in order to gain access to the work? You just told me if I have a device that doesn't supply any information I gain access to the work.
MR. MARKS: Right, right, and the reason why I think it still qualifies is that the key is in the normal course of its operation, because in the normal course of its operation regional coding flags are responded to by devices that are licensed authorized devices. I think if the standard that you need to meet is that, for an access control technology to be effective, is that it has to be effective in unauthorized devices and circumvention devices, then I think you'll never meet the standard.

MR. TEPP: If I have a DVD player that doesn't decrypt CSS --

MR. MARKS: Correct.

MR. TEPP: - doesn't recognize CSS --

MR. MARKS: Correct.

MR. TEPP: - and I put a CSS encrypted disc in that player, can I watch the content?

MR. MARKS: No.

MR. TEPP: Okay, so there's an example where there would be an effective technology or protection measure that controls access.

MR. MARKS: Correct, but let me give you a counter example. If you had an unlicensed DVD ROM drive, and you loaded a CSS encrypted DVD on that ROM drive, and you applied DCSS to the CSS encrypted DVD,
then you would be able to access the content on the
DVD on that unlicensed ROM drive hooked up to a
computer operating system.

MR. TEPP: Okay, well then, we're almost
going to get metaphysical on this I fear, but where
does region coding reside? Is it on the disc?

MR. MARKS: It is -- well --

MR. TEPP: Is it on the player?

MR. MARKS: -- yeah, yeah, good question.
The flag for the region coding that says I am a Region
1 disc, or I'm a multi-region disc, or I'm a Region 2,
3 and 4 disc, that resides on the DVD disc itself.
The response to that flag is a response mechanism that
is built into the player or the ROM drive. So, the
player or the ROM drive, as an obligation of the CSS
license, an obligation that's undertaken as part of
the authorization to decrypt the CSS encrypted
protected disc in the first place, looks for the
region code flat that's on the disc and abides by it.

MR. TEPP: Okay.

So, it's an obligation of the CSS license
to recognize and respect the region coding.

MR. MARKS: Correct.

MR. TEPP: The broadcast flag.

MR. MARKS: Correct.
MR. TEPP: Dare I go there.

MR. MARKS: Do we have another day?

MR. TEPP: But, does Section 1201 require
that a DVD player respond to the region coding flag,
because you've already said that the third parties who
modify players into multi-zone players are not in
privity with DVD CCA.

MR. MARKS: Right.

MR. TEPP: So, there's no contract claim there.

MR. MARKS: Right.

MR. TEPP: And, you've asserted that they
are violating 1201, and I'm trying to figure out how
that is if you are hooked for saying that it's a
1201(a)(1) violation is that the region coding system
is mandated by the contract, the license with DVD CCA.

So, if we're talking about a third party
that has no contractual or license relationship with
DVD CAA, where is the 1201 violation, and then I think
that boils down to, is a third party required, that
manufactured or modifies DVD players, required under
Section 1201 to recognize a region code?

MR. MARKS: Right, and I believe that the
region code flag and system itself is an effective
technological measure, because I believe in the
ordinary course of its operation it does require a
process or treatment with the authority of the
copyright owner to gain access to the work and,
therefore, I think that the manufacturer, the third
party modifier, who modifies the compliant DVD player
to be non-compliant does actually circumvent the
 technological measure because it's avoiding bypassing,
deactivating, impairing the regional code system. So,
that's how I proceed to that conclusion.

MR. TEPP: Okay.

Let's change the hypothetical just a
little bit and say, you've said that your
understanding is that most of the DVD players that are
multi-region and multi-zone are these modified
versions.

MR. MARKS: Yes.

MR. TEPP: Presumably, it's possible to
create from scratch a DVD player that never recognizes
region coding.

MR. MARKS: Correct.

MR. TEPP: And so you are not talking about
modifying, you are just creating a player that never
is ever in its life going to look for a region code.

MR. MARKS: Correct.

MR. TEPP: When it sees a DVD with a region
code on it it's going to play that disc. I think you've already told me that.

MR. MARKS: Well, there's a catch there, okay, you create a DVD player that never looks for a Region code, is that DVD player licensed by the DVD CCA to be able to decrypt CSS, or is that player not licensed by the DVD CCA to decrypt CSS, and does that player, in fact, decrypt CSS or doesn't it decrypt CSS?

MR. TEPP: Okay.

MR. MARKS: These facts are very, very relevant to your question.

MR. TEPP: Okay, that's a fair clarification.

Let's say, for the purposes of this hypothetical, there's no license with the DVD CAA, but they've got CSS decryption on there.

MR. MARKS: Okay, then my answer is, if the DVD player decrypts CSS without a license, and doesn't recognize the regional coding that's on the disc, yes, it will play the disc but it is in violation of the license and I think, clearly, you know, in terms of decrypting CSS without authorization, clearly falls into --

MR. TEPP: But, there's no license.
MR. MARKS: - there's no license, so I believe it clearly falls into the category of a circumvention device.

MR. TEPP: That was the easy one.

Now, flip it.

MR. MARKS: Okay.

MR. TEPP: They have a license and they are breaking it, there's clearly a license violation, I'm stipulating that.

MR. MARKS: That's right.

MR. TEPP: Is there 1201 violation?

MR. MARKS: I believe yes.

MR. TEPP: Can you give me the analysis there?

MR. MARKS: And again, the analysis is that the regional coding technology, granted that it's on the basis of a flag and a response, I grant you that, I grant you that, it is not the same, to the same degree self protecting that encryption and scrambling is, I grant you that. Okay. But, I do not believe that to qualify as an effective access control measure that it must be completely self protecting the way scrambling and encryption is.

I believe, as Mr. Metalitz was testifying, that there was discussion as to whether an access
control technology should be limited to scrambling or encryption, and Congress decided, no, it shouldn't be, and there was discussion about passwords being access control technologies, and, in fact, the statute 1201 refers to, you know, the application of information, a process or treatment, with the authority of a copyright owner. And, therefore, I believe this regional code system, which involves a combination of a flag on the disc, plus a response from the player, that in the ordinary course of operation it qualifies as an effective access control measure.

MR. TEPP: Okay.

Let's take it out of the CSS realm, because that's complicating the analysis, I won't go there. You've just got a regional code, don't have CSS, okay? I've got a DVD player, it doesn't have DCSS on it, you don't need it to play this.

MR. MARKS: Okay, right.

MR. TEPP: It doesn't recognize the region code. Is it a 1201 violation?

MR. MARKS: This is definitely a harder case, I think that's a definitely harder case. If you are saying that you've put content out in the clear. Let me make sure I understand your hypothetical.

MR. TEPP: Okay.
MR. MARKS: Just I want to be very clear, Mr. Tepp, you are saying you have content in the clear on a DVD disc. You've chosen not to encrypt it with CSS, is that right?

