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RULEMAKING HEARING

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FRIDAY,  
MAY 2, 2003

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The hearing was held at 9:30 a.m. in the Postal Rate Commission's Hearing Room, Third Floor, 1333 H Street, Washington, D.C., Marybeth Peters, Register of Copyrights, presiding.

PRESENT:

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

PANEL I WITNESSES:

FRITZ ATTAWAY  
MICHAEL EINHORN, Ph.D.  
PHIL GENGLER  
STEVAN MITCHELL  
ROBERT MOORE  
SHIRA PERLMUTTER  
RUBIN SAFIR  
BRUCE TURNBULL

PANEL II WITNESSES:

JONATHAN BAND  
SHAWN HERNAN  
KEN KUPFERSCHMID  
CHRIS MOHR  
JOSEPH V. MONTORO, JR.  
EMERY SIMON  
JAY SULZBERGER

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

9:38 a.m.

CHAIRPERSON PETERS: On the record. Good morning. I'm Marybeth Peters, the Register of Copyrights. I would like to welcome everyone to the third of the four days of hearings in Washington in this Anti-Circumvention Rulemaking.

The purpose of the rulemaking proceeding is to determine whether there are 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. It's a long sentence.

Today our session will focus on a number of proposed exemptions relating to audio-visual works on DVDs including backing up audio-visual works, tethering an audio-visual work to particular devices and region coding on DVDs. This afternoon's session will focus on proposed exempts for literary works including computer programs.

Let me now take a moment and introduce the Copyright Office panel. To my immediate left is David Carson, General Counsel of the Copyright Office. To my immediate right is Rob Kasunic, Senior Attorney and

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1 Advisor in the Office of the General Counsel also  
2 known as "Mr. 1201." To his immediate right is  
3 Charlotte Douglass, Principal Legal Advisor in the  
4 Office of the General Counsel. And to David Carson's  
5 left is Steven Tepp, Policy Planning Advisor in the  
6 Office of Policy and International Affairs.

7 The agenda for the next hearing which will  
8 be on May 9<sup>th</sup> and which will take place here at 9:30  
9 a.m. will be on two different topics but we'll skip  
10 that right now and go on to what we're going to be  
11 doing. The Office will be posting the transcripts  
12 after all hearings approximately one week after the  
13 hearing. The posted transcripts will be those as  
14 originally transcribed. There will be an opportunity  
15 for people to correct the transcripts. The goal is to  
16 get the transcripts up as quickly as possible so that  
17 people who are preparing for further hearing can have  
18 them. Then we'll do the corrections as soon as we get  
19 them back.

20 The reply comments and the hearing  
21 testimony will form the basis of evidence in this  
22 rulemaking which in consultation with the Assistant  
23 Secretary for Communications and Information of the  
24 Department of Commerce will result in my  
25 recommendation to the Librarian of Congress. The

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1 Librarian will make a determination before October 28,  
2 2003 on whether or not there will be any exemptions to  
3 the prohibition which should be instituted for the  
4 next three year period.

5 The format I have in front of me says it's  
6 divided in three parts. We've never really totally  
7 made it to the third part. The first part is that  
8 each of you get to present your statement. There is  
9 no official time for that. There are a lot of  
10 witnesses this morning so you should make it as brief  
11 as you possibly can. Then we get a chance to ask you  
12 questions. Hopefully some of them will be tough. And  
13 the third part is that you can ask each other  
14 questions.

15 Just for the record, it seems that in our  
16 asking the questions you all ask each other questions  
17 which is why we never get to the third part. I'm  
18 going to stop there. Because there aren't nameplates,  
19 maybe we can start with you, Michael, and you could go  
20 down, say your name and who you are affiliated with so  
21 that all of the people up here know who you all are.  
22 Nameplates will appear as this hearing progresses.

23 DR. EINHORN: My name is Michael Einhorn  
24 and I'm speaking here today on behalf of myself.

25 CHAIRPERSON PETERS: Shira.

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1 MS. PERLMUTTER: I'm Shira Perlmutter with  
2 AOL Time Warner.

3 CHAIRPERSON PETERS: Bruce.

4 MR. TURNBULL: I'm Bruce Turnbull of the  
5 law firm of Weil, Gotshal & Manges here today for DVD  
6 Copy Control Association.

7 MR. ATTAWAY: I'm Fritz Attaway, Motion  
8 Picture Association of America.

9 MR. MITCHELL: Stevan Mitchell on behalf  
10 of the Interactive Digital Software Association  
11 representing the video game industry.

12 MR. MOORE: Robert Moore with 321 Studios.

13 MR. GENGLER: Phil Gengler representing  
14 myself.

15 MR. SAFIR: I'm Rubin Safir. I represent  
16 two organizations. One is called New Yorkers for Fair  
17 Use which I started in 2000. The other one is NYLXS  
18 which is the New York Free Software Linux scene in New  
19 York City. It's grassroots.

20 CHAIRPERSON PETERS: Okay, thank you very  
21 much. We'll start at that end and move down. Let's  
22 start with you. Bob is telling me we should do  
23 proponents so let's start on this end.

24 MR. SAFIR: So it's the official  
25 statement.

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1 CHAIRPERSON PETERS: You make a statement  
2 with your case.

3 MR. SAFIR: All right. The last time  
4 these hearings showed up which was 2000 as I recall we  
5 were protesting outside at the Library of Congress  
6 because a young man in Finland had been arrested for  
7 trying to use his DVDs that he had purchased and was  
8 his legal property on his computer using a free  
9 operating system which in this case was GNU Linux  
10 operating system.

11 It was bizarre because the way he got  
12 arrested was he hacked into the encryption that the  
13 copyright control people had created in that. But  
14 what was really weird about it was that one of the  
15 keys somehow magically showed up and was available in  
16 one of the commercially available DVD players. Now  
17 with all the trouble that the movie industry went  
18 through to create this scheme and all the control that  
19 they had exerted over the systems, it was rather  
20 remarkable that somehow one of these keys just showed  
21 up magically just in time when the movie industry  
22 wanted to have a test case for the DVD and for the  
23 DMCA in order to strengthen their hand. But  
24 nevertheless that's what happened.

25 Unfortunately for them what happened was

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1 it happened in a foreign country. Nevertheless he was  
2 arrested not under the DMCA but he was arrested under  
3 various things. Then we met him later in New York  
4 when there was a court case trying to suppress the  
5 reporting of the DeCSS software which hacked into the  
6 encryption and allowed for the playing of those DVDs  
7 on any choice of operating system that you wanted to  
8 play it on.

9 Since that time I started New Yorkers For  
10 Fair Use in response to that gross violation of that  
11 individual's rights and gross violation of my rights  
12 and my kids' rights. After doing extensive research  
13 on the matter of the DMCA and the results of what's  
14 happened, we've had been able to come to only one  
15 conclusion which is that digital rights management  
16 especially as it applies to DVDs is theft.

17 Originally when I wrote to ask to speak  
18 here, I said that I wanted to have an exemption for  
19 all cash-and-carry commercial products. The reason  
20 for that is because constitutionally "fair use" is  
21 defined by Judge Ginsburg and as other judges as your  
22 constitutional rights to private property under the  
23 Fourth and Fifth Amendments of the Constitution.

24 When you go out and you purchase something  
25 for cash, it's yours. You take it home and it's

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1       yours. If you want to play it on your free operating  
2       system, that's good. That's your choice. If you want  
3       to play it on your blender, that's your choice. It's  
4       yours. If you want to scratch it and you want to rip  
5       it apart or throw it out the window or feed it to your  
6       dog or use it as a coffee coaster, that's your choice.  
7       The information that's on that copy there is also  
8       yours and the computer and the system that it runs on.  
9       It's your private property.

10               Now I don't need to tell the lawyers here  
11       about what the Constitution says about property but  
12       clearly the Fifth Amendment says blah, blah, blah,  
13       "...nor shall be deprived life, liberty and property  
14       without due process of the law." So let's explain  
15       this. Phil is going to help me.

16               Phil, you're a store owner. Right? Phil,  
17       do you have Fats Waller CD or DVD by any chance?

18               MR. GENGLER: Yes, I do.

19               MR. SAFIR: Great, how much is it?

20               MR. GENGLER: Fifty cents.

21               MR. SAFIR: Okay. Here's fifty cents.  
22       Thank you. Now this is my DVD. Wait. I want to use  
23       this DVD.

24               MR. GENGLER: You can't.

25               MR. SAFIR: Why not? Now that's theft.

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1 That's theft and that's what happens in my computer  
2 because I only have in my house free operating  
3 systems. There is no legal way despite the fact that  
4 they promised us that they were going to allow us on  
5 free operating systems using free software to be able  
6 to play DVDs. By this time, there still is no legal  
7 way of doing it. The way I can play my DVD on my free  
8 operating system is to either hack it with something  
9 that is a felony or a trafficking program or unless I  
10 happen to a genius and able to hack it myself.

11 Now in the case of the encryption that was  
12 used on the DVDs, it was a pretty weak encryption but  
13 the reason why it was hacked so quickly was because  
14 accidentally "somehow" the key in it was made available.  
15 I don't understand how that could happen but maybe the  
16 good people over there can explain it better.

17 In addition to that, there's no contract  
18 involved. Sure, the DMCA says if you put an  
19 encryption on something that you should be able to  
20 enforce not copying but actual access to your own  
21 property. You have a situation like at New York  
22 University in the Dental School where all the  
23 textbooks sold are on DVDs. At the end of the  
24 semester, the DVD turns itself off and then you have  
25 to purchase it again. They graduate from school with

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1 no textbooks.

2 Now we've been assured by the market that  
3 the market is going to take care of this problem. The  
4 market can't take of this problem because this is a  
5 civil rights issue. The market cannot take care of  
6 civil rights issues. A market can only occur when  
7 people are guaranteed their civil rights.

8 What we have right now is an extortion  
9 racket. You have to purchase an approved player only  
10 to play any DVD or any movie in the continental United  
11 States. In Europe, I had the fascinating experience  
12 of going to France and they have three DVD players.  
13 Each one of them has a \$55 license to the extortion  
14 racket over there so that they can play English ones  
15 and then they can play Japanese ones and then they can  
16 play French ones. It's remarkable.

17 Mind you, in my house, my kids aren't  
18 allowed to watch TV. We don't have a TV. I watch  
19 everything on my computer. My kids don't know that.  
20 I have a television built into my computer.

21 The bottomline is the first time I went  
22 over to a friend's house to see a "Star Trek" movie  
23 and he put it in and then the preview started. Then  
24 he said "This is boring" and he tried to click it  
25 forward. It came up with this big warning which said

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1 "Warning: you do not have access to this part of the  
2 DVD." I looked at him like "What?" It was the first  
3 time I heard this before. But when you actually see  
4 this happen it's astonishing. It's like watching a  
5 mugging in Central Park.

6 I said "How can you let that happen to  
7 yourself like that." Sure enough, he couldn't move it  
8 back. This was actually Trekkie. It was not a "Star  
9 Trek" movie. It was about little snips of comedy or  
10 real life Trekkie convention stuff. Once and a while  
11 they tried to move around the DVD in order to reseat  
12 parts and he accidentally flipped back to the previous  
13 section which was very easy to do since it was section  
14 one, then he was stuck again and there were 14 minutes  
15 of previews every time.

16 This is unacceptable. This is a violation  
17 of people's basic and fundamental property rights in  
18 which free society is based on. If that's democracy,  
19 we need to have ownership of information. It wasn't  
20 so long ago, two years ago, that Judith Platt from the  
21 Association of American Publishers went over and said  
22 that "Librarians are like Waco terrorists because they  
23 want everybody to be able to read for free" and this  
24 is almost a direct quote. It was such an astonishing  
25 thing to read that the light bulb start going up and

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1 you start realizing that something is wrong.

2 We really have two choices in front of us  
3 as a society. We have this huge technological boon  
4 which is making information extremely inexpensive. My  
5 dear grandfather who just passed away at 89 years old  
6 nothing in his lifetime that was produced is not under  
7 copyright currently. That means the entire events of  
8 his life, the invention of the radio, the invention of  
9 the record player, cars, World War II, the airplane,  
10 the whole 20<sup>th</sup> century is under copyright.

11 You cannot teach children in school  
12 anything about the 20<sup>th</sup> century or any of the  
13 technology of the 20<sup>th</sup> century without being in  
14 violation or not violation of somebody's copyright.  
15 We can't continue. Now that in itself is not such a  
16 bad thing. I would not make the issue that we don't  
17 want copyrights.

18 However the protection of the public as  
19 Ginsberg said in the Overage case is that both "free  
20 speech" and I will extend it to copyrights "is fair  
21 use." Therefore the statute that says "fair use" is  
22 defined in Section 102 of Copyright Law that defines  
23 "fair use" is not everything about "fair use." "Fair  
24 use" as Ginsberg says "is clearly the application of  
25 your basic human rights as defined in the Constitution

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1 in regard to the 'exclusive rights' of commerce of  
2 copyrighted material." As long as that "fair use"  
3 aspect is protected, I couldn't really care if it's  
4 300 years for a copyright but as soon as I can't take  
5 my DVD and make a copy of it so I can store it then  
6 there's something wrong here.

7 We've already seen in the last three years  
8 multiple changes in information technology platforms  
9 from MP4s and MP3s and so on from the CD and it's  
10 going to change rapidly again. If we can't be able to  
11 move that information around and if I can't give a  
12 copy of it to my grandmother so that she can enjoy it,  
13 then there's something extremely wrong with the  
14 society.

15 We are at a fork. We can decide that we  
16 are going to construct a society that's similar to  
17 George Orwell's "1984" or we can decide that we're  
18 going to go over and live a free society. There is no  
19 reason why at a time period when the cost of  
20 information keeps going down, that the cost of  
21 education keeps rising. This should indicate that  
22 there is something seriously wrong with the way that  
23 we are handling information in our society.

24 One last thing I would like to say, at the  
25 end of the last hearings, and I listened to them all

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1 on MP3 as they were going on, or as they were  
2 released, they were not on MP3, but on real audio  
3 files. The music industry had said the DVDs  
4 themselves, or the movie industry had said the DVDs  
5 themselves were not copyable. This panel asked them  
6 that isn't it possible that if they copied it directly  
7 in Taiwan by some device it forbids that you can  
8 pirate them anyway which was the point that was made.  
9 In fact they said well we'll have to find out for you  
10 later. Then later on they wrote in their answer that  
11 in fact it's not possible. Even if you copy them bit  
12 for bit that you wouldn't get a readable copy. That  
13 statement was a flat out lie. I don't know if it's  
14 perjury but it was a lie.

15 Anything coming from that side of the  
16 table was tainted by the fact that they had previously  
17 lied to this Commission. Two weeks after that you  
18 could go Queens and buy hundreds of DVDs, all of them  
19 with encryption codes. We checked to see if they had  
20 encryption codes in them and they did. They were  
21 exact duplicates of the DVDs that the movie industry  
22 actually created. Barry Sorkin from AOL Time Warner  
23 was one of the ones who contributed to that lie. You  
24 have to take that into account when you listen to what  
25 the other side of the aisle says. That's my

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1 testimony.

2 CHAIRPERSON PETERS: Thank you very much.  
3 Mr. Gengler.

4 MR. GENGLER: All right. I'm here today  
5 as a user of one of the alternative systems that Rubin  
6 mentioned. I use Linux exclusively on my computers,  
7 both a laptop and a desktop. Increasingly, these  
8 operating systems like mostly Linux but others like  
9 FreeBSD, BOS and even other less common ones are being  
10 used as an alternative to Microsoft Windows who people  
11 choose not to use for various reasons awaiting to  
12 their policies or costs even.

13 The situation that exists with Linux with  
14 regard to movies is that you can't play them. It's  
15 not due to a technological impediment. It's perfectly  
16 capable of handling DVD play-back if it had access to  
17 the keys used to encrypt the movie. These keys are  
18 kept private and licensed only to those who pay the  
19 licensing fee to the DVD CCA.

20 Back in the Universal City Studios versus  
21 Reimerdes, one of the cases Rubin cited where 2600  
22 Magazine was linking to the DCSS program. The DVD CCA  
23 said that they had two licensees for the technology  
24 for creating Linux players and that within a few years  
25 these players would be available. As of today there

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1 are no licensed DVD players available for Linux or any  
2 other of these operating systems. Even if one was  
3 released for Linux presumably they would release it in  
4 executable form as a binary so that you would not get  
5 access of the source and you couldn't see the keys.

6 Incapability in the binary structure  
7 between these other operating systems means that a  
8 player for Linux works only Linux and wouldn't work on  
9 FreeBSD or anything else. So you are still out of  
10 luck even though Linux users may have a way to play.

11 Without being able to decrypt the CSS  
12 encryption concerning these DVDs, there's no  
13 connecting even personal access to a movie just to  
14 watch it. The inability to obtain or use these  
15 technologies to get any kind of access to watch it, to  
16 make a backup copy of it, to do anything with it is  
17 clearly a case where their ability to use a work in a  
18 non-infringing way is made impossible by the  
19 technological encryption. I'll keep it brief. That's  
20 all I have.

21 CHAIRPERSON PETERS: Okay. Thank you very  
22 much. Mr. Moore.

23 MR. MOORE: Good morning, Madam Register  
24 and members of the Copyright Office. My name is  
25 Robert Moore and I'm the founder and president of 321

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1 Studios. We're based in St. Louis, Missouri. I began  
2 321 Studios in June 2001 with my son to teach him  
3 about the principles of running an Internet business.  
4 I am a software engineer by trade. We focused on  
5 basically developing a software to address problems  
6 that people have with DVDs.

7 DVDs are a great but fragile technology.  
8 Sorry about this but the screen doesn't quite want to  
9 synch up with the laptop. Despite the hype that DVDs  
10 are indestructible in routine use, they are quite  
11 subject to scratching, chipping, warping,  
12 delamination, among other things that make DVDs  
13 inaccessible.

14 Our reply comments in this proceeding  
15 detail the personal accounts of hundreds of families  
16 who have experienced these problems which we've  
17 submitted to you. Since our filing in February, we  
18 continue to receive messages from hundreds and  
19 thousands of other people complaining about the DVD  
20 problems and praise for our particular products.

21 Now to address the real live problems of  
22 DVD owners, 321 Studios developed software whose  
23 primary purpose is to help people use and protect  
24 their DVD collections. While consumers can use 321  
25 software to duplicate and preserve DVDs they have

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1 personally created, the public does not need any  
2 special rule to use our software for that purpose.

3           However because 321 software can restore  
4 damaged DVDs to a playable condition and make backup  
5 copies before damage occurs, we have been the target  
6 of a campaign to shut down our operations. Indeed I  
7 learned about how 321 software allegedly violates the  
8 DMCA when I read a newspaper article on DVD piracy in  
9 March of last year that quoted an MPAA spokesman who  
10 was leveling civil and criminal accusations against  
11 321. Since then we have initiated a lawsuit to defend  
12 our products and our practices. Thus our  
13 participation in this current Copyright Office  
14 proceeding takes on urgency.

15           Without conceding any legal position, 321  
16 has been tainted as a violator of Section 1201 because  
17 of the software that it markets. To the extent that  
18 the software serves exempt purposes, the bona fides of  
19 our operations will be more evident and the public  
20 will be able to overcome adverse effects in the making  
21 of non-infringing uses of particular classes of works,  
22 access to which is effectively protected by  
23 technological measures.

24           I have two purposes for my comments today.  
25 First, I want to highlight the problems with DVDs that

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1 lead us to support designation of particular classes  
2 of works for exemption and specifically literary and  
3 audio-visual works including motion pictures embodied  
4 in DVDs that may or may become inaccessible by  
5 possessors of lawfully obtained copies due to  
6 malfunction or damage. Second, I want to demonstrate  
7 how 321 software deals with these problems.

8 Most DVDs today are released in encrypted  
9 form. The DVD's Technological Measure Copyright  
10 Scrambling System ("CSS") is well known to the  
11 Copyright Office. But let me summarize several things  
12 that are relevant to this proceeding. CSS locks DVDs  
13 so that they can be played licensed DVD players only.  
14 These players are given digital keys to unlock or open  
15 the DVD. Secondly, CSS scrambles content so access is  
16 further controlled. And thirdly, the Copyright  
17 Control Association controls to these encryption keys  
18 needed to unscramble the content.

19 Now according to the MPAA technical expert  
20 in our litigation, Robert Schumann, the typical DVD is  
21 encrypted in multiple ways and licensed DVD players  
22 utilizing player software have four keys to decrypt  
23 data. These keys are your disk keys which are used to  
24 decrypt the title keys. Your title keys themselves  
25 are used to decrypt actual DVD content. Session keys

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1 which are given to unique viewing of a DVD and are  
2 deleted when a DVD disk is removed which are temporary  
3 keys. Fourth, player keys which are used to decrypt  
4 the disk keys.

5 I would also like to point out at this  
6 juncture that these disk keys are stored and can be  
7 stored in multiple locations on the DVD and can change  
8 from section to section or from chapter to chapter on  
9 the DVDs. If an area of the DVD that becomes damaged  
10 happens to hold that disk key, it will prevent the  
11 access to that particular section of the movie.

12 Unlike an old LP album which I used to own  
13 and I'm sure some of you did as well, if you scratch  
14 one song, then you can't hear that particular song or  
15 maybe you can hear it and it skips and distorts in  
16 that particular section. Unlike the LP or the vinyl  
17 records, the DVD once it becomes inaccessible can be  
18 completely totally inaccessible or portions of it.

19 I don't know about you but when I watch a  
20 movie it's important to me to see the entire movie  
21 from beginning to end. The MPAA may argue that I  
22 would only lose access to maybe Chapter three or  
23 Chapter four but maybe that's the chapter where I find  
24 out the butler did it. If I can't view the entire  
25 movie and its content, that's obviously something that

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1 would bother me.

2 Disk keys and title keys are stored in  
3 secured areas of the DVD and themselves are encrypted.  
4 Again according to Robert Schumann, a witness in the  
5 litigation, he basically says that "321 ZBDX copies  
6 circumvents the normal DVD access and copy protections  
7 afforded by CSS." As I said, "DVDs are marvelous but  
8 also fragile technology." It goes without debate that  
9 DVDs are a marvelous technology and that consumers  
10 have embraced DVDs as few new technologies, spending  
11 huge sums in the process. Typical DVDs can cost  
12 anywhere from \$10 to \$30 each. Players can cost \$70  
13 to \$1,000 a piece. Box sets of DVDs can range from  
14 \$70 to \$100 a piece.

15 It's easy to see that consumers spend  
16 hundreds and in some cases thousands of dollars on  
17 private DVD collections. I am one of those people.  
18 I have hundreds of DVDs in my private collection.  
19 However this wondrous technology is far from  
20 foolproof. It often does not work correctly even on  
21 licensed players. They can become scratched very  
22 easily. They can become warped due to heat damage.  
23 They can become chipped and delaminated.

24 This is a new thing that I actually  
25 learned about within the past six months which is

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1 about DVD rot. There are two layers in most DVDs  
2 giving it the ability to hold the voluminous amounts  
3 of data on that digital versatile disk. Those two  
4 layers due to imperfections in the manufacturing  
5 process can actually come apart. When they come  
6 apart, again it can make the DVD unplayable or  
7 inaccessible in many cases in its entirety.

8 Since the locks and keys of retailed DVDs  
9 are embedded on each disk, corruption can be to  
10 content and to the technological measures designed to  
11 limit access to content. It is impossible for a user  
12 who bought a DVD to know whether the content or the  
13 technical measures are corrupted. The only thing the  
14 user understands is that the DVD does not work.  
15 Corrupted DVDs cannot be viewed or contents skips or  
16 is distorted.

17 While consumers treasure DVDs, we have  
18 learned when there is a breakdown they are denied  
19 access or their viewing experience is highly  
20 distorted. 321 customers explain that scratching can  
21 occur innocently and unexpectedly. The biggest  
22 demographic of our market for our product is people  
23 who have children. A child mishandles a DVD. A  
24 family pet claws it. You take it to the beach with  
25 you on a portable player and the sand scratches it.

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1           DVDs can easily warp. Warping is a common  
2 phenomena experienced when DVDs are left in hot cars  
3 or overheated environments. DVDs can chip and crack  
4 very easily. Many people find DVDs crack when they  
5 try to get them out of the center holding device in  
6 the DVD case. What is more manufacturers have  
7 provided them no relief. Typically damaged DVDs  
8 cannot be returned or exchanged. An investment is  
9 therefore completely lost.

10           At best, one can only buy a replacement at  
11 a particular price assuming one is available and this  
12 is where it really gets very sensitive. People like  
13 myself have bought DVDs that are collector's items.  
14 These are special editions that are released for  
15 limited periods of time to the public. After that,  
16 they are withdrawn. They are no longer available on  
17 the store shelf. This has happened to me in several  
18 occasions.

19           I cannot replace the DVD that has become  
20 damaged or delaminated through no fault of my own if  
21 I wanted to. Some might argue I can go on eBay or I  
22 could find another source for a DVD that is no longer  
23 available to the public. Does that mean that my only  
24 alternative then should be to pay a higher price if I  
25 can find a collector's DVD that is no longer

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1 available? Should I be forced to compete in an open  
2 market environment for the few DVDs that are left of  
3 a particular collector's edition? I do not think so.

4 321 believes that the harms consumers  
5 experience are unfair and are inconsistent with the  
6 underlying propositions and purposes of Copyright law.  
7 If other kinds of work are damaged, they still may be  
8 usable. For example a book can be read even if it's  
9 pages are torn. An LP as I stated before can be  
10 played even if it's scratched in some cases. A video  
11 cassette can be viewed even if the tape has been  
12 warped.

13 But DVDs are different. They are  
14 marvelous technology and they have been hyped as a  
15 permanency in media. However they are very fragile.  
16 If the damage occurs to the access codes, no viewing  
17 is possible.

18 In our reply comments, we submitted  
19 hundreds of declarations of problems from consumers.  
20 In preparing for this hearing, we received even more.  
21 Typical of these is the testimonial of Marcus  
22 Zinsberger from Bonita Springs, Florida. Mr.  
23 Zinsberger wrote about a DVD of the film  
24 "Dragonheart." He explains "It just won't work  
25 anymore. I can see no physical damages whatsoever.

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1 I have tried playing it on about four or five  
2 different players. It doesn't work on any of them.  
3 Since the disk is out of print, it is expensive to  
4 replace. Even used copies are hard to get and  
5 expensive."

6 321's premier software product is DVD X  
7 Copy and it is designed to create usable back-up  
8 copies of DVDs. Importantly DVD X Copy can restore  
9 scratched and damaged DVDs to playable condition. Now  
10 it can't do it every DVD. Some DVDs are so badly  
11 damaged that nothing can bring them back to their  
12 original playable condition. But in many cases we  
13 have found that DVD X Copy because of the error  
14 correction code built into the DVD itself, a DVD-ROM  
15 installed on an individual computer can sometimes  
16 through hours of retrying to read that data can  
17 finally read the data and again restore it back to its  
18 original condition.

19 You should also know that as part of 321's  
20 commitment to proper use of copyrighted materials  
21 which we have gone to great lengths to try and educate  
22 the consumer in this regard, we have incorporated  
23 several anti-piracy mechanisms in our software. Now  
24 I will highlight these as I explain how our software  
25 works.

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1 First before DVD X Copy can be used, you  
2 must register with 321. This is an example of our  
3 registration or activation screen. Registration or  
4 activation is our first line of education and defense.  
5 It is important because we actually use digital  
6 watermarking technology so that we can track if  
7 someone is abusing the software and the copyrights of  
8 content owners.

9 What happens is when a customer of ours  
10 activates the software, they do so with a licensed ID  
11 and a password that is either in the retail box that  
12 they purchase or it's assigned to them when they  
13 purchase it on-line. This creates a fingerprint of  
14 the user's PC that has to do with the hardware that's  
15 inside, the hard drive, the amount of memory and other  
16 various hardware configurations specific to their  
17 computer.

18 We tether our application to this personal  
19 computer. If they move the software, it will no  
20 longer function. That tethering process or that  
21 activation process is used so that when our customers  
22 avail themselves of the fair use of this product, we  
23 create a digital watermark from that activation, from  
24 that fingerprint, of their PC and it's embedded  
25 thousands of times throughout the video stream.

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1           Our customers must also agree to a  
2 stringent use policy. We only authorize use of our  
3 software for the making of personal private copies.  
4 All users of 321 software told "this program allows  
5 you to create an archival or back-up copy of a DVD  
6 solely for the private and personal use of the owner  
7 of the DVD. Federal Copyright Laws prohibit the  
8 unauthorized reproduction, distribution or exhibition  
9 of copyrighted materials, if any, contained in this  
10 archival back-up copy. The resale, reproduction,  
11 distribution or commercial exploitation of this  
12 archival back-up copy is strictly forbidden. To use  
13 this program, you must agree to respect the rights of  
14 the copyright holders."

15           I believe that most people are honest. I  
16 believe that most people desire to see copyright  
17 holders rewarded for their efforts and for their  
18 investments which is why I think we have steel spikes  
19 in front of intersections when the lights turn right.  
20 We expect people to obey the law and when they are  
21 properly educated with their responsibilities in  
22 respect to those laws, I believe that most people  
23 respect the law and do so.

24           Another thing, making backups using 321  
25 software is a slow process. First, DVD X Copy must

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1 recognize the disk. It takes a few minutes to do so.  
2 Then we actually ask them if this is a rented or  
3 borrowed DVD. Many people have complained that our  
4 software would allow the illegitimate backup or  
5 copying of rented or borrowed DVDs.

6 Again what we are doing here is we are  
7 attempting to educate the consumer in regards to their  
8 specific responsibilities. If they are to answer yes  
9 to this question, the program will terminate after  
10 displaying a dialogue box showing and demonstrating to  
11 the customer that it is not legally permissible to do  
12 so. They must own the DVD that they are making a  
13 backup copy of.

14 We also go through the reading process.  
15 As you can see here, this particular DVD has gone on  
16 for about 32 minutes. The remaining time is about an  
17 hour and a half. We do get faster times with some  
18 computers. But the point that I'm trying to  
19 demonstrate here is that this is not a Xerox machine  
20 by any stretch of the imagination. This is a specific  
21 one-use process that the user must go through each  
22 time they wish to make an archival backup copy.

23 Now when working with damaged disks as I  
24 pointed out before, the process is further complicated  
25 because the data on the disk may not be readily

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1 comprehended. I actually thought I had a screen shot  
2 of the abort/retry screen shot. What that actually  
3 does is when it encounters an error on the DVD disk,  
4 the program is using the error correction code built  
5 on the DVD.

6 I'll try to make this as non-technical as  
7 possible. There is a data stream that is being read  
8 from beginning to end at any particular moment that a  
9 player is reading the data off of the DVD. At the end  
10 of that data is a check sum. In other words, this is  
11 a number so that if you were to apply some algorithms  
12 to this data stream to all the numbers and divide it  
13 by some number, it would produce this check sum. Once  
14 the player has read that data, it produces the check  
15 sum, compares it with the check sum at the end of the  
16 data stream on the DVD. If they match, then it knows  
17 that it read the data correctly.

18 The error correction code happens when  
19 check sums do not match each other. So that the  
20 player and the software are actually attempting to  
21 artificially reproduce the data stream in such a  
22 fashion that it produces the same check sum that it's  
23 expecting to see from disk.

24 Do you follow what I'm saying? That can  
25 take a lot of time. We're not actually after many

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1 reads reading the same data over and over again. We  
2 are attempting to find the correct balance of data  
3 from the read so that we can say "Ah, we finally have  
4 it". We have been able to artificially reproduce that  
5 data. This can take a lot of time. We have seen  
6 cases where in order to turn a DVD back into playable  
7 condition, it can take sometimes from six to 12 hours  
8 to go through this abort/retry process.

9 Every DVD backup made with 321 software  
10 also contains an indelible disclaimer. That's what  
11 this is. When people make a backup copy of their  
12 damaged DVDs or DVDs before they are damaged whenever  
13 they play that backup in the DVD, this is what they  
14 will see at the very beginning. I believe Rubin  
15 talked about some previews that he had to sit through  
16 for 14 minutes.

17 MR. SAFIR: Fourteen minutes of previews  
18 every time you got stuck.

19 MR. MOORE: That technology is actually  
20 controlled in the IFO files of the DVD. While we  
21 don't address that particular issue that Rubin brought  
22 up, we use that same technology to force the user to  
23 see this disclaimer. So this is an eight second  
24 disclaimer that appears on the screen. Our reasoning  
25 behind this is that no one is going to make a backup

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1 copy of a DVD and try to pass it off as original.  
2 It's going to be quite obvious to the casual observer  
3 when they put the backup in, that it's a backup copy  
4 indeed.

5 What's more, DVD X Copy does not store any  
6 content on the user's hard drive. The data goes to  
7 temporary memory and is erased after the copy is made.  
8 Backup copies are programmed to prevent serial  
9 copying. In other words, we put bit flags on the  
10 backup copies to prevent a copy being made of a copy.  
11 We are steadfastly despite what the MPAA or anyone  
12 else may believe in favor of the copyright holder's  
13 rights and the consumer digital rights.

14 We are against copyright misuse. We do  
15 not want the public to suffer from the limitations of  
16 the DVDs they lawfully acquire. At the same time we  
17 don't want our software being exploited by copyright  
18 pirates. We believe in bona fides of our customers.  
19 We do not believe that the average lawful consumer, a  
20 consumer who has paid for the purchase of a DVD,  
21 intends to make dozens, hundreds or thousands of  
22 copies of DVDs using our software. No one has ever  
23 shown that to be the case.

