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UNITED STATES COPYRIGHT OFFICE

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

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BREWSTER KAHLE, The Internet Archive
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REGISTER PETERS: On the record. Good morning. I'm Marybeth Peters, Register of Copyrights and I would like to welcome everyone to this hearing which is part of an ongoing rulemaking process mandated by Congress under Section 1201(a)(1) which was added to Title XVII by the Digital Millennium Copyright Act in 1998.

Section 1201(a)(1) provides that the Librarian of Congress may exempt certain classes of works from the prohibition against circumvention technological measures that control access to copyrighted works for three year periods. The purpose of the rulemaking is to determine whether there are particular classes of works as to which uses are or are likely to be in the next three-year period adversely affected in their ability to make noninfringing uses if they are prohibited from circumventing the technological access control measures that have been used. Pursuant to the Copyright Office's Notice of Inquiry which we published in the Federal Register on October 3, 2005, we received 74 initial comments and then 35 reply comments, all of which are available on our website.
In addition to this hearing today, we will also be conducting hearings in Washington over the next few days on March 29, March 31 and April 3. All of the information about the D.C. hearings is available on our website. We will post the transcripts of all of the hearings on our website a few weeks after the conclusion of the hearings.

The comments, the reply comments, the hearing testimony will form the basis of evidence in this rulemaking which after consultation with the Assistant Secretary for Communications and Information of the Department of Commerce will result in my recommendation to the Librarian of Congress. The Librarian will make a determination at least by October 28th on whether exemptions to the prohibition against circumvention should be instituted during the next three year period and if exemptions should issue, what particular classes of works should be exempted from the prohibition on circumvention.

Today, the format will be divided into three parts. First, it's the witnesses who will present their testimony. This is your chance to make your case in person, explain the facts, make the legal and policy arguments that support your claim that there should or should not be a particular exemption.
The statements of the witnesses will be followed by the members of the Copyright Office panel. The panel will be asking questions of the participants in an effort to define and refine issues and the evidence presented by both sides.

This is an ongoing proceeding. So no decisions have been made as to any critical issues in this rulemaking. In an effort to get as much relevant information as we can, the Copyright Office reserves the right to ask questions in writing of any participant in these proceedings after the close of the hearings.

After the panel has asked its questions of the witnesses, we intend to give the witnesses the opportunity to ask questions of each other. If we have not managed to come up with all of the critical questions that should be asked of you, I'm confident that you will ask each other those questions.

Let me turn to the members of the Copyright Office panel and introduce them. To my immediate left is David Carson who is General Counsel of the Copyright Office. To my immediate right is Jule Sigall who is Associate Register for Policy and International Affairs and to David Carson's left is Rob Kasunic who is Principal Legal Advisor in the
Office of the General Counsel.

Before beginning, I certainly would like to thank Paul Goldstein and Jillian Del Pozo in the Stanford Law School for extending their hospitality and providing this venue for our California hearing.

The first panel consists of Jennifer Granick with the Wireless Alliance and Steven Metalitz who has filed a massive joint reply commentors submission. The proposed exemption is computer programs that operate wireless communication handsets, in other words, mobile firmware. Later, this morning we will have a second panel with Brewster Kahle of the Internet Archive and again, Steven Metalitz representing the joint reply commentors.

Let's turn to the first panel and start with you, Jennifer.

FIRST PANEL

MS. GRANICK: Thank you. Thank you for the opportunity to speak before the panel.

Introduction: My name is Jennifer Granick, and I represent the Wireless Alliance and Robert Pinkerton. The Wireless Alliance recycles and resells used, refurbished and new cellular products. The Alliance works with the industry, refurbishers and the Environmental Protection Agency to reduce toxic
waste and to help bridge the digital divide. In the Alliance's experience, phones that are not locked to a specific carrier are much easier to recycle and resell.

Robert Pinkerton is an individual residing in Arlington, Virginia who traveled frequently in his former capacity as a Director of Government Solutions for Siebel Systems, a software company here in the Silicon Valley. Mr. Pinkerton, along with thousands of other Americans, has found that having a locked mobile phone has greatly interfered with his ability to communicate while traveling. We are asking the Copyright Office to grant an exemption under §1201(a)(1) to allow individuals to unlock their cell phones so that they use them with the carriers of their choice.

Brief Summary of Argument: As the litigation in TracFone v. Sol Wireless illustrates, Section 1201(a) is an actual threat to consumers seeking to unlock their cell phones. Cell phone unlocking is otherwise a legal and noninfringing activity and consumers should be able to unlock their phones without fear of liability. Unlocking to use the phone on the network of your choice is noninfringing. There is no option for most consumers
other than unlocking. Unlocking does not enable infringement of the firmware on the phone. Nor does unlocking necessarily hobble content companies in their efforts to impose digital rights management on audio-visual content stored on the phone. The balance of harms — particularly competition and consumer choice, environmental considerations and the digital divide — greatly weighs in favor of this exemption.

First, this is a decision for the Copyright Office. In opposition to their application for an exemption, the content industry argues that a court or regulatory agency would first have to outlaw a carrier's locking practices as anticompetitive and only then would consumers have a right to self-help through unlocking. We need not prove that carrier locking is illegal to warrant an exemption for customer unlocking. Customer unlocking is legal, regardless of whether the carrier's practices are prohibited under antitrust law, agency regulations or state consumer protection statutes.