MR. TEPP: No CSS, that's correct.

MR. MARKS: No CSS on the DVD disc.

MR. TEPP: I won't say in the clear because it's not, I don't know what region coding is.

MR. MARKS: Okay, I'm sorry, right, with no CSS encryption, the U.S. content owner has decided to put that piece of content out without CSS encryption, but you have put a regional code flag on the disc, and there is a player out there which can play the content, it doesn't have a CSS license so it can't play CSS encrypted content, but it can play this particular disc because it's not encrypted with CSS in the first place.

MR. TEPP: Right.

MR. MARKS: And, that particular player does not recognize the regional code flag that's on the disc, I would say, frankly, it's a much harder case to say that that particular player is circumventing.

MR. TEPP: Okay, let me take it to the next step then, because I - well, I think we are making
some progress and I'm interested in where we are going next.

We have, someone makes a Region 2 player, turns it into a multi-zone player, I buy it. I use it to play a Region 1 disc. Am I violating 1201(a)(1)?

MR. MARKS: I think that goes back to the again, if we're assuming CSS encrypted discs?

MR. TEPP: Yes, we are back in CSS.

MR. MARKS: If we are back in CSS land, I think it does, because I think the manufacturer of the multi-region player that is a CSS licensee is violating the CSS license, they are violating the obligation to respond to the regional code. I believe in the context of CSS encrypted discs, because in the ordinary course of their operation on players and ROM drives the regional codes are, in fact, responded to because license devices are obligated to respond to them, in that set of circumstances I believe the threshold is met for the regional coding to be an effective access control technology, and, therefore, I believe that this device, which avoids, bypasses, deactivates, defeats that effective access control technology, qualifies as a circumvention device, and then again my analysis that if an individual is using that circumvention device to defeat regional coding
they are engaged in 1201(a) prohibited conduct.

By the way, I want to say for the record just that I also agree with Mr. Metalitz that to engage in 1201(a) prohibited conduct you don't necessarily have to use a prohibited device.

MR. TEPP: Okay.

MR. MARKS: But, I think if you are using a circumvention device to defeat an access control technology, I think it does qualify as circumvention conduct under 1201(a), but I don't believe that's the only methodology to run afoul of 1201(a). So, I think we are in agreement, actually.

MR. TEPP: Okay.

So, it sounds to me, from all of this, that in isolation region coding is not really an effective technological protection measure that controls access to a work. You've told me that's a tough case to make.

MR. MARKS: You mean in isolation of the CSS license?

MR. TEPP: In isolation of CSS.

MR. MARKS: I think it's a harder case.

MR. TEPP: Okay.

MR. MARKS: I agree.

MR. TEPP: Do you want to give it a try?
Do you want to sustain that, because the next step is for me to ask the folks at EFF and IP Justice if they want to make the case that it's not.

MR. MARKS: I think it's borderline. I mean, and I don't mean to totally punt on this, but I'd be curious as to what my colleague, Mr. Metalitz, thinks.

MR. METALITZ: I agree with Mr. Marks that this is a tough case, because it turns on the operation of really two provisions in the statute. One is in the ordinary course of its operation, and the other is no mandate provision in 1201(c)(3), which doesn't apply if the product otherwise falls within the prohibitions of (a)(2) or (b)(1). So, if you have the CSS, you know, the, if you will, CSS non-compliant player, then that clearly does otherwise fall within the prohibitions of (a)(2) and (b)(1), and, therefore, you don't have to worry about whether all it's doing is failing to respond to a particular technological measure.

When you take that out of the equation, then I don't know what the bottom line answer would be. I do think it's relevant that this whole - and again, I'm not 100 percent sure about the chronology, but the use of regional coding within the context of
CSS I think was something that was clearly known at the time of the enactment of the DMCA, and I think it would be very difficult to make the argument that Congress did not intend that regional coding within the context of CSS would not qualify as a technological measure that effectively controls access to a work.

As Judge Newman and Judge Kaplan have pointed out, the fact that it can be circumvented doesn't rob it of its status as an effective technological measure, and as Mr. Marks mentioned and it's extensively documented in the legislative history Congress did not want to dictate what types of technologies would - particular methods would or would not qualify as long as on a functional basis it had the functional result of controlling access to a work.

So, I think you could argue that the regional coding, even in the absence of CSS, in the ordinary course of its operation would meet that test, the functional test, but I'm not sure that isolated from CSS, I'm not sure how that would come out.

MR. TEPP: Well, okay.

This is obviously a key analysis, because if we recommended an exemption that says it's okay to circumvent CSS for the purpose of defeating region
coding, we are taking CSS out of the analysis. And so, that's where I'm going with this, and as I promised I want to turn to the other table and give you all a chance to say what your analysis is of region coding in isolation from CSS, as to whether or not is an effective technological protection measure that controls access to the work, as the statute describes.

MS. HINZE: I think in the absence of some clear information about exactly where RPC sits in relation to CSS, I've read through the May 2 testimony as well, and I'm not a technologist. I have my understanding of how RPC works, but I think the relevant question that we haven't actually had answered here is whether RPC is part of the content that is scrambled within CSS. So, in terms of a practical response I think that's the key question.

MR. TEPP: Well, let's go to the hypothetical I gave these gentlemen. There is no CSS on a given DVD, just a region coding flag for a given region, and I have a player that plays that doesn't have DCSS on it, but I don't need it to play this particular disc, since there's no CSS on the disc. And, the player does not recognize region coding. Doe

either the player, the manufacturer of the player
violate 1201(a)(2) or do I violate 1201(a)(1) by building or using the player?

MS. HINZE: Let me say this. First, I'm very happy to engage in hypothetical speculation, but since I'm on record what I'd like to say is, I don't think that for our exemption to be granted I need to have a definitive answer to this.

The reason I say that is that I don't think the exemption that we are requesting here requires us to have a clear answer to that. From our point of view, the fact that there is an inability for consumers to play foreign region, non-Region 1 DVDs, that they have lawfully acquired, and lawfully imported into the United States on a Region 1 player without some sort of modification is the reason why we have sought an exemption.

So, to the extent that you are asking me to speculate on a hypothetical, I'm not sure that it actually speaks to our exemption. So, from that point of view, before I speculate, and I would be happy to speculate, I guess, after this proceeding is over, on the basis of some more information about exactly how it works in practice.

I'm not a technologist, and my understanding is that RPC is inside the CSS envelope.
That was certainly my understanding of how it works.

MR. TEPP: That's what Mr. Turnbull said.

That's my understanding of what Mr. Turnbull said in Washington.

MS. HINZE: Right, that's my understanding as well, in which case in order to change the RPC control on a player it would be necessary to violate CSS, on a disc or a player for that matter, the response mechanism.

Now, I'm aware that that's probably not an answer to your question, but --

MR. TEPP: That's true.