24 And to put our money where our morality  
25 is, we go even further. Last winter, we announced a

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1 reward program, announcing that we would pay up to  
2 \$10,000 to anyone who provided testimony that led to  
3 the conviction of any user using our software for  
4 copyright abuse. So far, no one has come forward  
5 claiming that reward. However I should point out that  
6 we have received many tips of DVD piracy that have  
7 nothing to do with our software. We have forwarded  
8 those tips on to the appropriate authorities.

9 In conclusion, in the California  
10 litigation, we are fighting for our principles and our  
11 business life. We asked the Copyright Office to  
12 enunciate a clear concise statement that those who  
13 lawfully acquire DVDs should be exempt from liability  
14 when they repair or make backup copies for their own  
15 personal use.

16 Consumers who are spending billions of  
17 dollars buying DVDs and have created this market  
18 should be allowed to protect their investment without  
19 resorting to the demands by distributors to repurchase  
20 the DVD that later goes bad or is no longer available.  
21 This market would not exist if it were not for the  
22 consumer. Consumers should also be allowed to take  
23 the backup copy of a lawfully acquired DVD and  
24 purchased DVD and use it where they choose to, in  
25 their car, on a boat, upstairs at a home, at a country

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1 retreat, when they are camping, as long as the  
2 payments were made and it's a fair use, the Librarian  
3 should sanction that process. I look forward to  
4 potentially answering any question.

5 CHAIRPERSON PETERS: Thank you, Mr. Moore.  
6 Dr. Einhorn, you're next.

7 DR. EINHORN: Thank you very much. My  
8 name is Michael Einhorn. I'm speaking on behalf of  
9 myself. In course of this discussion, I'm primarily  
10 speaking as a professional economist. I'm not  
11 necessarily a proponent or an opponent of any  
12 exemption. I do not dispute legitimacy of regional  
13 coding nor any anti-circumvention rules to Section  
14 1201(a).

15 I've been asked to speak primarily on the  
16 topic of regional coding and confine my remarks  
17 exclusively to that area. I will try to the best of  
18 ability to keep my remarks within the scientific  
19 domain of my profession.

20 I believe first and foremost that the  
21 economic reasoning is an essential way of viewing  
22 problems. It is appropriately integrated into law to  
23 facilitate the policymaking process. Insofar as I  
24 know, the most sophisticated use of law in the past 50  
25 years has emerged at least in regard to economic

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1 matters in the anti-trust area where economic insights  
2 have affected both the statutory and the common law.  
3 That kind of analysis began in the distinguished halls  
4 of the University of Chicago Law School which Mr.  
5 Attaway is an alum.

6 What I want to do today is confine myself  
7 to the area of consumer benefits and consumer costs  
8 and discuss all of these from an economic perspective.  
9 I'll leave it up to you to decide where the chips have  
10 to fall. I would distinguish that there are three  
11 consumer benefits toward facilitating -- Before I say  
12 that, I should say that all the effects here may be  
13 quite small after all Section 1201(a)(2) is in effect.  
14 I do not advocate a repeal of that section.

15 We therefore have a way of controlling any  
16 device that can be used to circumvent any technology.  
17 Therefore what we are talking about primarily is the  
18 ability of certain talented individuals - I am not one  
19 - who have the capacity to hack through certain  
20 protections on DVDs wherever they buy it. We  
21 understand therefore that we're talking about only  
22 that limited class use and confine our remarks to that  
23 particular area of the market.

24 Three consumer benefits that can rise from  
25 regional coding or the ability to defeat regional

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1 coding, first of all would be new material. A certain  
2 consumer may find they are able to get new material in  
3 one part of the world that would be much more  
4 difficult to get in another part of the world.

5 For example, an opera lover who lives in  
6 Cleveland, Ohio may go to Milan and find her favorite  
7 record store. If she does, she may come back with a  
8 bunch of DVDs outfitted from all kinds of operatic  
9 performances around the world. Some of them may be  
10 from the Metropolitan Opera in New York. Those  
11 presumably were protected by DVD protection. If she  
12 brings them back to Cleveland and she has the ability  
13 to hack, she would not be able to do so if this were  
14 made illegal.

15 The second matter is the re-outfitting  
16 costs. A person who spends one or two years overseas  
17 perhaps in Europe, perhaps on a military base may  
18 acquire a substantial DVD collection. If they do come  
19 back to U.S., they may have invested thousands of  
20 dollars in a DVD collection. They may find themselves  
21 in a position where they enjoy some other movies.

22 They now have to make the decision of what  
23 to do next. Should they throw out their old DVDs and  
24 buy a whole new set or should they buy a bunch of  
25 different regional coding or DVD devices that have

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1 different regional coding practices or if they can,  
2 can they hack?

3 Third is shopping over the border. There  
4 are some Americans who have the capacity to shop for  
5 DVDs over the border. They will indulge or they will  
6 practice what is known as "price arbitrage." They  
7 will go to where the prices are cheaper and they will  
8 buy DVDs at lower costs.

9 Each of these practices may do some harm  
10 to the content industry. It's after all quite  
11 possible for our shopper in Cleveland instead of going  
12 to Milan to buy her favorite DVD to contact the  
13 Metropolitan Opera and buy stuff through the mail  
14 immediately. That certainly is the way she can handle  
15 things. Someone who has quite an elaborate DVD  
16 collection after two years of being on a military base  
17 certainly could come back to the United States and  
18 outfit themselves with an entirely different new DVD  
19 player. They can bring back a second appliance. That  
20 certainly is possible.

21 In both of those cases, I would say as an  
22 economist that there's a bit of a difficulty there.  
23 We're putting on some kind of cost on consumers. I'm  
24 trying to figure out where would be the opposing gain  
25 other than raising some kind of barrier.

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1           In regards to the third element, I'm much  
2 more agnostic and much more careful. That is there  
3 will be some people who will shop over the border. It  
4 is entirely conceivable that people living in Los  
5 Angeles or better yet, San Diego, will drive a short  
6 distance to go to Tijuana. If they do, they will be  
7 able to get their hands on conceivably cheaper DVDs.

8           As far as I'm concerned, this is where the  
9 nub of the problem may be. It may be we have to  
10 decide the likelihood for these groups of individuals,  
11 these groups of international shoppers, to what degree  
12 we are permitted or are going to permit them to do  
13 this bearing in mind of course that there may be other  
14 consumer gains.

15           I will point out though that according to  
16 what I read regarding your previous rulemaking, you  
17 said that you are interested in knowing about the ways  
18 of diminishing the ability of individuals to use  
19 copyrighted works in ways that are otherwise lawful.  
20 Like it or not, these ways are otherwise lawful. It  
21 is now legal for example for an American to go over to  
22 Mexico and buy a video cassette that may be coded for  
23 Mexico and bringing it back to the U.S. and then use  
24 it in the U.S. Up to this point, the manner in which  
25 people do these things, what I'll call "international

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1 price arbitrage" is in fact lawful. If you want to  
2 continue to use that definition of otherwise lawful,  
3 you put it in the context that you think is  
4 appropriate.

5 The one point where I also wanted to  
6 devote some time to and concluding my remarks is a  
7 concept of what is called digital piracy. I'd much  
8 rather call this by a scientific name and that name is  
9 unauthorized reproduction and distribution of  
10 copyrighted content. What I mean here primarily is  
11 the ability to put stuff up on the Internet for file  
12 sharing systems that facilitate the use by consumers  
13 who have not paid for it. I'm entirely aware that  
14 certain individuals in this country or for that matter  
15 in this world feel it is their moral responsibility to  
16 distribute copyright content without the permission of  
17 their owner.

18 To the mind of some, we have what we call  
19 life, liberty and pursuit of free content or life,  
20 liberty and the right of redistribute free content.  
21 I don't believe in that group and I want to distance  
22 myself from anything they have to say.

23 I will make the following comment about  
24 their behavior though. It is entirely possible  
25 however inappropriate their behavior may be that the

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1 relaxation of rules on regional coding will have  
2 nothing to do with it. If they are so determined to  
3 put up free material on DVDs and they have the ability  
4 to hack it, what they can do is go down to any video  
5 store, get a bunch of DVDs and bring them home or they  
6 can buy the DVDs. They then given their abilities to  
7 hack can hack the DVD protection or the content  
8 protection on anything they can bring within the  
9 house.

10 It is unclear to me personally whether  
11 regional coding or the ability to defeat regional  
12 coding will do much in changing around the behavior of  
13 this element. While I don't support what they do, I  
14 question whether we'll have much incremental effect on  
15 their behavior which is based upon a much wider domain  
16 of content than merely DVDs that are brought over the  
17 border. Thank you.

18 CHAIRPERSON PETERS: Thank you. Let's go  
19 to Mr. Turnbull.

20 MR. TURNBULL: Good morning. I'm Bruce  
21 Turnbull of the law firm of Weil, Gotshal & Manges.  
22 I'm pleased to be here today representing the DVD Copy  
23 Control Association ("DVD CCA"). I appreciate the  
24 opportunity to present DVD CCA's views at this  
25 hearing.

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1           By way of background, DVD CCA is the not-  
2 for-profit corporation that is the licensor of the  
3 Contents Scramble System ("CSS"). DVD CCA licenses  
4 this technology on a royalty-free basis principally to  
5 three types of licensees: (1) owners of video content  
6 desiring to use CSS to protect their content on  
7 prerecorded DVD video disks; (2) to creators of  
8 encryption engines and hardware and software  
9 decryptors; and (3) to manufacturers of DVD players  
10 and DVD-ROM drives.

11           CSS was developed to protect against  
12 unauthorized access to and use of copyrighted motion  
13 picture content prerecorded onto DVD disks. CSS  
14 accomplishes this by conditioning the license for the  
15 technology and information necessary to decrypt the  
16 CSS encrypted content on compliance with certain rules  
17 for the use of such content. Thus, consumer access to  
18 the content is effectively conditioned on the use of  
19 products that are designed to protect against misuse  
20 of the content once decrypted.

21           In relation to this proceeding, DVD CCA  
22 believes that little has changed since the 2000  
23 proceeding and that the analysis and conclusions from  
24 that proceeding continue to be valid in relation to  
25 CSS encrypted DVD video content. Accordingly we urge

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1 rejection of all requests for exemption from  
2 1201(a)(1) that relate to CSS encrypted DVD video  
3 content.

4 Specifically the following points from  
5 2000 proceeding should guide the analysis and findings  
6 in this proceeding:

7 (1) Circumvention for a particular purpose  
8 including fair use or reverse engineering in order to  
9 achieve interoperability are beyond the scope of the  
10 rulemaking.

11 (2) In relation to the argument that CSS  
12 as an access control measure frustrates the consumer's  
13 ability to circumvent use controls associated with the  
14 work, the Register described the allegations of harm  
15 in 2000 as a failure to demonstrate actual harm.

16 (3) Circumvention of copy controls could  
17 be distinguished from circumventing access controls.  
18 That is the circumvention of copy controls an act not  
19 prohibited by the DMCA would not thwarted by the  
20 maintenance of a prohibition on circumventing CSS as  
21 an access control.

22 (4) In relation to the argument that an  
23 exemption is necessary in order to permit Linux users  
24 to play CSS encrypted DVD video disks, the Register  
25 stated "There is no unqualified right to access works

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1 on any particular machine or device of the user's  
2 choosing." Quoting again, "The reasonable  
3 availability of alternative operating systems or  
4 dedicated players for television suggest that the  
5 problem is one of preference or inconvenience and  
6 leads to the conclusion that an exemption is not  
7 warranted."

8 (5) Region coding "serves legitimate  
9 purposes and encourages distribution and availability  
10 of digital audio-visual works" and any alleged effect  
11 of region coding on DVD video disks was de minimis.  
12 Those were all from the 2000 proceeding.

13 Today not only are these same conclusions  
14 still valid but the development of the market has only  
15 underscored the fact that CSS has enabled the vast  
16 expansion of content available to consumers on DVD  
17 video disks. In response to consumer's enthusiasm for  
18 the format, content owners have released more and more  
19 high value content on DVD. This happy situation is  
20 directly attributable to CSS and the assurances that  
21 its legal and technical regime provide to content  
22 owners that their works will be protected from  
23 unauthorized access, copying and redistribution.

24 The continuation of this immensely  
25 successful format depends on the continued viability

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1 of this CSS legal and technical regime which must  
2 include the rejection of requests for legal permission  
3 to circumvent CSS.

4 Turning to specific requests in this  
5 proceeding.

6 (1) Requests for exemption based on a  
7 definition of a class of works that is tied to the  
8 proffered use to be made of the work remain beyond the  
9 scope of this proceeding. DVD CCA believes the  
10 lengthy and careful analysis made in the 2000  
11 proceeding drew the correct conclusion in that regard.

12 (2) Requests for exemption of CSS  
13 encrypted works generally where the class of work is  
14 defined either as a CSS encrypted DVD video disk or  
15 encrypted works or the equivalent should be rejected  
16 fundamentally because they effectively request the  
17 elimination of Section 1201(a)(1) entirely.

18 Clearly Congress did not intend that the  
19 value of a technological measure effectively  
20 controlling access to a work should be totally wiped  
21 out by exempting all works protected by that  
22 technological measure. Nor that encryption would be  
23 eliminated as an access control technology through a  
24 broad-based exemption for all encrypted works. In  
25 this case, CSS-enabled products are widely available

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1 at reasonable prices adapted for both traditional CE  
2 uses and computer uses. A general exemption is  
3 unnecessary in order to provide easy and universal  
4 access to the works protected using CSS.

5 With regard to the request to exempt  
6 circumvention of CSS encrypted works for the purpose  
7 of enabling the playback of such works using a  
8 computer with a Linux operating system, we reiterate  
9 what we said in 2000.

10 (1) There is nothing in the CSS license or  
11 requirements that limits its application in relation  
12 to Linux and nothing preventing a person desiring to  
13 make a Linux enabled CSS application from obtaining a  
14 CSS license and adhering to the requirements of that  
15 license and the CSS specifications. CSS as I said is  
16 licensed from a royalty-free, reasonable and non-  
17 discriminatory basis without regard to the operating  
18 system to be used in the product on which the CSS  
19 implementation is loaded.

20 (2) There is nothing in the Linux license  
21 that prevents a person from complying with both the  
22 CSS license and the Linux license as well. In that  
23 regard, we note that the founder of the Linux system,  
24 Linus Torvald, has in just this past week stated his  
25 agreement with this precise point.

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1 MR. SAFIR: No, he didn't. That's a lie.  
2 But that's okay. I know that's a lie. You are now  
3 perjuring yourself. Why don't you give them the  
4 article so they can actually read it?

5 CHAIRPERSON PETERS: Stop. Let him  
6 finish.

7 MR. TURNBULL: I will be happy to engage  
8 on that subject. I do in fact have his posting with  
9 me and will happy to engage in that.

10 CHAIRPERSON PETERS: Thank you.

11 MR. TURNBULL: Although DVD CCA does not  
12 require its licensees to inform us of what operating  
13 system they are using for their implementations and  
14 indeed we do not gather that information on a regular  
15 matter, we are aware of two Linux-based CSS  
16 implementations that have been made by licensees. We  
17 believe that one of these is still in the market  
18 today.

19 (3) With respect to requests for exemption  
20 to permit playback of non-Region I encoded DVD disks  
21 on CSS enabled Region I players, we note several  
22 points. As found in the 2000 proceeding, the Region  
23 code system is a reasonable and proper exercise of the  
24 distribution rights of copyright holders.

25 Accordingly the requester of an exemption

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1 must bear the burden of demonstrating harm beyond the  
2 de minimis level as well as the demonstrating that  
3 there is no reasonable, available alternative cure for  
4 the alleged harm other than the requested exemption.  
5 We believe that no request has demonstrated any actual  
6 harm to any user especially given that there are  
7 alternative means of responding other than granting an  
8 exemption.

9 Specifically in relationship to the  
10 alternatives available, we note that there are no CSS  
11 license or other prohibitions that we're aware of on  
12 the sale, importation or use in the United States of  
13 a non-Region I playback product. A consumer can  
14 obtain whether in the United States through an  
15 Internet retailer or abroad, a non-Region I playback  
16 device and then use that device in the United States.

17 For example, a consumer can directly set  
18 the region playback setting for a DVD-ROM drive to  
19 playback whatever region that user wishes including  
20 for example Region II content. Drives that enable  
21 this capability are permitted under the CSS rules and  
22 it is DVD CCA's understanding that many if not all  
23 DVD-ROM drives in fact enable such direct user  
24 selection of the region for the particular drive.

25 Indeed a quick survey of the retail market

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1 shows that the DVD-ROM drives are available for as  
2 little as \$19.95, hardly a hardship. Hence the  
3 exemption is simply not necessary for the de minimis  
4 number of consumers who desire to playback non-Region  
5 I content in legitimate compliant CSS playback system.

6 Finally in relation to region coding, the  
7 specific technology that would require circumventing  
8 in order to avoid a CSS licensed DVD playback systems  
9 region code system is not in fact the CSS encryption  
10 itself. While the overall CSS system requires that  
11 region code playback be incorporated into the playback  
12 system and further imposes certain standards which we  
13 call robustness requirements on licensees and  
14 implementations of the region code detection and  
15 response requirements, the actual technology that  
16 would need to be circumvented in order to feed to  
17 region code system is not CSS encryption but rather a  
18 range of implementations that are based on each  
19 licensees own selection of technology. Thus the  
20 technology to be circumvented would have to be  
21 determined on a producer by producer, product by  
22 produce basis.

23 (4) We believe that two additional  
24 requests are not proper subjects for exemption through  
25 this proceeding, request for exemption to facilitate

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1 research relating to access control technologies and  
2 requests for exemptions to permit access to public  
3 domain content.

4 The request for exemption related to  
5 research on access control technologies which are  
6 questionable based on the definition of class of works  
7 as noted earlier should be denied because Congress  
8 provided a specific exemption for research purpose and  
9 did not in that exemption permit the Librarian through  
10 this proceeding or otherwise to modify or extend that  
11 statutory exemption. The requester should properly  
12 address their pleas to Congress.

13 As to public domain works as we stated in  
14 our written comments, DVD CCA is not aware of any  
15 particular work that is protected using CSS where the  
16 work would be considered public domain. Accordingly  
17 no demonstration had been made that an exemption is  
18 warranted. Even if there were examples however it  
19 would seem that the request would be outside the  
20 request of this proceeding since the authority is  
21 limited to defining a "particular class of copyrighted  
22 works." By definition the public domain works would  
23 fall outside of any class of copyrighted works.

24 Finally DVD CCA takes no position on the  
25 request to exempt circumvention works where

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1 unskippable advertising was included on the DVD disk  
2 but requests that there would be no recommendation to  
3 permit an exemption of CSS to accomplish this because  
4 CSS has nothing to do whatsoever either  
5 technologically or legally with this aspect of the  
6 playback of DVD video disks. Thank you for this  
7 opportunity. I'll happy to respond to questions.

8 CHAIRPERSON PETERS: Thank you very much.  
9 Ms. Perlmutter.

10 MS. PERLMUTTER: Thank you for the  
11 opportunity in order to testify today. I won't take  
12 up the time we have available this morning by  
13 repeating the content of our written reply comments  
14 which go into much more detail. I'll just say a few  
15 words about the context and the potential impact of  
16 this proceeding. Then I hope to be able to discuss  
17 specifics more in the question period.

18 During the last rulemaking what was then  
19 Time Warner testified on many of these same issues  
20 that are presented here today. We said then that  
21 digital technology creates a need for the use of  
22 technological measures to protect copyrighted works  
23 plus a need for effective legal protection against  
24 circumvention. That of course is what the DMCA gave  
25 us in 1989.

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1           We also said that carve-outs from that  
2 protection could jeopardize the ability of copyright  
3 owners to provide works to the public in digital  
4 formats. We also said at that time that new formats  
5 were emerging and already popular, for example, DVDs,  
6 which give consumers high quality and richer content  
7 choices. Finally we said that there had been no  
8 substantial proof brought to the Office's attention  
9 that any harm to lawful uses was likely. Rather we  
10 were hearing a lot of fear and speculation about  
11 negative possibilities, things that might at some  
12 point result.

13           What's happened since the last rulemaking?  
14 First of all, 1201(a)(1) has now been enforced for two  
15 and a half years. So unlike the last time, we now  
16 have some experience with the actual application of  
17 the access control part of the statute. We have now  
18 had some more definitive judicial interpretation, not  
19 only the ElcomSoft case but the Second Circuit's  
20 decision in Universal versus Corley.

21           We have seen an explosive growth in the  
22 DVD market and a significant decrease in prices to  
23 consumers for purchasing copies of movies as well as  
24 for purchasing the players to watch them on. We have  
25 seen a myriad of new and exciting offerings to

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1 beginning to emerge for digital content.

2 We have now emerging on the market  
3 legitimate on-line music services which include  
4 MusicNet on AOL, a new Apple music service that was  
5 just announced this week. These various services give  
6 consumers a number of different options for how to  
7 enjoy music including streaming, downloading singles  
8 and even the burning of CDs.

9 We have also seen the development of  
10 legitimate on-line movie services, MovieLink, and  
11 other audio-visual services like Digital Video-on-  
12 Demand, both of which have the enormous benefit from  
13 my personal perspective of eliminating the trip to the  
14 rental store. So you have the opportunity to enjoy a  
15 movie for a 24 hour period without having to leave  
16 your home.

17 We have seen still no substantial evidence  
18 of harm. Technological protection measures are not  
19 beginning to block access. The copyright holders are  
20 interested in getting their works out to the public to  
21 as many members of the public as possible in as many  
22 ways as possible. In fact, technological protection  
23 measures are being used to enable more diverse types  
24 of access to more works and at different price points.

25 In a word, there is not only no reason to

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1 reach different conclusions than in the first  
2 rulemaking. But in fact we're seeing a success story  
3 here. The goal of the DMCA is beginning to be  
4 realized already. The trend toward more diverse and  
5 more flexible business models shouldn't be endangered  
6 by the adoption of far-reaching new exemptions.

7 Just a few words about the current  
8 requests for exemptions, the purpose of this  
9 rulemaking of course is as a safety valve to ensure  
10 the continued survival of fair use and other public  
11 interest exemptions within the framework of the  
12 statutory policies that are embodied in Section 1201.  
13 We wholeheartedly support that purpose. We rely in  
14 fact in all of our businesses every day on a thriving  
15 fair use doctrine.

16 But I think it's important to note that  
17 the term "fair use" is often used very loosely to  
18 encompass a number of different activities which range  
19 on the one hand from creative transformative uses to  
20 news reporting to classroom photocopying to home  
21 copying. Often we hear the term "fair use" used based  
22 on an inaccurate assumption that any personal use by  
23 any consumer is necessarily a "fair use."

24 Our concern is that while many of these  
25 current requests for exemptions are couched with

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1 greater specificity than the last rulemaking, when you  
2 look at what they ask in reality they are far-reaching  
3 indeed. Many of them challenge the fundamental  
4 policies that Congress adopted in the DMCA and even  
5 some of the basic principles underlying Copyright law  
6 neither of which is a proper subject for this  
7 particular proceeding.

8 Copyright owners have always had the  
9 ability to decide whether and how their works would be  
10 distributed to the public. It would be not only  
11 ironic but detrimental to consumers if the new  
12 possibilities for methods of distribution that are  
13 offered by DRM Technologies were hobbled by  
14 unrealistic insistence on an Old World "all or  
15 nothing" approach.

16 In particular, many of the requests boil  
17 down to the argument that once a copy of a work has  
18 lawfully been purchased, the purchaser must be free to  
19 make any desired use of the content whatsoever, short  
20 of redistributing copies to others on a commercial  
21 scale. These uses could range from the enjoyment of  
22 the work on any platform, in any format and in any  
23 place or any country to the extraction of portions of  
24 the work using the user's preferred technique.

25 The problem with this argument is first

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1 that it takes away the traditional ability of the  
2 copyright owner to control the manner of distribution  
3 and with it much of the incentive to develop new  
4 formats and new market offerings. But equally  
5 important, it destroys the economic feasibility of  
6 providing a range of diverse offerings at different  
7 prices. Works would only be able to be available at  
8 the comparatively high price of a permanent physical  
9 copy.

10 In terms of the factors the Librarian is  
11 directed to consider by the statute, what we see now  
12 is that the use of technological protection measures  
13 protected against circumvention by the DMCA has lead  
14 to the increase availability of more works in  
15 different formats. There is no substantial evidence  
16 those works are still not available for public  
17 interest purposes such as both the core transformative  
18 types of fair use and other types of fair use as well.  
19 The effect of circumvention on the market for  
20 copyrighted works and the openness of their owners to  
21 make them available in digital formats is great  
22 indeed.

23 So in sum, the worst case scenario  
24 envisioned by those seeking cutbacks to the DMCA's  
25 protection in 1998 and in 2000 has fortunately not

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1 come to pass. There is no evidence that copyright  
2 owners have imposed access controls on entertainment  
3 products in unreasonable ways that adversely affect  
4 the ability of users who engage in non-infringing  
5 uses. Just to conclude the continued effective  
6 protection of the DMCA is key to allow the on-going  
7 development of new offerings that benefit both  
8 consumers and copyright owners. Thank you.

9 CHAIRPERSON PETERS: Thank you. Mr.  
10 Attaway.

11 MR. ATTAWAY: Thank you, Ms. Peters and  
12 distinguished panel. I appreciate the opportunity to  
13 appear before you today. I'd also like to thank Mr.  
14 Einhorn for being the first speaker this morning not  
15 to call into question my honesty, integrity or lineage.

16 I would like to do a little demonstration  
17 today. I assume that the written summary that I  
18 submitted early will be part of the record so I won't  
19 go through all of that. What I would like to do is do  
20 a little demonstration on what is fair use. Kelly,  
21 are you ahead of me?

22 The purpose of this proceeding as you  
23 pointed out earlier is to determine whether persons  
24 who are users of copyrighted works are or are likely  
25 to be adversely affected in their ability to make non-

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1 infringing uses. Most non-infringing uses are either  
2 licensed authorized uses or fair uses.

3 Fair uses according to Section 107 of the  
4 Copyright Act includes such things as reproduction for  
5 purposes such as criticism, comment, news reporting,  
6 teaching, scholarship or research. I note that it  
7 does not mention backup copies. So far as I know, no  
8 court has ever said that fair use encompasses the  
9 making of backup copies. Indeed if it did, there  
10 would have been no reason to adopt Section 117 of the  
11 Copyright Act which specifically allows the making of  
12 backup copies under certain circumstances of computer  
13 programs.

14 So with that introduction, I ask my  
15 colleague, Kelly O'Connell to pretend she was a  
16 student at Fairfax High School making a report on  
17 "Spider-Man." In this multi-media report, she needed  
18 a short excerpt from "Spider-Man" to make a point that  
19 she wanted to make in her report which would probably  
20 be a fair use as defined by the Copyright Act.

21 So I asked her to take her video camera  
22 which is not professional equipment. Most people have  
23 video cameras like this and I asked her to simply make  
24 an excerpt from "Spider-Man" a legitimately acquired  
25 copy of "Spider-Man" that is protected by CSS against

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1 copying. I asked her to make an excerpt without  
2 circumventing CSS. First of all, Kelly, you are going  
3 to play the authorized DVD with sound. Then maybe not  
4 with sound. There we go.

5 (DVD played.)

6 MR. ATTAWAY: Okay, I don't want to go  
7 beyond our fair use of a small excerpt so let's stop  
8 this and play the fair use excerpt recorded by this  
9 video camera.

10 MS. O'CONNELL: It crashed.

11 MR. ATTAWAY: Oh, no.

12 MR. SAFIR: Gee whiz. I can't imagine.  
13 Maybe you can get your DVD player to work -- Let me  
14 see if there is anyone with a free operating system  
15 here. That's right. There's no DVD with free  
16 operating systems. Sorry. I guess we'll have to wait  
17 for Windows. It will take 20 minutes here.

18 MR. ATTAWAY: Am I the witness or is he?

19 CHAIRPERSON PETERS: You're the witness.

20 MR. ATTAWAY: Thank you. Well, had the  
21 computer not crashed you would have seen not a perfect  
22 copy by any means but certainly a reasonably viewable  
23 copy that would have served the purposes of criticism,  
24 comment, news reporting, teaching, scholarship or  
25 research. I submit to you that virtually any excerpts

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1 of audio-visual work that is capable of being  
2 displayed on a computer screen can be copied for fair  
3 use purposes and there is no need to have an exception  
4 for -- Excuse me.

5 CHAIRPERSON PETERS: I was going to ask  
6 you if we wanted to take the time. Kelly, how much  
7 time do you think it would take to reboot it?

8 MS. O'CONNELL: It's working right now.

9 CHAIRPERSON PETERS: Because one of the  
10 things we could do is stop you here and go to Mr.  
11 Mitchell and then come back.

12 MR. ATTAWAY: All right. You can do that.  
13 I'd like to make one other point while I have the  
14 stage here.

15 CHAIRPERSON PETERS: Certainly.

16 MR. ATTAWAY: It occurred to me during the  
17 testimony of the first speaker that there might be an  
18 explanation for the total disconnect there seems to be  
19 between the people represented by New Yorkers for Fair  
20 Use and the Copyright community. That disconnect is  
21 illustrated by this statement "Technology is making  
22 information extremely inexpensive." That simply is  
23 not true.

24 The type of information we're talking  
25 about here today, movies and sound recordings, is

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1 probably more expensive today than it ever has been  
2 before. A motion picture made by a major studio costs  
3 \$70 million to produce and another \$20 or \$30 million  
4 to market. They are extremely expensive. What has  
5 become inexpensive is the ability to disseminate those  
6 works. That's a great thing for consumers.

7 But if you cut off the economic foundation  
8 for any of these creative industries whether it be  
9 movies or textbooks or sound recordings or anything  
10 else you cut off creation. That would create a very  
11 bleak world indeed when information might be easy to  
12 disseminate but no new information would be created.

13 CHAIRPERSON PETERS: Why don't we go to  
14 you, Mr. Mitchell? And, Fritz, we'll come back to  
15 you.

16 MR. MITCHELL: Madam Register and  
17 distinguished panel, it is a privilege to testify  
18 before you here today. The Interactive Digital  
19 Software Association represents publishers of  
20 entertainment software who produce works for play on  
21 personal computers, dedicated video game consoles,  
22 hand-held devices and for play directly on the  
23 Internet.

24 Our member publishers have been pioneers  
25 in using the Internet to deliver content and unique

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1 game experiences under a variety of terms that  
2 consumers have shown that they are more than eager to  
3 accept. We have also been among the leaders in using  
4 technology to protect our works from piracy.  
5 Virtually all video game consoles employ TPMs in  
6 hardware and software to prevent the proliferation of  
7 pirated copies. Despite these efforts, the  
8 entertainment software industry remains plagued by  
9 piracy and indications are that it can be dramatically  
10 worse percentage wise in countries that have failed to  
11 provide strong legal protections for TPMs.

12 In short, there is no need for any  
13 exemptions to Section 1201(a)(1)(a)'s prohibitions on  
14 circumvention of TPMs for any type of entertainment  
15 software. We do not believe the proponents of any  
16 exemption have met their burden. Even if they had,  
17 the exemptions proposed could bring real harm to this  
18 industry without significantly increasing the  
19 availability of entertainment software to the American  
20 public.

21 Our theme for you here today is that in  
22 thinking about potential exemptions of Section  
23 1201(a)(1)(a)'s otherwise clear prohibition, we would  
24 ask you to consider not only how such an exemption  
25 would be used but also how easily it could be misused.

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1 We've spoken to you on a number of occasions about the  
2 most notorious example of this and I know I'm going to  
3 get some eye rolling from you on this because we have  
4 had a chance to discuss it with you in such depth.

5 But we're talking here about pirates use  
6 of the so-called Section 117 disclaimer. Literally  
7 thousands of pirate websites continue to carry  
8 elaborate disclaimers purporting to show why  
9 downloading software from the site is not infringement  
10 but a permissible use of Section 117 to make archival  
11 or so-called backup copies.

12 Habitual misuse of the provision has  
13 created considerable confusion even among those not  
14 otherwise inclined to break the law. These self-  
15 serving interpretations have unfortunately displaced  
16 reality for an alarming number of video game  
17 enthusiasts.

18 Recognition of this tendency we think  
19 should have a direct bearing on this rulemaking as  
20 well. It provides an additional compelling reason for  
21 you to continue as you have done to hold proponents  
22 strictly to their burden of proof and to create  
23 exemptions only for substantial and tangible reasons.  
24 It should also follow of course that any resulting  
25 exemption should be drafted narrowly, clearly and

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1 carefully to avoid inviting abuse.

2           There is one more procedural point that  
3 I'd like to make. It's one that is made most  
4 forcefully on our behalf in the Joint Reply Comments  
5 at page 28 of that voluminous document. We would  
6 suggest that any exemption you may contemplate for  
7 entertainment software should not simply be carried  
8 over to entertainment software because of the  
9 incidental fact that much of it is published in a DVD  
10 format or because of the other incidental fact that  
11 entertainment software consoles, some of the leading  
12 consoles, can be used to play DVD movies. No  
13 exemption for entertainment software whether in the  
14 form of computer games, console games, hand-held games  
15 or on-line games should be recognized without an  
16 independent basis on the record demonstrating why such  
17 an exemption is required.

18           Now as to the specific requests for  
19 exemptions that potentially implicate entertainment  
20 software products, we do not believe that any of the  
21 proponents have satisfied their burdens. One of the  
22 very few references specifically to video games in  
23 which proponents allege even a potential adverse  
24 effect on the availability material concerns, some  
25 console publishers reliance on TPMs to enforce

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1 regional coding in video games.