The DMCA is the only reason consumers arguably cannot engage in the otherwise legitimate activity of phone unlocking. Even if courts rule that carrier locking is unlawful, as they soon may in the one of the lawsuits that's pending, for example, in
California, the DMCA would still outlaw unlocking and we would still be here before the Copyright Office seeking an exemption. So the response that this is in the wrong forum is ridiculous. Only the DMCA prevents unlocking and only the Copyright Office can grant an exemption to the DMCA.

Section 1201 (a) threatens legitimate unlocking. Nearly all wireless communications providers use software locks to tie a customer's handset to their service network. There are several methods of locking. In general, locking prevents the customer from accessing the copyrighted mobile firmware (bootloader and operating system), and running that firmware in conjunction with the wireless network of their choosing.

The lock is a technological protection measure that controls access to a copyrighted work, i.e., the mobile firmware. Therefore, circumventing that lock arguably violates Section 1201(a). Now we recognize that under the rule of *Lexmark International, Inc. v. Static Control Components*, which is at 387 F.3d 522 (6th Cir. 2004), a defendant in an anti-circumvention case could argue that unlocking is not illegal. In *Lexmark*, the Sixth Circuit held that circumventing a secret handshake
between a toner cartridge and a printer did not violate the DMCA because the handshake did not "effectively" control access to a copyrighted work. Rather, the purchase of the printer gave the owner access to the printer code. Similarly, under some circumstances, we might find that purchasing a mobile phone may give the owner access to the firmware.

The Copyright Office should clarify that either mobile phone unlocking is legal under Lexmark, or, in the alternative, grant the exemption. Clarity from the Copyright Office, or an exemption, is required because, despite the rule of Lexmark, phone unlockers have been subject to suit and penalty under the DMCA.

Litigation between TracFone and Sol Wireless illustrates that Section 1201(a) poses a real and actual threat to the noninfringing activity of cell phone unlocking. In TracFone Wireless v. Sol Wireless Group, Inc., a small company in Florida was sued for purchasing prepaid wireless handsets, unlocking them and then reselling them for use on other wireless carriers' networks. Count Five of the complaint alleged that Sol Wireless violated Section 1201(a)(1) by unlocking the handsets. On February 28, 2006, the trial court issued a permanent injunction
against Sol Wireless preventing them from "engaging in
the alteration or unlocking of any TracFone phones."
This outcome illustrates that, even after *Lexmark*,
Section 1201(a) poses an actual harm to phone
unlocking. This also disposes of the content
industry's objection that the problem with phone
unlocking and the DMCA is speculative.

All of the relevant statutory factors
support granting this exemption. First, the vast
majority of current and future mobile customers cannot
unlock their phones without circumvention. Ninety-five percent of new subscribers have a choice of only
four nationwide carriers, all of whom lock the
handsets they sell.

Second, allowing customers to change
networks has no adverse effect on the market value of
firmware. Customers buy firmware because it operates
their phone, not because it has any independent value
as a copyrighted work. This is uncontested.

Finally, the balance of harms is in favor
of unlocking. We have argued that unlocking helps
customers far more than it hurts wireless carriers,
and the public has resoundingly agreed. All the reply
comments filed in response to our requested exemption,
with the sole exception of the content industry's
reply, were in favor of our exemption, of granting our exemption. The thirteen comments tell personal stories about how locked phones deprive customers of the full value of their purchase. For example, Michael Ditmore had to buy a new phone simply because two carriers consolidated. Jonathan Butler's phone and Bluetooth accessories are now just "expensive paperweights." Everett Vinzant lost $1200 because his carrier wouldn't unlock his phone.

Unlocking allows customers to use the wireless products they have already purchased, and helps customers to choose among competing service providers. This is precisely the kind of competition that is consonant with U.S. telecommunications policy. Wireless providers may claim they need software locks because they subsidize the price of the handset and they want to make up the difference be ensuring that the customer uses the carrier's service. However, legally enforceable service contracts provide for a minimum monthly fee and for hefty early termination penalties. These contracts ensure that carriers receive the benefit of the subsidy that they provide.

The environment benefits from unlocking because more handsets can be sold on a secondary market and that means less toxic chemicals end up in
landfills, incinerators and groundwater. As our written comments show, the proliferation of second-hand handsets will help address the digital divide problem, particularly in developing nations.

Most importantly, there is no evidence that phone unlocking threatens the rights of the content industry. Increasingly customers use handsets for accessing, storing, using, not to mention creating, copyrighted works. The exemption we are requesting is narrowly drawn. We are asking for an exemption that would only allow an individual to circumvent a TPM (technological protection measure) that controls access to the software that operates the phone that connects that phone to a carrier's network and enables it to work. This exemption does not allow circumvention of TPMs that control access to audiovisual material stored on a handset.