MS. HINZE: - in the absence of clear information I'm not sure what value there is in my speculation. I'd be happy to do it, but, perhaps, on the basis of some more information so that I could actually make a meaningful analysis.

I'm not adverse to looking at this in further detail with some further information. As I said, I don't think it's necessary, I don't think this question has to be reached in order to make the consideration for our exemption that we have sought.

MR. TEPP: Well, it does seem like the central question, because if region coding, you are asking for an exception to 1201(a)(1), to defeat the
access control of region coding.

MS. HINZE: Specifically, the way that I think this would work from the point of view of our exemption, and I'm aware that there's a slight difference in what's being requested here, is that a user may be able to modify their Region 1 player. In the absence of Section 1201(a) that wouldn't - with Section 1201(a)(1), it would potentially be a violation for a user to modify the player. I think that would be the legal liability point of view.

So, we would be requesting an exemption that would allow consumers to do that, so that they could play back on their devices.

DOCTOR REEVES: But, the line of questioning I'm pursuing goes to the very heart of that, as to whether or not there is liability under 1201(a)(1) for defeating a region control. And so, I'm at a loss as to how to address your exemption without tackling this issue as well.

MS. HINZE: Well, I'm not sure that I can provide you with more technical information, which I think is what you probably need to have a correct legal analysis.

As I said, I would be happy to speculate, but it will only be speculation. In order to answer
this question in a meaningful way, I think better information is required, and to the extent that the entertainment companies and movie studios have made that their position, the response to that is, if that is, indeed, the case then an exemption is required.

MR. TEPP: But, you are not willing to state a position one way or the other for yourself.

MS. HINZE: It's difficult for me to actually state a conclusive answer when I've never actually seen the spec on exactly how the robustness rules work, and exactly how RPC is implemented.

It's not that I'm adverse to speculating, but it's mere speculation, and in order for it to be a meaningful legal analysis I, too, would be interested in seeing some further technical analysis of how this is actually implemented, and I would be very happy to supplement our response based on that information.

MR. TEPP: Well, that's likely that you'll get a question on that then.

MS. HINZE: Great.

MR. TEPP: Was there something else on this point?

MR. METALITZ: Yes, the only thing I wanted to say is that my understanding was that, and I mean
in a lot of the comments that we made here were about regional coding in the context of CSS, not in the context of no CSS, which I also understood to be the exemption that she was seeking.

MR. TEPP: Okay, well -

MS. HINZE: Just to clarify, we have sought an exemption of whatever - ours is whatever it would take in order to get a playback type exemption. So, I don't know the answer to your question. It's a matter of technology, I said that, if it's the case that RPC is a separate technology and a separate access measure, and if there's a violation of 1201(a)(1), for circumventing RPC without - CSS or there's no necessity for circumventing CSS, then I think we would still require an exemption from 1201(a)(1), in my understanding, in order for consumers to playback lawfully acquired foreign DVDs on a U.S. Region 1 DVD player.

MR. TEPP: And, if the region code flags are within CSS, so that they cannot be altered unless you first decrypt CSS, are you asking for an exemption to be able to do that as well?

MS. HINZE: To circumvent CSS?

MR. TEPP: To circumvent CSS, so that you can then do whatever needs to be done to the region
coding.

MS. HINZE: If it's necessary to circumvent CSS in order to modify the Region 1 DVD player to make it play back non-Region 1 DVDs, then yes, by definition that would be part of the scope of our exemption.

MR. TEPP: Okay, that's what I thought, but I wanted to confirm it.

Thank you.

MS. HINZE: Thank you.

MS. PETERS: Thank you.

David?

MR. CARSON: Yes, I'd like to pursue Steve Tepp's line of questioning for one or two more questions. Let's pull our Circular 92, and go to page 180. I'd like to focus on the definition of circumventing a technological measure.

Now, let's go back to the hypothetical. If I recall, one of Steve's hypotheticals was, I buy a multi-region DVD player, you folks would assert that that multi-region DVD player is a violation of 1201(a)(2), I believe, correct?

MR. MARKS: Yes.

MR. CARSON: Now, I'm trying to understand how my use of that multi-region player is in itself an
act of circumvention as defined in 1201(a)(2)(b). No, I'm sorry, gosh, (a)(3)(a), sorry. This is hard to track, but it's right there on the middle of that page, so to circumvent a technological measure means to descramble a scrambled work.

MR. MARKS: Right.

MR. CARSON: I don't think I've done that.

MR. MARKS: Right.

MR. CARSON: To decrypt the decrypted work, have I don't that?

MR. MARKS: No.

MR. CARSON: Okay, or otherwise to avoid, bypass, remove, deactivate or impair technological measures. Have I done that?

MR. MARKS: Ding, ding, ding, ding, ding, ding.

MR. CARSON: Okay, how did I do that?

MR. MARKS: Because this is the analogy I would draw, Mr. Carson, when you download DCSS, you know, you -

MR. CARSON: I didn't.

MR. MARKS: No, no, no, I'm using an analogy.

MR. ARSON: Oh, I'm sorry.

MR. MARKS: If you download DCSS or if you
use a Macrovision stripper, you know, you've bought
the thing, or you've obtained the thing, you yourself,
necessarily, by your own hands and conduct, aren't
stripping off the encryption or stripping off the
Macrovision, it's the device that's doing it.

    MR. CARSON: Yes.

    MR. MARKS: I say it's the same thing here,
you've bought the multi-region player, it's the multi-
region player itself which is avoiding that bypass
saying the regional code treatment, the disc is
treated with a flag, there is supposed to be a
response to the flag, in the ordinary course of
operation there is a response to the flag. This
device has been modified, Jimmy, so there's no
response to the flag. Therefore, I think it qualifies
as circumvention.

    You may disagree with that, but that's the
argument.

    MR. CARSON: No, I honestly don't know
where I am on it, I'm just trying to parse the
language of the statute and figure out whether it
works.

    MR. KASUNIC: The question is, is your
problem with the verb here or with the object? Are
you wondering whether —
MR. CARSON: Now we're really getting metaphysical.

MR. KASUNIC: Are you asking about the situation with the Streambox, the real networks in the Streambox case to a certain extent?

MR. MARKS: I knew I should have reread that case last night. I have it with me here, and I think there is something relevant in that decision about it. But, I guess I've got to - I think there was something, frankly, in the Streambox decision about down, if you'll forgive the pun, downstream controls or measures that were somehow linked to the initial encryption. So, I guess at the risk of giving myself another homework assignment, can I come back to you on whether Streambox has any relevance to this issue?

MR. CARSON: I don't care, but he does.

All right.

So, maybe Mr. Tepp hasn't found us a way out of this dilemma, I don't know. Let's assume we are dealing with an access control, and let's assume that what these folks want to be able to do is to circumvent a technological measure that effectively controls access to the work.