2 It is suggested that regional coding in  
3 such circumstances can prevent a game enthusiast from  
4 playing certain games purchased in Europe or Japan on  
5 video game consoles sold in the U.S. We suggest that  
6 whatever deprivation that may result is isolated, de  
7 minimis and easily remedied short of cutting deep into  
8 1201(a)(1)(a).

9 There is no shortage of computer and video  
10 game releases in the United States. More than 1800  
11 new titles have been released just since the end of  
12 the last rulemaking cycle, a period which also saw the  
13 successful launch of three new console platforms, new  
14 handheld platforms and the emergence of an entirely  
15 new genre of on-line console games. Many successful  
16 titles received release across all regions. Though  
17 some others for cultural marketing and legal reasons  
18 may only be released in one or two.

19 Occasionally a U.S. video game collector  
20 or an aficionado may wish to acquire a version of  
21 a game produced for the European or the Japanese  
22 market. In the case of titles released first in  
23 another region, some may not want to wait a few weeks  
24 or perhaps a few months for a title's eventual U.S.  
25 release. But this we would posit is an inconvenience,

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1 not a harm sufficient to justify an exemption.

2 With the healthy growth of international  
3 Internet commerce, even the most esoteric demands for  
4 video games can easily be met. The very same channels  
5 through which a collector might legitimately purchase  
6 an import game also give him or her the ability to  
7 acquire an appropriately coded console on which to  
8 play them, a remedy vastly more preferable than  
9 allowing someone to take circumvention into their own  
10 hands. These options are even more widely available  
11 today at lower prices than they were in 2000. Clearly  
12 the argument for exemptions to satisfy these needs is  
13 weaker now than it was three years ago.

14 During the 2000 rulemaking cycle when  
15 considering regional coding of filmed entertainment on  
16 DVD, you were very careful to examine any potential  
17 harm along with the positive use facilitating purposes  
18 underlying region coding practices. In 2000 for  
19 example, you found that region coding served  
20 legitimate purposes as an access control and that it  
21 encouraged distribution and availability of digital  
22 works by preserving market opportunities for U.S.  
23 distributors.

24 Region coding for the video game industry  
25 serves the same constructive purposes as well as many

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1 others, ones that we pointed out in greater detail in  
2 our IDSA initial reply filing of February 19<sup>th</sup> at page  
3 three in three bullets there. For the video game  
4 industry, region coding is used to enhance consumer  
5 enjoyment of regionalized language appropriate video  
6 game products. It also serves to preserve local  
7 distributor marketing opportunities. Ultimately, an  
8 undeniably use-facilitating regional coding makes it  
9 possible for publishers to offer products that might  
10 not otherwise be made available at all.

11 Publishers are often able to acquire  
12 properties subject to licensing restrictions that may  
13 allow them, for example, to use content, characters,  
14 music or advertising in some regions but not in  
15 others. With the ability to use TPMs to respect these  
16 limitations, these licensing opportunities and the  
17 resulting public distribution of these games might be  
18 severely curtailed or become altogether impractical  
19 but for the ability of them to be restricted by the  
20 publisher using TPMs.

21 In assessing the need for a given  
22 exemption, we would ask that you place considerable  
23 weight not only the use facilitating nature of the  
24 technology at issue but at also on the potential  
25 piratical uses of any resulting exemption. We are

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1 asking that you specifically inquire as a discrete  
2 part of your analysis how a given exemption can be  
3 misused to facilitate piracy. Whereas the video game  
4 industry's region coding technology passes the use  
5 facilitating process, we believe that any proposed  
6 exemption would fail this piracy facilitation test.

7 Creating an exemption to permit  
8 circumvention of region coding would, we are  
9 convinced, affirmatively contribute to piracy. It  
10 would make enforcement against circumvention and  
11 circumvention devices significantly more difficult.  
12 It would also create considerable confusion around the  
13 operation of an otherwise relatively clear rule.  
14 Confusion and ambiguity we have already seen pirates  
15 play to their advantage in these other context.

16 Any exemption even one clearly restricted  
17 to acts of circumvention would undoubtedly be  
18 understood by the pirate community as a legalization  
19 of mod chips, game enhancers, game copiers and the  
20 many other circumvention devices that are commonly  
21 used to circumvent TPMs in video game consoles. As  
22 counterintuitive as this may seem to those of us who  
23 know better, I ask you to reflect for a moment on how  
24 much pro-piracy mileage the video game pirates have  
25 been able to get out of Section 117.

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1           Finally, I'll mention briefly that Static  
2 Control has asked for the creation of three exemption  
3 all seemingly aimed at avoiding difficulties it  
4 currently faces in producing printer components. We  
5 address its proposals in detail in a second reply we  
6 filed on March 10, 2003.

7           To summarize very briefly while we offer  
8 no comment on the first proposed class, we do take  
9 issue with the second and third classes proposed  
10 there. These proposals are totally unnecessary to  
11 address any problem that this company believes it is  
12 encountering from the operation of the DMCA. But  
13 those exemptions if granted risk significant  
14 unanticipated impacts on current video game technology  
15 as well as other industries who are just beginning to  
16 explore the beneficial uses of embedded software.

17           We truly appreciate the care with which  
18 the Copyright Office, the NTIA and the Librarian have  
19 administered these proceedings and the proceedings in  
20 2000. To summarize, we believe that no compelling  
21 factual case has been made for any exemptions in the  
22 entertainment software space. Region coding is use  
23 facilitating and any exemption allowing its  
24 circumvention would contribute directly to further  
25 piracy.

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1           The video game industry has done well to  
2           integrate technology into products under conditions  
3           that consumers find not only acceptable but so deeply  
4           satisfying as to make video and computer games the  
5           fastest growing entertainment industry segment in the  
6           world and one of America's premier high technology  
7           success stories of the last decade. There has been no  
8           demonstrated need to create exemptions to these rules  
9           now or for in the foreseeable future and certainly not  
10          within the next three year cycle. Thank you very  
11          much.

12                   CHAIRPERSON PETERS: Thank you. Mr.  
13          Attaway, are you ready to resume?

14                   MR. ATTAWAY: We'll find out.

15                   CHAIRPERSON PETERS: We'll test  
16          technology.

17                   (DVD copy played.)

18                   MR. ATTAWAY: All right. While you are  
19          watching this, I will just point out the obvious that  
20          it's not as good as the original DVD. I certainly  
21          wouldn't assert that. I do maintain though that it is  
22          good enough for the purposes that fair use is intended  
23          to serve. It probably could have been better by the  
24          use of better equipment but employees of MPAA  
25          typically can't afford the latest in video cameras so

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1 this was the best that Kelly could do.

2 Can you do the final screen shot? The  
3 last point I want to make is this quote from the  
4 Second Circuit in the Reimerdes case where it said "We  
5 know of no authority for the proposition that fair use  
6 as protected by the Copyright Act much less the  
7 Constitution guarantees copying by the optimum method  
8 or the identical format of the original." Thank you  
9 very much. I appreciate this opportunity to testify.

10 CHAIRPERSON PETERS: Thank you. Because  
11 we've been sitting for some time, some people may have  
12 certain needs. It could be coffee. We will take a 15  
13 minute break and resume at 11:25 a.m. or shortly  
14 thereafter. Off the record.

15 (Whereupon, the foregoing matter went off  
16 the record at 11:12 a.m. and went back on  
17 the record at 11:24 a.m.)

18 CHAIRPERSON PETERS: Back on the record.  
19 We do have another panel this afternoon. So we do  
20 have limited time. We'll be asking questions of  
21 specific witnesses. We beg you to be as concise as  
22 possible.

23 I also want to point out that we're very  
24 well aware of the differences of opinion between the  
25 members of the panel. This is not an opportunity to

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1 totally debate each other. We're really just looking  
2 for the answers to our questions. I'm going to start  
3 the questions with David Carson.

4 MR. CARSON: All right. First of all, if  
5 I recall correctly, one of the things we said in 2000  
6 when we were addressing requests that we exempt audio-  
7 visual works on DVDs was that the availability of  
8 essentially all motion pictures released on DVD also  
9 in VHS format was one reason why we saw no problem  
10 because whatever people were saying they couldn't do  
11 with DVDs, they could certainly do with VHS tapes.  
12 That was part of the analysis that we engaged in as I  
13 recall. Here is my question. Have things changed in  
14 that respect and if they have changed or if they are  
15 going to be changing in the next three years, how does  
16 that alter the analysis? This one is actually for  
17 anyone.

18 MR. TURNBULL: Perhaps the people who  
19 actually put out the content can answer on the  
20 question of what's available in each format. I would  
21 just say that I think one other point that was made in  
22 the 2000 that's directly relevant to this and I  
23 commented in my opening statement on it is that the  
24 difference between the access control and the use  
25 control technologies is such that the use control

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1 which was in the 2000 is the same for both DVD movies  
2 and VHS in the use of the Macrovision technology.

3 In terms of defeating the use control, the  
4 same issue arises whether you release the content in  
5 VHS or DVD. I think the analysis that was done in  
6 2000 is still valid on that point.

7 MR. ATTAWAY: I hope that I demonstrated  
8 that even if a movie is not available in VHS or any  
9 other format that a movie on a DVD one can make fair  
10 use of it simply by taking screen shots. You don't  
11 need VHS.

12 MR. CARSON: Can you confirm what I read  
13 in the press and what my own personal experience seems  
14 to tell me? VHS is essentially a dying format, isn't  
15 it? Is that an overstatement?

16 MR. ATTAWAY: Well, I'm the eternal  
17 optimist and I'm still hoping my 8-track will have a  
18 use in the future. But I don't know, Mr. Carson. I'm  
19 not in the marketing business so I just can't express  
20 an opinion on that.

21 MR. CARSON: Can you add anything, Shira?

22 MS. PERLMUTTER: Yes, just to say, it may  
23 be that in the long term consumers are so much happier  
24 with DVDs that it will become the dominant or only  
25 format at some point. But that's not true today and

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1 not going to happen in the next couple of years as far  
2 as I can see.

3 So as long as that's still not the case  
4 obviously it's very easy to say that there is another  
5 format out there that can be used in other ways.  
6 Although as Bruce pointed out, you still have copy  
7 control measures involved. But as Fritz said, there  
8 is still the ability to get access with DVDs and  
9 there's still the ability to use fair use. It's just  
10 an additional factor in the mix.

11 MR. CARSON: Mr. Turnbull, you said  
12 something that I just wanted to follow up on and get  
13 your thoughts on it. If anyone else has any other  
14 information on it, I would like to get that as well.  
15 If I understand correctly, you said that assuming that  
16 there's a legitimate reason to circumvent a region  
17 code. We're not talking about circumventing CSS.  
18 We're talking about circumventing something else. I  
19 wonder if you can just elaborate and explain it to me.

20 Let's assume for the moment that we are  
21 sold that people ought to be able to circumvent  
22 whatever they need to circumvent in order to deal with  
23 the region code issue. It's your job right now to  
24 tell me why we shouldn't say you can circumvent CSS  
25 and what it is we should say that you can circumvent.

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1 Not that you're an advocate for that and not that I'm  
2 even an advocate for that. I want to know what it is  
3 that we're being asked. If we wanted to do that, what  
4 would it be that we would actually have to be saying?

5 MR. TURNBULL: The way the system works is  
6 that CSS encrypts the work. Once you have a licensed  
7 decryption of the work, the player or the software on  
8 the computer then looks for certain pieces of  
9 information that are lodged in particular bit setting  
10 in the decrypted content. One of these settings is  
11 the region code setting. It is not part of the  
12 encryption. It is a setting that is in the underlying  
13 work or the information accompanying the underlying  
14 work.

15 The requirement to look for that setting  
16 and the requirement then to respond to the setting is  
17 a license requirement for CSS but it is not part of  
18 the encryption that is CSS. But what CSS in licensing  
19 says is that the method for looking for the code and  
20 responding to the code and then in fact either playing  
21 or not depending on the settings and the configuration  
22 of the playback system is a matter for the individual  
23 implementation but it must be done as we put it  
24 robustly. It must be done in a way that is difficult  
25 to hack.

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1           So if you have an XYZ playback system,  
2           that playback system may use something that is unique  
3           to it to both look for the code and also prevent  
4           somebody from defeating the region code playback.  
5           That's going to be different from the ABC Company's  
6           system or from the MNO Company's system.    The  
7           requirement from the CSS license is simply that it  
8           must be done and it must be done in a way that is  
9           difficult to hack.

10           MR. CARSON: Now does one have to get past  
11           CSS somehow in order to tinker with those region code  
12           settings?

13           MR. TURNBULL: If you have access to the  
14           unencrypted content. All of this is done after the  
15           decryption takes place. So the question would be  
16           gaining access to that content. Again there are rules  
17           that relate to the circumstances of trying to prevent  
18           people from gaining access to the unencrypted content.  
19           Again those are done on an implementation by  
20           implementation basis.

21           So there are two different things. One is  
22           getting access to the content where the prevention of  
23           that must be robust. And then the region code  
24           detection and response system which again is done  
25           individually by the implementation must be done under

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1 the rules in a robust way.

2 MR. CARSON: So if I understand you  
3 correctly and I'm not at all sure I do, if I were  
4 sitting at home trying to be able to do whatever I  
5 needed to do to play a Region II DVD, CSS would be  
6 totally irrelevant. The actual Content Scrambling  
7 System wouldn't be anything I'd have to deal with.  
8 I'm getting access to the material because I have a  
9 compliant player to start with anyway. After that  
10 whatever I'm doing may or may not be circumventing  
11 some kind of access control but it's not circumventing  
12 CSS.

13 MR. TURNBULL: CSS, the encryption,  
14 correct.

15 MR. CARSON: Okay. Well I have a glimmer  
16 of understanding. Thanks. Anyone else have any  
17 intelligence on that information.

18 MR. MOORE: Mr. Carson, actually I  
19 disagree with that. You actually must unlock the DVD  
20 and decrypt the contents in order to expose the region  
21 code. We know that from the backup software that we  
22 make. There is no way to get at the region code  
23 without first going through CSS.

24 MR. TURNBULL: I'm sorry. I didn't mean  
25 to say anything different from that. You do have to

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1 decrypt the content. But once you have decrypted the  
2 content, that is when the region code detection  
3 occurs. And if you can gain access to the unencrypted  
4 content that has been unencrypted by a licensed  
5 legitimate system, then you don't need to hack the  
6 encryption system at all.

7 MR. CARSON: But how am I going to gain  
8 access to the unencrypted content?

9 MR. SAFIR: You can't. Just say you  
10 can't, which is the answer.

11 MR. CARSON: I asked Mr. Turnbull.

12 MR. TURNBULL: To take the computer  
13 system, the player is more complicated because you are  
14 opening a player and player manufacturers don't want  
15 you to do that. But in a computer where you have  
16 access to programming capabilities, there are buses,  
17 the interfaces, within the computer that the content  
18 travels on once it has been decrypted.

19 Quite frankly, the CSS license says that  
20 the licensed playback system should make it hard to  
21 gain access to the content when it's unencrypted and  
22 traveling on those buses from the point at which it's  
23 been decrypted to the point of which it's displayed.  
24 If you can gain access to that, you break through  
25 somebody's access control at that point in the system,

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1 then you have the content in unencrypted form and you  
2 can do whatever you want to do with the region code  
3 setting.

4 MR. CARSON: Let's assume that the only  
5 thing you care about is CSS with that particular  
6 organization. Let's just assume that for the moment.  
7 For me to do what you just described, would I have to  
8 do what you would assert is a circumvention of CSS?

9 MR. TURNBULL: It's a little complicated  
10 because CSS is both the technology and also our  
11 license and the conditions on which the license is  
12 based.

13 MR. CARSON: All I care about is the  
14 technology.

15 MR. TURNBULL: Okay. If you are only  
16 talking about the technology to do what I just  
17 described, you don't have to do anything to CSS. You  
18 would be circumventing whatever the individual  
19 implementing software company has put in place to make  
20 it hard to get at the unencrypted content when it's  
21 being passed from the decryption point to the display.

22 MR. CARSON: Does anyone have a different  
23 understanding and want to explain?

24 MR. MOORE: That's definitely not true.

25 MR. SAFIR: That's not true.

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1 MR. CARSON: Well right now I have someone  
2 giving me one explanation and I have two other people  
3 saying that's not true. That makes it real easy for  
4 me to decide, doesn't it?

5 MR. SAFIR: That's right. He's not  
6 telling the truth.

7 MR. CARSON: Explain to me why it's not  
8 true. First Mr. Moore. Then Mr. Safir.

9 MR. MOORE: I think he's trying to explain  
10 the underlying technology behind this. The end effect  
11 to the enduser though is that you must unencrypt the  
12 data in order to get at the region code. There is no  
13 other way to do so. Period. That would be what they  
14 would interpret as a circumvention.

15 MR. CARSON: Is that true, Mr. Turnbull?  
16 You interpret that as circumvention.

17 MR. TURNBULL: You do have to unencrypt  
18 the content. This is the third time to say that. You  
19 do have to unencrypt the content in order to find the  
20 bit that says what region that particular disk is set  
21 for. Once you have unencrypted the content however,  
22 CSS, the technology, is no longer relevant to what is  
23 going on from that point to the point at which the  
24 content is displayed on the computer monitor.

25 So if you can gain access to the

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1 unencrypted content breaking through whatever system  
2 the individual software company has built, you can  
3 then get at the region code. It may be easier to  
4 defeat the CSS system as encryption technology and  
5 never have to worry about these individual robust  
6 implementations of content after CSS is removed. But  
7 you don't have to.

8 MR. CARSON: So breaking CSS would be one  
9 way of doing it but it's not the only way. Is that  
10 what you are saying?

11 MR. TURNBULL: Correct.

12 MR. CARSON: Do you have something to add,  
13 Mr. Safir?

14 MR. SAFIR: Yes, you have to break CSS to  
15 get to the access codes in the encoded stuff. You  
16 have an encoded envelope. In the encoded envelope, it  
17 includes region coding. If you don't break the  
18 envelope, then you can't get to the coding. You can't  
19 get to the egg yolk until you break the shell. It's  
20 really that simple.

21 Anything else he said is just mixing up  
22 the fact of the question that you asked. Yes, you  
23 have to gain access by -- By the way, he already broke  
24 CSS code in order to gain access to the regional  
25 coding scheme. That's a definite. I don't know why

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1 he's using so many words to say otherwise.

2 This gentleman here who actually wrote a  
3 program that does similar things will confirm the  
4 actual fact of the science. This reminds me of  
5 showing the Shuttle explosion after all these  
6 scientists came over and said a lot of gibberish and  
7 the guy came over and says this is the problem. He  
8 takes liquid nitrogen. He drops the ring in. Then he  
9 drops the ring on the floor and it shatters. He says  
10 that's what happened to the Challenger. Then  
11 everybody said oh.

12 The answer to your question was a simple  
13 yes. You must break through the CSS encryption in  
14 order to get to the regional access key.

15 MR. CARSON: We may follow up in writing  
16 to try to get a more detailed explanation. This may  
17 not be the best means of getting useful information o  
18 the subject. You'll all have an opportunity to  
19 explain it to us in plain English.

20 CHAIRPERSON PETERS: Rob.

21 MR. KASUNIC: This question is geared to  
22 opponents of exemptions. There have been a number of  
23 statements that if there is an exemption found whether  
24 it's for region coding or for circumventing CSS that  
25 this will cause great harm to making works available.

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1 Exactly what would that harm be? How harmful would it  
2 be for there to be an exemption to Section 1201(a) (1)  
3 in particular given the fact that this is mostly done  
4 in private, difficult to find out about, that there  
5 are very few people that would be technologically able  
6 to affect that circumvention? Also included in that,  
7 how many lawsuits or enforcements of circumvention of  
8 Section 1201(a) (1) are you aware of?

9 MR. ATTAWAY: If I may, I'll address the  
10 first question. I don't know that I know the answer  
11 to the second. To respond to the first question, just  
12 let me give you an example of regional coding. To me,  
13 regional coding is a marketing decision. A copyright  
14 owner decides what regions or what players he or she  
15 wants to market the work and makes a decision. Some  
16 owners of works will say I don't care. All players  
17 can play my content. Others will say no, I only want  
18 it to be played on Region I players or Region II  
19 players or so forth.

20 In the case of movie companies, we do it  
21 sequentially for marketing reasons. But it's  
22 basically a marketing decision just like some works  
23 are only available on VCD which is a format that is  
24 fairly widespread in Asia. I don't think it exists or  
25 anyone has VCD players at all in the United States.

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1 So people who buy VCD audio-visual works if they bring  
2 it to the United States, there is nothing to play it  
3 on. That's just a fact of life. It's not a violation  
4 of any expectation of the buyer when he buys this  
5 work.

6 But getting back to my illustration, if a  
7 copyright owner decides not to market works that play  
8 on Region I players in the United States and there's  
9 demand for those works in the United States and if  
10 people in the United States have the ability to hack  
11 the region coding system, then there is less demand  
12 for the copyright owner to change his mind and decide  
13 that he ought to be marketing to Region I players. So  
14 the people that don't have the expertise or ability to  
15 hack are still out of luck. If there is no exemption  
16 that allows hacking and there is demand for that  
17 content in the U.S., then there is much greater  
18 economic incentive for that copyright owner to market  
19 his works on Region I players.

20 MR. KASUNIC: Mr. Turnbull.

21 MR. TURNBULL: If I could suggest two  
22 particular harms to your granting such an exemption.  
23 The first harm is I would reiterate what Mr. Mitchell  
24 said which is that you should look at the potential  
25 for the misuse of the exemption and the fact that it

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1 will be very hard to keep the information within the  
2 confines of somebody's individual garage. So there  
3 would be tremendous potential for misuse of such an  
4 exemption.

5 The second is in relationship specifically  
6 to DVD CCA licenses, CSS as both a trade secret and a  
7 patented technology. Shortly after the DCSS program  
8 was created and disseminated, DVD CCA brought a trade  
9 secret misappropriation and misuse lawsuit in the  
10 California State Court.

11 One of the bases for maintaining a trade  
12 secret is that reverse engineering to obtain the trade  
13 secret was done in an improper way. One of the bases  
14 for it being improper is that it is a circumvention  
15 under the DMCA. If you were to grant an exemption to  
16 permit circumvention under the DMCA, we would lose  
17 that basis for the maintenance of the trade secrets  
18 that are underlied CSS. Now I hasten to add that we  
19 have other arguments and I'm not conceding anything in  
20 that case. But I do think that you would make it more  
21 difficult for us in maintaining the trade secrets.

22 MR. MITCHELL: For at least some dedicated  
23 video game platforms, the harm would come specifically  
24 from how such a circumvention is accomplished. In  
25 fact, the proponent of this very exemption has

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1 suggested as much in his own submission when he  
2 acknowledged that indeed the easiest way to circumvent  
3 region coding is to essentially disable the legitimate  
4 copy verification process that also enforces other  
5 access controls to strip out all of the ability of a  
6 video game console to perform the checking between the  
7 hardware and the software. So it would result in  
8 drastically overbroad circumvention in that instance.

9 MR. KASUNIC: Well, let me follow up on  
10 that point in terms of what the potential misuse for  
11 an exemption that may be found. I've heard that both  
12 through Mr. Mitchell and Mr. Turnbull. I'm referring  
13 now to my handout that I gave you which is a reprint  
14 of Section 1201(a)(1). That specifically deals with  
15 what the class of works that's published, the effect  
16 of that exemption. Is your view of that Section 1201  
17 (a)(1)(D) that if we do find an exemption for a  
18 particular class of works that the exemption will  
19 apply only to non-infringing uses of a work after the  
20 circumvention is accomplished? Or would it be  
21 something broader that would also allow basically  
22 anyone to circumvent for any reason? Or something  
23 narrower if you read it that way? That's to anyone.

24 MR. SAFIR: I'm sorry. Could you repeat  
25 the question?

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1 MR. MITCHELL: Is this provision which  
2 allows the Librarian to publish a particular class of  
3 works and states that non-infringing uses by persons  
4 who are users of a copyrighted work who are or are  
5 likely to be adversely affected and the prohibition  
6 contained in Subparagraph (a) "shall not apply to such  
7 users with respect to such class of works for the  
8 ensuing three year period"? In terms of misuse of the  
9 potential exemption if someone did misuse the  
10 exemption, would they still be liable under Section  
11 1201 because they are not using it for non-infringing  
12 use?

13 MR. SAFIR: This is a legal question  
14 essentially.

15 MR. KASUNIC: Essentially yes.

16 MR. SAFIR: Because I can give you an  
17 opinion but it's just an opinion.

18 MR. GENGLER: I can take a shot at this  
19 one. I would say that since Section (D) here says  
20 that the use is to be non-infringing that if misuse of  
21 it is to be found non-infringing then it's still a  
22 violation of the anti-circumvention provision. In  
23 that case, it's still illegal and it's not covered by  
24 this. Only when the work is a non-infringing use is  
25 it exempted from this prohibition.

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1 MR. KASUNIC: Are there any points of view  
2 from opponents of exemption?

3 MR. SAFIR: Can I just add something to  
4 that? When Congressman Ashcroft who is now the  
5 Attorney General was involved in writing up the DMCA  
6 originally, he said that he would not have voted for  
7 this or pushed this through Congress which was in his  
8 committee if it wasn't for the fair use provision that  
9 was later added which is now 1201. It's pretty clear  
10 that at least as he said in plain English and also as  
11 it seems to be the intent of Congress that use of any  
12 access breakage to the works which would then be used  
13 for a non-affording copyright infringing purpose would  
14 be in itself a violation of the DMCA.

15 In addition to that let's not forget that  
16 there's copyright also. If you violate 107 of the  
17 Copyright Law, you are an infringer of copyright.  
18 It's not like they don't have any legal protections or  
19 recourses at that point.

20 MR. KASUNIC: I understand that. But I do  
21 want to try and focus on this particular point because  
22 it does have an impact on what if any potential  
23 exemption that we recommend the scope of that  
24 exemption is.

25 MR. TURNBULL: I think looking at the face

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1 of the language the last clause seems to be clear that  
2 the exemption would apply to the users who are  
3 adversely affected. So you can eliminate everybody  
4 else who wasn't a user who was adversely affected  
5 using this language.

6 However reading the plain language it says  
7 with respect to the class of works. It doesn't say to  
8 with respect to the non-infringing uses of the class  
9 of works. Now it would certainly be what was intended  
10 that it would be with respect to the non-infringing  
11 uses of the class of works of that class. I haven't  
12 looked at the underlying legislative history to see  
13 what might be there to expand on that.

14 What I would say though is that what I was  
15 saying and Mr. Mitchell can speak for himself but it  
16 is that there is right above the part that you've  
17 highlighted this such other factors as the Librarian  
18 considers appropriate. What I was saying is that the  
19 potential misuse of a exemption is another factor that  
20 would be appropriate to consider particularly given in  
21 the CSS context the history where there are  
22 notwithstanding lawsuits and injunctions.

23 We continue to see postings of DCSS and  
24 other matter which is in violation of our injunction  
25 with regard to the trade secrets. Certainly it's

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1 already been found that it was a violation of the DMCA  
2 in the Universal City case. There is a real reason to  
3 be concerned about the misuse of an exemption with  
4 regard to CSS.

5 MR. KASUNIC: Shira.

6 MS. PERLMUTTER: I agree with Bruce that  
7 obviously the intent of this provision is that any  
8 exception applies only to the non-infringing users of  
9 that particular class of work. So it wouldn't make a  
10 lot of sense in the first place.

11 I only wanted to add in response to your  
12 prior question about the harm from an exemption to the  
13 circumvention provision in 1201(a)(1) that it has a  
14 lot of spillover effect. I just wanted to add that  
15 point that if you have a statement by the Office and  
16 Librarian that certain acts are legitimate that it can  
17 also affect other things not just trade secrecy cases  
18 but also how the trafficking in devices provision is  
19 interpreted.

20 You will get a lot of arguments about the  
21 extent to which devices are used for legitimate  
22 purposes that can spill over. It also may affect the  
23 very model of the idea of delivery to consumers on  
24 different terms and conditions and just the principle  
25 that access means you are buying access to a

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1 particular kind of thing for a particular kind of  
2 purpose. You can end up with a situation where  
3 individual hacks and individual ability to gain  
4 unauthorized access can cause real damage to that  
5 delivery model.

6 MR. KASUNIC: In terms of that damage if  
7 there has been damage, has that ever been remedied by  
8 Section 1201(a)(1)? Has anyone brought a number of  
9 actions under the trafficking provisions? Is  
10 1201(a)(1) being used?

11 MS. PERLMUTTER: I think the hope is  
12 always with one of these statutes that you don't need  
13 to use it, that you don't need to go to court and that  
14 the prohibitions are there. But I know of only the  
15 cases that we've been involved in and I don't know of  
16 other cases that might be pending.

17 MR. TURNBULL: If you have an individual  
18 who truly keeps it all to himself or herself in doing  
19 their circumvention and therefore doesn't spill over  
20 into 1201(a)(2) in trafficking or providing products  
21 or whatever, finding out about the individual is going  
22 to be rather difficult. So it may well be a reason  
23 why I don't know of any cases.

24 MR. KASUNIC: Mr. Einhorn.

25 DR. EINHORN: I would urge that if you

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1 have the legal authority to make the distinction you  
2 might be very well wise to just limit the exemption to  
3 those people who do non-infringing uses if you have  
4 the authority to do that. If someone does decide for  
5 whatever reason to break regional coding or any kind  
6 of access protection and then for the purpose of  
7 violating copyright, it may be sensible in addition to  
8 having our sanctions under the Copyright Act and under  
9 the No Electronic Theft Act to have one more  
10 instrument in our toolkit to stopping from this.

11 I don't know that you have the authority  
12 to limit to certain uses. In that particular way, we  
13 can address some of the concerns of Mr. Mitchell who  
14 feels that people are going to run with this and get  
15 the bad idea of what they can or cannot do. By  
16 establishing that you can only do this for non-  
17 infringing uses and establishing it loud and clear,  
18 any prospective pirates who are attracted to regional  
19 coding or any kind of circumvention technology for the  
20 purpose of unauthorized reproduction and distribution  
21 of other people's content can be punished more  
22 immediately by the law for their individual actions.

23 MR. MITCHELL: We should also take into  
24 account I believe how such a circumvention might  
25 practically be accomplished in this situation. A rule

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1 that would permit region coding circumvention only for  
2 authorized uses as I mentioned would likely be  
3 construed to actually be much broader than that, to  
4 constitute essentially a legalization of circumvention  
5 devices that are used for purposes of circumventing  
6 regional coding and an additional layer of difficulty  
7 particularly for entertainment software publishers in  
8 that those particular devices even if it were  
9 theoretically and technically possible to only  
10 restrict them to circumventing region coding look  
11 identical to devices that actually accomplish much  
12 more nefarious purposes and that completely circumvent  
13 the verification process that is used to distinguish  
14 pirate games from non-pirate games.

15 So what we would have is a rule out there  
16 that would allow for a certain class of devices  
17 essentially to be used but those devices would not  
18 necessarily be region coding only devices. Most of  
19 them would allow for the play of pirated games. That  
20 has certainly been our experience and those of our  
21 member companies.

22 I would commend you to take a look at the  
23 filing by Riley Russell at Sony Computer Entertainment  
24 America who actually has produced deposition testimony  
25 in support of the proposition that there is no

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1 standalone market for devices that only circumvent  
2 region coding. One such gentleman who tried to market  
3 the device was out of business within a year. It is  
4 because the market that exists for these devices is  
5 not one predominantly driven by this region coding  
6 circumvention function but rather by the desire to  
7 play pirated games.

8 MR. SAFIR: That's actually a supposition  
9 which is not true. The truth of the matter is that  
10 the prints that they have in Europe and the reason why  
11 they didn't buy that device was because they couldn't  
12 find a market. The truth of the matter is that it was  
13 hard for this guy to actually his device in the stores  
14 especially electronic chains in which these things are  
15 available. The only way this was available was  
16 basically through the Internet. What you are saying  
17 is just flat out not true. In addition to that, you  
18 have to also recognize these people already have DVD  
19 players.

20 MR. MITCHELL: Our experience is that --

21 MR. SAFIR: They have three DVD players.

22 MR. MITCHELL: Our experience is that  
23 whatever devices that may be available only to  
24 circumvent region coding, more expensive, much more  
25 difficult to find and generally more difficult to use

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1 than the fully functional devices that would allow for  
2 the play of pirated games. It is these fully  
3 functional circumvention devices that account for the  
4 vast majority and the vast demand for this whole range  
5 of circumvention license.

6 MR. GENGLER: I object to that  
7 interpretation of it because if you say that because  
8 there is a possibility that it could be interpreted as  
9 over broad and potentially be used to try to allow  
10 infringing device, then it invalidates the entire  
11 clause there that would allow for the creation of it  
12 unless it only has non-infringing. Anything that's  
13 non-infringing can also be mostly used in almost all  
14 cases for an infringing purpose. To say that just  
15 because it could be used to do that would be to render  
16 this entire section useless and almost provide for no  
17 exemptions to be possible.

18 MR. SAFIR: What's your fix on that?

19 MR. MITCHELL: It is an issue that we  
20 believe goes to the very issue of the availability of  
21 video games. If an exemption were to result from this  
22 proceeding which has the result of putting  
23 circumvention devices into the hands of thousands and  
24 thousands of people that not only circumvent region  
25 coding but also allow for the play of pirated games,

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1 it follows as a matter of course that piracy would  
2 thereby increase. If piracy is going to increase as  
3 a result of that, then the availability of works could  
4 potentially decrease.