Granting an exemption for circumventing a process that allows a consumer to access the mobile phone firmware does not necessarily open the door to circumvention of a process that controls access to or copying of audio-visual works. The content industry's reply comments finesse this by saying that a mobile device's functions of accessing, receiving, playing back, storing and copying copyright materials may be
controlled by the same programs that connect the user to the dial tone provided by a particular network. But the content industry knows how it protects its works on mobile phones and it provides no evidence that the protection is or must be controlled by the same firmware that operates the phone on the network of the customer's choosing.

Modern cell phones are built like ordinary personal computers. Cell phones generally have a processor, a bootloader that starts the operating system, an operating system, a set of applications and data files. The way these layers interact in mobile phones differs, not just from the carrier to carrier, but from model to model. Because phones have different chips, different operating systems and different configurations, it is very difficult to generalize as to what is true about mobile phone architecture.

Publicly available documents about mobile phone technology show that DRM and content playback happens at a different layer than locking. For example, the Open Mobile Alliance is a consortium of technology companies, including content providers, which is promoting an open digital rights management standard. The OMA standard is used by a significant
percentage of the mobile device market. The OMA architecture places DRM functionality at a different layer than Service Provider functionality. And I have a picture which I have as an exhibit to my testimony which I'll give you. But I also have it available to put on a screen if we have the technological capability to do that. I'm almost done. So maybe we can do that in a moment. But this proves that DRM is not necessarily entwined with "accessing a dial tone."

These are different functionalities.

Different mobile devices will deal with DRM and service provision functions differently. Even if some carriers may currently place DRM technology at the firmware layer, the OMA standard, for example, does not require this architecture for DRM to work. The content industry, in collaboration with the carriers and manufacturers, can simply choose to store the keys to DRMed audiovisual material elsewhere, as is currently the case with many of the handsets on the market.

In conclusion, this application for an exemption should be granted. Members of the public have written to the Copyright Office asking that the right to unlock their phones be returned to them. Unlocking promotes competition, environmentalism and
social equality. At the same time, there is no evidence that unlocking encourages or enables infringement. The Copyright Office should remove the only legal barrier to this noninfringing, socially beneficial conduct, by either indicating that unlocking is not illegal under *Lexmark* or by granting the exemption. Thank you.

REGISTER PETERS: Thank you.

MS. GRANICK: If you would like, I can hand out my exhibits now or after Mr. Metalitz testifies, as you wish.

(Discussion off microphone.)

(Ms. Granick distributes exhibit.)

MR. METALITZ: Thank you very much. I'm Steve Metalitz and as you noted in your opening statement, I'm here on behalf of 14 organizations in the copyright industry that joined together as joint reply commentors in this proceeding and we appreciate very much the opportunity to provide some perspectives today.

I should say at the outset that our organizations are not mobile carriers or providers of wireless services for the most part, in fact, entirely and I'm not here to defend the policies of particular carriers or the rules that they impose about unlocking
their phones or the vertical integration of the provision of the wireless service with the provision of the equipment used to access wireless services and many of the arguments that Ms. Granick has made I think quite forcefully, I don't have an quarrel with. I'm certainly not here to argue that it is not bad for the environment. The status quo is not bad for the environment and doesn't have some of the other potentially anti-competitive impacts that she's set forth in her testimony and in her submissions.

But I do think that from our perspective there is a serious question about whether the position she is taking is in the correct forum. I certainly got the impression from the submission that this has been raised to the FCC and that certainly would seem to be an appropriate place to come to a more global solution of some of the problems that are set forth in the comments, in the reply comments, that we've heard again this morning.

So again, I'm not here on behalf of wireless carriers. Nor am I really capable of defending their policies. So I'll just move on from there.

I think I found the reply comments interesting here because I think they present a
slightly different picture than the Wireless Alliance presented in its initial comments. We see in the reply comments that the situation isn't quite as black and white as the initial comments suggested. There are carriers according to the reply comments who do allow unlocking of their phones. T-Mobile was mentioned and that carrier again according to the reply comments has some policies on this question that some people were concerned about, but it did appear, for example, from Mr. Weiseman's reply comment and Mr. Khaw's reply comment that these policies do allow unlocking or provide unlocking of the phones in order to make the kinds of changes that many of these commentors want to make.

Mr. Khaw's concern was that he should have been notified of what the policy was and that it had a 90 day waiting period and that certainly may be a valid consumer protection complaint. But the point I'm making is that it does appear that competition is bringing at least some changes to this marketplace that may reduce the equities on the side of action by the Copyright Office in this case.

Mr. Weiseman's comment also suggested to me, his reply comment, that there are other ways to deal with this problem. You can buy phones in Europe
that work in the United States and that are unlockable in which the SIM card can be swapped out. So that potentially is another means of achieving the goal that some of the reply commentors want to achieve.

Other reply comments, I think, present the picture of people having to make some choices in the marketplace about which features they want. Did Mr. Butler who is one of the reply commentors want a phone that was Bluetooth capable or did he want to pay the lowest rates that were available? Mr. Hoofnagle apparently could have bought an unbranded and unlocked device and chose not to because the other device had other features that he wanted.

These are really marketplace issues which I assume would best have marketplace solutions and of course, the entity for regulating or empowering the market in these services is not the Copyright Office. It's probably the FCC or perhaps antitrust authorities.