Now, I think it was you, Mr. Metalitz, who
said that if you exempt this class of works it's going
to - it's likely to dissuade the legitimate marketing
of foreign films on DVDs in the United States. Is
that an accurate characterization?

MR. METALITZ: It certainly discourages
that.

MR. CARSON: Okay.

I'm trying to figure out why that's the
case if the class by definition is limited to works
that are not released in the U.S. I mean, wouldn't,
in fact, that be an incentive for people to start
distributing them here so that you couldn't qualify
for the exemption?

MR. METALITZ: Well, I'm actually a step
earlier in the analysis. At the time that a company
like the ones that are listed in Mr. Marks' list,
Pioneer, Bande and these others, are deciding what's
the value of obtaining the exclusive distribution
rights in the United States, I think it would matter
to them whether that would be compromised by the
widespread, and, obviously, it would depend on how
widespread it was, the existence in the hands of their
market of circumvention devices that would enable
people to circumvent their regional coding and thereby
obtain access to this material. Those people,
therefore, are excluded from the market that's the potential market for that distributor.

Although I will agree that anime titles, and I think this is mostly what we are talking about here, may have a growing viewership, this is still a niche market, and if your most devoted fans are already able to get this, because after the Copyright Office announced that it was not a violation of the law to circumvent regional coding there was a sudden upsurge in the availability of multi-region players, or the chips that were needed that you could solder yourself to make these into multi-region players, and that if that became widespread suddenly the most devoted part of your fan base might be gone. And, therefore, it would be less likely that you, the distributor, would want to get into that business. There's less money to be made.

Now, there would be some titles where you might do it anyway, because you think you can break through out of that niche market, cross over and really get a mass market. So, you know, you may try that a few times. And, if you are successfully maybe that would - and, you know, the hoopla about the latest anime release is approaching the hoopla around the release of Matrix II Reloaded, then this could
really change the economics of the marketplace.

But, as I understand it now, this is a niche market, and if you are going to lose, or there's a threat that you will lose a lot of your most devoted fans, then that distributorship is not going to be worth that much to you, and you are just going to be reluctant to give in to that market.

MR. CARSON: Well, aren't the only people who are going to be able to take advantage of this people who actually go abroad and buy them and bring them back in? And, if that's the case, you are not talking about a big part of the fan base, are you?

MR. METALITZ: Well, some of those people, the 124 people, wherever it was, that wrote in seemed to do a lot of shopping outside the United States for these titles, and I don't know how many of them already have shopped outside the United States for a multi-region player, but I'm sure that would increase once this exemption were granted.

MR. CARSON: Well, if the concern is that there are all these devices that are going to be out there, once people are given our blessing to circumvent to their heart's content, you've still got 1201(a)(2) to stop the trafficking in those devices, don't you?
MR. METALITZ: Yes, I think it would still be in violation of 1201(a)(2), but again, I think that the concern is that once the (a)(1), and this is really repeating some of what you heard at the hearings earlier this month in Washington, these are not airtight compartments between (a)(1) and (a)(2). They are legally, but I don't think they are practically.

MR. CARSON: Okay.

Now, I think it was you, Mr. Marks, who talked about the fact that even if you can circumvent, with respect to some of these foreign DVDs, that may not be the answer because some of them may be only - may only have PAL or CCAM on them --

MR. MARKS: Correct.

MR. CARSON: - and at least some players here can't read PAL or CCAM.

MR. MARKS: Correct.

MR. CARSON: The flip side of the coin is, some players here can read PAL and CCAM.

MR. MARKS: Yes, absolutely.

MR. CARSON: So, if at least if you are lucky enough to have one of those players you are home free, right?

MR. MARKS: Yes, or you may, if you don't
have to upgrade to a different player that will do the transcoding.

MR. CARSON: Okay.

MR. MARKS: Yes, I agree with you.

MR. CARSON: Do you have any sense of the proportion of, let's say, European DVDs that have the content only in PAL or CCAM?

MR. MARKS: I don't.

MR. CARSON: Okay.

MR. MARKS: I don't.


MS. HINZE: Could I just point out, just by way of clarifying here, a PAL or a SECAM to NTSC converter is not illegal in the United States.

MR. CARSON: Is not what?

MS. HINZE: Is not illegal, and costs approximately $20.

MR. CARSON: Yes.

MS. HINZE: It's not a difficult issue to make that conversion.

MR. CARSON: Okay.

MS. HINZE: The issue here is whether or not there's a 1201(a) violation.

MR. CARSON: Okay.

MR. MARKS: I want to just, let me just put
a marker down there. I absolutely agree with Ms. Hinze, I'm sorry, I don't know why I can't get your name pronounced correctly. I really apologize for that. I absolutely agree, there is nothing illegal about converting from, you know, SECCAM and PAL to NTSC, or back and forth, and again, I emphasize there's nothing in the CSS license that prohibits player manufacturers or ROM drive manufacturers from doing those conversions.

What I would like to say is that, you know, as she has just mentioned, you can buy a converter on the open market here in the U.S. for $20, if, in fact, that is your problem. It really goes to the heart of the argument that I was trying to make about regional coding, which is that if you want to play a Region Code 2 disc here in the United States you spend maybe $30 or $40 and buy a ROM drive, set it to Region 2, and do the same thing. It's practically the same amount of financial burden.

So, to do the one is really not very burdensome, I think to do the other isn't very burdensome either. And, just coming back to sort of from the metaphysical to the practical, that's what I urged the Copyright Office to consider in this analysis, is the balance here, and the balance of
burdens to users, and I believe there is a very non-
burdensome way for users to, in fact, be able to play
the non-Region 1 discs here in the United States that
they acquire abroad. And, I believe that that burden
and inconvenience is less than the potential harm to
copyright owners by granting the exemption to the
regional code system.

MR. METALITZ: The other panelists here are
actually much more expert on this PAL/CCAM/NTSC issue
than I am, but our viewpoint was that that's a fixed
cost, no matter whether you circumvent or whether you
go out to get a Region 2 whatever DVD ROM drive, if
you have that problem you have that problem.

I think the reason we addressed this in
our comments was because of what's said on page 21 of
EFF's comments, which said that it's not feasible for
someone to purchase and use a DVD player from one of
the foreign regions without also purchasing an
expensive multi-standard television or signal
converter, due to the incompatibility between the
three main video display standards, and they contend
that imposing this burden on consumers is a
substantial adverse effect.

So, I don't know, maybe - I don't know if
the price has gone down a lot in the last few months,
but they were characterizing these converters as expensive at the time of the initial filing, and now they are $20.

MR. CARSON: So, Ms. Hinze, do you want to retract that statement?

MS. HINZE: Let me explain that statement, one, expensive TV multi-standard, or, signal converter, $20.

MR. CARSON: So, we don't really have a problem there, do we? All right, never mind, that's not terribly important.