5 MR. SAFIR: But that hasn't happened,  
6 right? The DeCSS is already available to anyone who  
7 wants it at this particular junction where we are  
8 right now. There hasn't really been any more or less  
9 pirating on any larger or lesser scale. So here we  
10 are sitting and talking about a theoretical loss that  
11 can happen. Actually the horse is already out of the  
12 barn. The DeCSS code is already out there and there  
13 hasn't been any real sizeable impact on the motion  
14 picture industry, Time Warner or Universal.

15 MR. KASUNIC: Mr. Attaway, you had a  
16 comment.

17 MR. ATTAWAY: Just one final comment. As  
18 you consider your obligations in this proceeding  
19 particularly with regard to regional coding, I would  
20 urge you to focus on the words "adversely affected."  
21 No one has talked about that today. But when I  
22 purchase a DVD, I have no expectation that it will  
23 play in my VCR. I don't think I'm being adversely  
24 affected by that fact. It's just a fact. It doesn't  
25 play.

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1           When I purchase a Region I DVD, I have no  
2 reasonable expectation or should have none that it  
3 will play in a Region VI DVD player.

4           MR. SAFIR: That's not true again.

5           CHAIRPERSON PETERS: Mr. Safir.

6           MR. SAFIR: When somebody buys a DVD, they  
7 have no idea about region coding at all. So they put  
8 the DVD in and it doesn't work. So while you might  
9 have that expectation --

10          MR. CARSON: Are you in the middle of a  
11 sentence, Fritz?

12          MR. ATTAWAY: I thought I was.

13          MR. CARSON: Will you respect Mr. Attaway  
14 please and let him testify?

15          MR. ATTAWAY: I believe that all DVD  
16 packaging reveals the equipment where it will play and  
17 where it won't play. I don't think there is an  
18 expectation that when you purchase a Region I DVD that  
19 it will play in other regions. I would submit that  
20 there is no adverse impact here.

21          CHAIRPERSON PETERS: Thank you. Steve.

22          MR. MOORE: I was wondering if I could add  
23 something to that real quick.

24          MR. MITCHELL: Of course.

25          CHAIRPERSON PETERS: Sure.

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1 MR. MOORE: 321 Studios doesn't really  
2 take any position on region coding. In fact we leave  
3 the region coding intact when we make a backup. But  
4 Mr. Attaway said that no one has presented any  
5 evidence of being adversely affected, I take  
6 opposition to that because we have actually submitted  
7 here into evidence that several hundred declarations  
8 of individuals and families that have been adversely  
9 affected by the fact that they bought DVDs that were  
10 defected that the store would not accept and return or  
11 exchange.

12 They've bought DVDs that after a period of  
13 time delaminated and would no longer play in a player  
14 or became scratched due to their children mishandling  
15 the DVD and they are unable to gain access to that DVD  
16 in order to view what they have paid for. So I do  
17 consider that to be an adverse reaction.

18 CHAIRPERSON PETERS: But you are actually  
19 talking about having purchased it and having had  
20 access to it later not having access to it.

21 MR. MOORE: It has happened both ways.  
22 It's happened where we've bought DVDs that will not  
23 play from the onset where we can't have access to it  
24 up front through a normal DVD player. Or through the  
25 course of time, it becomes inaccessible.

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1 CHAIRPERSON PETERS: Do you want to  
2 comment on the fragility?

3 MR. ATTAWAY: If I can engage on that  
4 point, I don't believe that there is any expectation  
5 that when I purchase this DVD it will last forever  
6 just like when I bought my 1988 Mazda. There was no  
7 expectation that it will last forever or that I should  
8 have a right when it wears out to go on to the Mazda  
9 lot and get a new one.

10 People realize when they buy a DVD that if  
11 they leave it out in the sun it's going to melt and  
12 they are not going to be able to play and they'll have  
13 to buy a new one. There's no expectation that this is  
14 going to last forever.

15 CHAIRPERSON PETERS: Is there any  
16 expectation how long it lasts for?

17 MR. SAFIR: Decades.

18 CHAIRPERSON PETERS: No.

19 MR. SAFIR: My books do.

20 CHAIRPERSON PETERS: You're talking about  
21 different media.

22 MR. SAFIR: My CDs have for three decades  
23 now.

24 CHAIRPERSON PETERS: You're fortunate.

25 MR. TURNBULL: The question of if you

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1 bought a DVD that never played, it seems to me is a  
2 different issue and perhaps some other agency of the  
3 Government would be worried if the retailer and the  
4 producer didn't take it back in that kind of  
5 circumstances.

6 CHAIRPERSON PETERS: Like FTC.

7 MR. TURNBULL: I think you don't need to  
8 have an exemption to the DMCA in order to deal with  
9 that problem.

10 CHAIRPERSON PETERS: For those that never  
11 played. Right.

12 MR. MOORE: Actually I have two copies of  
13 DVDs. One is actually quite visibly damaged. It has  
14 a split and this will not play at all. This one which  
15 is "Dragonheart" which by the way was the declaration  
16 I read earlier in my testimony from one of my  
17 customers has no visible damage to that back of the  
18 DVD. You can't tell that it's been mishandled. Maybe  
19 it was. Maybe it wasn't. I don't know if this is  
20 part of delamination or what the problem is. I don't  
21 even know how old this particular DVD is. But it is  
22 inaccessible in a normal DVD player. You cannot  
23 access this information.

24 When this DVD was bought if I owned this  
25 DVD, I would expect that I owned the DVD and the data

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1 that's contained on the DVD. I should be able to  
2 access it if I choose to.

3 CHAIRPERSON PETERS: Forever?

4 MR. MOORE: Well, certainly for some  
5 specified period of time. The hype from the DVD  
6 industry is that these things are pretty permanent.  
7 In fact, that's been an argument from their side  
8 against this type of technology. They say DVDs don't  
9 break. They are not really all that fragile. They  
10 hold up really well. The truth is that through  
11 manufacturing imperfections and some mishandling by  
12 customers they don't last as long as a enduser expects  
13 them to.

14 MR. GENGLER: Actually on that note of  
15 DVDs lasting forever, Jack Valenti of the MPAA in a  
16 Congressional hearing to the Committee on the  
17 Judiciary on the topic of DVD backups has said  
18 something along the lines that DVDs last forever and  
19 there's no need to make backups. I don't have the  
20 direct quote.

21 CHAIRPERSON PETERS: You're not going to  
22 say anything. Michael.

23 DR. EINHORN: Without taking a final  
24 position on this, I would just urge you when you  
25 determine that don't try to determine what the

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1 consumer's expectation may be when they buy something.  
2 Rather you in fact may form that expectation by your  
3 policy. Let's assume that whatever you decide, you  
4 can give out that 100 percent expectation that's  
5 correct one way or the other and base the appropriate  
6 harms on that assuming that every consumer understand  
7 things correctly.

8 Consumers can be very floppy. They can go  
9 back and forth. It's a matter of economic  
10 policymaking. The best thing to assumption in the  
11 long run is consumer's get the picture and you will  
12 have to define for them where we are going.

13 CHAIRPERSON PETERS: The good news is that  
14 consumer expectation doesn't equal fair use. Fair use  
15 has its own parameters.

16 MR. TURNBULL: Could I just ask as a  
17 general matter and maybe in relationship to this  
18 whether you are going to offer the opportunity for the  
19 witnesses to submit post-hearing comments on specific  
20 points that may have come up?

21 CHAIRPERSON PETERS: We haven't decided  
22 that yet. We have decided that we may be asking  
23 questions.

24 MR. TURNBULL: It might be valuable again  
25 given the time constraints and some of the knowledge

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1 constraints that may exist on some points.

2 CHAIRPERSON PETERS: We'll think about it.  
3 Thank you. Mr. Lutzker.

4 MR. LUTZKER: My name is Arne Lutzker.  
5 I'm counsel for 321. I'll turn to the expert on 1201  
6 who suggested that I might be able to make some  
7 comments. This particular point if this is  
8 appropriate I would just like to remark on.

9 Regarding expectations, the way the DVDs  
10 are marketed from a personal experience I was  
11 traveling to the West Coast and saw a program on DVDs  
12 in which the description of a DVD by proponents of the  
13 technology suggested it was indestructible. The guy  
14 did bending and that it was designed to last for a  
15 relatively indefinite period of time. I think it  
16 would be not inappropriate if this is a serious  
17 question for the Copyright Office to obtain marketing  
18 material from the industry regarding the communication  
19 to the public about their expectations on DVDs.

20 The experience that 321 has had which is  
21 evident in the declarations of individuals is that  
22 purchases are made and within a relatively short space  
23 of time because the DVD marketing as we know has  
24 exploded in the last three to five years people in  
25 that period of time are experiencing extensive

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1 continuous problems with access to works due to damage  
2 that they experience due to things beyond their  
3 control which may be at a moment of purchase where a  
4 work has delamination or other problems.

5 Whether one suggests that a work should  
6 last indefinitely is not really the issue with this  
7 proceeding because you're only dealing with three year  
8 period of time. If an exemption applies to a  
9 particular class of works as 321 has suggested,  
10 damaged purchased DVDs for which full purchase price  
11 has been made for those works and if in this three  
12 year period more information comes to the forefront,  
13 that's fine.

14 But at the moment, the marketplace has a  
15 disconnect. People purchase DVDs. Many of them by  
16 virtue of declarations have presented that there is  
17 extensive public harm with respect to accessing of  
18 works in DVD format where there is damaged experience.  
19 This is one of the clear examples of extensive public  
20 harm. 321 would be pleased to present more  
21 declarations if it's desired. That particular class  
22 of works is in need of reform. The expectation of  
23 consumers is that these products would last for at  
24 least a reasonable period of time and many of them are  
25 not experiencing that.

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1           MR. TEPP: Thank you all. I have a number  
2 of different questions on a number of different  
3 topics. I'm not going to try and ask them all at this  
4 point. Since we are talking about this DVD durability  
5 issue, I'll focus on that one. I'll direct my first  
6 question primarily to Mr. Attaway but others who would  
7 like to jump in are welcome to do so.

8           The Copyright Office in DMCA Section 104  
9 Report to Congress concluded that beyond the backup  
10 exception in Section 117 of the Copyright Act there  
11 might be a strong case for fair use for backing up  
12 other types of works and also in that case I believe  
13 the analysis with regard to computers. To what extent  
14 do you believe that an argument can be made that  
15 backing up a DVD is a fair use? I know you said  
16 earlier that there's no case law holding that but how  
17 strong do you think the argument is?

18           MR. ATTAWAY: I think it's very strong.  
19 If there are arguments in support of being able to  
20 make backup copies of DVDs, that is an issue for  
21 Congress to decide. However the Copyright Act in my  
22 opinion is quite clear.

23           As I said earlier in my testimony, if it  
24 weren't clear then there would have been no reason to  
25 enact Section 117. This is not an issue of

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1 interpretation of the Copyright Act. It may be a  
2 legislative issue. We can deal with it in that forum.  
3 But I certainly don't think it is a legitimate issue  
4 in this particular forum.

5 MR. TEPP: I'll give Ms. Perlmutter a  
6 chance to come back if you want. Let me rephrase the  
7 question a little bit. Mr. Moore has put before us a  
8 proposal for an exception to create backups of works  
9 to circumvent technology to create backups of DVDs.  
10 According to Section 1201, we're supposed to analyze  
11 exceptions for non-infringing uses.

12 That's the reason I'm asking this  
13 question. Is creating a backup of a DVD a fair use  
14 keeping in mind that Congress may decide to create  
15 more certainty for certain acts that are fair use  
16 without necessarily saying other acts aren't fair use?  
17 In our consideration of the proposed exception, is the  
18 underlying activity that they wish to have an  
19 exception to circumvent for a non-infringing activity?

20 MR. ATTAWAY: No. Well, yes. Wait a  
21 minute. You rephrased the question. You asked your  
22 question in a way I wasn't expecting it. It is not a  
23 fair use.

24 MR. TEPP: To create a backup of a DVD.

25 MR. ATTAWAY: That is correct.

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1 MR. TEPP: Ms. Perlmutter. Then I'll come  
2 to Mr. Safir.

3 MS. PERLMUTTER: First of all, I agree  
4 with Fritz that you wouldn't need the very explicit  
5 specific exception in 117 for backup copies if fair  
6 use covered it. However the critical thing to focus  
7 on is that the purpose of 117, the rationale, for the  
8 exception was the vulnerability to damage or loss. So  
9 that's a prerequisite to the whole concept of allowing  
10 backup copies.

11 Backup copies shouldn't be just an excuse  
12 to have two copies. It should be because there is  
13 some particular danger that doesn't exist ordinarily.  
14 My reading of the Section 104 report which of course  
15 you are the experts on it, it looked as if there was  
16 some specific attention being paid to backing up of  
17 hard drives because of a potential crash of a  
18 computer. That was also focused on the concept that  
19 there was a real danger that's not there in the  
20 physical work of loss.

21 Just to point out that we can listen to  
22 debates about the extent to which DVDs can be damaged,  
23 but the point is no physical property is  
24 indestructible. In fact, DVDs are much less  
25 vulnerable to destruction than a lot of other types of

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1 material objects on which copyrighted works are  
2 embodied like for example, LPs or books on paper. In  
3 this world generally, we don't always have the ability  
4 to make backup copies of any kind of personal property  
5 that might someday be damaged in some way.

6 MR. TEPP: Mr. Safir, you wanted to speak.

7 MR. SAFIR: Yes. Let me address two  
8 things about this. First of all, clearly the section  
9 on fair use in the statute for fair use it says that  
10 these are examples of fair use. I can't read the name  
11 from here but Mr. Tepp.

12 MR. TEPP: Yes.

13 MR. SAFIR: I turned 40 and my eyes fell  
14 apart.

15 MR. TEPP: You did it just right.

16 MR. SAFIR: Your point is extremely valid.  
17 There was fair use before the changes in the Copyright  
18 law that included that statute. There would be fair  
19 use without that clause. Fair use according to the  
20 Supreme Court just a couple of weeks ago clearly says  
21 that fair use is your Constitutional protection for  
22 property rights and for free speech.

23 Ginsberg said and you can read it in the  
24 Eldredge case yourself that we are not going to  
25 discuss in this case the free speech issues because

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1 the free speech issues are covered under fair use. So  
2 for years now, we've been going under the premise that  
3 fair use is an exception to Copyright. No, Copyright  
4 has always been an exception to people's individual  
5 property rights under the Constitution which the  
6 courts since St. Anne's Act have evolved into an idea  
7 or this judicial concept of fair use which then  
8 Congress later on went over and codified as examples.

9 But you can't turn around and say because  
10 only these eight things or nine things are the only  
11 ones that are in there that are justifiable for fair  
12 use, that it's the only fair use you have. Obviously  
13 I can use my DVD as a frisbee. Nothing says I can't.  
14 It's fair use.

15 MR. TEPP: Okay. Thank you.

16 MR. SAFIR: Let me just say one more  
17 thing. Time Warner's issue about traditional  
18 copyright controls and so on. She has been making a  
19 position repeatedly that the DMCA is not some type of  
20 radical change in the relationship between individuals  
21 and the copies of material that they own and trying to  
22 bring things back to some center.

23 Traditional stuff that you own and  
24 everything I own I have additional copies of. I have  
25 all my pharmacy textbooks going back to 1984. I have

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1 my grandfather's LPs with Sarah Vaughan on 78 records.  
2 I have digital copies of them of MP3s and copies of  
3 them on tape and so. I have so many copies it's  
4 unbelievable. I have copies of newspapers which I  
5 used to scan into my computer, only if there were  
6 graphics for cases like when I would testify over  
7 here.

8 All of this has always been part of my  
9 fair use rights if not explicitly under there but  
10 that's always traditionally what I've been allowed.  
11 The DMCA has rapidly changed that so their position is  
12 not the traditional position. Their position is  
13 radical. It says that the individuals don't have  
14 access to things that they paid cash for.

15 CHAIRPERSON PETERS: Excuse me. You're  
16 giving us your interpretation of fair use. We  
17 understand that it's your interpretation. There are  
18 many different people in this room who probably would  
19 disagree with you including a number of courts. We  
20 understand where you are coming from.

21 MR. TEPP: Okay. Let me just make one  
22 clarification. I may ask tough questions and loaded  
23 questions. I'm not trying to make a point. I'm just  
24 asking tough questions. As the Register has said at  
25 the beginning of each hearing, nothing has been

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1 decided yet.

2 Let me move on to my next question which  
3 I want to direct to Mr. Moore.

4 MR. SAFIR: I'm sorry. I didn't mean to  
5 imply that you decided anything.

6 MR. TEPP: Good. Thanks. Mr. Moore, you  
7 may have alluded to this already but I want to clarify  
8 it. The copies that your customers make using your  
9 software, are those copies fully protected by CSS and  
10 region coding and all the technological protections  
11 that the copyright holders have placed on the original  
12 copy or are they somewhat less protected?

13 MR. MOORE: They don't have the CSS  
14 protections in place. The reason for that is because  
15 we can't burn the disk key back to the blank media.  
16 We actually sought to re-encode the backup with CSS  
17 leaving it virtually untouched from the original. We  
18 found out that through industry agreements between the  
19 DVD drive burner manufacturers and the entertainment  
20 industry that they precluded those drives from writing  
21 to the specific sectors necessary to make that disk  
22 key appear on the media.

23 We could re-encrypt it with CSS. The  
24 algorithms are widely known. But if we did so, they  
25 would refuse to play in any player whatsoever. You

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1       couldn't play it in a DVD player and you could not  
2       play in a computer player.       So they would be  
3       unplayable.

4                       MR. TEPP:    Okay.

5                       MR. MOORE:   However I do that any piracy  
6       features that we've incorporated into the backup media  
7       in some ways even reenforce the protection mechanisms  
8       that the entertainment industry sought to include in  
9       the first place.

10                      MR. TEPP:    I'll save the rest of my  
11       questions for later.   Thank you.

12                      MS. DOUGLASS:  I just have a quick couple  
13       of questions.   Maybe you have addressed this before,  
14       Mr. Turnbull.   Are there DVD licenses for Linux  
15       players now?

16                      MR. TURNBULL:  The CSS license -- CSS is  
17       not required for the DVD format.   It is an overlay  
18       that has been widely adopted for movies but you can  
19       make DVD without using CSS.   The CSS license does not  
20       ask what operating system you are going to use.   It  
21       simply says that in your implementation you must take  
22       certain steps including keeping the keys secret and  
23       things like that.   So we don't ask people whether they  
24       are making Linus implementations or not.

25                      In conjunction with the hearing three

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1 years ago, we did go out and make an attempt to find  
2 out what was available. We discovered and provided to  
3 you and it was in the notice that there were two that  
4 we were able to find. There could be others we simply  
5 don't know about. As we understand it today, one of  
6 the two licensees we identified three years ago is  
7 still making a Linux-enabled implementation. That is  
8 available primarily through OEM deals with computer  
9 manufacturers. So it would come loaded with the  
10 computer.

11 MS. DOUGLASS: Thank you. Next question  
12 is very hypothetical. I'll back up a bit and talk  
13 about yesterday's hearing for purposes of illustrating  
14 what I'm talking about here. Yesterday I believe  
15 there was an opinion expressed that if there was an  
16 exemption for screen readers or TTS, the publishers  
17 would interpret that as a mandate and even if the  
18 blind and visually impaired which we were talking  
19 about yesterday could not implement or could not  
20 circumvent, the publishers would make it possible for  
21 that particular option to be placed in their eBooks.  
22 We were talking about eBooks.

23 Not speaking about whether anybody has  
24 proved a case or whether the criteria have been met or  
25 anything and if the Copyright Office recommended that

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1 there were a region coding exemption, what would  
2 prevent a region coding just to be turned off? I'm  
3 sorry I've given so many words to such a minor point.  
4 But what prevents the copyright owners from simply  
5 turning off region coding if there were an exemption?

6 MR. TURNBULL: There's nothing that  
7 prevents them from turning it off even today in the  
8 absence of an exemption. The region code is not a  
9 required feature under CSS or the DVD format licenses.  
10 It is something which is available to motion picture  
11 companies to use if they wish. It's also usable in  
12 combination.

13 You could have a disk that's coded for  
14 three regions and playable in those three regions. I  
15 think the answer to your question is there's nothing  
16 that prevents it now in your hypothetical and there  
17 would be nothing that would prevent it later.

18 MR. MITCHELL: With respect to  
19 entertainment software, it would be a different  
20 situation because we again think that there might be  
21 some impact on the availability of video games because  
22 of the way that region coding is used as a  
23 constructive tool to allow games to be made available  
24 in certain regions that might not be able to be made  
25 available in all regions.

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1           If a video game publisher for example is  
2 licensed for the use of certain content or certain  
3 music or a certain character only in the U.S. region,  
4 they can use region coding currently to make that game  
5 available in the U.S. Whereas if they would not use  
6 region coding, they would be faced with a very  
7 different economic and marketing decision.

8           Do we make this same game available all  
9 throughout the world and incur perhaps additional  
10 expenses in doing so? Or if we cannot obtain the  
11 licenses to make a particular game available in Europe  
12 or in Japan, do we simply forego making this title  
13 available in the United States? So it's an  
14 exceptionally useful tool to video game publishers for  
15 the purposes of being able to make these products  
16 available in specific regions and also as I mentioned  
17 to increase user enjoyment by ensuring that releases  
18 in those countries are released with appropriate  
19 content or released with appropriate music or  
20 localized to languages that are also compatible with  
21 that region.

22           MS. DOUGLASS: Ye, Mr. Einhorn.

23           DR. EINHORN: I fully want to endorse what  
24 Mr. Mitchell said. I think regional coding is an  
25 entirely valid business practice. As a professional

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1 economist, I would strongly not want to associate  
2 myself with any other wises. Mr. Attaway points out  
3 that a movie costs \$80 million to \$100 million to  
4 produce and distribute.

5 In so doing, we want to reserve the right  
6 for the content owners to make their content available  
7 through a bunch of windows that allow them implicitly  
8 to price discriminate against different kinds of users  
9 depending on where they live and also in their  
10 interest in seeing a movie. This is why a movie at a  
11 video store costs less than a first run theater.

12 What the distinction here is though is  
13 we're not considering whether or not to disallow  
14 regional coding. The system of course we want to  
15 encourage. We also have right now a number of ways in  
16 which regional coding can be defeated. It can be  
17 defeated through PAL converters on video cassettes and  
18 it also can be defeated by devices that you can buy  
19 and also for limited recoding devices that you can  
20 also have on your own computer.

21 So it's now possible to defeat regional  
22 coding. To defeat regional coding in a small number  
23 of cases, we're asking ourselves now are we adding any  
24 more to the fire here. What is the effect of allowing  
25 one more use this time for people who have the

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1 capacity to hack through certain protections and  
2 saying you know there are few of you out there but if  
3 you have the ability here to hack through a DVD and  
4 figure out how to use the DVD without having to buy a  
5 second DVD recorder and you can save yourself some  
6 money? I guess it was a lawful before and can be a  
7 lawful use after. But I don't mean to suggest here  
8 that regional coding is something that we want to  
9 defeat as a global strategy.

10 MR. MOORE: I'd like to add that while we  
11 talked before about how you must decrypt CSS encrypted  
12 data in order to get at the region code, the reverse  
13 is not true. In the absence of CSS and in the absence  
14 of encrypted data, you can still apply the region  
15 code. The two are not dependant on each other.

16 MR. TURNBULL: Two things. The first is  
17 that actually makes the point that I was trying to  
18 make before which is region code is in fact  
19 independent from the technology of CSS. The second  
20 issue is however the reason why CSS as a license  
21 matter requires the detection of the region code is  
22 that there is no other legal obligation to do that.  
23 So you could insert the code in a DVD disk that was  
24 created without CSS but there would be absolutely  
25 nothing that would require anybody to look at it.

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1 Therefore the system wouldn't work.

2 MS. DOUGLASS: Thank you.

3 MR. SAFIR: I'd like to add to that just  
4 that from my perspective, I really don't care about  
5 regional code either. I don't understand why they  
6 really need it. They can just distribute it  
7 regionally just like any other products that Nike does  
8 or anybody else. But in and of itself, the regional  
9 coding is not an issue. The real issue is access to  
10 the information.

11 MS. DOUGLASS: Thank you.

12 CHAIRPERSON PETERS: Back to you, David.

13 MR. CARSON: You don't have any questions.

14 CHAIRPERSON PETERS: No.

15 MR. CARSON: Let me follow up, Mr.  
16 Turnbull, with what you just said. First of all, I  
17 gather the region code itself is a technological  
18 measure that controls access. Is that understood and  
19 agreed to?

20 (Chorus of yes.)

21 MR. TURNBULL: Yes, when responded to.

22 MR. CARSON: Okay, understood. So you  
23 don't need CSS to have region coding. On the other  
24 hand, I assume CSS might be one obstacle in getting to  
25 the region code and doing something with it. Is that

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1 a fair statement?

2 MR. TURNBULL: Yes, I suppose.

3 MR. CARSON: I want to spend some time on  
4 region coding but first a couple of other questions.  
5 I think one of you may have made a passing reference  
6 to but they were on the agenda for today and I just  
7 want to cover them very briefly. First of all, is  
8 there anyone here who would contend that it is a  
9 violation of Section 1201(a)(1) to circumvent an  
10 access control that is applied on a DVD that contains  
11 nothing but public domain material? Is there anyone  
12 here who says that if someone put CSS on a DVD that  
13 simply had "Birth of A Nation" on it and nothing else  
14 and I circumvented that would I be violating Section  
15 1201(a)(1)? Silence. Shira, would I be?

16 MR. MOORE: I would certainly say no.

17 MR. CARSON: Okay. I guess I would like  
18 to hear from some of the content providers what their  
19 position is on it because their response is probably  
20 a more interesting one to me.

21 MS. PERLMUTTER: If it's purely public  
22 domain material then the mere act of circumvent, no.

23 MR. CARSON: No one else disagrees. There  
24 might be some interesting questions when it's mixed in  
25 with public domain and copyrighted and that's a

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1 different question I understand. We were also  
2 supposedly going to be talking about tethering of DVDs  
3 although no one has talked about it. We had at least  
4 one comment. I just wanted to get some clarification.

5 At least one of the comments has alleged  
6 that DVDs can be tethered to a single platform  
7 preventing users from playing the same DVD on a  
8 computer and a standalone player. Now I'm not  
9 familiar with that at all. I'm just wondering if  
10 there's anyone here who can tell me if that is or is  
11 not in fact the case. I suppose potentially it can be  
12 done. Are there in fact DVDs out there that can be  
13 only tethered to computers or only to non-computer  
14 players so you can't use them on both?

15 MR. SAFIR: It's worse than that.

16 MR. MOORE: Mr. Carson, actually what you  
17 might be thinking about is when I spoke before about  
18 error correction code and how our software actually  
19 works to restore a DVD to a playable condition. It's  
20 because of the different technologies that reside in  
21 a player that sits on top of my television and the DVD  
22 player in my computer.

23 If a DVD has become damaged, the DVD  
24 player that sits on top of my television doesn't have  
25 the circuitry on the inside of the box to go through

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1 the effort of actually trying to do that error  
2 correction and displaying the DVD. Do you follow what  
3 I'm saying?

4 MR. CARSON: Yes.

5 MR. MOORE: So it will not play in set-top  
6 player.

7 MR. CARSON: But that's a damaged DVD.

8 MR. MOORE: That's a damaged DVD of some  
9 kind whether it's delaminated or it's been scratched.  
10 However that DVD may very well not necessarily but may  
11 very well play in the player in my computer because my  
12 DVD player in my computer has the necessary circuitry  
13 on the inside to actually go through the effort of  
14 reading the error correction code and trying to make  
15 the adjustment. Does that answer your question?

16 MR. CARSON: That's not really my question  
17 because the comment which I unfortunately don't have  
18 in front of me but as I understood what the comment  
19 was asserting is that there are some DVDs marketed  
20 that are actually on the market so that once you buy  
21 it off the shelf and assuming it works the way it's  
22 supposed to work, it is restricted to a single  
23 platform. You cannot for example play it on a  
24 computer perhaps or you cannot for example play it on  
25 a DVD player that you hook up to a TV set.

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1 MR. SAFIR: That was actually my comment.  
2 It's the Vital Books sting. Vital Books has a product  
3 where they sold the entire dental school's textbooks  
4 plus other material that students shouldn't have to  
5 buy. It forces them to buy them at the university  
6 level if you are in the program. Then it only works  
7 with the Vital Books player which is only available on  
8 a certain pre-installed max by Vital Books. At the  
9 end of the semester, the books turn themselves off.

10 When they marketed this, the infringement  
11 on fair use was so clear that they said as a marketing  
12 ploy in their website that if publishers should come  
13 over and help us do this project because you won't  
14 have to compete with your used books anymore in the  
15 used book market. Then when I pointed that out to  
16 them in a Slashdot thread when I was working at NYU at  
17 the time in which I quit over that whole thing, then  
18 what happened after that was they removed that stuff  
19 from the website because they realized it was so  
20 damaging to them.

21 Now the condition is still like that.  
22 Basically most of the DVD at this point is still not  
23 printable. Since then, they have been able to print  
24 it but it still turns itself off at the end of the  
25 semester.

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1 MR. CARSON: My question is really since  
2 we're talking about audio-visual works that was really  
3 what I was talking about.

4 MR. SAFIR: But the point is it's tied to  
5 one subset of a whole --

6 MR. CARSON: I understand what you are  
7 talking about. I get the point on that. The focus of  
8 today's hearing is really audio-visual works.

9 MR. TURNBULL: Let me maybe comment  
10 briefly. CSS was designed explicitly as a multi-  
11 industry matter and it was tested and reviewed across  
12 platforms and across industries explicitly for the  
13 purpose of making sure that in fact CSS was usable and  
14 is usable across any platform that anybody wants to  
15 build. There is no license limitation and the  
16 technology was vetted by many people in the computer  
17 industry when it was initially developed.

18 MR. CARSON: No, I don't think the comment  
19 was suggesting this was a function of CSS but rather  
20 to be a visual works marketed in DVD format.

21 MR. MOORE: Mr. Carson, I think I  
22 understand your question. As far as I know, there are  
23 no DVDs that are currently marketed that way. But I'm  
24 certainly aware of the technology inside of the DVD  
25 format that certainly could provide for that.

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1 MR. CARSON: Sure.

2 MR. TURNBULL: I think his backups  
3 actually are.

4 MR. MOORE: Pardon?

5 MR. TURNBULL: If I understood your  
6 presentation before, your backups are tethered to the  
7 particular device.

8 MR. MOORE: That has more to do with the  
9 watermarking that we actually put into the video. The  
10 backups will still play on a regular DVD player.

11 MR. CARSON: Okay, let's spend a moment on  
12 the backups. We've heard by it's not fair use to make  
13 a backup of the DVD. We've heard Mr. Safir's  
14 interpretation of the fair use statute. What I don't  
15 think I've heard from Mr. Moore or perhaps Mr. Lutzker  
16 out of their mouths why it's fair use to make a backup  
17 of a DVD. I would think you would want to make that  
18 case to us. Here's your chance.

19 MR. MOORE: Well, it's a fair use or a  
20 non-infringing use or both, I'm not a lawyer.

21 MR. CARSON: You have one.

22 MR. MOORE: I'm just an average consumer.  
23 I'll let Mr. Lutzker answer the legal definition or  
24 his legal definition if you would like to hear it.  
25 But mine is a non-infringing use. Mine is a use where

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1 I'm not infringing on the copyright holder. I'm not  
2 doing anything that would otherwise take any revenue  
3 outside of the copyright holders' pockets.

4 MR. CARSON: Can I just stop you? You are  
5 making a copy. Mr. Lutzker, tell me why that's not  
6 infringement because we know that's a violation of  
7 Section 106 unless you can give me some other  
8 provision that gets him out of the bind that he's just  
9 put himself in.

10 MR. LUTZKER: I don't think that there's  
11 any question that a backup copy is a copy. I think  
12 we'll have uniform agreement on that. There is a  
13 separate and more subtle question under 117 which Mr.  
14 Attaway has initially addressed in terms of whether a  
15 DVD is a computer program as defined under that  
16 provision. I don't know that you are going to reach  
17 that decision in this proceeding or not. But that's  
18 a separate issue in terms of the nature of backups  
19 with regard to computer programs.

20 Making an assumption which I wouldn't  
21 conceive about that a DVD for our purposes does not  
22 immediately fall in the 117 issue. Therefore, the  
23 question is then is it a fair use. The answer is it  
24 may be a fair use to make a backup of a program under  
25 certain circumstances.

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1           The case that we have presented is really  
2 a split case in the sense that it is clear and I would  
3 beg to differ with the Register in terms of consumers'  
4 expectations. Consumers' expectations are that when  
5 you buy a DVD you're going to have it for as I would  
6 say a reasonable period of time.

7           If DVDs are not indestructible but a  
8 fragile medium that is subject to material wear and  
9 tear such that the access controls can be damaged and  
10 therefore deny access to the very product that you  
11 have purchased, under what circumstances should you be  
12 permitted as a lawful acquirer of that product to make  
13 an acquisition of that product and then to make a  
14 backup for use purposes? The case that has been  
15 presented in the full comments which we do address the  
16 backup more specifically and here we've addressed the  
17 damaged aspect but the ability to make a backup of a  
18 perfectly clean, undamaged DVD in my view may be a  
19 concomitant necessity related to the fragility of the  
20 medium and combined with the marketing practices of  
21 the industry where consumers have indicated we can't  
22 get replacement copies, we are basically forced to  
23 repurchase the product.