So I think looking at the full picture, there is also some sense that some of what is motivating the reply commentors is inconveniences that they encountered. There's one reply comment regarding research. I don't have his name at hand here, but I can get that for you. But there's one reply comment
involving research and development of applications to work on the mobile platform and there the carrier does provide unlocked phones for developmental purposes. The researchers accidentally locked it again and had a lot of difficulty getting another one. I can understand their frustration, but again, I think this falls more into the inconvenience category.

So if we look at this full picture, it starts to resemble a little bit more some of the other instances that are familiar to the Copyright Office panelists in which there are alternative ways available for consumers to achieve the objective that they want. The Office held in the past that buying a product that's intended perhaps for another geographic market and bringing it into the United States is a viable way to achieve this if your paramount goal is to have this capability. I would just urge that all those reply comments be taken into account and the whole record be taken into account as the Copyright Office looks at this issue.

With regard to TracFone case, obviously when we said that in our reply comments that there was no evidence in the record that anyone other than the petitioners had ever stated that this was a violation or could be a violation of 1201, we were unaware of
the TracFone case. We learned of it from the reply comments of the Wireless Alliance and of course, our statement in our reply comments was incorrect in that regard. It did appear as one of many counts in a complaint brought by TracFone against Sol Wireless.

That case has been ended. A permanent injunction has been entered apparently with the consent or at least with no opposition from the defendant. I have to assume this without having delved too deeply into it because the entry of a permanent injunction before any evidence is taken two months after the complaint is filed ordinarily would not happen, I would think, over the objection of the defendant who's competently represented by counsel. So the case in any case, the injunction, has been entered.

There is no provision in the injunction that refers to Section 1201. There is a provision in the injunction that enjoins the defendants from facilitating any unlocking of phones which I guess could cover the 1201 count in that case. Interestingly, the same injunction has been entered in a companion case brought by Nokia Corporation against Sol Wireless and the other defendants. That case did not have any count in it regarding Section 1201 and
yet an identical injunction was entered. I think the wording is "facilitating or in any way assisting other persons or entities that the Sol Wireless knew or should have known were engaged in altering or unlocking any new Nokia wireless phone" and then the wording in the TracFone injunction is the same except it's "altering or unlocking any TracFone phone..."

I think if you look at this case, it was essentially a trademark case, and at least according to the recitation in the complaint which, I would note that the defendants did deny the allegations of the complaint, this really was primarily a trademark case in which people were selling these TracFone phones after having bought them off the shelf at WalMart. They were altering them so that they could be used on other networks besides the TracFone prepaid network and selling them as TracFone phones.

So the gist of the case was a trademark case. It's true that there were two 1201 counts in the complaint, but there was never any decision on them and there's no reflection in the injunction that the court was ruling on the merits of that and as I said, it certainly appears from the circumstances that the injunctions were entered in both cases without opposition, substantive opposition, from the
defendants.

I don't know quite where that leaves us. It does obviously show that our statement that no one had ever claimed that this was a 1201 violation was not correct. I don't think it provides very much evidence that this is a 1201 violation and certainly it doesn't provide any support for the argument that any court has found that it is a Section 1201 violation.

I just make two additional points. One is I think the TracFone litigation does give us a little more insight on the argument that the submitters make that the uses that they would wish to make of the firmware are inherently noninfringing particularly under Section 117 and I think they cite the Aymes v. Bonelli and other Section 117 cases. I think those may be a little bit different than the facts from what people are trying to do when they unlock their cell phones. In Aymes v. Bonelli, the basis for the court's conclusion that Section 117 applies is that the buyers should be able to adapt a purchased program for use on the buyer's computer because without modifications the program may work improperly if at all.

It seems to me that in this case the
software is working fine. It's working to do what it was originally intended to do which was connect you to the network of one wireless carrier. It isn't doing some other things, but I don't think it could be argued that the program doesn't work properly or doesn't work at all.

Also the allegation in the TracFone case, was not that simply the software had been altered but that the software installed by TracFone had been erased and deleted and other software loaded into the phone. Again, that may not be infringing, but it also isn't a Section 117 situation where you're adapting software. To erase and delete it to me doesn't mean that you're adapting it. So I don't know the facts. All I know in the TracFone case are the facts that were alleged and there was never a trial in that case and as I said, the defendant denied the allegations of the complaint. But I would just suggest that perhaps the fit between Section 117 and the uses that the submitters and those that they represent wish to make may not be a perfect fit.

Finally, on the point of this spillover effect if you will of this proposed exemption on digital rights management and other technological protection measures for copyrighted material, the
point that we would wish to emphasize is that at this point the services provided through a wireless phone are by no means limited to a dial tone, of course, and in fact in their economic significance, the access to copyrighted material may be the most important part of the transaction. I think Ms. Granick is correct that there may be no technological imperative that permission for accessing the dial tone and for accessing copyrighted material be located in the same layer of the software and I suspect she is much more expert than I am in what the actual practices of some of these carriers are. As I will emphasize again, we don't represent the carriers.

So I will look at her exhibit with interest there, but I'm prepared to concede that there are probably ways to make sure that this is not, that the permissions structure is not tightly integrated. On the other hand, there may well be situations which the permissions structure is tightly integrated and in that case, granting this exemption could well have a much greater effect than allowing people simply to change their dial tone from T-Mobile to AT&T or to whatever other companies are in the market today.