MS. HINZE: Can I, however, address one of the earlier statements about the ease and convenience of doing this, From the consumer point of view, you just buy a DVD --

MR. CARSON: With what?

MS. HINZE: From the consumer point of view, just buy a DVD ROM and put it into your computer.

MR. CARSON: Right.

MS. HINZE: In fact, if you actually want to watch movies from, for instance, Region 2, Region 3 and Region 4 where I'm from, you actually have to buy three different DVD ROM drives, you have to install them on your mother board, if that's a
possibility, and then you have to find the ability to make your BIOS, or your operating system, recognize the three different DVD ROM drives all set to different regions, and then you have to have some sort of software that will do a conversion of the PAL to NTSC for a playback to display on your VGA monitor.

That, one, involves three sets of drives, and, two, is something that will be difficult technically to do. It's not trivial.

MR. CARSON: More difficult than circumventing CSS?

MS. HINZE: To modify a Region 1 player, as I understand it, from information that's available on the internet, so this is information that exists that I have heard about, I understand can be as simple as pressing a series of buttons. However, it does violate Section 1201(a)(1) according to the views of my opponents, and, therefore, an exemption would be required.

MR. CARSON: Okay.

Mr. Marks --

MS. GARLICK: May I - I'm sorry, I just wanted to make one comment in relation to the harm that's being claimed. I'm getting some conflicting senses of what's going on here in relation to region
coding.

On the one hand, we are told that region
coding is necessary to incentivize distribution
structures and to enable people to comply with local
laws. On the other hand, it seems to be, from the
testimony that you read earlier, that it's okay to
sell Region 2 players into the U.S. market, and it's
okay for people to run around and buy all kinds of
equipment in order to be able to circumvent these
region codes.

So, I'd just like to pose a question for
others to consider, is, you know, how valid is this
claim of harm, particularly, against the history of
people being able to import for personal use
previously.

MR. CARSON: We'll get there, have
patience.

Mr. Marks, I'm a little puzzled by the
suggestion you made, in your last round of comments,
that you can just go out and get the DVD ROM drive.
Now, if I'm not mistaken, we've been talking about
limits. You've been saying, why do you ever watch it
on the a computer, just get a DVD player and watch it
on TV, better to watch it on TV anyway. Now you are
saying, why should we watch it on a TV, watch it on a
computer, get a DVD ROM drive. I mean, which is it?

MR. MARKS: You can do both.

MR. CARSON: Well, no, apparently not, because in this particular case you can't watch it on a TV.

MR. MARKS: Whoa, whoa, whoa, hang on.

MR. CARSON: I'm hanging on just barely.

MR. MARKS: You may not put words in my mouth. You can do a lot, but not that.

I said, I specifically said in this letter that I submitted on June 23, 2000, that there's no restriction in purchasing and importing a DVD player coded for Region 2. So, if you would prefer to play it on a DVD player and watch it on your television set, assuming - well, in the case of Japan and Region 2 stuff they are NTSC, we are NTSC, so you won't have an NTSC/PAL conversion problem there, so let's stick with that and put the NTSC/PAL conversion, because that happens whether there's an exemption, no exemption, regional coding, no regional coding, it's kind of a moot factor because it exists irrespective of regional coding or not. So, let's stick with Region 2 for a second, Japan, U.S., both NTSC format countries.

You can buy that DVD player, and, you know, hook it up to your television and play it.
That's a more expensive, and I acknowledge, more expensive proposition that you would have to engage in, because you may find difficulty in finding a Region 2 DVD player here in the U.S., and you may, in fact, have to import it from Japan. And, I acknowledge that.

What I was saying in the ROM drive circumstance, it's easier because you can buy any ROM drive here in the United States and change the regional setting yourself.

So, the point I was trying to make is that's a less burdensome method of being able to actually view the Region 2 DVD discs here.

MR. CARSON: Okay.

MR. MARKS: But, I certainly wasn't arguing, and I apologize if I gave the impression, that that was the exclusive method by which you could do it.

MR. METALITZ: I would just say also on the DVD ROM example, first of all, I guess it costs a little more if you do the player, but maybe you don't have to, you know, make all the steps that Ms. Hinze talked about for bringing your new DVD ROM drives on line.

The second is, as I recall the comments,
and I can't swear that all of them fit in this
category, but the vast majority of the comments really
seek to view DVDs that are coming from one market,
either an Indian market, Japanese market, Australian
market. I know some people, we have an increasing
number, let's say, of global citizens who actually are
interested in watching DVDs that aren't released in
the United States, but they come from all over the
world, but I think that does shrink considerably the
number of people who would need three or four
additional DVD ROM drives. I think for most of the
people who have spoken up in this proceeding, their
problem could be solved if they got one.

MR. MARKS: Can I have just one more point
also? In terms of that issue of somebody who, you
know, has a global cultural interest and has a
veracious appetite for foreign titles from all sorts
of different regions of the world, it seems to me the
best way that that can be satisfied is for those
different variety of foreign titles to be made
available in the U.S. on discs that are coded either
for Region 1 or coded for multi-regions, so that,
therefore, you don't have to get into all of this
problem of multiple players and multiple ROM drives,
or ROM drives where you are resetting the region
coding player. And, it seems to me we need to try and figure out what is the best way to incentivize this.

I would maintain that for the last three years the regional coding system has been legally protected, you know, in fact, in terms of there not being an exemption granted, and the result has been a very strong proliferation of foreign language and foreign works available on DVD in the U.S. market.

I believe if there was not that proliferation, and if there was a diminution, in fact, of foreign works available in the U.S., on Region 1 or multi-region DVD discs, we might be in a more difficult position here today.

But, I think, you know, the evidence is showing that there's actually quite a dramatic increase in the availability of these foreign language titles, and I think that's ultimately the result we all want.

MR. METALITZ: I think we also have to assume, based on what we know about, again, going back to the Japanese situation, that for whatever reason the producers of those titles have decided that the way they want to reach the U.S. market is through distributorship in the United States, and the Region 1 version, rather than originally producing their
titles either in all region or in Region 1 and 2 at least, so that they could directly export it into the United States.

You know, they may change their mind, they may decide that this niche market is never going to be more than a niche market, and there will be enough people out there ordering by mail order from Japan, and so let's enable these discs on Region 1 and 2.

But, they haven't made that decision, unlike, for example, the Indian film makers who appear to be releasing an all region, there could be a variety for reasons for this, but I think the most logical one is that they also figure this is the way to reach the U.S. market. And, if we want to encourage distribution, continued increased distribution of these titles in the U.S. market, regional coding is part of that picture.

MS. HINZE: Could I address that?

MR. CARSON: Sure.

MS. HINZE: The precise reason EFF is seeking this exemption is because in the last three years there are a number of works that have not become available in the U.S. market, and the reason we are seeking this exemption is because for whatever reason these works have not become available.
MR. CARSON: Yes, we understand that.