24           From a fair use point of view, there is no  
25 question in my mind that the ability to access a work

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1 that you have lawfully purchased falls within the  
2 parameters of fair use. I don't think you would make  
3 any finding other than that. If you purchased the  
4 product and if it's subject to access controls, you  
5 have made a lawful acquisition and you should be  
6 entitled to access that work. Whether you can do  
7 other things with it falls within the parameters of  
8 Section 107 or other exemptions but you should be able  
9 to access it.

10 If you can't access it, then there is a  
11 material adverse harm to the consumer. The question  
12 then becomes are you allowed on a self-help basis on  
13 a private individual basis to make a backup in  
14 anticipation of a problem materially occurring. As  
15 long as the medium is as fragile as it is, there is a  
16 legitimate basis to conclude that fair use under those  
17 circumstances is the making of a backup.

18 What 321 has done in its marketing  
19 practices is educate consumers as to what you can do  
20 with this by adding indelible disclaimers and warnings  
21 that facilitate the proper educational use of that.  
22 They have done this on their own initiative. They've  
23 added methodologies and digital technologies which can  
24 allow the tracing if there is an abuse of the  
25 practice. Under the circumstances that have been laid

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1 out in the combined comments and the testimony today,  
2 there is support for the conclusion that an individual  
3 can make a backup copy of a lawfully acquired, fully  
4 paid for work for private personal use only.

5 MR. CARSON: Okay. Let's turn to region  
6 coding. I'm going to focus to the three of you, Ms.  
7 Perlmutter, Mr. Turnbull and Mr. Attaway. First of  
8 all, the justification for region coding, the one that  
9 comes instantly to mind to me and I certainly recall  
10 focusing on three years ago is exactly the marketing  
11 window. At different times, you don't want people in  
12 other parts of the world to be able to play DVDs when  
13 you are about to open in the theaters. I'm talking  
14 about motion pictures. I'll get to you in a moment,  
15 Mr. Mitchell. That's the basic concept I gather. Is  
16 that right?

17 MR. TURNBULL: Yes.

18 MR. CARSON: Apart from that, is there any  
19 other reason why region coding is important in the  
20 motion picture industry?

21 MR. TURNBULL: My understanding is that  
22 there are occasions when a particular company will  
23 have the distribution rights in one area and not in  
24 another.

25 MR. CARSON: Sure. But that's been true

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1 in all of the copyright industries for ages and most  
2 publishers of various kinds of materials haven't  
3 really felt that they have to prevent people from  
4 reading the book in the region where they weren't  
5 permitted to sell it.

6 MR. TURNBULL: Correct but I think the  
7 reason why there was a sense that DVDs might be  
8 different is because you can for example have multi-  
9 languages and frequently do have multiple languages on  
10 the DVD. You can encode different playback formats on  
11 the same disk. There might be reasons of efficiency  
12 and other reasons to want to do all of that and then  
13 say but I want to make sure that this stays in a  
14 particular region because I only have the rights in  
15 that region. So there may be some differences with  
16 other past kinds of technologies.

17 MR. CARSON: Shira.

18 MS. PERLMUTTER: And to amplify on that a  
19 little bit, our comments are going to this are in  
20 somewhat more detail. I think you might want to ask  
21 some questions when Dean Marks testifies at hearing in  
22 L.A. But certainly just as with the video games,  
23 there is some issues about local languages, local  
24 censorship, requirements that can make a difference  
25 from region to region.

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1 MR. CARSON: But why does that mean that  
2 you have to prevent people in those areas from  
3 actually be able to view them as opposed to simply not  
4 marketing the content in those areas? Aren't you  
5 going far beyond what you have to do by coding it so  
6 that it can't even be seen on a player in that region?

7 MR. ATTAWAY: We are only marketing in  
8 those regions. People can view them. Anyone can go  
9 out and buy a Region VI player if they feel that  
10 strongly that they want to want Region VI DVDs in the  
11 U.S. Or visa versa, anyone in Singapore can purchase  
12 a Region I DVD player in the U.S. and take it to  
13 Singapore and play Region I DVDs in Singapore.

14 MR. CARSON: I understand that. It's not  
15 really answering my question though. Why do you have  
16 to prevent someone from being able to view a Region II  
17 DVD here in the United States?

18 MR. ATTAWAY: I just said that we are not  
19 preventing it.

20 MR. CARSON: You are making it awful hard  
21 though.

22 MR. ATTAWAY: No harder than if someone  
23 chooses to release only on VCD as I said earlier.

24 MR. CARSON: There is a difference I  
25 think.

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1 MR. ATTAWAY: You would have a hard time  
2 finding a VCD player in the United States too.

3 MR. CARSON: Let me try this out on you  
4 because I think there is a difference but maybe you'll  
5 say it's not a difference. It's one thing to say I  
6 have no reasonable expectation that I can play a VCD  
7 on my video cassette player or even on my DVD player  
8 because it's a different animal. It's a different  
9 thing.

10 Here though you are talking about a DVD.  
11 You're talking about a choice that the content  
12 provider has made to disable that DVD from playing in  
13 a device that otherwise would be able to play it. Now  
14 that's very different from the VCD situation where I'm  
15 trying to play it on VHS recorder or my DVD player.  
16 Do you see the difference? If so, can you explain why  
17 I shouldn't care about that difference?

18 MR. ATTAWAY: I understand the point that  
19 you are making but the concept of regional coding was  
20 intended to more or less replicate the technology in  
21 the analog world when there were different analog VCR  
22 technologies, NTSC, PAL and SECAM, which because of  
23 those differences it enabled motion picture companies  
24 to market motion pictures regionally.

25 When DVD was being considered, the

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1 decision was made to incorporate regional coding in  
2 order to provide the motion picture companies the  
3 ability to maintain that regional marketing practice.  
4 It was felt that they needed that ability and to  
5 induce motion picture companies to release product in  
6 DVD format, everyone involved embraced the regional  
7 coding concept. I submit to you consumers are better  
8 off because of it because it is one of the inducements  
9 that allow people to watch movies on DVD format  
10 instead of VHS. It was a good thing and not a bad  
11 thing.

12 MR. CARSON: So if you couldn't do region  
13 coding, the movies industries would choose not to  
14 market DVDs.

15 MR. ATTAWAY: I believe that was the  
16 position of some companies, yes.

17 MR. CARSON: And just going back to what  
18 you said a moment ago, is it your understanding that  
19 the reason that in the video cassette world we have  
20 different kinds of formats, PAL, SECAM, NTSC, the  
21 purpose of that was in fact so that video cassettes  
22 marketed in Europe for example couldn't be marketed  
23 here?

24 MR. ATTAWAY: No.

25 MR. SAFIR: This is false.

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1 MR. CARSON: Mr. Safir, I really don't  
2 need you. I really don't. So we are talking about  
3 something different here. You may be replicating what  
4 happened but the reasons why that happened in the  
5 video cassette world were accidental or reasons that  
6 because in different areas of world choices were made  
7 to adopt different formats.

8 MR. ATTAWAY: Correct.

9 MR. CARSON: Here you are making a choice  
10 to say people will not be able to play a Region II DVD  
11 in Region I. That is a little different, isn't it?

12 MR. ATTAWAY: It is not different in terms  
13 of the marketing practices that are desired to be  
14 followed.

15 MR. CARSON: All right. I understand  
16 that. Now we've had a number of comments and one in  
17 particular I remember is we have a large Indian  
18 community in the United States. We have communities  
19 in the United States obviously from all over the  
20 world. The Indian one I remember because we had  
21 several comments but one in particular pointing out  
22 that as I'm sure you know the Indian film industry is  
23 the largest film industry in the world.

24 There are many Indian expatriates over  
25 here who would like to be able to watch DVDs. The

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1       assertion is that you can't watch them over here  
2       because they have the wrong region code and yet they  
3       are not even marketed here. First of all, that's the  
4       premise. Is that accurate as far as you know?

5               MR. ATTAWAY: I'm not a big devotee of  
6       Indian movies. I just don't know if they are  
7       regionally coded or not. I can't imagine that they  
8       would be.

9               MR. CARSON: You make a good point that  
10       you thought the testimony was that the Indians didn't  
11       use region coding. Three years ago, that's what I  
12       thought I'd heard. That's not what I read in comments  
13       in front of us now and that's what I'm trying to get  
14       at. Is there anyone here who has any information on  
15       that?

16               MS. PERLMUTTER: I guess the problem we're  
17       having is it's the Indian film industry that makes  
18       that decision, not any of us. We don't necessarily  
19       know what they are doing.

20               MR. CARSON: Michael.

21               DR. EINHORN: Can I ask for a point of  
22       clarification? Regarding the Indian matter, I would  
23       be very surprised if they regional code. I'm sure  
24       it's just coded for India.

25               MR. CARSON: But that's regional code,

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1 isn't it?

2 DR. EINHORN: Only for one region.

3 MR. CARSON: Right.

4 DR. EINHORN: Would that be covered by the  
5 DMCA since it's a foreign copyright? It's a work that  
6 is not --

7 MR. CARSON: Yes. Don't worry about that,  
8 Michael. It's not an issue. Let's assume for the  
9 moment and hopefully we'll get the real fact because  
10 apparently none of us here have the real facts.  
11 Fritz.

12 MR. ATTAWAY: I was just advised that in  
13 the reply comments of IIPA the statement is made based  
14 on information given to them by the Indian film  
15 industry that they do not regionally code.

16 MR. CARSON: So that's not an issue.  
17 Okay.

18 MS. PERLMUTTER: But only to follow up on  
19 that, essentially it's the choice of the film maker  
20 not to encode so that Indians all over the world can  
21 watch it in that format.

22 MR. CARSON: Which is great.

23 MS. PERLMUTTER: That's always possible.  
24 There's no requirement that anything be region coded.

25 MR. CARSON: Right. But let's assume and

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1 this may be a false assumption now. You certainly  
2 have given me information that suggests that what was  
3 in that one comment was false. Let's assume that  
4 there are a more than trivial number of cases where  
5 people who acquire abroad DVDs of motion pictures that  
6 are not available for sale in the United States want  
7 to view them in the United States. What's the  
8 justification for preventing someone who wants to do  
9 that from doing it?

10 MR. ATTAWAY: The justification is to  
11 maintain the regional distribution system of motion  
12 pictures. There are a lot of people not so much in  
13 the United States but in Asia who would like to view  
14 motion pictures on DVD before they reach theaters in  
15 Asia. Regional coding was developed to allow motion  
16 picture companies to engage in sequential marketing.

17 MR. CARSON: Let me make my question  
18 clearer. This may obviate the need for you to reply  
19 because this is not necessarily an attack on regional  
20 coding. In fact nothing I've said should be  
21 considered an attack on regional coding.

22 MR. ATTAWAY: I feel like I'm being  
23 attacked.

24 (Laughter.)

25 MR. CARSON: You're supposed to, Fritz,

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1 but that's just for the fun of it for me. The point  
2 is I may ask tough questions because I'm trying to get  
3 things out of you. That doesn't necessarily mean I  
4 have a opposing point of view.

5 MR. ATTAWAY: I understand.

6 MR. CARSON: But in any event, the premise  
7 I'm getting at really is why shouldn't someone here in  
8 the United States who purchased a DVD in Japan or  
9 India, brought it home and wants to see it if they can  
10 figure out how to do it be able to circumvent the  
11 region coding in the privacy of his or her own home so  
12 he or she could watch it. That's the question.  
13 Shira.

14 MS. PERLMUTTER: Two points. The first is  
15 it's just important to recognize that what you are  
16 talking about is affecting the rights of foreign  
17 copyright owners and how they decide where their work  
18 is going to be viewed. This exception would be one  
19 that would say that you can circumvent to get access  
20 to a foreign right holder's work that they intended to  
21 be seen somewhere else. I just think that's important  
22 to keep in mind.

23 MR. CARSON: So you think the Copyright  
24 has the right to determine where a copyright owner's  
25 work is going to be viewed.

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1 MR. SAFIR: Isn't that nice.

2 MS. PERLMUTTER: I think we have the  
3 rights that are set up in the Copyright Act. But I  
4 think if something is encoded in a certain way, it's  
5 meant to be sold in only one place.

6 MR. CARSON: Sold. My person bought in  
7 India and brought it back here.

8 MS. PERLMUTTER: But my point is only that  
9 you are dealing with issues that have to do with  
10 foreign copyright owners' interests and rights and  
11 that's just something to take into account as you look  
12 this.

13 MR. CARSON: Sure.

14 MS. PERLMUTTER: My second point was going  
15 to be that overall what you are looking at is the  
16 extent to which there have been adverse impacts. The  
17 point is that there are many ways that in those  
18 relatively small percentage of cases where someone  
19 buys a foreign film that happens to be regional coded  
20 and wants to watch it here - and we have no idea on  
21 this panel at the moment what level of problem we're  
22 talking about - that there are many other ways to do  
23 it. Bruce has talked about some of them. So it's  
24 important to look at the whole picture. Is access for  
25 doing that kind of thing actually being unduly

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1           impaired rather than the specifics of the particular  
2           exemption in 1201(a)(1).

3                       MR. CARSON:   Okay.   Let's turn to the  
4           video game industry.   We heard articulated that the  
5           primary basis for region coding in the motion picture  
6           industry which is one that this office certainly three  
7           years ago not only understood but more than understood  
8           said that's legitimate and that's part of the reason  
9           why we don't really see an issue with respect to  
10          region coding.   That's what we said at that time.

11                      Now with video games, I don't think you  
12          have the same issue that we just talked about with the  
13          motion picture industry about timed release.   First of  
14          all, video games don't play in motion picture theaters  
15          obviously.   So that's not an issue, correct?

16                      You've given us a handful of reasons why  
17          region coding is there.   One is that it helps you  
18          comply with your licensing agreements.   Another is  
19          that it allows a game publisher to match content to  
20          cultural sensibilities and so on to basically target  
21          a particular addition as it were of a video game to  
22          the local market.   The third one sounds like the same  
23          thing.   I'm not distinguishing very well because it's  
24          marketability and user enjoyment.

25                      One is maybe you want to comply with local

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1 laws and the other is you want to target it to your  
2 market and what your users expect. Why do you need  
3 region coding for that? Why can't you just sell a  
4 particular country's edition in that particular  
5 country? If someone wants to bring the Japanese video  
6 game here and play it, let them play it. Why are you  
7 preventing them from doing it and why should we care  
8 that you should be able to?

9 MR. MITCHELL: There is another rationale  
10 too that I believe you had recognized during the 2000  
11 rulemaking as a legitimate purpose for regional  
12 coding. It is enhancing local distributor marketing  
13 opportunities for regionally appropriate content. We  
14 would suggest that this too for the video game  
15 industry is an important consideration in that it does  
16 foster the growth of local distributorships, local  
17 retailerships for appropriately region coded product  
18 and discourages the world market in one region product  
19 that might otherwise interfere with that development  
20 in what is basically a nascent industry in making key  
21 markets around the world.

22 As to your question about why those  
23 purposes couldn't also be accomplished through just  
24 simply marketing a particular content, I suppose you  
25 are correct that those purposes could initially be

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1 accomplished. However it wouldn't necessarily  
2 guarantee that those products couldn't be resold in  
3 other markets en masse and would not necessarily  
4 facilitate those purposes in the secondary markets to  
5 which it is sold.

6 MR. CARSON: Okay. That's it.

7 CHAIRPERSON PETERS: Since it is 1:00  
8 p.m., what we will do is conclude now. One more?

9 MR. TEPP: I promise to be short. I just  
10 want to follow up on something. Thank you for your  
11 indulgence. Mr. Carson earlier asked "Is a region  
12 code an access control?" Mr. Turnbull's reply I  
13 thought was an interesting one, "When it's responded  
14 to." That triggered in my mind a different part of  
15 Section 1201 that says affirmative responses are not  
16 required from devices. Are devices which fail to  
17 respond to region controls, multi-zone players, more  
18 like devices that avoid or bypass the region control  
19 or are they simply failing to affirmatively respond to  
20 region controls?

21 MR. TURNBULL: Because the manufacturers  
22 under the CSS license are obligated to interpose some  
23 form of technology that makes it difficult to avoid or  
24 bypass simply or to ignore the region code and to hack  
25 into the system that responds to the region code,

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1 there is technology as I said earlier which would have  
2 to examined on a product-by-product, producer-by-  
3 producer basis which protects that capability in a way  
4 that likely would considered to be an effective  
5 technological measure under the DMCA.

6 MR. TEPP: Aside from licensing issues  
7 though, you have a player out there that's a multi-  
8 zone player. It may be violating your license. It  
9 may be violating at patent but it exists. For  
10 purposes of 1201, is it a circumvention device?

11 MR. TURNBULL: Let me try it again. The  
12 XYZ manufacturing company has made a DVD player  
13 including a robustly implemented region code playback  
14 system. In order for the XYZ manufacturer's device to  
15 become a multi-zone player, someone has to defeat the  
16 region code system that they have built into their  
17 player.

18 MR. TEPP: What if it was never built into  
19 the player is what I'm asking.

20 MR. TURNBULL: They are. The multi-zone  
21 players that I'm aware of that are on the market what  
22 has happened is that manufacturers' implementations  
23 have been defeated and their parts have been  
24 substituted in an after-market process that's done  
25 either by the user or more likely by a service center.

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1 CHAIRPERSON PETERS: David has one.

2 MR. CARSON: I just want to follow up on  
3 that. By whatever means I get myself a multi-zone  
4 player, as far as you're concerned I bought it. I got  
5 it. Now I'm going to watch a DVD from Region III.  
6 Have I just violated Section 1201(a)(1)?

7 MR. TEPP: That's where I was going.

8 MR. CARSON: Yes.

9 MR. TURNBULL: I don't see how you have  
10 actually defeated anything that was in that product  
11 because it was not in that product when you bought it.

12 MR. CARSON: Well the region coding was in  
13 the DVD and I have a product which doesn't exactly  
14 ignore the region coding. It just accommodates the  
15 coding for all regions. While I'm doing that and  
16 actually using that, am I circumventing any access  
17 controls?

18 MR. TURNBULL: I don't think so.

19 MR. CARSON: Any other views?

20 MR. ATTAWAY: I think that is analogous to  
21 when you purchase a DVD drive for a computer as I  
22 understand it. You can set it for any region that you  
23 want to. As a matter of fact, you can go back and  
24 forth several times. So you're clearly not violating  
25 1201(a). Could I make one more point? Mr. Carson,

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1 you were so tough on me and I was flustered. I  
2 neglected to make this point.

3 Actually I tried to make the point earlier  
4 and I didn't make it very well. The point is that you  
5 should not permit circumvention of regional coding  
6 because it removes the incentive to market those works  
7 in the U.S.

8 If you allow circumvention of just for the  
9 sake of this example Indian films to be viewed in the  
10 U.S. which are encoded regionally, you eliminate the  
11 incentive of Indian producers to release those films  
12 in Region I. So all of the people who do not have the  
13 ability to circumvent that would like to view those  
14 films will not be able to. That's why you shouldn't  
15 do it.

16 MR. LUTZKER: If I could add just one  
17 thing also along the lines of what Fritz said and  
18 supplementing in response to the questions about the  
19 backup because we do deal with specifically in our  
20 written comments at pages nine, ten and eleven, you  
21 could look at that and also it addresses the very  
22 first question you asked about is VHS a soon-to-be  
23 eliminated technology. What we did in these comments  
24 is and I realize representatives here may not be aware  
25 of it but quote members of the studios who are

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1 suggesting that in fact VHS is a technology of the  
2 past. Many of them are eliminating products so that  
3 you can only get it in DVD format.

4 CHAIRPERSON PETERS: With that, we will  
5 conclude this morning's hearing and for those who may  
6 be testifying this afternoon, we'll be back in an  
7 hour. Off the record.

8 (Whereupon, at 1:07 p.m., the above-  
9 entitled matter recessed to reconvene at  
10 2:08 p.m. the same day.)

11 CHAIRPERSON PETERS: On the record. We  
12 will resume the hearing this afternoon. Almost  
13 everybody was here this morning so I won't go through  
14 the formal opening. Just to make it clear that there  
15 are no time constraints but you should be concise in  
16 your remarks. Then after you finish your testimony  
17 and everybody has finished then the panel will ask  
18 questions and we will have the transcript up within  
19 one week. But you still have an opportunity to  
20 correct it and then the corrections will be up on-  
21 line.

22 This afternoon we're going to basically  
23 here from Mr. Montoro, Mr. Hernan, Mr. Band, Mr.  
24 Sulzberger, Mr. Mohr, Mr. Simon and Mr. Kupferschmid.  
25 Let's start with you, Mr. Montoro.

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1 MR. MONTORO: Good afternoon, Ms. Peters  
2 and members of the Board and thank you for inviting me  
3 to speak before you today. I welcome Mr. Tepp. It's  
4 nice to have you on the Board with us.

5 Since time is limited, I may not address  
6 every issue but that in no way means that I either  
7 agree with disagree with it. It does not seem like it  
8 was only three years ago that I was here last. During  
9 the 2000 rulemaking, I sat before you and explained  
10 the problems consumers faced with using dongled  
11 software when those mechanisms failed to permit access  
12 because they either have malfunctioned, been damaged  
13 or have become obsolete.

14 For those that were not present during the  
15 previous hearings, what I have here in my hand is  
16 called a dongle and while one of these devices may  
17 seem innocent enough, quite often consumers are forced  
18 to use multiples of these devices to run software  
19 programs on their computer. This is also a cause of  
20 failure. This is what we've been asked at times to  
21 run on top of a laptop. Can you see that?

22 My testimony at that time, along with  
23 others on the subject, was in some way responsible for  
24 the second exemption that arose from the first  
25 rulemaking. As a father, I have derived great

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1 pleasure in watching my daughter grow up over the past  
2 10 years. As parents, we try to teach and lay down  
3 certain guidelines, but we don't always get to see how  
4 well we did. In my testimony today, I hope to show  
5 you that the guidelines this Office laid out regarding  
6 the second class of exemptions in 2000 were not only  
7 correct but have done much good as well and that a  
8 renewal of that exemption is warranted.

9 In October 2001, I received an inquiry  
10 from a potential client. This was a large  
11 organization with amazing people resources that did an  
12 extensive analysis report. Apparently they had heard  
13 of my company through my comments and testimony during  
14 the previous rulemaking. I learned they had two  
15 programs which used a dongle that ran on the same  
16 machine a the same time. One set of these access  
17 control devices had failed in the past. The  
18 manufacturers were no longer in business and there was  
19 no way to replace these devices that were starting to  
20 act up.

21 I also learned that due to budget  
22 constraints and the amount of time it would take to  
23 train people on new programs, it was not feasible to  
24 find and use an equivalent piece of software.  
25 Further, incredibly enough, no one in their vast

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1 organization had the technical expertise to replace  
2 these control mechanisms.

3 That potential client was the United  
4 States Department of Justice. The agency involved was  
5 the Immigration and Naturalization Service, the INS.  
6 This software was used for the travel document  
7 production system which as you might know produces  
8 passports and visas.

9 In the words of the INS, "If those dongles  
10 had failed again, there would have been an indefinite  
11 halt in travel document production." In a post 911  
12 world, I think you can all imagine the implications of  
13 a catastrophe like that.

14 I am proud to say that this potential  
15 client became a customer of mine, and this is in large  
16 part due to the decision made by the 2000 panel and  
17 the Register of Copyrights. Thank you, Ms. Peters.  
18 We were able to solve the access control problems the  
19 INS was having and once we completed the project, I  
20 received a very nice thank you letter from the INS  
21 that is attached. All of you should share in that  
22 praise.

23 I have read the papers of some of my  
24 opponents that claim a renewal of this exemption is  
25 not justified simply because a number of the comments

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1 and reply comments only included one or two examples  
2 as evidence that a real problem exists. I would like  
3 to point out that nowhere in the notice of inquiry  
4 does it state that the submissions from the previous  
5 rulemaking are to be ignored. And in those comments  
6 and reply comments there is a substantial amount of  
7 material presented by my company, the National Library  
8 of Medicine, the National Agricultural Library and  
9 others to justify a renewal of this exemption.

10 I would not want anyone to think that the  
11 problem of access control devices is a trivial one.  
12 Therefore I would like to submit along with my  
13 testimony today an additional 87 pages of examples  
14 that have to do with malfunctioning, obsolete or  
15 damaged devices. Ms. Peters stated in the Final  
16 Ruling of October 27, 2000, "that no evidence had been  
17 presented that the marketplace is likely to correct  
18 this problem in the next three years." And three  
19 years later, we see how right she was. Please take  
20 note that of the papers I am submitting with my  
21 testimony, none were previously presented, and in  
22 fact, all of the problems submitted today have  
23 occurred over the past three years.

24 It seems that others are aware of the  
25 problems users face and I would like to applaud the

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1 Software & Information Industry Association ("SIIA")  
2 and its president, Mr. Ken Wasch, for their forward  
3 thinking. The SIIA represents over 600 high-tech  
4 companies that develop and market software and  
5 electronic content. In their reply comments on page  
6 10 paragraph 2, Mr. Wasch says that "even with only a  
7 few examples submitted, the SIIA still recognizes the  
8 need for an exemption and is willing to give those  
9 commentators the benefit of the doubt."

10 He goes on to say that they do not oppose  
11 the codification of an exemption if one meets certain  
12 criteria, "Subject to threshold conditions, literary  
13 works including computer programs and databases that  
14 the circumventor has legal access to, but are  
15 protected by access control mechanisms that fail to  
16 permit such access because of malfunction, damage or  
17 obsolescence which results, or in the immediate future  
18 will result, in damage to such works."

19 I do take issue with some of those  
20 threshold conditions that he mentions. I also wonder  
21 if they are outside of the scope of this rulemaking  
22 procedure, which is to determine a class of works. As  
23 Ms. Peters suggested in the final rulemaking,  
24 "Congress should consider amending section 1201 to  
25 provide a statutory exemption for all works,

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1 regardless of what class of work is involved, that are  
2 protected by access control mechanisms that fail to  
3 permit access because of malfunction, damage or  
4 obsolescence." It would seem that this would be the  
5 proper place for those conditions to be incorporated.  
6 However just in case, I have to go over it anyway.

7 The first condition is "a person or  
8 organization should have legal access to the work at  
9 the time of circumvention." I certainly agree on this  
10 but wouldn't it be assumed that the person must have  
11 legal access anyway because I don't think we'd be  
12 making exemptions for infringing users. As long as  
13 the user has legal access to the work, then the  
14 copyright owner will already have been compensated.

15 In the course of good business practices,  
16 my company has required a copy of an invoice or some  
17 other proof of purchase from a customer. There are  
18 however occasions where the person or company cannot  
19 locate a copy of their invoice because the software  
20 had been purchased too long ago. For instance, the  
21 Department of Justice was not able to locate an  
22 invoice for their software because it was purchased  
23 more than eight years ago. Since companies do not  
24 need to maintain tax records for that long, it would  
25 be an undue burden to ask them to provide an invoice

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1 or not receive relief. Therefore I would suggest when  
2 some other proof of purchase is not available, there  
3 must be an alternative such as a declaration under  
4 penalty of perjury. My company has used both of these  
5 methods for many years now.

6 The second condition given "any person or  
7 organization seeking to qualify for an exemption must  
8 notify the copyright owner and give the copyright  
9 owner the opportunity to cure the problem, for  
10 instance, by providing a copy of the work in a form  
11 not protected by access control technologies or fixing  
12 the problem with the access control measure."

13 On this I disagree. In the final  
14 rulemaking as well as in the papers I submitted today,  
15 it is clearly stated that "vendors of the software may  
16 be non-responsive to requests to replace or repair the  
17 dongle or may require the user to purchase either a  
18 new dongle or an entirely new software package,  
19 usually at a substantial cost." One of these  
20 companies is called ERDAS. They produce Department of  
21 Defense software which includes Target Mapping  
22 programs. The company only warrants the device for 30  
23 days. After that a new dongle must be purchased. If  
24 the software package is out of date then no warranty  
25 is even offered.

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1           Certainly the vendor's website should be  
2           the first place the enduser should start looking for  
3           a solution. A number of the examples I have submitted  
4           have come directly from the manufacturers' websites,  
5           however, sometimes they are already aware of the  
6           problem or there is not always a solution provided.

7           Ornis software notes, "The manufacturers  
8           of hardware locks have informed us that the new breed  
9           of parallel port devices are likely to damage the  
10          dongles due to the method used for high speed data  
11          transfer. These devices include parallel port SCSI  
12          adapters, scanners, Ethernet adapters, tape drives,  
13          video cameras, floppy disk drives, CD-ROMs and CD  
14          writers. This list is not inclusive." In another  
15          paper from Ornis, they acknowledge, "that an ongoing  
16          project for Rainbow Technologies, a device maker, has  
17          been to greatly reduce the failure rate of their  
18          dongles."

19          We must remember the software manufacturer  
20          does not act alone. They are also dependent on and  
21          their products must interact with the dongle vendor  
22          that makes the hardware device and software drivers,  
23          as well as the operating system vendor, such as  
24          Microsoft, Apple or Red Hat and Linux. It can be  
25          weeks or months before a problem is reported, then

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1 identified, tracked down and finally resolved.

2 So what would be a reasonable time to wait  
3 for the company to cure a problem? How long could the  
4 INS have waited to print passports and travel  
5 documents? I submit that the very event itself is too  
6 much.

7 One of my clients is a worldwide company  
8 called Stratus Technologies. They are headquartered  
9 in Massachusetts. They manufacture servers to run  
10 mission critical applications. Among their clients  
11 are the United States Federal Agencies. Stratus  
12 servers are currently being used for defense,  
13 financial intelligence and aviation mission critical  
14 systems. With these systems, access control device  
15 failure is not even an option. Therefore the company  
16 with the full knowledge and approval of the software  
17 vendor has used my software to replace the hardware  
18 dongle which has allowed their customers to enjoy a  
19 99.999 percent uptime of their servers.

20 This is clearly one example of how the  
21 availability for copyrighted works has increased since  
22 the passage of the exemption and that the market of  
23 copyrighted works has gone up as well. I would love  
24 to live in a world where companies were responsive to  
25 their customers' needs and trusted them. But to hope

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1 that a company would provide a copy of the work in a  
2 form not protected by an access control device is a  
3 little much to hope for. After all, if they trusted  
4 their users then why would they have used the access  
5 control device in the first place.

6 The third requirement they mentioned  
7 suggests "that there must be a non-infringing work  
8 available in unprotected form that is equivalent to,  
9 or would serve as an adequate substitute for a  
10 specific digital work that is protected by an access  
11 control measure and would otherwise be subject to an  
12 exemption." I don't believe the SIIA is specifically  
13 referring to the hardware lock/dongle access control  
14 problems I'm speaking about. I think we all know that  
15 there is a tremendous amount of time that is required  
16 to learn a new software program, even if it is in the  
17 same field. Trying to determine what would be an  
18 equivalent program would be a nightmare, not to  
19 mention the costs involved in buying new software and  
20 training people to use it.

21 I have a letter from a lady named Janice  
22 Lourie who has authored books, articles and is the  
23 holder of several software patents as well as a  
24 graphic artist. She spent over two years mastering a  
25 program called "Elastic Reality" which was bought by

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1 Avid. Avid later disconnected the product and  
2 incorporated some of the features into other products  
3 but not all the features. Asking someone to invest  
4 another two years to train in another program rather  
5 than remove a problem device is not a practical  
6 solution.

7 The last point I would like to raise in  
8 regard to the SIIA reply comment is the same comment  
9 they made three years ago. Mr. Wasch says that there  
10 are easy real-life solutions to the concerns alleged  
11 in some of the comments. He states that "there are  
12 numerous third party companies that offer to escrow  
13 software code in confidence. If users are concerned  
14 about having access to code due to malfunction or  
15 irreparable damage to the access control technology or  
16 due to the demise of the copyright owner's business,  
17 they can use these trusted third parties to escrow the  
18 software to ensure future access to the content if  
19 such an event was to occur."

20 The flaw in this thinking is the same as  
21 it was three years ago. Software code is only  
22 possessed by a developer not an enduser, so it is up  
23 to the developer to escrow the code. Since it is not  
24 mandatory for developers to do so, no matter how  
25 concerned a user may be they still are not going to

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1 have access to the code and they will get no relief.

2 But I'll just pursue this for one more  
3 second. Let's suppose there the manufacturer had  
4 escrowed the code and a few years later went out of  
5 business. We've happen to get very lucky because when  
6 one of us calls up a year or so later the phone is  
7 still connected and we hear a phone message saying  
8 "Sorry we've gone out of business but you can check  
9 with XYZ escrow company where our code is located if  
10 you are having a problem." I'm sure we all in this  
11 room have some computer experience as an enduser. I  
12 wonder how many would be able to read that source code  
13 in the language it was written in, perhaps C, C++,  
14 Paseal or maybe Assembly language. Then find the  
15 programming tools needed and have a few thousand  
16 dollars laying around that we don't need to purchase  
17 those tools to compile the programs to build the  
18 software to debug the program of errors. Did I  
19 mention the time it takes to actually do all that. AS  
20 you can, the very notion is humorous.

21 On the BSA, in the joint reply comments  
22 submitted by the firm of Smith & Metalitz and others,  
23 the author's only argument to the renewal of the  
24 exemption is that there is not enough evidence on  
25 record at the time of his writing. So hopefully I've

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1 been able to build the record to their satisfaction.  
2 They have also expressed the same concern as the SIIA  
3 of a requirement to seek the assistance of the  
4 copyright holder which I've already addressed.