I just conclude by saying that I think the overall impression that I got from the submission,
from the reply comments, from the testimony today, really that this is only a very small part of a larger picture. There are many concerns about alleged anticompetitive practices in this industry and I think there are some fora where those concerns could be comprehensively addressed.

Whether the Copyright Office should get into the game here really depends first of all on an assessment of what alternatives are available to people in the situation that Ms. Granick describes. It depends on a realistic assessment of the market which as I indicated seems to be moving toward allowing more of this unlocking and providing people with these alternatives and finally, I think it has to take into account the potential unintended consequences.

And I certainly take Ms. Granick at her word that the intent of the proposal here is not to unlock the DRM that is protecting content that's accessible through a mobile phone. But I think the Office has to be quite aware of what those consequences, while unintended, might be. Thank you very much. I'm pleased to try to answer any questions you might have.

REGISTER PETERS: Thank you. Ms. Granick,
do you at this point want to refute in any way or say anything with regard to what Mr. Metalitz just said?

MS. GRANICK: Thank you. Yes. On the issue of the availability to consumers of alternative means, the allegation here is that customers could simply go to their wireless carrier and have their phone unlocked and I think that the stories that people who wrote in in support of our comments tell show that that process is extremely difficult and time-consuming and burdensome when and if it's possible at all.

I also want to point our attention to several lawsuits that have been filled against the major carriers including AT&T, T-Mobile and Cingular in California specifically, but I know that there have been other antitrust-based lawsuits in other parts of the country saying that these companies secretly lock their phones and refuse to unlock their phones for customers. So the idea that customers can easily go to their carrier and have their phone unlocked is belied by both the reply comments and by the allegations in several pending class action lawsuits against the major carriers.

Additionally, I think what we're seeing with the TracFone case and now that that's been
settled in a way that -- well, in the *TracFone* case, one of the terms of the final injunction, the permanent injunction, is that Sol Wireless will not unlock handsets anymore and the *Nokia* case didn't have that claim in it because *Nokia* didn't own the handset. *TracFone* owned the handset and that's why the *Nokia* suit didn't have that. But they were joint lawsuits that were consolidated and brought about the same set of facts. So they have the same permanent injunction entered.

My point is with that lawsuit on the books, cell phone companies/carriers who are using this technique in order to capture customers will know that they can use Section 1201 against customers who are wayward and will know that the Copyright law will back them up in this effort even if state consumer protection laws or antitrust laws don't. So this gives the carriers not just the practical ability to lock their phones but a legal tool and a legal reason not to unlock when customers come calling.

**REGISTER PETERS:** Thank you. Before we go to our questions, Steve, do you have anything you want to say in response to what Ms. Granick said?

**MR. METALITZ:** I would be glad to submit if they're not in the record already the injunctions
that were entered in the Nokia and TracFone cases. They don't constitute, there's nothing in there that constitutes any type of finding that 1201(a) was violated. There's a recitation in the TracFone injunction that this was alleged. There is no such recitation in the Nokia injunction because it wasn't alleged. And then the injunctions just move on to what the defendants are not going to do and what they're not going to do is engage in the alteration or unlocking of any, I'm looking at the TracFone phone one here, any TracFone phones or "facilitating or in any way assisting other persons or entities to engage in the altering or unlocking."

But both cases alleged that this activity was in violation of several federal laws and state laws in Florida and there's no way I don't think you can draw from the injunction any conclusion about which, if any, of those laws was violated. So I don't know what signal it sends. But I don't think it would be much of a basis for anyone to claim that there's been a decision on 1201 issue.

REGISTER PETERS: Okay. Thank you. The order that we're going to go in is Rob Kusanic to my immediate left is going to go first and David, and then I'm taking the prerogative of going last, and
then Jule and then if there's anything left, I'll participate. But let's start with you, Rob.

LEGAL ADVISOR KASUNIC: Just getting back to the question of choice, isn't it true that it seems from the statements that we've gotten that T-Mobile will allow switching of carriers? Is that your understanding although there may be some delays in certain situations where I think one of the reply comments said that there was a policy of a waiting period for a certain number of days, but that they will switch?

MS. GRANICK: My reading of the reply comments in conjunction with the lawsuit filed against T-Mobile in Alameda County which I have attached to my testimony as Exhibit E, I believe, is that T-Mobile, I'm sorry, it's F, lies to its customers about the fact that it locks its phones, informs them that the phones are not compatible with other networks even though they are except for unlocking and continues to give customers the run-around if customers approach them to unlock their phones.

The people who follow the Copyright Office proceedings and who take the time to write in reply comments are probably among the most savvy of customers of wireless communications and the fact that
these people were able to repeatedly call and hunt
down someone at T-Mobile who gave them the right story
and finally allowed them to unlock their phone does
not mean that this is a viable real option for most of
the customers, particularly in light of the
anticompetitive and unfair competition practices of
the company.

LEGAL ADVISOR KASUNIC: Given that there
are these complaints about it, aren't we likely to see
some kind of a market response to this given that and
certainly these are just complaints? So we can only
take that at face value and we haven't heard a final
conclusion and the other side of the story to that.
But isn't there a likelihood that we would see market
corrections where there is at least some choice for
consumers now that there's some indication that T-
Mobile, that's one of the four carriers?