MS. HINZE: I just want to make it clear from the point of view, for instance, Region 4 works, there are numerous titles that are not new titles, that have not become available. It's been more than three years since some of these titles have been released, and they are not in existence in Region 1 format. They are not in existence in any format in the United States, and the only way that a consumer could actually have access to play those titles here would be to buy a Region 4 version of the disk and, hopefully, find some way to play it. That would presumably require an exemption. That's specifically why we sought the exemption, because these works simply are not available, and to the extent that there's an incentive structure, the incentive structure would be to actually encourage people to distribute these works. We believe our exemption will actually have the effect of encouraging U.S. distributors to make these works available.

We would certainly welcome that, if that were the case, but the reason the exemption is being sought is because our experience is that that has not been the case.

MR. CARSON: Right.
Now, should someone who goes abroad and buys a DVD from another region - well, let's start over - does someone who goes abroad and buys a DVD from another region, and then brings it here and wants to try to succeed in playing it here, notwithstanding region coding, are they engaging in an infringing use of the work?

MR. MARKS: I don't think so.

MR. CARSON: Is there any reason why they shouldn't be permitted to view the DVD that they purchased abroad?

MR. METALITZ: They are.

MR. CARSON: Pardon?

MR. METALITZ: They are permitted to do that, as far as the copyright law is concerned, I believe.

MR. CARSON: Right, but the region coding is preventing them from doing that, correct?

MR. METALITZ: No, the region coding is making them go a different route to do that, rather than circumventing the region code they need to get a - use one of the other methods that we've talked about, resetting their DVD ROM drive or getting a --

MR. CARSON: None of which is necessarily a very easy way of doing it, right?
MR. METALITZ: Right.

MR. CARSON: So, there are impediments to their engaging in what we all agree are non-infringing uses.

MR. METALITZ: The adverse impact in this situation is not zero.

MR. CARSON: Right, okay, so let's go through the cost of benefits then, because, obviously, I think your argument is the benefits of this region coding system far outweigh the costs to these people who are facing difficulties in doing it.

MR. MARKS: Correct.

MR. CARSON: So, I think I was given four justifications by Mr. Marks. First of all, rights are territorial. Does that have any effect when we are talking about an individual who purchased a DVD abroad and wants to look at it here?

MR. MARKS: No, it doesn't for the most part. I think we're looking at the - and I'm glad you are asking that, because we are looking at the consequence of if there could be an exemption to regional coding will there be, you know, parallel importation of these discs, and not just the one off that is permitted by Section 602.

MR. CARSON: Okay.
Now, of course, the exemption wouldn't in any way extend the parallel importation. That's understood, isn't it?

MR. MARKS: I do understand, but I'm just talking about the practical reality spillover versus the scope of necessarily the exemption itself.

MR. CARSON: Have we had any problem thus far with parallel importations?

MR. MARKS: We had a lot of problems with parallel importation, but they've generally been from the U.S. out, rather than --

MR. CARSON: Exactly.

MR. MARKS: - into the U.S.

MR. CARSON: Well, of course, this exemption, if it existed, would apply only to the U.S. So, I gather there's not really any record of a problem of parallel importation into the U.S., of foreign media.

MR. MARKS: So far, no, but, you know, that sort of begs the question as to whether that's because of the regional coding or not.

MR. METALITZ: And, I'm not sure that we know enough about that, because again, let me emphasize that the major studios are not generally the - I mean, there are some exceptions, but the major
studios are not generally the authorized distributors of these titles, and it may be that parallel importation is occurring in violation of the exclusive distribution rights of the distributors who tend to be independent.

MR. CARSON: So, that leads to a very interesting question. I mean, you are here representing the major studios, why on earth do you care?

MR. METALITZ: Well, I'm not just representing the major studios, number one.

MR. CARSON: Okay.

MR. METALITZ: And, we're representing AFMA, for example, and of course some of the major studios are involved here as well.

But, obviously, regional coding, as you know, is a global system.

MR. METALITZ: Right, but we are not going to effect it elsewhere, we are only talking about here.

MR. CARSON: I agree. This proceeding cannot directly affect it anywhere else. So, for U.S. copyright owners, whether or not this exemption is granted is, I would think, a trivial thing, isn't it?

MR. METALITZ: No, I don't think it's a
trivial matter, both because to the extent that there's a growing market for foreign language DVDs and others in this category, it's certainly a market opportunity that they would want to exploit as distributors, and all of these companies are distributors of other people's product, to some extent.

And, the second reason, of course, is because they want to maintain the integrity globally of the regional coding system, and they don't want the United States setting the example of permitting circumvention of regional codings.

MR. CARSON: Okay.

MR. MARKS: And, in fact, on these foreign language feature films, at least according again to this DVD release report, the fourth largest distributor distributing 91 of the 1700 titles was Columbia Tri Star, distributing 91 foreign language releases in the U.S.

So, they probably would have an interest. They may be able to better answer some of these questions, whether they have parallel importation problems of the foreign language films or not. I just don't know.

MR. CARSON: Okay.
MR. METALITZ: Again, these are niche markets for the most part, so you wouldn't expect a huge flood of parallel imports, but it might be enough to affect that market.

MR. CARSON: All right.

Well, let's move on to the second justification, the theatrical window. That's, obviously, not an issue here, is it? We are talking about viewing foreign DVDs here, as a general proposition I don't think we're -

MR. MARKS: Only to the extent, I would say, if, in fact, there was a U.S. distributor who gained theatrical distribution rights to the foreign film here in the U.S., it certainly could affect it.

MR. CARSON: Yes, there is certainly the possibility, do we have information about how often that arises?

MR. METALITZ: We have the example in our submission, the Rabbitproof Fence.

MR. CARSON: Yes, you've got that one.

MR. METALITZ: I agree with you that this is not the typical situation.

MR. CARSON: Right, and we certainly heard out of your mouths plenty of times that when you come up with one example that's just one example, it
doesn't mean much. So, so far we've got one example on that side of the equation I gather, that's all we can say.

MR. MARKS: One example where the theatrical distribution in this country occurred after the DVD release.

MR. METALITZ: In a non-Region 1 setting.

MR. MARKS: There could well be other examples, I just don't know of them. It wouldn't surprise me.

MR. METALITZ: I mean, it really depends on how much of the U.S. theatrical market is of titles that are first released outside the U.S. That would be the likeliest source of this, such as *Rabbitproof Fence*, and, obviously, that's not a high proportion, but it's not insignificant either. There are, you know, foreign films that do quite well in the United States.

MR. CARSON: Right, but --

MR. METALITZ: And, some of those may have been, you know, I'm speculating here, that some of them may have been released on DVD with region coding that didn't allow playing in the United States prior to the time of their theatrical release in the United States.
MR. CARSON: Right, I'll agree, that's the question, and we just don't have a clue what the answer is, I guess.