5           There has been no harm to the industry.  
6 So many of the opponents have in words the lawyers  
7 like summarily dismissed the comments of others in  
8 this proceeding claiming that the commentator did not  
9 provide enough examples. Allow me to turn the tables  
10 for just a moment. It should be noted that nowhere in  
11 these proceedings has an commentator presented real  
12 evidence that there have been any negative impacts as  
13 a result of these exemptions going into effect. In  
14 the reply comments of Mr. Metalitz, he states that  
15 there are no reported nor unreported cases that he is  
16 aware of that would show that the provisions have had  
17 a substantial adverse impact.

18           The industry has continued to grow with  
19 the exemptions in place and this with an economy that  
20 has not been its strongest over the past three years.  
21 Companies such as Aladdin Knowledge Systems, makers of  
22 some of the access control devices along with Rainbow  
23 Technologies have continued to grow. Documents I have  
24 included show in the case of Aladdin, through the  
25 years 2000-2002, a steady increase in sales and a

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1 record fourth quarter for the year ended 2002.

2 In the case of Rainbow Technologies, in  
3 Quarter 4 2001, they report a strong finish with  
4 increased revenue and operational profitability. In  
5 Quarter 4, 2002, the company reports a 19 percent  
6 quarterly revenue growth and significant improvement  
7 in operating income. In Quarter 1 2003, they  
8 announced strong results and a fivefold improvement in  
9 net income quarter over quarter.

10 Technology is changing again. I've  
11 included several articles that show that three and a  
12 half inch floppy drives are following the path of the  
13 five and a quarter inch drives, vinyl records and  
14 eight track tapes. Some disks are protected with  
15 access control software making it impossible for the  
16 Library and educational institutions to make archival  
17 copies. Mistery Carless and Kahle of the Internet  
18 Archive have already listed programs that they are  
19 unable to back up because of the dongles. Next will  
20 be software programs on floppy disk protected by  
21 access control software that they will be unable to  
22 transfer to other media.

23 As I said earlier, it has been three years  
24 since I sat before you and presented testimony which  
25 was very similar to today's. Unfortunately the

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1 problems that we discussed back then have not gone  
2 away or have been cured or are likely to be cured  
3 again in the next three years.

4 We can look back over the last three years  
5 at the results of the first rulemaking. The  
6 availability of copyrighted works has increased as in  
7 the Stratus example. Libraries and educational  
8 institutions can now archive access control protected  
9 applications onto other media.

10 The value of copyrighted works has  
11 increased as in the Department of Justice/INS example.  
12 Relief is now available to legal users, after the  
13 copyright holder has already been compensated to  
14 continue to have trouble free use and access of their  
15 software as in the case of Ms. Lourie and the many  
16 other examples included. No evidence has been  
17 presented to show any type of adverse effect to the  
18 industry.

19 Since Congress has not yet acted, it is  
20 once again up to this panel to provide the consumer  
21 with relief in granting a renewal on the exemption of  
22 the second class of works, those protected by access  
23 control mechanisms that fail to permit such access  
24 because of malfunction, damage or obsolescence. Thank  
25 you.

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1 CHAIRPERSON PETERS: Thank you. Mr.  
2 Hernan.

3 MR. HERNAN: Good afternoon and thank you  
4 for the opportunity to testify here today. My name is  
5 Shawn Hernan and I'm the Vulnerability Team Leader at  
6 the CERT Coordination Center at Carnegie Mellon  
7 University. The CERT Coordination Center is part of  
8 the Software Engineering Institute which is a  
9 Federally funded research and development center  
10 dedicated to helping others make measured improvements  
11 in their software engineering capabilities.

12 The CERT Coordination Center was  
13 established in 1988 by DARPA to provide coordination  
14 and leadership in response to Internet security  
15 emergencies. Today we continue that mission with  
16 funding from the Department of Defense, the Department  
17 of Homeland Security, the Secret Service and other law  
18 enforcement and intelligence agencies. Among other  
19 functions the CERT Coordination Center is a leading  
20 provider of information about Internet security  
21 vulnerabilities.

22 Intruders cause billions of dollars in  
23 damage each year by compromising and disturbing the  
24 information systems upon which the U.S. economy is  
25 dependent. Many estimates of the damage caused by

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1 computer intrusions and viruses exceed \$14 billion  
2 which is the approximate annual revenue of the U.S.  
3 recording industry.

4 Poor information security is a large and  
5 growing threat to the economic vitality and national  
6 security of the United States. Furthermore none of  
7 the incidents seen in the last few years have even  
8 approached the level of damage that is possible.  
9 Despite the billions in dollars of damage so far, I  
10 believe we've been lucky.

11 At the heart of this problem are the  
12 vulnerabilities in computer software. Publicly  
13 disclosed vulnerabilities in computer software have  
14 skyrocketed from 262 in 1998 to more than 4100 in  
15 2002. Unless vulnerabilities in software are  
16 dramatically reduced, system operators will be unable  
17 to evaluate and remediate even the most serious  
18 vulnerabilities. More research is urgently needed  
19 into the ways to reduce software vulnerabilities.  
20 However the DMCA is having a chilling effect on that  
21 research at the CERT Coordination Center.

22 Often when a researcher discovers a flaw  
23 and the software vendor disputes the finding, CERT is  
24 called upon to act as an arbitrator of technical  
25 facts. We've recently encountered exactly that

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1 situation while investigating vulnerabilities in  
2 software from Adobe and ScriptLogic.

3 DMCA and other copyright issues were  
4 raised in the course of both investigations. In each  
5 case we were able to establish the facts with a  
6 minimum of disagreement. However, less scrupulous  
7 vendors could use unfounded threats of DMCA  
8 prosecution to stall or halt our investigation. Our  
9 concern has not arisen in a vacuum but is based in  
10 part on the actions others have taken in response to  
11 DMCA.

12 In August 2001, Niels Ferguson, a highly  
13 respected cryptographer, self centered his own work  
14 describing flaws in a video encryption scheme  
15 developed by Intel. He did this because in his words  
16 "I would go bankrupt just paying for my lawyers."

17 In September 2001, Dog Song, a well known  
18 and respected programmer and author, replaced the  
19 contents of his website with a single sentence,  
20 "Censored by the Digital Millennium Copyright Act."  
21 In April 2002, the IEEE for a brief period of time  
22 required authors to certify that their work did not  
23 violate the DMCA. In July 2002, Hewlett Packard  
24 Corporation threatened SNOsoft with action under DMCA  
25 for publishing information in tools designed to

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1 demonstrate weaknesses in HP software. The threat  
2 came after CERT had already been in contact with both  
3 HP and SNOsoft regarding the flaws.

4 In October 2002, Red Hat refused to  
5 disclose details about a security flaw in their  
6 operating system for fear of violating the DMCA.  
7 According to the site that had the details, the  
8 information could only be shared with non U.S.  
9 citizens. And there are the well publicized cases  
10 involving Ed Felton of Princeton and Dmitry Sklyarov  
11 of ElcomSoft.

12 For those of us with computer security  
13 expertise, the result of these cases has been to  
14 instill fear in law abiding and responsible  
15 researchers. At the same time, I know from my  
16 experience in the CERT Coordination Center that the  
17 activities of those who would use knowledge about  
18 computer security to compromise computer systems  
19 continues unabated. It is a classic case of the law  
20 of unintended consequences. Quoting Richard Clark,  
21 former Director of the U.S. Office of Cybersecurity at  
22 the White House, "I think a lot of people didn't  
23 realize that it (DMCA) would have this potential  
24 chilling effect on vulnerability research."

25 I'm here today to ask the Librarian of

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1 Congress to take those steps within his power to  
2 remove the fear, uncertainty and doubt that the DMCA  
3 has caused for me and for others in the security  
4 community. The exemptions in section 1201 for  
5 security testing and encryption research suggest to me  
6 that it was not the intent of Congress to hamper  
7 security research.

8 Unfortunately the exemptions are  
9 imprecise. The exception for encryption research does  
10 not provide any protection for other kinds of security  
11 research including vulnerability research. The  
12 security testing exemption requires the testing to be  
13 done for the purpose of protecting one's own system or  
14 sharing the information directly with the developer of  
15 that system.

16 In addition the very definition of  
17 security testing requires that the owner or operator  
18 of a computer system consent to such testing without  
19 clearing defining the meaning of ownership in a world  
20 in which software is routinely licensed. While these  
21 requirements may sound like good public policy on the  
22 surface, they rest on the assumption that the software  
23 developers are operating in good faith. Unfortunately  
24 in practice, the DMCA provides unscrupulous software  
25 vendors a means to suppress vital research and

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1 criticism.

2 For one example of how the seemingly  
3 sensitive rules of DMCA fail to work in practice,  
4 consider that many legitimate licensees of software  
5 are unable to submit reports to a software  
6 manufacturer without purchasing expensive support  
7 contracts. This leaves a researcher in a quandary.  
8 Shut up, pay for support or risk prosecution.

9 In cases where the developer has gone out  
10 of business, there is literally no one who can receive  
11 the information. In other cases the developer has  
12 stopped making updates to a product that is still  
13 widely used and vendors will not often acknowledge or  
14 correct flaws in unsupported software.

15 A faulty assumption underlying section  
16 1201(j) is that any given vulnerability is confined to  
17 a single vendor. Software is often derived from a  
18 common source or written according to a common  
19 standard. This results in software flaws which are  
20 shared across many vendors, sometimes numbering into  
21 the hundreds.

22 The time and effort required to notify a  
23 large community of software vendors securely often  
24 exceeds the resources available to average researcher.  
25 This leads the researcher in another quandary. Shut

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1 up, assume the full burden of handling the problem  
2 through to the end or risk prosecution. A researcher  
3 may choose to report such flaws to the CERT  
4 Coordination Center or another coordinating body,  
5 though section 1201(j)(3) suggests that the security  
6 testing information must be shared directly with the  
7 manufacturer of the software.

8 We see vulnerabilities every day in our  
9 work and reducing them will not be easy. It will  
10 require investment in new research. But in its  
11 attempt to provide intellectual property protection,  
12 the DMCA in effect stifles fair, open and responsible  
13 criticism. It may appear to consumers as though all  
14 software is equally poor and vendors feel no pressure  
15 to change. Instead we should be doing all we can to  
16 create market incentives for software manufacturers to  
17 focus on product quality and to invest in research to  
18 ensure that quality. Public attention on existing  
19 vulnerabilities is the best way to create these  
20 incentives so that the long standing flaws we see  
21 again and again in software products can finally be  
22 eliminated.

23 I believe these examples and arguments  
24 have shown that the DMCA is having a chilling effect  
25 on computer security in general and scholarship and

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1 criticism in particular. That is in no one's interest  
2 but better security is. As security increases,  
3 software manufacturers will have higher quality, more  
4 secure products to offer. Users will benefit from  
5 greater assurances that their information is safe and  
6 secure and content providers can have greater faith  
7 that their product remains in the hands of licensees.

8 I do not believe the intent of Congress  
9 was to diminish computer security research or divert  
10 talented individuals to other fields. The protections  
11 included in DMCA for encryption research, security  
12 testing and privacy lead me to believe that these were  
13 valued activities that were specifically intended to  
14 be protected. But the protections are vague and the  
15 environment litigious resulting in precisely those  
16 effects.

17 We hope that Congress will address the  
18 shortcomings in DMCA to clearly and unambiguously  
19 provide a safe haven for security research but we  
20 recognize that this is not the forum for such  
21 requests. In absence of more comprehensive  
22 Congressional action, we respectively ask the  
23 Librarian of Congress to adopt the exemptions proposed  
24 by the CERT Coordination Center. Thank you.

25 CHAIRPERSON PETERS: Thank you. Mr. Band.

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1 We missed you this morning. You have been at every  
2 one of our hearings.

3 MR. BAND: This is my swan song, I guess.  
4 I'll try to make it good. Thank you very much. Last  
5 week, the "Washington Post" published a startling  
6 photograph of rooms stacked from floor to ceiling with  
7 books that had been saved from looters at the National  
8 Library in Baghdad. Apparently a Shiite cleric  
9 pictured in the photo feared that these precious books  
10 and manuscripts would be looted so he arranged for  
11 them to be moved to an empty room at a nearby mosque  
12 where he could watch over them.

13 One of the great ironies of the  
14 technological innovations in storage media is that  
15 those ancient books from the National Library in  
16 Baghdad have a better chance of being accessible to  
17 future generations than much of the content produced  
18 in this country over the past 100 years. This is  
19 because the innovative forms of storage media rapidly  
20 become obsolete as they are superseded by seemingly  
21 better storage media.

22 As you well know for sound recordings,  
23 there have been metal disks with small notches, paper  
24 rolls for player pianos, wax cylinders. Remember the  
25 45 RPM singles, the 33 RPM LPs, reel to reel tapes,

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1 cassettes, 8-track tapes, digital audio tapes and now  
2 the CD. It is very difficult if not impossible to  
3 purchase players for all of these media except for  
4 cassettes and CDs. And even cassette players are  
5 becoming scarce. A similar progression has occurred  
6 with computer media. For years, PCs have not been  
7 able to read 5-inch floppies and many PCs today cannot  
8 even accept a 3.5-inch diskette.

9 In addition to being prone to  
10 obsolescence, innovative technology is exceeding  
11 complicated and therefore prone to malfunction. A  
12 modern PC operating system has as many components as  
13 a Boeing 747. Just about anyone who has purchased a  
14 PC has had the happy experience of dealing with tech  
15 support as he has attempted to install new software or  
16 get the PC to perform as it should.

17 Our collective personal experience with  
18 the obsolescence and malfunction of technology make  
19 the necessity of this exemption intuitively obvious.  
20 Just as we know that the sun will rise tomorrow, so  
21 too we know that access control mechanisms will fail  
22 to permit access because they will malfunction or  
23 because they will become obsolete. We all know this  
24 to be true so we really don't have to debate the need  
25 for this exemption. Yet some commenters have argued

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1 that the proponents of this exemption have not  
2 provided sufficient evidence of the need for this  
3 exemption.

4 In addition to all the evidence that Mr.  
5 Montoro is offering today, the Internet Archive has  
6 provided at least half a dozen separate concrete  
7 examples of obsolete access control mechanisms that  
8 must be circumvented to enable lawful uses. But for  
9 these commenters, I fear that no amount of proof will  
10 be sufficient. I suspect that they're opposed on  
11 principle to any exemptions.

12 Now other commenters recognize the obvious  
13 need for this exemption but seek to limit it by  
14 requiring that the lawful possessor of the copy first  
15 request assist of the copyright holder. To mandate  
16 this approach in all cases would be extremely  
17 inefficient and burdensome to the user. He will have  
18 to find the current corporate incarnation of the  
19 copyright holder. He then will have to contact the  
20 copyright holder and wait for a response that may  
21 never come. If a response does come, it may direct  
22 the user to send the copy at the user's expense to the  
23 copyright holder. The user may then have to wait  
24 weeks or even months until the copy is returned. To  
25 prevent these abuses, the Copyright Office would have

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1 to develop a highly regulatory exemption with  
2 deadlines, depute resolution mechanisms and so forth.

3 The current market-based approach makes  
4 much more sense. In the vast majority of cases, the  
5 user will first turn to readily identifiable copyright  
6 holder because the user will possess the technical  
7 expertise to circumvent or because the circumvention  
8 will be inexpensive and the user will hope that the  
9 copyright holder will stand behind its product.

10 There will only be a handful of cases  
11 where the copyright holder will still be in business  
12 but the user will have the sophistication to  
13 circumvent and it will be cheaper or faster for the  
14 user to do that than request assistance from the  
15 copyright holder. These few instances will not  
16 measurably harm the copyright holder. The Copyright  
17 Office need not worry about them.

18 In sum, the Librarian got it right the  
19 first time and should renew this exemption. Thank you  
20 very much.

21 CHAIRPERSON PETERS: Thank you. Mr.  
22 Sulzberger.

23 MR. SULZBERGER: Thank you. I'm Jay  
24 Sulzberger and I'm here representing New Yorkers for  
25 Fair Use. I was a little bit puzzled as to what to

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1 say on this panel because seemingly this particular  
2 panel is about very specific harms or very specific  
3 parts of a big complex law. But as a matter of fact,  
4 I've been provided by the first three panels with a  
5 parade of horrors.

6 Mr. Montoro seems to have an 86 page  
7 parade of horrors. Of course, CERT has the most  
8 extraordinary parade of horrors, things that one  
9 would not have thought could happen in America, things  
10 that one would have expected from the old Russian  
11 Communist Empire. Of course, Mr. Band has just  
12 brought up the problems of the spontaneous or planned  
13 looting of ancient libraries of Earth's heritage.

14 I was going to try to make what I thought  
15 was a difficult argument that we should not be  
16 discussing particular exemptions to particular anti-  
17 circumvention clauses of the DMCA. But I think that  
18 with the three panelists before me that the pattern is  
19 clear. There is no excuse for any anti-circumvention  
20 law in the United States of America because in each  
21 and every case it is not that we have a parade of  
22 particular offenses against good sense, offenses  
23 against our freedom, attacks on free markets, attacks  
24 on scientific research, attacks of artists' rights,  
25 attacks upon our rights of free speech and the most

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1 important, a fundamental general and effective attack  
2 upon our present right of private ownership of  
3 computers.

4 Computers today are printing presses and  
5 it's shocking. I have certain conservative  
6 tendencies. I'm also sympathetic to the Socialists  
7 but the idea that everybody who is a member of the  
8 middle classes can pick up a computer for \$300 and pay  
9 their \$20 a month and get Internet access and set up  
10 a webpage, it's shocking. Democracy is one thing but  
11 mob rule is another. Yes, there's nothing that  
12 America can do about this. I hope there isn't but it  
13 looks like there is.

14 The DMCA's anti-circumvention clauses in  
15 combination with the loose association, alliance of  
16 cartels, oligopolies, monopolies, which I term the  
17 "Englobulators" is in the process of placing spy  
18 machinery and remote control machinery at this very  
19 moment into every single Intel motherboard that's  
20 going to be sold in the new year. When Microsoft  
21 completes the software part of its system of DRM  
22 called Palladium, this will end completely your right  
23 of ownership, your right of private use of your  
24 Palladiated computer.

25 Now a question arises. It can't be true

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1 what I'm saying. I'm a nut. I'm an extremist. I'm  
2 strident. Yes. But I'm not nearly as much of a nut,  
3 I'm not nearly as much of an extremist and I'm not  
4 nearly as crazy, vicious, strident as the  
5 Englobulators.

6 The question arises. Why hasn't the press  
7 picked up on the fact that I'm the less extreme of the  
8 extremists? I believe in the Constitution even though  
9 I didn't sign it. That's my anarchist side. I think  
10 there is something to the first 10 amendments and we  
11 should take the Fourth Amendment very seriously. I  
12 think also the Fifth has something to say about  
13 takings.

14 Why doesn't the press get it? A very  
15 simple reason. I'm talking about rights and power.  
16 I'm talking about fundamental rights of ownership,  
17 fundamental rights of free speech, fundamental rights  
18 of free association using our Internet and our  
19 computers. Because in practice today, most people run  
20 a damaged, malfunctioning and obsolete operating  
21 system usually called Microsoft Windows or several  
22 versions. Copyright law has already been dreadfully  
23 misapplied in the past 20 years to prevent people from  
24 gaining control of their property and their house.  
25 It's pretty important property.

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1           We know that Microsoft and as a matter of  
2 fact, all other vendors and makers of source-secret  
3 operating systems, it's almost impossible not to given  
4 into the temptation to spy somewhat when you are ether  
5 connected to the Internet. Sun has done it. Other  
6 companies have done it. It's mainly Microsoft because  
7 it was only after 1990 that the Internet became widely  
8 spread although some of us had email in 1970. But  
9 now, most people have a computer. It's their means of  
10 personal communication. It's also their means of  
11 authorship. It's their means of publication.

12           Let me deal with the accusation of  
13 copyright infringement. Yes, sure. There can be a  
14 heck of a lot more very serious copyright, the most  
15 dreadful sort because there are computers in the  
16 Internet. I don't give a good God darn about it. The  
17 invention of writing was dreadful to the ancient  
18 honorable profession of the singing poets. The  
19 invention of the printing press did terrible things to  
20 the Catholic Church's position in Europe particularly  
21 once the Bible was translated and then printed.

22           Things change. The cries of a small  
23 unimportant industry, I mean the whole of the "content  
24 providers." I, of course, refuse to admit that there  
25 are any more content providers. I reread my own stuff

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1 and enjoy it much more than Disney has made since  
2 about 1935. I stand equal to them by the way. New  
3 Yorkers for Fair Use, one of our favorite tropes is  
4 "Nonsense, we're not consumers. We're owners and  
5 we're makers."

6 Let me try and outline what anti-  
7 circumvention laws do and what they're about to do.  
8 This is one of our standard pieces of propaganda.  
9 We've been handing it out since last summer. "We are  
10 the stakeholders." Why do we say "We are the  
11 Stakeholders"? It's an old joke. Everybody knows  
12 this. I'm sure this is not the first person to say.  
13 In Washington parlance, what is a stakeholder? It's  
14 some organized group that can afford a full time  
15 lobbyist. That's all.

16 The bizarre spectacle of course of seeing  
17 small private interest, when I say small, I mean  
18 small. The cotton subsidies last year in the United  
19 States were about 40 percent the gross of Hollywood.  
20 You don't see huge articles about particular laws and  
21 the deep struggle and the basic principles over how  
22 much of a subsidy they should get.

23 I'm not sure I'm actually going to read  
24 this whole thing but Freedom one, you may buy a copy  
25 of a movie recorded on DVD. You may watch this movie

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1 whenever you please. You may make copies of this  
2 movie, some which may be exact copies and others may  
3 be variant copies.

4 We all know that the legal underpinning of  
5 DRM is anti-circumvention. In the future, you won't  
6 be able to do that. Now this is an assault of private  
7 ownership of computers. This is absurd. Let me just  
8 say and you all know this, Ernest Miller and Joan  
9 Feigenbaum both of Yale have suggested that this is  
10 just a mistake and it will soon be corrected.

11 Copyright law shouldn't say anything about  
12 private copy. In the first place, technically it's  
13 going to be very hard. You're going to have endless  
14 of the most difficult subtle things. For example,  
15 there's something on a news spool. Is that a copy or  
16 is it something in transmission?

17 The nature point which will defend us  
18 against the dreadful assault on private property which  
19 is the all the anti-circumvention clauses of the DMCA  
20 is to draw a nature line inside your house. You have  
21 a copy of something. If you have lawfully obtained it  
22 -- By the way, we're not copyright extremists. I  
23 myself am a big supporter of the GPL which is a  
24 somewhat strict copyright license. I consider it to  
25 be part of the one main foundations of the success of

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1 free software. If you don't draw the line and you  
2 seek for exemptions, you'll have to make hundreds of  
3 exemptions. Even if you enforce them and you could  
4 enforce them, the principle would remain. You don't  
5 have control of your machine. You have to get  
6 lobbyists or grassroots organizations to come to  
7 Washington to appear before every three years and beg  
8 on bended knee for a particular exemption.

9 We don't have to do that. You are allowed  
10 to turn to Congress and say "We've seen the parades of  
11 horribles and there's not just one parade." All of  
12 the people here arguing for exemptions, the principle  
13 is the same. These people can't reach into your house  
14 and tell you what to do. It's absurd.

15 I'm going to try to avoid discussing the  
16 other side of the bundle of rights that these people  
17 want to take away from us, the rights of free  
18 publication, the rights of free dissemination which  
19 are of course restricted by copyright which I support  
20 strongly. I don't think it right that I should go  
21 down and steal a movie without paying for it and set  
22 up a movie house and charge admission for it.

23 I'm sorry. I lose my track on one of my  
24 sentences before. You know the Xerox machine. It's  
25 always the same structure you all know this year. The

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1 people who have the old methods of publication think  
2 their methods have to go on forever. Always the word  
3 "business model" is used. We're not worried about  
4 their "business models." We're worried about our  
5 computers and our rights.

6 I believe it is within your commission to  
7 turn and say we've had it. What are we going to do?  
8 Do we have to have these hearings every six months?  
9 We're going to have to have ten of you up there and a  
10 hundred of us here explaining the absolute terrible  
11 things that anti-circumvention laws in the United  
12 States do to markets, do to freedom of speech, do to  
13 development of better computer, etc., etc. I think  
14 you can turn and say "We've heard enough."

15 We would suggest that Congress reconsider  
16 the entire bundle of anti-circumvention clauses of the  
17 DMCA. If I'm asked specific questions, I would be  
18 happy to try and connect by at most three half steps  
19 any particular anti-circumvention measure to truly  
20 horrible and very large scale things. Thank you.

21 CHAIRPERSON PETERS: Thank you. Mr. Mohr.

22 MR. MOHR: Hi, my name is Chris Mohr with  
23 Meyer & Clipper on behalf of the Reed Elsevier. Thank  
24 you for the opportunity to testify and offer our  
25 perspectives over the last three years. I represent

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1 Reed Elsevier, a leading publisher of a variety of  
2 products including trade publications, educational  
3 works and electronic databases. We invest millions in  
4 the creation and distribution of copyrightable  
5 content.

6 Our position in this proceeding is simple  
7 and that is no exemptions should apply to databases of  
8 any stripe. The reasons for this are laid out in our  
9 comment and I'm only going to summarize a few key  
10 points here.

11 This is a very different proceeding from  
12 what happened three years ago. In 2000, we had no  
13 record in front of us. Any judgment that was made by  
14 the Copyright Office at that point in time was by  
15 definition predictive because the Statute had not yet  
16 gone into effect. Now we are benefitted by three  
17 years' worth of a rearview mirror in which we can  
18 gaze.

19 The Office had made the rule surrounding  
20 this proceeding clear. The burden is on the  
21 proponents of an exemption to offer evidence, not  
22 theoretical critiques, not policy reasons, as to why  
23 the Statute never should have been enacted or  
24 suggestions on how to revise existing defenses that  
25 might be in the Statute.

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1           The Notice of Inquiry asked for "concrete  
2           examples or cases of specific instances in which the  
3           prohibition on circumvention of technological measures  
4           controlling access has or likely to have an adverse  
5           effect on non-infringing uses. It would also be  
6           useful for the commentor to quantify the adverse  
7           effects in order to explain the scope of the problem,  
8           e.g. evidence of widespread or substantial impact  
9           through data or supplementary material."

10           This puts the burden on the proponents in  
11           two significant ways. The first is to identify  
12           verifiable, non-infringing uses that they've engaged  
13           in under the existing exemption. The second is to  
14           identify causation, that these are in fact due to the  
15           existence of the prohibition. Then at the end of the  
16           day, there is still a balancing requirement that has  
17           to be done on the benefit of these access controls on  
18           non-infringing uses.

19           Now Mr. Montoro has submitted what we  
20           think is -- and frankly I have no way to draw any  
21           opinion on what might be or might not be attached to  
22           his written comments because I haven't seen them. So  
23           to the extent that he has attachments, I don't know  
24           what they are. I can tell you that to the extent that  
25           he's offered actual instances of government agencies

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1 and his relationships with government agencies, that  
2 isn't relevant evidence for the simple reason that  
3 circumvention done pursuant to contracts with  
4 government entities is exempted under 1201(e).

5 Thus far our position is as it was in the  
6 initial going. Now again if he has other things that  
7 relates specifically to hardware dongles and computer  
8 programs subject to hardware dongles that may be a  
9 record. I don't know. I haven't seen it. But as to  
10 what I've heard so far, we don't think that there's  
11 any exemption here.

12 As a side matter, we would also point out  
13 that one of the things that ought to be considered is  
14 the risk of what happens when stuff gets out of its  
15 wrapper as of Friday has gone up. The Grockster  
16 decision said that it's okay if you have basically you  
17 know infringement is going to be widespread. You know  
18 that's the primary reason that people are going to use  
19 their service. You are not liable for anything that  
20 might happen. It might be a rather bizarre  
21 application of the knowledge standard.

22 If that is in fact legal, the risk to any  
23 copyright owner of any circumvention of protection  
24 measures is greater than it is now and it's already  
25 pretty large. With that, I still have remarks about

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1 the evening session. I looked at literally. So I'll  
2 shut up.

3 CHAIRPERSON PETERS: Thank you. Mr.  
4 Simon.

5 DR. EINHORN: Are you going to go out of  
6 order?

7 CHAIRPERSON PETERS: No, Mr. Kupferschmid.

8 MR. KUPFERSCHMID: Good afternoon. I'm  
9 Keith Kupferschmid. I have to say I've been called  
10 many things in my lifetime, some good and some bad.  
11 I've never been called an Englobulator. Is that  
12 what's it called?

13 MR. SULZBERGER: Englobulator. I think  
14 that's useful term of art.

15 MR. KUPFERSCHMID: So in actuality, I'm  
16 Vice President of Intellectual Property Policy and  
17 Enforcement at the Software Information & Industry  
18 Association. I want to first off express my  
19 appreciation for this opportunity to testify here  
20 today. I would like to thank the Copyright Office and  
21 the panelists in particular for conducting these  
22 hearings.

23 By way of background, SIIA is the  
24 principal trade association of the software and  
25 information industry. We represent over 600 high-tech

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1 companies that develop and market software and  
2 electronic content for business, education, consumers,  
3 the Internet and entertainment. Our membership is  
4 quite diverse. We have information companies like  
5 Reed Elsevier, West, McGraw-Hill, New York Stock  
6 Exchange. We have software companies like Corel,  
7 Oracle, Veritas. We have DRM companies like  
8 Macrovision, Protexis and Aladdin. We have others  
9 that probably not so easily definable like AOL Time  
10 Warner and Sun and a whole bunch of others.

11 So SIIA members represent a very wide  
12 range of business and consumer interests. Our members  
13 create and develop new and valuable access control  
14 technologies for use by others seeking to protect  
15 their copyrighted software and content with such  
16 technologies. They use access control technologies to  
17 protect their proprietary software and content. They  
18 purchase or license software and information products  
19 in other content and services that utilize these  
20 access control technologies. So as you might imagine,  
21 SIIA and our members are extremely interested in the  
22 issues that arise in the context of this hearing.

23 Unlike many of the other companies and  
24 individuals you may have heard from either today or  
25 yesterday or in the future, we're really not on this

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1 side or that side. We are really smack dab in the  
2 middle because of where our members are. Although our  
3 interests extend to many of the exemptions that are  
4 proposed, I will endeavor to limit my comments to  
5 three exemptions specifically talking very briefly  
6 about tethered works and thin copyrighted works and  
7 then also the existing exemption for malfunctioning  
8 access control measures.

9 As noted in our comments, SIIA believes  
10 that none of the comment submitted relating to  
11 tethered or thin copyrighted works either individually  
12 or taken as a whole provides sufficient factual  
13 evidence or legal argument to justify the creation of  
14 an exemption to section 1201(a)(1). With regard to  
15 the existing exemption for malfunctioning access  
16 control measures, we likewise believe that none of the  
17 comments submitted individually or taken as a whole  
18 provide sufficient factual evidence or legal argument  
19 to justify renewal of the exemption in its present  
20 form.

21 I will visit this issue since this is a  
22 topic of the hearing but first, we'd like to say just  
23 a few words very briefly about the other two proposed  
24 exemptions. First off, tethering, an exemption for  
25 tethering or access control measures that is for post

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1 sale use is unwarranted and very much unwise. Many of  
2 the alleged problems and concerns with tethering and  
3 post sale transfers are presently being addressed by  
4 those software companies that do use tethering.

5 Alleged problems for those who upgrade  
6 their computers, change operating systems or transfer  
7 software to another person are based on incorrect or  
8 incomplete information. For example, users who  
9 purchase new computer or hard disk can contact the  
10 software company's technical support agent to get  
11 assistance in either reinstalling or reactivating the  
12 program that's protected by a product activation code  
13 at no additional cost.

14 In addition if the user reformats his hard  
15 disk or replaces his current operating system in most  
16 cases, reactivation will take place without that  
17 person even needing to contact the software company at  
18 all. I won't go into any more detail because our  
19 written comments do go into detail here and do provide  
20 a more detailed explanation of this.

21 To the extent that there is any basis to  
22 the concerns raised, the benefits of being able to  
23 curtail piracy and to improve customer access to these  
24 software products greatly outweighs any temporary  
25 glitches or inconveniences that might be occasioned by

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1 some users. Once again we describe in detail these  
2 type of business models and they're adversely affected  
3 by these proposed exemptions. I won't go into detail  
4 here.

5 With regard to thin copyrighted works,  
6 there's a proposed exemption for thin copyrighted  
7 works, fair use works, pro se educational thin  
8 copyrighted works, pro se educational fair use, they  
9 should all be soundly rejected. First off, these  
10 exemptions were rejected in the first rulemaking.  
11 Secondly absolutely no new facts or legal arguments  
12 have been proffered that would alter the analysis or  
13 the decision rendered by the Library of Congress in  
14 the first rulemaking. Absolutely nothing new has been  
15 added to the record.

16 In addition because of the recently  
17 enacted TEACH Act, it creates an exemption that  
18 directly affects at least certain educational uses of  
19 copyrighted works protected by access control  
20 measures. At the very least, it would be unwise to  
21 create any pro se educational use exemption.

22 In the event that the Library of Congress  
23 disagrees with our views on either tethered works or  
24 thin copyrighted works or the existing exemption for  
25 malfunctioning access control measures, SIIA strongly

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1 urges the Library of Congress to adopt a certain  
2 thresholds requirement that must be met before any  
3 organization or individual can qualify for an  
4 exemption. As I will discuss shortly, this is  
5 especially important for any exemption for  
6 malfunctioning access control measures.