MS. GRANICK: T-Mobile, Cingular, Verizon
and Sprint are the four major carriers and I think
that the inclination is going to be exactly the
opposite from what you suggested. It might be.
Ninety-five percent of American customers only have a
choice of one of those four companies, all of whom
lock their phones and all of whom have a history of
refusing to unlock phones for customers. Once they
realize that this has gotten the imprimatur from the Copyright Office and from the court in Florida, they're going to continue to do so and as consolidations happen in the wireless industry, there's really no reason for any of these four companies to change their practices. The market is captured and there is not space for new entrance because the spectrum is sold. So I don't think that there is going to be any market pressure.

Most people when they go to get their cell phone don't think about this. When I bought my cell phone, I certainly didn't think that I was going to be able to use it on a different network. I thought what I think most consumers think which is this is my Verizon phone and it works on Verizon and when I switch or if I switch, I'm going to have to throw out the phone.

I don't think customers know. The companies don't tell them. There is not any information out there and basically, the companies tell them quite the opposite and it's worked very well for them. So market pressure requires an educated populace and a lot of demand and mostly people are thinking about keeping their phone number and getting something that works both at their home and their
office and they're not informed enough about this to know that there's a problem until they encounter it. In all of the reply comments, every single one of these people was surprised when they found out that their phones were locked and I think that's the real reason there won't be a market demand.

LEGAL ADVISOR KASUNIC: You had mentioned that the only thing preventing consumers from doing this is the DMCA. To what extent are contractual provisions in place in virtually all of these situations where consumers purchase their phones?

MS. GRANICK: I've looked at the consumer contracts for these companies and the contracts require monthly minimum fees for a certain period of time and provide for a hefty termination fee. But the contracts don't say that you are only allowed to use your device on our network. For example, if I wanted to take my Verizon phone with me or let's say I had a phone that worked in Europe and I was going to go to Europe, I would still be contractually obligated to pay my service provider the monthly fee every month, but I could also use it in Europe. Let's say it was Verizon. Verizon doesn't operate in Europe. I have my phone for the two months I'm going to be over there. Verizon is still getting my monthly payment,
but I'm able to still use it with a different carrier
and pay that other carrier in addition and keep my
device.

And that's the way people want to use, so
that travelers want to use cell phone unlocking, and
that's totally fine under these contracts. Additionally, once the contract expires, people need
to be able to unlock their phones if they want to take
it to new network or if they want to, as the Wireless
Alliance does, recycle them and make these phones a
desirable commodity on the second hand market.

LEGAL ADVISOR KASUNIC: So is it your
understanding that none of the contractual provisions
relate at all to any of the software on the phones?
Part of the question then is to what extent is the
purchaser of a phone the owner of the software inside
the phone or on the other hand, is there any
indication that the purchaser is a licensee of that
software which would then potentially remove the
Section 117 relationship?

MS. GRANICK: I'm not aware of anything
that says that the purchaser of the phone has any kind
of limitations as you're suggesting on the phone. So
I'm not aware of that, but I can look into that. I
don't think that this needs to come in under Section
in order for it to be noninfringing because basically what customers who want to unlock their phones are doing are simply programming their phones so that it works on a different network. This does not impact any of the exclusive rights of the copyright owner because there is no copy and there's no distribution. They are simply programming as the software is designed to be programmed.

LEGAL ADVISOR KASUNIC: Then that's a question that I'm having a lot of trouble with is exactly if you could try and walk me through to the extent that you can. You've mentioned four different types of locking systems in your comment, the SPC, the SOC locking, band order locking and SIM locking. I'm having trouble clearly understanding in each case what the underlying copyright work that's being protected. I get the sense that it's an operating system that's in firmware within these phones.

But if you can be as specific as possible about what the work is and then to what extent each one of these different locking systems is actually limiting access to that copyrighted work as opposed to just unlocking access to a network. That would be very helpful.

MS. GRANICK: The firmware, what I'm
calling the firmware, is the bootloader and the
operating system on the phone which is the programs
that the phone needs in order to run on a network and
the way that locking access is that or the way that
unlocking access is the firmware is that when you
unlock the phone it allows those programs to run. So
by accessing, I mean using the program.

There are basically four different kinds
of locking and as I said with the cell phone
architecture, the way that cell phones are built
differs not just from carrier to carrier but from
model to model. But there are basically these four
types and what the locks do is they prevent one type
of lock. SPC locking and also SOC locking prevent the
customer from inputting a code into the phone that
tells the phone it's okay to operate on a different
network. So the phone needs to be told this network
is, that the lock prevents this phone from operating
on any other network and in order to operate on a
different network, that code, you have to input that
code.

More specifically for SPC locking, you
can't tell your phone point to Sprint instead of
Verizon unless you put in the SPC code. That's how
you tell the phone it's okay and if you don't put in
that code and tell the phone it's okay, then the phone will not run.

So SOC locking, it's similar, but basically the carrier requires a code in the handset to match a code sent over the carrier network and you can change the code in your handset to match a different provider's network code and then that will allow the phone firmware to work to run.