MR. METALITZ: I think the answer is that it's not unheard of, but I would agree with you, it's probably not going to be a major part of the market.

MR. CARSON: Okay.

Let's move on to the third justification, local censorship, not an issue here, I assume, correct?

MR. METALITZ: Well, not censorship, but it could be for ratings.

MR. CARSON: For ratings, okay.

But again, we are talking about people who acquire these abroad and are bringing them here so they can watch it. Are we really concerned about them being deceived by ratings or having a problem with ratings?

MR. METALITZ: I don't know the extent to which there's - you know, it's certainly more in the video game area that this is an issue, but I don't know the extent to which it's an issue in the audio visual.

MR. CARSON: Okay.

Well, even with the video games, I mean if
I go to Japan and buy a Japanese video game and bring it back here and it's a lot more violent than what people are used to here, I knew what I was buying, didn't I? Are you going to tell me that I shouldn't be able to play it here because it's too violent for me?

MR. METALITZ: I'm certainly not telling you that, but I'm sure there are state legislators around the country who would tell you exactly that.

MR. CARSON: No doubt.

Okay, finally, the fourth and final justification you gave, Mr. Marks, and all I've got on my piece of paper, you are going to have to elaborate for me, is, I just wrote down CCAM and PAL, and I'm not quite sure what that means.

MR. MARKS: Oh, yes, well, what I was referring to there is that, you know, some of the justification for doing regional coding in the first place was to try and replicate those divisions in PAL in SECCAM markets, PAL, SECCAM and NTSC markets, that certainly the division in regional coding isn't completely analogous to the division of foreign territories vis-à-vis PAL and SECCAM.

But, for example, Region 2, which is generally Western Europe and part of Central Europe,
is generally a PAL territory, although Region 2 also includes Japan, which is an NTSC territory. But, in general, we try to make any territory like Europe, which is generally PAL and CCAM, all subject to one region, to sort of minimize the problem of the NTSC/PAL transcoding problem.

MR. CARSON: Okay.

I can following what you say as a matter of fact, but I'm not sure I understand how that is a justification for region coding, and why we should be - why we should hesitate before coming up with the exemptions because of this denominator. Why does that matter?

MR. MARKS: Well, why it mattered initially is, we wanted to be sure that, you know, when somebody bought - that we could say, okay, these just are destined for Europe and for, you know, Region 2 players in Europe, that we will know to put on the PAL/SECCAM version of the movie so that they will be playable on the television sets that are in Europe.

If you, you know, exempt, do an exemption for regional coding, people may, in fact, you know, bring in discs that are not NTSC discs, expect, okay, with this exemption I'm going to be able to clearly play this on my DVD player and television set, and, in
fact, they may not be able to do so. So, it can add to confusion.

    MR. CARSON: Is that a problem you care about?

    MR. MARKS: I care about it to the extent that I believe if you create an exemption for regional coding, and if, in fact, what ends up becoming the de facto standard is that regional coding is basically defeated and no longer abided by, both here in the U.S. and abroad, that's going to hurt our distribution business. So, yes, I care.

    MR. CARSON: I'm not sure I see the connection between that and your previous statement that someone might be disappointed --

    MR. MARKS: No, no, no, because you asked me why do I care about an exemption granted for regional coding.

    MR. CARSON: No, no, my question was, why do you care that someone who buys something abroad and takes it home, thinking, oh great, I've got an exemption I can play it, and then they are not able to because of the PAL and SECCAM issue.

    MR. MARKS: Well, what I'm trying to --

    MR. CARSON: What do you care about that?

    MR. MARKS: - I care about that because I
think it goes to the issue of how much utility and
d-value are you actually giving to users by granting
that exemption.

MR. CARSON: Okay, and we certainly had a
conversation on that before.

MS. HINZE: Could I just quickly add a
quick statement of clarification there?

MR. CARSON: Sure.

MS. HINZE: I have a number of Region 4
DVDs that I currently cannot play. Each of them are
labeled as to being PAL.

MR. CARSON: What?

MS. HINZE: PAL, which is the Australian
standard.

MR. CARSON: Right.

MS. HINZE: It's clear to any consumer who
buys a foreign region DVD - It's on the label, they
know exactly what they are getting. I don't think
there's any issue of confusion on the part of
consumers.

And, as I said before, I'm a little
puzzled about Mr. Marks' statement, because as I
understand it, a $20 PAL to NTSC converter is all
that's required in order to address that particular
concern.
One, I can't see how consumers will be confused because it's clearly labeled on a foreign DVD, and second, it's not illegal to have a PAL to NTSC converter or to use one, and three, it's a matter of a $20 PAL to NTSC converter.

MR. MARKS: And, I guess I would answer, and the discs are clearly labeled that they are playable on Region 4, so there's no consumer confusion, and it's not a burden to get a Region 4 player here in the U.S., and then play the disc. I think it's quite equivalent.

MR. CARSON: Well, you know, I've heard two different things about that, and I would like clarification on that. On the one hand, at times I've heard you say it's easy to get a player from another region, and other times I've heard you acknowledge that maybe it's not so easy. I mean, which is it?

MR. MARKS: Okay, well, let me say, you can import a player and it's certainly easy to get a ROM drive, you know, here in the U.S., and set it to Region 4.

MR. CARSON: Okay.

MR. MARKS: So, if the issue is viewability of the disc, and the consumer's ability to view the disc, there's an easy alternative that doesn't involve
circumvention.

MR. CARSON: Okay.

Well, how easy is it to import the player?

MR. MARKS: I haven't tried, so I couldn't
tell you.

MR. CARSON: Okay.

I've heard $40 or $50 bandied about as the
price of a player from another region.

MR. MARKS: No, no, no, you've heard
bandied about $40 or $50 for the price of ROM drives.

MR. CARSON: Oh, okay.

MR. MARKS: And, I have listings here of
many, many different ROM drives that are in that price
range.

MR. CARSON: Okay.

Do you have any information on what the
cost would be for an American citizen living here to
get - to acquire a DVD player for Region 4 or Region
2?

MR. MARKS: I don't have that information.

MR. CARSON: Does anyone have any
information on that? No, all right.

Okay, finally, just one question about the
video game issue.

Mr. Metalitz, you mentioned that one
difference between the region coding issue for video
games that may not be there with respect to motion
pictures is that in some console systems the region
coding is closely integrated with the access control
technology that prevents playing of pirate games. So
that, if you permit people to circumvent the region
coding in the video game area, you may also be
permitting them to, basically, commit piracy. Is that
more or less an accurate summary of your testimony?

MR. METALITZ: Yes, your exemption won't
say that if you granted it, it won't say you are
allowed, but I think that would be the fact. And, I
think the emphasis in the contrast is on May after the
interrogation we had from Mr. Tepp, we are not 100
percent, at least I'm not 100 percent sure of the
degree of integration between CSS and the regional
coding, but I know that in at least some of the
console systems it is closely integrated.