7 These three threshold requirements should  
8 at the very least include the following:

9 (1) Any person or organization seeking to  
10 qualify for an exemption must have legal access to the  
11 work at the time of the circumvention. Mere  
12 possession of a work should not be sufficient for an  
13 exemption to apply. The person or organization  
14 seeking to avail itself of the exemption must have  
15 legal access to the work at the time of the  
16 circumvention. To allow otherwise would harm numerous  
17 business models used by copyright owners today and in  
18 the future to get their products into the hands of the  
19 consumers and would open the door to widespread what  
20 I'll call "legitimate piracy."

21 For instances, many software and  
22 information companies make their product widely  
23 available to users but access to the works is limited  
24 to those users who have a key. Password or product  
25 activation code are examples. To obtain this key, the

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1 user must first license the product from the copyright  
2 owner. Allowing those who merely possess a  
3 copyrighted work to circumvent the access control  
4 attached to that work would adversely affect these  
5 business models to the disadvantage of many legitimate  
6 users.

7 Examples of business models adversely  
8 affected include the software as a service model, pay-  
9 per-views, and of course try-before-you-buy software.  
10 All these would likely not exist if anyone was allowed  
11 to circumvent the access control measures that prevent  
12 non-licensees from accessing the software.

13 2) The second threshold condition and this  
14 is the most important of the list that I have here is  
15 any person or organization seeking to qualify for an  
16 exemption must notify the copyright owner and give the  
17 copyright owner an opportunity to cure the alleged  
18 problem. When the user cannot access content that she  
19 has legal access to, it is usually more efficient for  
20 that user to contact the copyright owner to remedy the  
21 problem rather than taking it upon herself to  
22 circumvent the access control measure. I haven't  
23 heard anyone disagree with that.

24 In many cases the copyright owner will be  
25 willing and able to adequately address the user's

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1 concerns. Frequently the only time users are unable  
2 to obtain the assistance necessary to access a  
3 protected work are only when the company is going out  
4 of business or is not able to support the access  
5 control used on their products. In those two  
6 circumstances, a user can easily meet this threshold  
7 requirement.

8 Also requiring that users contact the  
9 copyright owner and give the owner time to cure the  
10 problem will ensure that the copyright owner is aware  
11 of the problem and can take steps to fix the problem  
12 in the future. For example, Aladdin Knowledge Systems  
13 is a software company, an SIIA member, who is affected  
14 by this malfunctioning, damage or obsolescence  
15 exemption. They will replace a damaged dongle for  
16 free if they are contacted. If the customer contacts  
17 Aladdin first, there will be no need for them to  
18 contact a service like Spectrum Software.

19 It will also give the copyright owner the  
20 opportunity to notify other users of the problem and  
21 provide them with an appropriate technical solution.  
22 But of course if they don't know about it and if they  
23 are never contacted, this never happens.

24 3) The third threshold is that there must  
25 not be a non-infringing work available in an

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1 unprotected form that is equivalent to or would serve  
2 as an adequate substitute for a specific digital work  
3 that is protected by an access control measure and  
4 would otherwise be subject to this exemption. I won't  
5 go into detail on that threshold condition because you  
6 have that in my written comment.

7 To touch upon the subject at hand which is  
8 malfunctioning access control measures, the reminder  
9 of my comments will be about that. None of the  
10 comments submitted provide a factual basis or any  
11 substantive legal arguments in support of the  
12 malfunction, damage or obsolescence exemption as it  
13 exists today. These comments merely recommend that  
14 this class exemption be renewed absent as evidence to  
15 the contrary.

16 In direct conflict with the requirements  
17 established by the Library of Congress, these comments  
18 fail to provide any justification for the Library of  
19 Congress to renew this exemption for another three  
20 years. Several of the comments suggest the burden  
21 should fall on the opponents of the exemption to prove  
22 that the exemption should not be renewed.

23 Placing the burden of proof on opponents  
24 of an exemption would have the effect of creating a  
25 perpetual exemption. Under this scenario, the

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1 opponents of an exemption would have to prove  
2 something they are not in a position to know. While  
3 the opponents of an exemption may have a general idea  
4 of who is taking advantage of an exemption or how many  
5 people are taking advantage of an exemption or even  
6 what type of activity they are engaged in, often times  
7 they do not know this information at all and can only  
8 make rough estimates.

9           There can be no doubt that the burden of  
10 proving the need for a new exemption or a renewal of  
11 an exemption should fall squarely on those who are in  
12 the best position to provide evidence of the value and  
13 need for the exemption and the adverse effects that  
14 are likely to occur without one. For example, there  
15 is no way for a particular dongle company to know  
16 precisely how many of their customers or more  
17 significantly their non-customers contacted or use  
18 software Spectrum or similar companies to circumvent  
19 their dongles and whether the need for an exemption  
20 still exists for those companies. In fact, one SIIA  
21 member who produces dongles tried to get a list of  
22 Spectrum Software's customers from them to ensure that  
23 only authorized users who are using their service but  
24 Spectrum Software would not divulge this list.

25           If there's an explicit requirement in the

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1 exemption that the copyright owner or dongle provider  
2 first be contacted by the circumventor, then copyright  
3 owners like Aladdin would perhaps have a better idea  
4 of the number of people wishing to take advantage of  
5 the exemption and perhaps be able to provide more  
6 information to the Copyright Office. Because the  
7 existing exemption includes no explicit requirement  
8 that the copyright owner be contacted first, there is  
9 no way for the copyright owner to know with any  
10 certainty whether anyone is availing themselves of  
11 this exemption.

12 Therefore the burden of proving that an  
13 existing exemption should be renewed must be placed on  
14 those who are engaged in the activity for which an  
15 exemption is requested. Since the only comments that  
16 were filed merely make perfunctory requests that the  
17 malfunctioning, damage or obsolescence exemption be  
18 renewed without providing evidentiary or legal support  
19 whatsoever, the Library of Congress must reject the  
20 request for this exemption.

21 Now although there is no evidentiary legal  
22 support for renewal of the existing exemption, there  
23 does appear to be some evidence that a subset of this  
24 class exemption could possibly be renewed. We do not  
25 believe that the level of evidence provided in the

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1 written comments today has met the burden of proof  
2 required. But if sufficient evidence were to be  
3 provided at these hearings, we would not oppose the  
4 codification of a more narrowly tailored exemption for  
5 malfunctioning access control measures which causes or  
6 in the immediate future will cause damage to the  
7 protected work as noted in more detail in our written  
8 comment provided the exemption is subject to the  
9 threshold conditions that I mentioned.

10 Although SIIA would not oppose a  
11 sufficiently narrow exemption for malfunctioning  
12 access control measures provided sufficient evidence  
13 is provided to establish a need for such an exemption,  
14 we are certainly concerned about its abuse. A mere  
15 belief that the works may be susceptible to damage  
16 should not be enough to qualify for an exemption. The  
17 circumventor must have tangible, creditable evidence  
18 that supports a good faith belief that immanent damage  
19 to the protected work will occur. Otherwise this  
20 exemption could be misused by pirates and hackers  
21 merely by claiming that circumvention was necessary  
22 because they thought the protected works are or will  
23 be damaged. In addition, it is essential that the  
24 threshold conditions outlined by SIIA be incorporated  
25 in this exemption especially the second threshold

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1 condition.

2 Before closing, I want to just mention a  
3 couple additional things. I heard from Mr. Montoro  
4 earlier where he quoted us in his comments. His quote  
5 if I have this correct is that we apparently said  
6 "Even with only a few examples submitted, the SIIA  
7 still recognizes a need for an exemption and is  
8 willing to give these commentators the benefit of the  
9 doubt."

10 Our comments don't say that. It's not in  
11 here. I give Mr. Montoro the benefit of the doubt  
12 also that he just made an honest mistake. But I  
13 encourage you to go to page 10 paragraph 2 of our  
14 comments which I will not reread and read the quote  
15 for yourself or read the whole paragraph.

16 In addition, let me just mention one other  
17 thing. I have a little show and tell for myself. Mr.  
18 Montoro, if you could actually pick up your link of  
19 dongles there, I want to make a comparison here. You  
20 see that and you see this. Companies are switching to  
21 what is called a USB lock. They are getting away from  
22 these dongles.

23 This is because quite honestly of some of  
24 the issues and problems that have been occurring with  
25 dongles. This is a lot smaller than that. It's a lot

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1 more secure. It's a lot more effective. It doesn't  
2 have quite the same issues that arise with dongles.  
3 It's less likely to cause conflicts.

4 For instance, many dongles are one-sided  
5 so you cannot plug the printer into it. Or many  
6 dongles are also plugged into the SCSI port which also  
7 causes some printer problems. This is not true for  
8 USB locks like this one. This is made by Rainbow  
9 Technologies. After the hearing, I can give you some  
10 material to read up on that and give you a copy of  
11 this if you are interested. But it's just simply not  
12 true for USB locks which plug into the USB port itself  
13 or if you have many USB locks, you can plug it into a  
14 USB hub. It's easily bought at something like Circuit  
15 City or Best Buy.

16 The real conundrum we have here is that on  
17 one hand we are asked to address the problems of old  
18 technologies, problems people are having with dongles.  
19 Then on the other hand when we go ahead and address  
20 them, we hear complaints that "you're not servicing  
21 our old technologies." So we're really damned if we  
22 do and damned if we don't in many instances. This is  
23 just one example of that.

24 The last thing I'll mention is some  
25 responses and comments that Mr. Band had about the

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1 Internet Archives. He referenced the fact that it's  
2 about the amount of information. If you look at the  
3 Internet Archives, you look at the amount of  
4 information that is supplied. Although I do have some  
5 issues with the so-called "amount" which I don't think  
6 is very significant, I'm not even going to focus on  
7 that.

8 I want to direct your attention to the  
9 quality and accuracy of their information because  
10 quite honestly it's just not true. This is not  
11 information from me. This is information if you go on  
12 their website itself you can find. We copied, cut and  
13 pasted and put it right into our comments. That was  
14 with minimal research. I'm sure you could find more  
15 inconsistencies.

16 Also with regard to something Mr. Band  
17 said, "we would oppose all exemptions on principles"  
18 or something of that nature, I think you heard me say  
19 the exact opposite here. It's just not the case. We  
20 want an exemption that is narrowly tailored to the  
21 specific, distinct, verifiable problems that are  
22 complained up provided there's sufficient evidence.

23 With that, I will close. I want to thank  
24 the Copyright Office and the panel for giving me this  
25 opportunity to testify here today. I'll pleased to

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1 answer any questions especially follow-up questions  
2 since I have not seen this 87 page document. I'm very  
3 interested in seeing that and being able to provide  
4 you with a response. Thank you very much.

5 CHAIRPERSON PETERS: Thank you, Mr.  
6 Kipferschmid. Mr. Simon.

7 MR. SIMON: Thank you. Sure I'm working  
8 right? Thank you for giving me the opportunity to  
9 appear before you today on behalf of the Business  
10 Software Alliance ("BSA"). BSA members are the  
11 residual of the technology industry that doesn't  
12 belong to SIIA. As you proceed in this rulemaking, I  
13 would urge you to keep in mind a couple of what I  
14 believe to be important kind of facts in this process.

15 One fact is that access controls have now  
16 become a key tool in both anti-piracy and security  
17 technologies. That's important. Product activation  
18 is being utilized by a broad range of software  
19 companies, Adome, Intuit, Microsoft, Semantech.  
20 Security technologies especially important in today's  
21 world depend on access control to make firewalls,  
22 filters, intrusion controls and antivirus products  
23 work. Many think that the solution to fungus that is  
24 SPAM and that is invading our e-mail inboxes also lies  
25 with technologies like filters that depend on access

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1 controls for their efficacy and effectiveness.

2 Second, the Statute creates a burden of a  
3 showing of harm in order for an exception to be  
4 promulgated by the Librarian. But I think that the  
5 way the Statute works is it's not enough to show that  
6 harm is evident or is potential but it requires a  
7 balancing test. It requires a showing that that harm  
8 outweighs the harm that would be created by the  
9 exception.

10 I believe that to be true because  
11 otherwise the whole Statute wouldn't work. The  
12 Statute was created because the Congress perceived  
13 that threats of piracy, theft and other crimes were  
14 sufficiently acute to create this universe of  
15 statutory rules. That was a Congressional  
16 determination. If you are to deviate from that  
17 determination and create an exception to their  
18 judgment, I believe that the burden is not only to  
19 find harm but to determine that that harm outweighs  
20 the original Congressional purpose.

21 The third thing that is important to keep  
22 in mind is the goal of this rulemaking is to correct  
23 problems not to rewrite the law. So many of the  
24 submissions that have been sent to you would you like  
25 you to rewrite the Act. I don't think that is within

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1 the ambit of what this rulemaking was intended to do  
2 nor frankly with due respect that it's in the ambit of  
3 the Librarians's authority. It's important to keep  
4 that in mind as well.

5 So the DMCA struck a balance between  
6 copyright owners and users with the goal of fostering  
7 new markets so that broad segments of the public could  
8 access copyrighted materials in digital form. I  
9 believe that it has occurred. The tribunal rulemaking  
10 proceeding was intended to renew this balance and if  
11 demonstrably needed for limited classes of works to  
12 modestly recalibrate it for the ensuing three years.  
13 Just those three years, the Statute requires that they  
14 do an overall review every three years.

15 So just because you made an exception last  
16 time around for malfunction, damage and obsolete, the  
17 situation doesn't mean that the cases has to be made  
18 or presumed for the next three years. BSA members  
19 strongly supported the inclusion of this rulemaking in  
20 the DMCA because we believed that it provides the  
21 needed safety valve to ensure that the DMCA stays  
22 current and relevant as a marketplace evolves and  
23 develops. This rulemaking is in place to ensure the  
24 Statute functions well, not to rewrite the law, not to  
25 rethink it, not to undo it.

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1           With that said, that throat-clearing out  
2 of the way, let me talk specifically about five  
3 issues. Since this is the only opportunity that BSA  
4 will have to testify before you, they include a couple  
5 of issues that are necessarily in the title of this  
6 evening's session. Those five issues are malfunction,  
7 damage and obsolete access controls; security research  
8 issue which was raised by the witness from CERT;  
9 contractual terms as a precondition for access;  
10 embedded software; and circumvention for the purpose  
11 of non-infringing uses.

12           With due respect to works protected by  
13 malfunctioning, damaged or obsolete controls, I would  
14 like to note that this exception as promulgated by the  
15 Librarian last time around is most probably  
16 inconsistent with the provisions of the Act. The Act  
17 permits the Librarian to promulgate exceptions in  
18 respect of classes of works, a subset of the category  
19 in Section 102 because this exception applies to all  
20 literary works, computer programs, etc. We believe  
21 that it fails to meet that statutory directive.

22           We also think that it suffers from a  
23 second flaw which is that the terms malfunction,  
24 damage and obsolescence are never defined. What may  
25 be in Mr. Montoro's mind, a malfunction, may be in the

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1 mind of the designer of the product, performance  
2 exactly as intended. What some folks view as an  
3 obnoxious access control may well be obnoxious. Don't  
4 buy the product. It may well be exactly what was  
5 designed and intended. So if you were to proceed down  
6 the path of trying to rethink this particular type of  
7 exception, I would strongly urge you to think through  
8 trying to define those terms rather than leave them as  
9 pregnant imperatives.

10 In this rulemaking, several groups have  
11 submitted statements in support for this exemption.  
12 By simply stating that the existing exemption be  
13 continued, ignoring the procedures of the Copyright  
14 Office that require each exemption to be reviewed de  
15 novo. I'll give you an example. Comment 18 from the  
16 Center for Electronic Law is typical. It notes that  
17 the problems at the Three Rivers Community Technical  
18 College faced when their contract employee left the  
19 college. Apparently he had the only password to a  
20 particular system. The college was unable to access  
21 the system when the contract employee was effectively  
22 fired because he wasn't doing his job.

23 Simply put this example does not  
24 demonstrate any failure or obsolescence of the DRM.  
25 What this example demonstrates is that the people in

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1 management failed in allowing only one person to know  
2 the password to a critical system, never mind that  
3 person being a contract employee. The factual  
4 difficulties faced by this college are real. It's a  
5 real problem but they have nothing to do with this  
6 rulemaking. They have nothing to do with an exception  
7 of the anti-circumvent rules.

8 Let me move on to a point that was raised  
9 by Jonathan on the obsolescence issue which we'll come  
10 back to in a second. But in effect, Jonathan argued  
11 that technology moves along very quickly. We went  
12 from 5-inch floppies to 3.5-inch floppies to who knows  
13 what. Every time one of those things stops being  
14 widely available, it creates a problem.

15 There is a perfect solution to that. Stop  
16 technological progress. Stop moving from one format  
17 to another. You'll never have anything that's  
18 obsolete because you'll have a single standard for all  
19 time. It will always be supported and it will be  
20 perfect. I don't think that's how the world works.  
21 Things move along. Things change.

22 Moving on, works protected by access  
23 controls and circumventions needed to carry out  
24 security research. This is a big deal issue for BSA  
25 and its members. Many of BSA's members are in the

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1 business of producing, developing, deploying security  
2 products. This issue was specifically addressed by  
3 the Congress in the law, not in the rulemaking, in the  
4 law in section 1201(j).

5 I would suggest, urge to you that in those  
6 circumstances where the Congress has already enacted  
7 specific exceptions, the Librarian must proceed with  
8 extreme caution in changing or expanding that  
9 determination because you run very close to rewriting  
10 the law. If the Congress thinks this exception as it  
11 has drafted is inadequate, it has the prerogative to  
12 do so.

13 BSA members include the leading security  
14 companies and none of them support an exception. BSA  
15 members have significant concerns that may propose  
16 exceptions which would have a negative impact on the  
17 security by creating an opportunity for the widespread  
18 distribution of cracking tools. We are not in any way  
19 suggesting that the kind of testing that CERT does and  
20 the kind of testing that legitimate entities do and  
21 the monitoring and disclosure that they do is anything  
22 but indispensable. It is indispensable quality of  
23 security that we provide through our products.

24 We are saying this is something very  
25 simple which is we do not believe that the provisions

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1 of the DMCA stand in the way of the good work that  
2 CERT is doing or in the way of the development and  
3 deployment and testing of better security products.

4 The second exception that the Librarian  
5 promulgated last time was kind of into space. It was  
6 with respect of what I will colloquially call  
7 "censorware" so various filtering products. The way  
8 that this exception was formulated in our opinion is  
9 again both imprecise and substantially over broad.  
10 I'll give you an example.

11 The way antivirus products work is you  
12 have a database of virus definitions which are  
13 generally protected by some kind of technological  
14 protection measure. What you do is you run those  
15 definitions to figure out whether or not the  
16 particular virus exists. You want those definitions  
17 protected because otherwise the bad guys get access to  
18 it and can work off those definitions to create  
19 viruses that you can't control. The way that your  
20 exception read last time "the compilations consisting  
21 of lists of websites blocked by filtering software  
22 applications" is probably broad enough to encompass  
23 web-based definition sets for whether it's an  
24 antivirus product or security products or filtering  
25 for SPAM products or a variety of other databases

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1 which are used for security and integrity reasons.

2 I am not speaking to the issue which I  
3 think is what the Librarian was getting at which is  
4 being able to test the integrity of filters to make  
5 sure they were not over broad when filtering for  
6 things like pornography or other similar social  
7 issues. What I'm suggesting to you is if that's your  
8 intent, do it narrowly and don't inadvertently cast a  
9 shadow over important security technologies that are  
10 now an integral part of what we all depend on.

11 I'll say just two words about some of the  
12 submission which have urged you to create an exception  
13 for contractual provisions that may be associated with  
14 the -- I simply put to you that contract law is an  
15 important body of law and it is of right now not  
16 Federal law and as of right now not within the ambit  
17 of the Copyright Office or the Librarian of Congress.

18 The embedded software issue has become  
19 germane in your deliberations because of the Lexmark  
20 v. Static Control case. BSA has not and does not have  
21 a position on that case and its relevance to this  
22 proceeding for the following reasons: the fact is  
23 that this case is still under way; and that the  
24 principal causes of action asserted in that case have  
25 nothing to do with access control and 1201. They have

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1 something to do with copy control. They have  
2 something to do with copyright infringement. Neither  
3 of those issues is the subject of this rulemaking.

4 The second and related point is that the  
5 Copyright Office has not traditionally treated  
6 embedded versus nonembedded software in any way  
7 differently from the other. Such distinctions should  
8 be avoid now and going forward. So the case before  
9 the courts is where it belongs. The legal issues  
10 before the court are not anti-circumvention of access  
11 controls. You should let the courts play out whatever  
12 they are going to play out.

13 The final point is circumvention for non-  
14 infringing uses. This is an issue that keeps on  
15 popping up again and again. I would simply like to  
16 share with you something that I learned at a  
17 conference at Berkeley which I attended some three or  
18 four weeks ago.

19 The issue that was being debated was  
20 whether or not you should permit circumvention for  
21 purposes of fair use. The question was asked of a  
22 rather distinguished panel of computer scientists. Ed  
23 Felton was among them. A computer scientist from MIT  
24 was among them. There were two or three others.

25 The question that was asked of them was

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1 this. With today's technology, would you, some of the  
2 best computer scientists in the country maybe the  
3 world, know how to design a DRM that would permit fair  
4 use but would not swallow up the entire purpose of the  
5 Statute? As a pure engineering technological matter,  
6 can you do that? The answer came back the same from  
7 all of them. It was just two letters, one word. No.

8 I submit to you that these notions that  
9 somehow you can calibrate -- It's unfortunate. The  
10 current status of engineering technology does not  
11 permit us to calibrate based upon individual's  
12 activities quite that way. Maybe someday it will.  
13 Until such time, I would urge you to think very  
14 carefully and very long about exceptions for non-  
15 infringing purposes. I'll stop right there. Thank  
16 you very much.

17 CHAIRPERSON PETERS: Thank you. Are you  
18 ready? We'll start with David.

19 MR. CARSON: Keith, I have questions for  
20 you, having to do with what's been most simply stated  
21 at page two of your reply comments, the threshold  
22 requirements that you think should be required before  
23 one came up with an exemption along the lines of or a  
24 subset of the exemption that we currently have for  
25 malfunctioning, damaged or obsolete access controls.

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1                   You have three requirements. One is that  
2                   the person who is seeking to qualify with the  
3                   exemption must have legal access to the work. Another  
4                   you have to basically notify the copyright owner to  
5                   give them a chance to work it out and finally there  
6                   must not be a non-infringing work available in an  
7                   unprotected form that could do the job basically. The  
8                   first question, I assume your answer is going to be  
9                   yes. Do we have the power under 1201(a)(1)(a) to so  
10                  limit a class of works and if so, can you tell me how  
11                  you construe that statute in a way that gives us the  
12                  power to put those conditions on the class of works  
13                  that we exempt?

14                  MR. KUPFERSCHMID: That's why I suggested  
15                  them as threshold conditions rather than incorporating  
16                  these straight into the class of works themselves  
17                  because even in your rulemaking last time in the  
18                  discussion pieces you mentioned quite of few of these  
19                  if not all of them as criteria that affected your  
20                  decision making process. So I think most certainly  
21                  you could include them as threshold conditions in  
22                  order to be eligible for any of the classes and then  
23                  define the classes in terms of characteristics of the  
24                  class of works.

25                  MR. CARSON: But how is for example

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1 whether Mr. Montoro goes to the software company to  
2 see if they can fix it first how can that be  
3 considered part of the definition of that class of  
4 works? It has nothing to do with the works. It has  
5 to do with what the particular person wanting to  
6 circumvent has or has not done.

7 MR. KUPFERSCHMID: Like I said, by making  
8 them threshold conditions rather than incorporating  
9 this language into the specific classes, you're not  
10 defining the class itself by the use or the users. Do  
11 you see where I'm going?

12 MR. CARSON: I see what you are saying but  
13 it's not helping me because I guess that leads me to  
14 the next question. Where do you find in 1201(a)(1)  
15 that we or the Librarian has the power to impose  
16 threshold conditions on who can use and take advantage  
17 of an exempted class?

18 MR. KUPFERSCHMID: I don't see that it's  
19 not in there either. I certainly think you have the  
20 leeway to do that. I don't see any place where you  
21 would be prohibited from doing that.

22 MR. CARSON: We can do it because it  
23 doesn't say we can't do it.

24 MR. KUPFERSCHMID: There's definitely a  
25 process here where you are able to decide really what

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1 should be exempted and what should not. These  
2 threshold conditions are one way of doing it. Like I  
3 said, I don't see any prohibition against you being  
4 able to do that.

5 MR. CARSON: The second question is still  
6 primarily for you, Keith. Sorry. To repackage a  
7 question that Mr. Kasunic gave to the panel this  
8 morning because maybe it will or maybe it won't help  
9 you out with respect to at least the first of those  
10 threshold conditions you would like to have imposed,  
11 1201(a)(1)(d) says that "the Librarian shall publish  
12 any class of copyrighted works for which he has  
13 determined that non-infringing uses by persons who are  
14 users of a copyrighted work are or likely to be  
15 adversely affected" and the prohibition contained in  
16 subparagraph (a) in 1201 "shall not apply to such  
17 users with respect to such class of works for the  
18 ensuing three year period." How do you interpret  
19 1201(a)(1)(d) and in particular, do you interpret it  
20 as allowing only people who are engaging in non-  
21 infringing uses to circumvent with respect to a  
22 designated class or do you interpret it as permitting  
23 anyone to circumvent with respect to a designated  
24 class once that class has been designated?

25 MR. KUPFERSCHMID: Certainly not anyone.

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1 I've been part of the last two panel discussions and  
2 people have answered this question in depth. I don't  
3 want to repeat what they said that much but it  
4 certainly is not anyone. The end result has to be a  
5 non-infringing use.

6 The reason I put this in the threshold  
7 conditions is because the problem is if you don't see  
8 it there, people think "Oh, gee, it does apply to  
9 anyone and I don't have to be a legitimate user."  
10 I've seen this on user groups, discussion, chat rooms.  
11 If it's not there in the words, in the "Here's the  
12 criteria", they are going to think it's not part of it  
13 and it will apply to anybody.

14 MR. CARSON: But I gather then -- I  
15 shouldn't gather anything until you tell me whether I  
16 should. Let me ask you. Based upon your  
17 interpretation of 1201(a)(1)(d) in terms of legal  
18 analysis not in terms of how people perceive it,  
19 doesn't 1201(a)(1)(d) really take care of that first  
20 condition that "the person or organization seeking to  
21 qualify for the exemption must have legal access to  
22 the work at the time of circumvention"? Is there  
23 leakage there?

24 MR. KUPFERSCHMID: I think from a legal  
25 perspective, I think you are correct. I don't think

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1 there is leakage from my standpoint. But I can't  
2 separate myself and just put on my blinders and see  
3 what's happening in the rest of the world. That's why  
4 I'm suggesting this. It's because if it's not spelled  
5 out, the rest of the world is going to go "We have an  
6 exception for access control measures" without delving  
7 into what are the further criteria. So it goes beyond  
8 a legal criteria.

9 MR. CARSON: I follow. Thanks.

10 CHAIRPERSON PETERS: That's it? How about  
11 Steve?

12 MR. TEPP: Okay. Thank you. Mr. Carson  
13 wants that side so I'll come to this side. Mr. Band,  
14 I'll start with you. You are here as I understand it  
15 representing a number of organizations, libraries, law  
16 libraries and similar CERT organizations, a  
17 significant segment of which are part of institutions  
18 that are part of or state institutions. So my  
19 question to you deals specifically with that segment  
20 of the groups you are representing. The Supreme Court  
21 as you are probably aware has held that the state  
22 institutions and states generally have sovereign  
23 immunity from many Federal laws including Trademark  
24 Act and the Patent Act directly and through the Fifth  
25 Circuit's ruling it appears that it extends to the

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1 Copyright Act as well. I think it's reasonable to  
2 assume to Section 1201 of Title 17. Given that  
3 general sovereign immunity from enforcement of Section  
4 1201, what is the need for that segment of the people  
5 you are representing today for any exemption at all  
6 for any purpose under 1201?

7 MR. BAND: I guess there are several  
8 levels of answers to that. First of all, as you  
9 noted, that's only a subset of the people I'm  
10 representing and not the other people that I'm  
11 representing or our organization is representing.  
12 Secondly, there are various statutes pending in  
13 Congress that would - actually I don't know if they've  
14 been reintroduced this year but they've been there in  
15 the past and I'm sure they will be reintroduced - that  
16 would find various mechanisms to address that issue.  
17 So we're looking at this in the long term. Whether  
18 it's this Congress or the next Congress, I think  
19 eventually that issue will be addressed.

20 Another part of this puzzle is that it's  
21 conceivable that the institution might have sovereign  
22 immunity but it is far from clear that the individual  
23 librarian who actually engages in the activity would  
24 not be able to be sued under some legal theory either  
25 under the Copyright Act or some other legal doctrine.

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1           As a result, it could be that the library  
2           itself, that institution has sovereign immunity, but  
3           the employee might not and might be subject to suit or  
4           could be sued in his individual capacity and so forth.  
5           So there is still some potential for liability and  
6           exposure to those individuals. I think also simply as  
7           a practical matter the institutions have been  
8           operating under the assumption that the copyright laws  
9           still apply to them, including Section 1201.

10           MR. TEPP: Let me follow up on that real  
11           quick on a couple of points just to get your response.  
12           The legislation that was out there last year as you  
13           noted has not been reintroduced. Do we have to  
14           consider whether there is a likelihood that it will be  
15           enacted in the next three years as part of any  
16           evaluation of exemptions with regard to those  
17           institutions? The second part, I'll just get them  
18           both out and then you can answer both. To what extent  
19           the remedies against the individuals in these  
20           institutions that you've referenced would be limited  
21           to injunctive relief and the extent to which  
22           injunctive relief after the fact is really a  
23           prohibition on the act of circumvention?

24           MR. BAND: With respect to the second  
25           question, the answer is I don't know. I haven't

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1 studied it carefully enough and I could get back to  
2 you on that. With respect to the first question, I  
3 guess what I find curious about the question and  
4 actually the whole line of questioning of course is  
5 that these exemptions do not apply to individual users  
6 or to classes of users.

7 The exemptions are applies to classes of  
8 works. That was a position that the Copyright Office  
9 took in the last rulemaking and I assume it's sticking  
10 to that position that the exemptions are applying to  
11 classes of works and not classes of users. If you are  
12 willing to start entertaining exemptions with respect  
13 to classes of users, then we're willing to talk about  
14 that.

15 MR. TEPP: Okay. Thanks. Just to clarify  
16 why I'm asking, obviously the scope of our authority  
17 is something we've been asking about. I think there  
18 clearly was some decision made last time but there is  
19 still questions being asked. The statute -- I'll just  
20 leave it at that. Thank you.

21 MR. BAND: But I would just as a final  
22 note add that notwithstanding the sovereign immunity  
23 issue there's still large segments of the library  
24 community who would not be able to benefit from  
25 sovereign immunity regardless of how it's construed

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1 and its future.

2 MR. TEPP: Thank you.

3 MR. MONTORO: May I comment on that?

4 MR. TEPP: Sure.

5 MR. MONTORO: Thank you, sir. I had a  
6 comment to make which is also along this. Mr. Mohr  
7 also raised up that comment about the government  
8 already being exempt which I think is what we are  
9 talking about here that the Libraries Association or  
10 educational facilities for backup might be already  
11 exempt. But it doesn't really discount the examples  
12 any. These are still tangible examples of problems  
13 that can happen.

14 MR. TEPP: That's a different kind. I'm  
15 talking about the sovereign immunity issue. What Mr.  
16 Mohr was referring to was the statutory exception for  
17 government agencies within 1201(e). As long as you've  
18 raised that, let me ask you a question. Do you agree  
19 with Mr. Mohr that the activities you've cited where  
20 you're a contractor for a government agency do fall  
21 within the scope of statutory exception in 1201(e)?

22 MR. MONTORO: I'm not an attorney to  
23 comment legally on that. Even if it was true, I would  
24 simply say that again it does not discount the  
25 examples any of these problems happening in the

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1 marketplace. If they can happen to a government  
2 facility or a government agency, they certainly could  
3 happen to other people as well.

4 MR. TEPP: Okay. Thanks.

5 MR. BAND: But also let me just add that  
6 it doesn't seem to apply to all activities of  
7 government authorities. It applies to lawfully  
8 authorized investigative, protective, information  
9 security, or intelligence activity, not everything  
10 else. So it may apply to some aspects of the INS but  
11 I'm not sure that even passport control would  
12 necessarily fall within that list of activities.

13 MR. HERNAN: May I follow up as well?

14 MR. TEPP: Sure.

15 MR. HERNAN: One of the particular issues  
16 we face at CERT being part of a federally funded  
17 research and development center is that the work we do  
18 is directly in support of the United States Government  
19 but we are encouraged and do receive private funding  
20 as well. We sit as a bridge between private industry  
21 and government organizations. That's one of our  
22 roles.

23 So it has been particularly of concern to  
24 us to what extent are we required to show that any  
25 particular activity we engage in is being funded by

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1 the Government or being funded by private money.  
2 Although let me thank Mr. Simon for his nice comments  
3 about his work we think it's pretty good too. We  
4 don't know without any particular case law to back  
5 this up if our particular activities have to be  
6 documented as being funded pursuant to some Government  
7 contract or through private funding sources.

8 MR. SIMON: Can we ask questions too or  
9 not?

10 MR. TEPP: We've never gotten there but  
11 fire away.

12 MR. SIMON: I was just curious if CERT had  
13 ever been sued or if anybody had ever sent you a  
14 letter alleging that what you were doing was a 1201  
15 violation.