Band order locking is a bit different. It basically restricts the frequencies on which the handset will operate. If you change the locking, then the phone can operate on all of the wireless frequencies, but you need to do that. If you don't do that, then the phone won't run.

And SIM locking is basically a handshake between a little card that you insert into the body of the phone and the firmware on the phone. The firmware asks the card "Are you my Verizon card" and if the card says "No," then again the phone won't run. You are not accessing the firmware. The firmware won't go.

LEGAL ADVISOR KASUNIC: Just to think of this in the context of some other cases that have looked at issues with the difference between running a program and being able to perhaps view the computer
program, this is firmware. Is there any way to view
of the code of this program even though you might not
be able to make it run?

MS. GRANICK: My research indicates that
that differs from phone to phone. There are some
phones which you could get to dump the code off of the
phone into a readable format and there are some phones
that encrypt that or that have that as closed code.
That's not readable and it depends on the phone.

LEGAL ADVISOR KASUNIC: Have you
considered at all whether Section 1201(f) could be
applicable at all to this situation where an
independently created, where there was reverse
engineering of this in order to create an independent
computer program that would allow you then to have
this operating system interoperate with another
network?

MS. GRANICK: I've considered it and I
think that Section (f) is entirely different and
doesn't contemplate this thing at all because this
isn't about reverse engineering and it's not about
interoperability. It's about allowing the phone to
operate as it already is designed to operate on any
network that runs on the standard. It's simply about
being able to program the phone so that it can go from
network to network.

So let me see if I can rephrase. Customers aren't reverse engineering to create independent programs that will modify the phone or that they store on the phone. All that customers are trying to do when they unlock is to be allowed to program their phone to operate on a different network and the phone is already enabled to operate on these different networks. It doesn't need any more software or anything special.

Any CDMA phone will operate on any CDMA network. Any GSM phone will operate on any GSM network. The only reason it doesn't is because the carrier has locked it. So it's entirely different from Section (f).

LEGAL ADVISOR KASUNIC: Have you thought about this at all?

MR. METALITZ: About the applicability of 1201(f)?

LEGAL ADVISOR KASUNIC: Yes.

MR. METALITZ: No, I haven't looked at that.

LEGAL ADVISOR KASUNIC: Okay. Last question. What benefit do you think that -- In looking at some of the reply comments it seemed that
most people were looking for help elsewhere to get them to do what they wanted to do. What benefit do you think an exemption would actually serve these individuals in a situation where they would have the ability to circumvent but they would not through the exemption, unlike for instance something like 1201(f) that also affects the trafficking provisions potentially, this would not offer any opportunity for someone to come along with a service or to traffic in a device that would allow these consumers to affect this change? So what benefit would you see for the exemption?

MS. GRANICK: It would certainly help, for example, my client, the Wireless Alliance, which gets tons of used cell phones and wants to basically erase the software off of that and either install new software or to unlock the phones and leave the current software on. So my client, the Wireless Alliance, has the capability of doing what Sol Wireless did which is totally refurbishing the phones and stopping them from them being on a different network. But they can't do it because of this provision.

Similarly, I think individuals would be able to do this by either guessing the code or by calculating what the unlocked code is. Many of the
unlocked codes are based on the kind of hardwired number that's associated with the handset. I believe it's called an ESN number or an EIN number and I think consumers who can find the EIN number by looking at the hardware of the phone and can calculate the unlocked codes from that. So it would help Wireless Alliance and it would help consumers as well.

LEGAL ADVISOR KASUNIC: Steve, did you have a comment on that? Do you think that the erasing of the software is something that's implicated by prohibition on circumvention?

MR. METALITZ: I guess the question is whether it's an infringement to erase it which I guess it isn't. What seems to be involved in at least the first three of the technologies that the initial comment describes, the first three circumvent techniques, if you will, is reprogramming the firmware, making it do something that it wasn't able to do prior to the circumvention and subsequent actions and it seems to me if that is not infringing it has to be because of Section 117 which gives you a right to make an adaption of the software.

And then I think your question about whether the person doing this is in fact the owner of the copy or simply a licensee is on point. I don't
have any idea what the contracts say in this case, but I guess you would have to look at that. I think the SIM locking a little different, but at least for the first three, it strikes me that this is preparation of an adaptation. So it's noninfringing character I think would rise or fall based on whether 117 covers it.

MS. GRANICK: I think that that's a bit of a misunderstanding of those first three types of unlocking and let me try to explain it again. This is no more a reprogramming of the firmware than asking my TeVo to record Desperate Housewives instead of The Daily Show as reprogramming my TV. All it's doing is indicating to the software that this is my preferred channel as opposed to this.

The phone comes programmed to connect to any CDMA network, any GSM network. The carrier says, "You'll only get me. You're only going to get Verizon" and what I want to do as the consumer is say "I'd also like to get Sprint" or "I'd also like to get T-Mobile." So it's not reprogramming the software in the way that I'm making an adaptation of the underlying code. I'm simply instructing the code the way the code is designed to be instructed.

LEGAL ADVISOR KASUNIC: So it's almost
like a filter in a sense that you have this capacity
to see the whole thing and you're being limited to a
certain spectrum in some case.