MR. CARSON: Even if that's true, though,
isn't that just the result of a choice made by video
game manufacturers to integrate the two of them, and
aren't you just penalizing the user because of that
choice that was made by the providers of this stuff?

MR. METALITZ: Well, it is true that they
chose this system, and, in fact, they have different
systems. I mean, the major console manufacturers don't all have the same system. So, I hesitate to generalize.

But, they are - if you are asking for the reasons why video game companies do this, I think as I said they are similar to, although not identical to, the reasons that movie studios use regional coding, the main ones being licensing restrictions, because their licensing this region for the most part, and localization, which is I think a big issue not only because of the cultural issues as far as the level of violence that's allowed, but language and other factors. That's why they do it, that's why they have regional coding.

You are asking why they have a system in which the two are closely integrated?

MR. CARSON: Well I'm not even sure I care why, I'm just wondering whether we should care about it, when it's a choice that was made by the people who were saying don't do it to us. Well, it was their choice to do it that way, it was their choice --

MR. MARKS: Well, no, but wait one second. You could be putting us in sort of a catch-22, you know. If you don't integrate it closely with an access control methodology, and there's absolutely no
connection to an access control methodology at all, and it's a flag with a response, then you are saying to us, well, it may not be an effective access control method at all. And then, if you do try and hook it into a licensing scheme, like CSS which is an access control methodology, then you are saying, well, wait a second, you are somehow, you know, illegally bootstrapping two access control methodologies together.

So, what's our choice?

MR. CARSON: We'll have to decide that.

MR. MARKS: I'm glad I stumped you. Sorry.

MR. METALITZ: Again, Mr. Carson, I think in terms of the real world impact of this, I think the video game companies experience is colored to a great degree by the Section 117, I don't it's too strong a word to say debacle, where a provision that's been enacted by Congress has been widely abused as an excuse for piracy, and the same thing we fear will happen again in this situation.

So, I think the video game industry is living with a very high level of piracy right now. It's a huge problem in which their losses are quite extensive, and in many countries they virtually don't have a market because of piracy, and this would simply
exacerbate the problem.

MR. CARSON: But, what's the connection between that and region coding?

MR. METALITZ: Because allowing the circumvention of region coding, as I said, would I think step you into the quicksand of promoting the circumvention of access controls, generally the playing of pirate games on video game consoles.

MR. CARSON: Okay, I get it.

MR. TEPP: You know, I just want to react to something that just got said very quickly, because you didn't stump me.

MR. MARKS: I was afraid of that. I was really afraid of that. I was hoping you'd be too tired to continue, but, oh, well.

MR. TEPP: Oh, no, if you think that was an interrogation, I think what we are trying to figure out is precisely whether what's going on is bootstrapping something not protected by 1201, by merging it with something that is. And, if so, whether we should respond in the affirmative to a request for an exemption to deal with that, to allow non-infringing uses.

MR. MARKS: Right, and I think that's a very fair question, and what I was trying to say, and
maybe I didn't articulate it clearly enough, is that
if you accept the premise, and you may not, but if you
accept the premise that it's legitimate for a
copyright owner to employ technical measures in order
to enforce – help enforce their distribution rights,
including their right to decide how to market their
works, where to market their works, when to market
their works, if you accept that premise that it's
legitimate for copyright owners to do that, then one
of the technologies to do that is this regional coding
technology, which, as I mentioned before, in and of
itself is not self protecting to the degree that
scrambling and access control – that scrambling and
encryption are, but still constitutes an access
control technology.

If your goal as a copyright owner is to
say, I want to try and ensure that that access control
technology truly is effective, so that it qualifies
for protection under the DMCA, one way of
accomplishing that may be to link it, you know, as we
have done in CSS, as an obligation of an encryption
scrambling technology, which, perhaps, more clearly
qualifies for protection under 1201.

And so, that's actually a more, I think,
reasonable explanation, perhaps, to the flippant
question I posed to Mr. Carson.

MR. TEPP: I'm certainly not trying to pass judgment on what's legitimate for a copyright owner to do in terms of the distribution market. I'm not aware of any violation of the law by attaching region coding in the first place, that's not the question we're faced with. The question we are faced with is, once it is in place is it a 1201 issue, and if so should there be an exception. And, in spite of my so-called interrogation, I still haven't heard, I don't believe, an argument or an analysis of region coding in isolation that it is within the definition of an effective technology or protection measure that effectively controls access to works.

MR. METALITZ: I think one of the reasons that you may not have heard that is because it doesn't exist in isolation from CSS. I mean, theoretically it's possible for someone to release the disc that you talked about, that doesn't have CSS, but does have region coding. At least I think that's theoretically possible, but I'm not aware that that ever happens.

What at least happens in the vast majority of cases is that it is - they are both there, and I think we've explained our view why in that circumstance I don't think there's much doubt that as
the Copyright Office and the Librarian found three years ago, region coding is an access control technology that's protected by 1201.

And then the question, quite properly, is, have proponents met the burden of showing that it would be adverse impact on non-infringing uses, which we concede is not zero, but is it sufficiently significant weighed against the value that you recognized three years ago of region coding to justify an exemption.

MS. PETERS: Okay.

We could go on forever, it is now --

MS. GROSS: I'm sorry, can I just make one comment before we conclude?

MS. PETERS: Sure.

MS. GROSS: Thank you.

I just wanted to raise a point that we had discussed in an earlier panel with respect to Linux users being able to play their DVDs. And, Mr. Marks had a press release talking about the IBM Think Pad, the press release is about two years old. It was my understanding that once that press release went out, announcing this Think Pad Linux DVD player that there was a good deal of controversy, threat of litigation, and it was immediately withdrawn from the market.
So, before you conclude that there is a Linux box available, I think you need to see a little bit more information, because it's my understanding that that particular Think Pad is not available for Linux playing today.

MR. CARSON: Who threatened that litigation?

MS. GROSS: I'm not sure. This is two years old, this story, so I'm just saying, I think we need to have a little bit more information about the existence of this box.

MR. CARSON: Well, you're welcome to pass it on to us.

MS. GROSS: I will do that.

MS. PETERS: Okay.

It's 6:18, we've been at this for more than nine hours. Many of you have been here all day, and contributed. I want to thank all of you, you've given us a lot to think about, and at least for now, except for you, Mr. Marks, who have many things to do for homework --

MR. CARSON: And, Ms. Hinze.

MS. PETERS: - and Ms. Hinze, but I do thank you for all of your efforts, both to what you've filed with us and as well as your participation here.
So, this hearing is concluded, all the hearings are concluded, and enjoy your evening. Thank you.

(Whereupon, the above-entitled matter was concluded at 6:18 p.m.)