16 MR. HERNAN: It has been intimated to us  
17 by some of our contacts not necessarily the legal or  
18 management contacts at software vendors but certainly  
19 our technical contacts have from time to time  
20 intimated that the research we would need to do in  
21 order to produce an advisory or another document may  
22 in fact be a violation of 1201.

23 MR. SIMON: Okay, but you've never gotten  
24 a letter or a suit filed against you or anything like  
25 that.

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1 MR. HERNAN: That's correct but I think  
2 that has more to do with the fact that we are  
3 recognized as a fair and impartial organization than  
4 anyone's recognition that we aren't necessarily immune  
5 from that.

6 MR. TEPP: Mr. Hernan, let me follow up  
7 with what you just said because it's interesting to  
8 me. The statute 112(e) says "person acting pursuant  
9 to a contract with the United States". It doesn't  
10 appear to be interested in who's paying.

11 MR. HERNAN: I don't know. That is an  
12 open question to us and a subject of some considerable  
13 debate at least among the technical staff. Without  
14 any case law that anybody can point to and certainly  
15 with the concerns of individual prosecution, we don't  
16 know if we are acting pursuant and what are the  
17 requirements to show that the work we are undertaking  
18 is pursuant to a government contract.

19 MR. TEPP: Should I take it though that if  
20 you knew that you were acting pursuant to a contract  
21 that Section 112(e) would take care of all your  
22 troubles with regard to Section 1201?

23 MR. HERNAN: With a certain minor  
24 exception. As part of our FFRDC contract, we are  
25 legally limited in the size of the organization. We

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1 can only employ 250 member in the technical staff  
2 about 20 of which form the CERT Coordination Center.  
3 Our mission as an FFRDC is to engage private industry  
4 and bring best practices to bear in private industry.  
5 To the extent that we cannot teach others who are not  
6 acting pursuant to a government contract to do what we  
7 do. It directly interferes with the core mission of  
8 an FFRDC.

9 MR. TEPP: So then it sounds like your  
10 primary concern is about trafficking in the  
11 circumvention measures, talking to other people about  
12 how --

13 MR. HERNAN: No, sir. My primary concern  
14 is doing the research that is necessary to produce the  
15 document which may itself be subject to the anti-  
16 trafficking concerns. I know we have some concerns  
17 there. But merely the act of doing the research  
18 required to produce the document is of some concern to  
19 us as well. So if we are in a lab testing a product  
20 if we can't get past the anti-circumvention clause of  
21 1201(a) to even be subject to the risk of 1201(b),  
22 that concerns us.

23 MR. TEPP: I'm taking a long time. I  
24 apologize. Let me try and wrap it up. If you got an  
25 exception for 1201(a)(1) that allowed you to do the

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1 research that you are interested in doing, you could  
2 do the research and create the document you're talking  
3 about, would you then though be unable to do anything  
4 with that document because of 1201(a)(2) or 1201(b)?

5 MR. HERNAN: 1201(b) I think we would be  
6 protected largely because the document is not designed  
7 primarily as a circumvention device although that's  
8 again lacking case law. Refresh my memory please  
9 again regarding 1201(a)(2).

10 MR. TEPP: That they are advertised  
11 primarily as a circumvention measure and whether they  
12 have substantial other commercial uses.

13 MR. HERNAN: Again not being a lawyer, I  
14 don't know how 1201(a)(2) would apply to that work or  
15 not. Being a non-profit organization, it's unclear to  
16 me how one goes about talking about the commercial  
17 value of our work.

18 MR. TEPP: Let me wrap this by just  
19 throwing it back to Mr. Mohr since you are the one who  
20 started us on 1201(e) to let you if you would like  
21 respond to any of the issues that have been raised and  
22 whether or not you think for example the notion of the  
23 INS being able to print passports which is something  
24 that 1201(e) would allow circumvention of the  
25 malfunctioning access control.

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1           MR. MOHR:     Frankly I think that's a  
2 protective activity even assuming that you read the  
3 statute that way and depending on how you construe the  
4 second clause.  In other words, if you say that "this  
5 section does not prohibit any lawful authorized  
6 investigative", etc., then it goes down and says "or  
7 a person."  So it's unclear as to whether the "or"  
8 stands by itself or a person acting pursuant to a  
9 contract or whether that's a subset of the  
10 investigative activity.  But even if frankly the idea  
11 of the passport control isn't a protective activity,  
12 it doesn't really pass the laugh test.

13           MR. SIMON:    Actually there's a more  
14 fundamental issue there because I thought passports  
15 were issued by the State Department.  So what's  
16 Justice doing issuing passports?

17           MR. TEPP:     That's definitely beyond the  
18 scope of the meeting.  Thank you for your indulgence.

19           MR. MOHR:     I'm sorry.  Could I just add a  
20 few points to what you said about the threshold  
21 conditions?  If you find that you have no authority to  
22 issue conduct based conditions such as a waiver or  
23 such as seeking lawful usage in fact that is not  
24 already in the statute, it would seem to me that the  
25 obverse is true that the record necessary to support

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1 an exemption would have to be rachetted up. In other  
2 words, does that make sense?

3 MR. CARSON: If you explain it, it might.

4 MR. MOHR: Okay, fair enough. I'm  
5 assuming that the language that you mentioned in  
6 1201(a)(1)(d) I believe. I've been going back and  
7 forth over that and I think Keith's reading is  
8 probably right that it's built in. But at the same  
9 time it talks about usage and determining is separate  
10 from the class. So if that's the right reading of the  
11 statute and you're going to exempt a class then what  
12 is necessary to support the class is going to be much  
13 higher than what it would be if the lawful use  
14 requirement was already built in. Am I making myself  
15 clear?

16 MR. CARSON: I think I follow it.

17 MR. MOHR: In other words, if (d) doesn't  
18 build in the lawful use requirement, then we are  
19 talking about a totally different level of record that  
20 we need. That's the obverse of what we're talking  
21 about.

22 CHAIRPERSON PETERS: Got it. Rob.

23 MR. KASUNIC: I just have a couple of  
24 questions. The first relates to the balancing that  
25 Mr. Simon raised that we have to look at in this

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1 rulemaking. Assuming that there is an ample showing  
2 of harm that would support the exemption that we had  
3 the last time dealing with damaged, malfunctioning and  
4 obsolete, what harm has come to past in the past three  
5 years since we've had an exemption in place? How  
6 could you specify and quantify what harm has resulted  
7 to copyright owners as a result of that exemption?

8 MR. SIMON: I think that's the wrong  
9 question to ask.

10 (Laughter.)

11 MR. KASUNIC: But that's the one that's  
12 before you.

13 CHAIRPERSON PETERS: But he asked it.

14 MR. SIMON: But I'll try to answer it  
15 anyway. I just tell it the way I see it. You can  
16 have dongles which Mr. Montoro argues to us are needed  
17 to support obsolete situations where there is  
18 malfunctioning. But there's a high risk that these  
19 very same devices are going to be distributed for  
20 illicit purposes, for purposes of making unauthorized  
21 copies.

22 For example a question I would like to  
23 hear Mr. Montoro answer is what precautions does he  
24 take to make sure that his dongle-beating devices  
25 don't end up in the wrong hands. There is a specific

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1 reason. Some years ago there were a couple of  
2 products called RivalLock and IceLock which were  
3 dongle-defeating software products using as one of  
4 BSA's members, CNC Mastercam. CNC Mastercam sued a  
5 company called ImagineThat which was then distributing  
6 those products.

7 A District Court judge in Connecticut held  
8 the court is not persuaded by the claim "non-  
9 infringing uses" offered for ImagineThat's products  
10 and finds that the products are not widely used for  
11 legitimate non-objectionable non-infringing purposes.  
12 The defendants have offered no creditable evidence  
13 that the products are widely used for legitimate non-  
14 objectionable purposes.

15 That company, ImagineThat, is a precursor  
16 of Mr. Montoro's Spectrum Software Company and in fact  
17 Mr. Montoro owned that company and was enjoying from  
18 distributing those products based on that ruling. So  
19 there is harm. There's a District Court that found  
20 the exactly identical tools in that instance with  
21 respect to CNC software products for causing real  
22 harm.

23 MR. KASUNIC: Before Mr. Montoro answers  
24 your question, I'd like to see if anyone else can  
25 answer mine. But is that then the result of this

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1 exemption during the last three years?

2 MR. SIMON: No, but this exemption would  
3 create a further level of defense and a further level  
4 of argument to argue in cases like this where while  
5 there's very little evidence being presented that the  
6 product is being distributed for a good purpose in  
7 fact would be almost a justification.

8 We have this problem right now in the  
9 software industry in a different place in the law but  
10 the same concept which is Section 117. Pirates  
11 distribute pirated copies all the time. They say,  
12 "No, this is permitted under backup and archival  
13 copying under Section 117 so it's perfectly legal for  
14 you to do this."

15 I think I did last time during your  
16 proceeding point you to literally dozens and some  
17 thousands of websites where this is posted explicitly.  
18 What we fear is that if this exemption were  
19 promulgated in a very broad way, that it could be used  
20 as a justification for piracy.

21 MR. KASUNIC: One thing in that respond is  
22 you used the word "could" and you used the word  
23 "fear." We've already commented on those in our  
24 circumstances being speculative. What I'm really  
25 looking at is --

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1 MR. SIMON: That's exactly the reason I  
2 suggested to you that the question you should be  
3 asking is the burden is on those to show that there's  
4 harm being caused by the current statute, not by the  
5 statute to defend itself.

6 MR. KASUNIC: I understand that and that's  
7 why I assumed in this question that we had evidence of  
8 the harm. We have had this exemption for three years.  
9 Is there any other specific idea?

10 MR. KUPFERSCHMID: Yes, if I can add.  
11 First of all, I want to say I agree with everything  
12 that Emery just said. But I want to go back and  
13 stress that second threshold requirement that I had  
14 about contacting the copyright owner, the dongle  
15 manufacturer because without that, we have absolutely  
16 no way of knowing.

17 We tried. We had one member company who  
18 tried contacting Spectrum Software who was using their  
19 services or using their devices and couldn't find out.  
20 Really there's just no way for us to know. Let's not  
21 forget who the burden of proof is on in this instance  
22 in this rulemaking.

23 So as it stands certainly if this  
24 threshold requirement is not included in some manner,  
25 we're going to be coming back here in three years and

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1 three years and saying we have absolutely no idea. At  
2 least with that threshold requirement, we might have  
3 some idea of what's going on because then we'll have  
4 the people who are supposedly using this actually  
5 coming to us, the copyright owners, and letting us  
6 know. So we'll have an idea of what the harm is. But  
7 until something like that happens, we'll have  
8 absolutely no idea and it will be speculative.

9 MR. SULZBERGER: I'd like to address the  
10 question of harms due to the DMCA and actually earlier  
11 what I consider misguided laws about copyright and  
12 software. I would like to specifically address some  
13 of the supposed harms that would come to writers of  
14 anti-virus software.

15 You know real operating systems simply  
16 don't have viruses. For example, none of the Unisys  
17 have viruses despite the claims of the Microsoft  
18 apologists. There is no cause for any anti-virus  
19 software so there is no cause for any discussion now.

20 How come you can't go into a store and  
21 just buy an already loaded cheap IBM-style PC loaded  
22 with a free operating system? The BSA is of course  
23 partly at least a creature of Microsoft and they go  
24 around they terrify small companies and medium sized  
25 companies and government agencies and school districts

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1 and demand that their licenses be shown to them.

2 At the same time, Microsoft's copyright  
3 license with the endusers guarantees the enduser the  
4 right to refuse the license and get a refund. The BSA  
5 stands with Microsoft in refusing to grant endusers  
6 relief from ever having to worry about anti-virus  
7 software.

8 Now I'm going to connect this with dongles  
9 too. Dongles are old and nowadays often limited piece  
10 of hardware and software which is indeed a form of DRM  
11 or copy protection. Microsoft in collusion with  
12 unfortunately Intel and other large manufacturers of  
13 CPUs and motherboards is in the process of creating a  
14 single dongle which is deeply embedded into the  
15 motherboard and the CPU. There will be no dongle  
16 business and there'll be no getting around dongle  
17 business when this happens. This is happening now.

18 The harm to consumers is simple. No  
19 matter what Microsoft says and no matter what the BSA  
20 says they intend to never allow any free operating  
21 system, one that doesn't have viruses, the ones that  
22 run the `Net, the ones that send your email, the ones  
23 that run most of your websites that you go to. They  
24 don't want to let those into people's houses.

25 The foundation, the legal underpinnings by

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1 which they intend to prevent this is misuse of  
2 copyright law. I just wanted to address where the  
3 real harms are. We're not talking about small to  
4 small companies or dongle go-arounds or dongle helper  
5 companies or dongle companies. We're talking about  
6 the entire home operating system business.

7 The reason you have viruses and the reason  
8 your stuff doesn't work so well is because  
9 misapplication of copyright law and the failure to  
10 enforce the Anti-Trust Law. Every single anti-  
11 circumvention provision acts to increase the power of  
12 the present cartels, oligopolies and monopolies here.  
13 Thank you.

14 MR. KASUNIC: Mr. Montoro, I do want to  
15 give you the other side of question and how has this  
16 exemption specifically benefitted what you have been  
17 able to do in the last three years? How have you used  
18 this exemption?

19 MR. MONTORO: Thank you, sir. In the  
20 testimony that I've already given I gave substantial  
21 examples of the good that has actually occurred not  
22 only through the Department of Justice INS examples  
23 but through many others as well. These are real  
24 examples. They are all documentable. These are not  
25 fictitious. The people's names are right there. But

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1 there are issues that were raised by Mr. Simon that I  
2 have to address and also some issues that I need to  
3 address as well that Keith brought up.

4 Mr. Simon, I just need to make a  
5 correction. It's Mr. Montoro. M-O-N-T-O-R-O.

6 MR. SIMON: I apologize for that.

7 MR. MONTORO: Thank you, sir. Now I don't  
8 know how much I want to get into the previous  
9 litigation that was going on back then. I only want  
10 to say that this was only a preliminary injunction.  
11 There was never any information that was submitted by  
12 the plaintiff which was done in a Connecticut court by  
13 a Connecticut plaintiff. If the issue would have been  
14 pushed further, I think the outcome would have been  
15 quite different.

16 One of the examples that was raised by  
17 Shawn and some other papers on our first day of  
18 hearings was Mr. Finkelstein I believe is the cost of  
19 litigation is so prohibitive against a small defendant  
20 that quite simply a lot of times a small guy can't  
21 afford to litigate these matters. At the time, that  
22 was the case. We just don't have the resources that  
23 companies with those kind of \$500 million or \$1  
24 billion companies can actually come at us with.  
25 That's all I want to say about that at the moment.

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1 I would also like to note that I don't  
2 think Mr. Simon ever did give Mr. Kasunic an actual  
3 answer to his question as to what harm actually ever  
4 occurred over the past three years that this exemption  
5 was in effect. I do have comments to make on Keith's  
6 comments as well.

7 I do agree with the SIIA on their try-it-  
8 before-you-buy software. Certainly that should not be  
9 exempt because the person does not have legal access  
10 to the full use of the software at that time. So  
11 there's no question there.

12 He brought up a company called Aladdin and  
13 said that "Aladdin will replace -- I'm sorry. Let me  
14 back up one more thing. Keith mentioned that in my  
15 testimony -- I have to go to the little glasses now.  
16 I'm not used to that. That's really different for me.  
17 That has changed in the past three years which is that  
18 I can't see anymore. It's terrible.

19 (Laughter.)

20 Anyway, the comments that I said was that  
21 Mr. Wasch says that even with only a few examples  
22 submitted, the SIIA still recognized the need for an  
23 exemption and is willing to give those commentators  
24 the benefit of the doubt. It goes to credibility  
25 which is why I want to bring this up. The actual

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1 quote was "We are willing to give these commentators  
2 the benefit of the doubt therefore the SIIA does not  
3 oppose the codification of an exemption." If that  
4 sounds like I turned something around, I do apologize,  
5 Keith but I believe the point was still there and it's  
6 pretty accurate as I said it.

7 Also going to credibility, Aladdin Systems  
8 does make dongles. Keith mentioned that the company  
9 will replace a dongle for free. There's no need to  
10 contact either the manufacturer or my company or  
11 anyone else that might make a similar product. What  
12 I have to say is I respectfully suggest that it's just  
13 plain wrong. It's not even close to being accurate.

14 A lot of places these dongles are supplied  
15 and as I said I have the whole string set up here,  
16 these are blank devices that are supplied by the  
17 manufacturers of the device. Rainbow Technologies  
18 makes one. Aladdin makes one and other companies make  
19 them. It's very clear they supply the developer with  
20 a key. The developer then puts whatever information  
21 they want to put in there that's unique to that  
22 company. That's exactly the reason why Aladdin for  
23 example would never be able to replace a  
24 manufacturer's key because they would have no  
25 knowledge as to what's inside the key.

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1 I don't want you to take my word for it.  
2 This is one of the papers that I brought in today.

3 CHAIRPERSON PETERS: Mr. Kupferschmid, you  
4 will have an opportunity.

5 MR. MONTORO: That paper is one by Rainbow  
6 Technologies. I'll be happy to supply one. Keith,  
7 I'm looking for that page that shows the technical  
8 problems with Aladdin and then right after that is the  
9 one by Rainbow Technologies. It's the page right  
10 after this one.

11 MR. KUPFERSCHMID: I have to jump in here  
12 for a second.

13 MR. MONTORO: Let me just point it out to  
14 you.

15 MR. KUPFERSCHMID: I have never seen this  
16 document and never heard about it until about an hour  
17 ago.

18 MR. CARSON: You can keep it, Keith.

19 MR. KUPFERSCHMID: This is 80 some odd  
20 pages and I'm expected to go through this and give an  
21 opinion right now. That's not going to happen.

22 MR. MONTORO: No, that's not necessary for  
23 this one issue that I do want to go over. I don't  
24 think that you would disagree that Aladdin and Rainbow  
25 basically made dongles and that these products

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1           although they have their own benefits basically are  
2           the same.

3                         What I do want to read is on problems that  
4           Rainbow documents. They have a question and answer,  
5           an FAQ section right there on that second paper, Mr.  
6           Tepp. The question is "Why do I have to contact my  
7           developer? Can't you replace my key?" The answer by  
8           Rainbow Technology is "A hardware key represents a  
9           physical license to an application. Rainbow has no  
10          legal ability to sell someone's software. Rainbow  
11          merely is a vendor supplying blank keys to our  
12          customers and not even we know the content of the key  
13          once it is programmed by our customers, the software  
14          developers. We know nothing of their application or  
15          how they implemented our product into theirs, nor are  
16          we licensed or contracted to support their  
17          customers..." I'll stop there but I think I've made  
18          the point.

19                        One further thing regarding Kupferschmid's  
20          testimony is that Keith mentioned about USB keys. He  
21          asked me to hold these up so that everyone can see how  
22          big these things are and they are pretty impressive.  
23          He did show the new USB keys. Could you hold that up  
24          for me, Keith, so everyone can see that? Thank you.

25                        Now I've also brought in some papers and

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1 I showed you about the financials that I talk about  
2 that no one in the industry has been hurt. What I  
3 wanted to go over briefly just so everyone can see was  
4 that in 1998 only Aladdin, and not Rainbow but there  
5 are other companies that make access control pieces,  
6 36,139 of these devices; in 1999, 44,691 devices; the  
7 year 2002 44,345; the year 2001 46,613; the year 2002  
8 49,520. Obviously they are doing well. That's almost  
9 a quarter million devices. To say that an exemption  
10 is not needed for over a quarter of million people  
11 from this one company that have the devices of this  
12 size because now we're introducing a new device is  
13 completely wrong.

14 MR. SIMON: Mr. Montoro, since you are  
15 answering questions and I hope I'm pronouncing your  
16 name correctly this time.

17 MR. MONTORO: Thank you, Mr. Simon.

18 MR. SIMON: Could you help me out and give  
19 me some idea of what steps you take to make sure that  
20 the people who acquire your products are actual  
21 legitimate licensees of software?

22 MR. MONTORO: Yes, sir. You asked that  
23 question. I did address that actually in my testimony  
24 earlier but I will go over it again for you. What my  
25 company does first of all is that we have an order

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1 form that the customer must fill out. That order form  
2 also includes a declaration basically that says they  
3 are the owner of the software and that they have tried  
4 to contact the developer and have not been able to  
5 obtain any relief.

6 The second thing that we do is we require  
7 the customer to then go ahead and send in a copy of a  
8 proof of purchase. In other words like I said  
9 earlier, a copy of an invoice, a packing slip,  
10 something that shows that actually that company is  
11 licensed.

12 The third thing that we would require if  
13 that's not available would be a declaration under  
14 penalty of perjury as in the example of the Department  
15 of Justice where they were not able to find an actual  
16 invoice because it was done so long ago. That's the  
17 first part of the question. I'm not finished.

18 The second part of the question is what  
19 happens when someone would get my software. How do we  
20 make sure that the software is not going and being  
21 distributed worldwide and not contributing to any kind  
22 of a piracy problem which really is an outstanding  
23 question?

24 I'd like to give you a great answer too.  
25 I will. I've been a developer for over 13 years. One

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1 of the things that I've tried to do is make sure that  
2 my software cannot have been installed, or if it is  
3 copied, it gets copied, I'm sorry, not copied, it gets  
4 transferred, it gets -- I know it's hard, isn't it?

5 MR. KASUNIC: It sounds like a DRM.

6 MR. MONTORO: Indeed.

7 MR. KUPFERSCHMID: It sounds like an  
8 access control measure.

9 MR. MONTORO: It is.

10 MR. KUPFERSCHMID: Maybe it can be  
11 circumvented on this exemption.

12 MR. MONTORO: And maybe I could make my  
13 own software. Actually yes, it might be. But what we  
14 try to do then is protect the client's software.  
15 Let's say in your BSA case for MasterCam for example,  
16 the software that I would distribute is Spectrum  
17 software. It would read the lock device. Once it  
18 reads the lock device it creates the software  
19 equivalent to the dongle. We're not even bypassing  
20 the security measure. This is actually a replacement  
21 of the security key but it's being done in software.  
22 That software piece is then actually tied to that  
23 computer.

24 Could you please sit back a little bit,  
25 Keith? It's nice to talk to you. Thank you. That

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1 software is then tied directly to the computer by  
2 certain things down in the registry and also by some  
3 other things as well that I'd rather not talk about.  
4 So that software then cannot be copied off of that  
5 computer. We try to be responsible.

6 MR. SIMON: That's great stuff. And I  
7 think that if the Copyright Office were to go forward  
8 with some kind of exception in this area if it were to  
9 implement safeguards like the ones that you described  
10 which you have to authenticate the guy is a legitimate  
11 licensee. You have to ask them hard questions. You  
12 have to make sure that the software you're providing  
13 them is not just spread all over the world. Those are  
14 good safeguards.

15 MR. MONTORO: Thank you.

16 MR. SIMON: Our objection is not to your  
17 helping out people who have a problem with technology  
18 that's not working or some vendor has gone out of  
19 business.

20 MR. MONTORO: And you and Keith made that  
21 point.

22 MR. SIMON: Our concern is making that  
23 when you are helping the guy who has a legitimate  
24 problem you don't inadvertently end up helping out a  
25 whole bunch of other people too who don't deserve your

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1 help.

2 MR. MONTORO: I understand that point and  
3 my company has tried to be responsible in that way.  
4 Even when Keith in his paper brought up the three  
5 conditions essentially, we're not completely opposed  
6 to every condition as long there are safeguards that  
7 permit the use of that product or a use of a service  
8 to bypass that device or replace that device in the  
9 event that some things can't be done.

10 MR. SIMON: Fair enough. Thank you.

11 MR. BAND: If I may just jump in, the  
12 important point is that Mr. Montoro has a market based  
13 incentive to prevent his product from being  
14 distributed too far because then he's losing business.  
15 My point is that I think market-based solutions take  
16 care of a lot of these issues rather than trying to  
17 over regulate, even assuming that the Copyright Office  
18 had the authority to put all these conditions, which  
19 I'm not sure it does have. But assuming that it did  
20 have it, it's really not necessary given that in most  
21 cases the people doing the circumventing are people  
22 with highly specialized skills. He has a market  
23 reason not to want it to be overly distributed so he's  
24 going to take care of it himself.

25 MR. SIMON: I like his answer.

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1 MR. KUPFERSCHMID: Let me just add also  
2 something Mr. Montoro raised early on in his comments  
3 which is he mentioned about how many of the dongles  
4 and these USB locks as well have been distributed and  
5 that Aladdin is distributing a lot more of these days.  
6 Yes, that's true. The reason it's true is because  
7 there's a lot more piracy these days. That's why  
8 there's a lot more demand for the dongles and for the  
9 USB locks. There are lot more software companies  
10 these days that feel the need for them. That's why  
11 their business has increased.

12 CHAIRPERSON PETERS: I noticed that your  
13 hand is up. However actually this is a formal hearing  
14 and the only people who can ask the questions are us  
15 and the people who are the witnesses. They have an  
16 opportunity to present their views but there's no way  
17 in this process that we can take anything else.

18 AUDIENCE MEMBER: I understand that, Madam  
19 Chair. I've heard so much fear, uncertainty and doubt  
20 --

21 CHAIRPERSON PETERS: I'm sorry. We're not  
22 going to put this in the record. Charlotte.

23 MS. DOUGLASS: I just have some quick one-  
24 shot questions. One of them goes to Mr. Sulzberger.  
25 I understand I think that we're not here to really

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1 talk about fair use in general so whether or not the  
2 DMCA shafts fair use or not. I just wanted to ask  
3 about Palladium. What are the alternatives to  
4 Palladium? Why would you say "the end of the world  
5 we're not going to be able to do anything after"?

6 MR. SULZBERGER: I can think of many  
7 business models as they are called or fanciful  
8 projections, businesses. But if I had the same  
9 persuasive power not saying anything corrupt here in  
10 any simple way that the Congress of the United States  
11 as the MPAA and the RIAA, the American Association of  
12 Publishers has, I can think of many business models  
13 that could make me billions of dollars very quickly if  
14 I could get special laws by which the United States,  
15 police forces and the courts would protect my new  
16 businesses.

17 Here's a new business. I project porn on  
18 the side of buildings and I then debt people's  
19 accounts if they look at it. Now I could claim as a  
20 matter of fact under Copyright law that I need these  
21 special protections. After all, I own the porn in the  
22 sense of copyright because I hold the copyright. My  
23 answer is very simple. Things really do change. We  
24 don't build pyramids anymore. Faberge eggs haven't  
25 been made in some time. Actually stuff like Petrarch

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1 wrote isn't being produced as much anymore. There are  
2 extraordinarily complex and actually heavy  
3 interactions between law, polity, custom, economics  
4 and human techniques of building things.

5 So today the music industry cartel of the  
6 most absurd sort is able to charge \$15 or \$20 for a CD  
7 of a few songs. I don't know. I've never bought one  
8 in my life. Now that the Internet has come and  
9 computers have come surely there is dreadful copyright  
10 infringement just as there is every single day when  
11 one uses the Xerox machine.

12 The answer is that Congress shouldn't pass  
13 laws to defend the special interests which are  
14 themselves gross violators of anti-trust law in the  
15 crudest possible sense and of course real copyright  
16 infringers as everyone knows. In a matter of fact if  
17 there were a symmetry in these laws, I would demand -  
18 Here's my answer to Palladium partly - that I be given  
19 permission to seize control of all the RIAA companies'  
20 computers so I could make sure they are not violating  
21 my copyrights.

22 After all, their company is somebody  
23 that's been convicted and have paid hundreds of  
24 millions of dollars for copyright violations. I have  
25 never violated a copyright in my life on any piece of

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1 popular music. So it seems to me quite reasonable  
2 that I should be able to go to the Congress and say  
3 and I should be able to go to Microsoft and say "Give  
4 me control over their machines." The answer is things  
5 change. If it's no longer they can't make money by  
6 selling CDs or they can't make money by selling things  
7 over the `Net if the trade-off is I give up my right  
8 to private ownership of my computer, I give up my  
9 right to privately e-mail, encrypt what I want to my  
10 friends, then I say "Good, there is no more such  
11 business." There aren't any buggy-whip companies  
12 today and that's because things change.

13           Once you get a sense that what we're  
14 talking about is a small industry, there'll be music.  
15 I make music for myself. There'll be music. There'll  
16 be performances of music. With the free Internet,  
17 we'll make movies and we'll make more music. We'll  
18 make it collaboratively. Already people have put  
19 together which is not as finished a product as the  
20 "Star Trek" movies but amateurs have thrown together  
21 a short "Star Trek" movie. Probably they would  
22 consider perhaps a copyright violation, the copyright  
23 of the only idea of the "Star Trek" universe. We  
24 don't need to give up private ownership of computers  
25 just to protect a few cartels.

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1           By the way, one of the monopolies we'll be  
2 protecting is Microsoft because no matter what they  
3 say since they violate the law today daily in the most  
4 gross manner possible, they certainly -- They violate  
5 by the way copyright licensing as I pointed out. Why  
6 are they pushing so hard for Palladium? Because  
7 without Palladium, we're going to break through.  
8 You'll be able to really control your own machine and  
9 a free operating system on it and they don't want  
10 that. Let them die. That's progress.

11           MS. DOUGLASS: Okay, Mr. Hernan has an  
12 answer to that, too.

13           MR. HERNAN: I just wanted to be on record  
14 a little bit regarding Palladium. Palladium and its  
15 related technology, TCPA and now TCG, is a useful and  
16 powerful security technology that has legitimate uses.  
17 It is a tool like lots of security tools. With all  
18 due respects, Mr. Sulzberger, I don't think the  
19 scenarios of Microsoft trying to take over the world  
20 through Palladium and TCG are really within the scope  
21 of this hearing. It is a useful and powerful  
22 technology that can be used for good and bad purposes.

23           MR. SULZBERGER: May I briefly respond?

24           MR. CARSON: Is it pertinent to what this  
25 hearing is about?

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1 MR. SULZBERGER: Yes. I said I would  
2 demonstrate it and I will demonstrate right now. What  
3 does Palladium do? It enables a person who is not the  
4 owner of the machine to run a Trojan which is heavily  
5 protected by effective technological measures as  
6 envisioned under the DMCA and makes it illegal for you  
7 to try and look and see what they are doing with your  
8 machine in your living room. It is directly  
9 connected.

10 Now I wish to address Shawn Hernan. Of  
11 course I agree absolutely that there are some uses and  
12 it's conceivable I could want to allow you, sir, to  
13 run a shrouded Trojan operating system on my machine.  
14 It's conceivable. Let's be realistic. The same  
15 arguments would show that the first ten amendments of  
16 the United States Constitution are useless. This  
17 power should not be granted. It will be effectively  
18 granted to a small group of monopolists, convicted  
19 monopolists in one case, oligopolists and cartels who  
20 have displayed the most brutal contempt for the rule  
21 of law and to think that now they will evince the most  
22 delicate concern for free markets when by changing one  
23 bit of the mask they would none but keys assigned by  
24 Microsoft to be placed in the TCPA is a fantasy so  
25 fantastic that I do not believe that anyone, Mr.

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1       Hernan, if he would consider the history would  
2       actually defend this. Thanks. That's all I'm going  
3       to say.

4               MS. DOUGLASS: Thank you very much. I  
5       have one question of Keith. Just for clarification,  
6       your second threshold condition was that the would-be  
7       circumventor would have to notify the copyright owner.  
8       But if the copyright owner is no place around or if  
9       the copyright owner has gone out of business, I would  
10      presume that would not be necessary. All he would  
11      have to do seek to contact the copyright owner. Is  
12      that what you are saying?

13              MR. KUPFERSCHMID: Yes, he would have to  
14      seek and provide evidence of the fact that he tried to  
15      contact the copyright owner and the copyright owner is  
16      no longer in business.

17              MS. DOUGLASS: Thanks.

18              CHAIRPERSON PETERS: Do any of you have  
19      any questions that you would like to raise for the  
20      record of any of the members of the panel to answer?

21              MR. HERNAN: This morning we saw a  
22      wonderful example of one of the dilemmas that faces  
23      CERT on a regular basis. Mr. Carson asked a number of  
24      questions regarding the actual behavior of the region  
25      encoding scheme on DVDs and got two equally credible

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1 answers but obviously conflicting answer though. If  
2 Mr. Carson were not an attorney for the Copyright  
3 Office but were rather an attorney for a large  
4 corporation, how could he engage a private corporation  
5 to settle that question without that private  
6 corporation risking prosecution under DMCA for  
7 circumventing the very work about which he is curious?

8 CHAIRPERSON PETERS: And who do you want  
9 to answer that?

10 MR. HERNAN: Anyone.

11 CHAIRPERSON PETERS: Not us.

12 MR. CARSON: I think you need to bring  
13 back someone from the last panel to answer this.

14 CHAIRPERSON PETERS: Takers? Jonathan.

15 MR. BAND: I just have one quick comment.  
16 Mr. Simon before was suggesting that I was asking for  
17 progress to stop and that it would be the solution to  
18 this problem. But of course I'm not asking for  
19 progress to stop. No one here is. I think we're just  
20 recognizing that it's a fact of life that progress is  
21 occurring. On the whole, it's a good thing. But the  
22 point is that the progress that is occurring has  
23 certain side effects and what we need to do here is  
24 try to minimize some of those harmful side effects.  
25 That's the point of the exemption we're seeking.

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1 CHAIRPERSON PETERS: Okay. If nobody else  
2 has any questions, then the hearing is closed. Thank  
3 you. Off the record.

4 (Whereupon, the above-entitled matter was  
5 concluded at 4:32 p.m.)  
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