    MS. GRANICK: Exactly.

    LEGAL ADVISOR KASUNIC: Thank you.

    REGISTER PETERS: Your turn.

    GENERAL COUNSEL CARSON: Thank you. This
may be asking you to repeat what you've already said,
but I just want to make sure it's clear in my mind.
Going back to the basics, Section 1201(a)(1) says "No
person shall circumvent a technological measure that
effectively controls access to work protected under
this title or a copyrighted work." So I want to make
sure I understand. What is the copyrighted work to
which access is being controlled here?

    MS. GRANICK: It is the bootloader
operating system and the programs which tell the phone
to run.

    GENERAL COUNSEL CARSON: Okay, and you've
mentioned four different devices, or device might be
the wrong word, four different methods that I gather
would be the technological measures that effectively
control access to that.

    MS. GRANICK: Correct.

    GENERAL COUNSEL CARSON: The one that I
wasn't sure I followed within this scheme, maybe you
can just elaborate, is in what respect is the band
order locking. From the description, it didn't quite
become clear to me how that actually was an access
control, but maybe you can clarify.

MS. GRANICK: I can -- Basically, the
phone will not, the phone is told only to connect to
a specific frequency which correlates to the carrier.
So my phone says connect only to Verizon and I can't
make my phone run on any other frequency. So I can't
access that code that makes the phone run with any
other frequency.

GENERAL COUNSEL CARSON: I think I follow.
One of the, I think, perhaps the primary concern you
have, Mr. Metalitz, you're not terribly concerned
about the wireless carriers. You're concerned about
the copyright owners whose interest you do represent
and the fact that a lot of their content now resides
on cellular phones and the fact that it's possible
that these same operating systems that control access
to telecommunications networks also may control access
to the works of your clients. But that's your main
concern I gather.

MR. METALITZ: Yes, we're concerned about
that, what might be the impact.
GENERAL COUNSEL CARSON: Let me ask then both of you whether it would be of assistance to maybe narrow the scope of what's being proposed here like whether this makes you any happier, whether this makes you any unhappier. But if we said "Computer programs in the form of firmware," and I guess one question would be is it always firmware, if it is that's safe I suppose, "that enable wireless telecommunications' handsets to connect to a wireless communication network."

Let me start with you, Mr. Metalitz, and I'll repeat it just to make sure you get it. But the question would be would that allay your concerns and again "Computer programs in the form of firmware that enable wireless telecommunications' handsets to connect to a wireless communication network."

MR. METALITZ: It certainly would if the word "solely" were placed before "enable." I think we're concerned about software that may have multiple capabilities, one of which is to give you the dial tone and another of which is to integrate it into that is that capability to access all this other material. So certainly if it were solely to enable that, then I think the concern we have about the impact of this on access to unrelated video games and music and so forth
would be allayed.

GENERAL COUNSEL CARSON: Is there any reason to believe that there exists firmware that exists solely to enable that kind of access?

MR. METALITZ: There may be. There certainly was in the past because at one point, all that your phone would do is get you a dial tone and it may well be that you can disaggregate the function that gets you the dial tone now from the other functions. In that case, something that's circumvented to get to that function to allow you to make the changes, the reprogramming, that would Ms. Granick describes with regard to that function, I think it states a class that can be defined.

GENERAL COUNSEL CARSON: But I would imagine that a Verizon or a Sprint or a T-Mobile might well decide if we had such an exemption then I'm going to make pretty darn sure that my firmware doesn't work that way and that it controls both so that I'm outside the scope of the exemption and then we have a meaningless exemption. Wouldn't that be a likely scenario?

MR. METALITZ: It would I suppose and that is exactly the kind, I would think that's exactly the kind of issue that an agency like the FCC or an
antitrust authority would be concerned with as to whether they're bundling the service that is regulated by the FCC. Well, I hesitate to assert what is or isn't regulated by the FCC, but clearly they have a different role to play with regard to the dial tone than they have with regard to access to all this other material and it would certainly make sense for the FCC to tell the wireless carriers what you can or can't do, what's your freedom of action in this area.

I agree with you that there could be ways for a wireless carrier to get around this and make it less useful to those of Ms. Granick's clients who have the capability to actually perform the aftercircumvention as Mr. Kasunic emphasized. That's all that this proceeding is about.

GENERAL COUNSEL CARSON: But then if, of course, Ms. Granick's clients got the exemption they wanted, wouldn't that be a pretty strong incentive for the wireless companies to segregate out those two functions?

MR. METALITZ: It certainly would become, I assume it would become a contractual issue, a licensing issue, between content providers and wireless carriers as to how that was managed because the content providers would want to have some security
about how access to their material was managed.

GENERAL COUNSEL CARSON: So let me repeat what my language is to you, Ms. Granick, and get your reaction. "Computer programs in the form of firmware that enable wireless telecommunications' handsets to connect to a wireless communication network." Would that do it for you?

MS. GRANICK: Yes, it would. I don't know the answer first to the question of whether this always comes in the form of firmware.

GENERAL COUNSEL CARSON: Okay.

MS. GRANICK: I believe it does because I think you're flashing the software onto the chip in the phone, but I'm not sure. But we're talking about accessing computer programs that enable the wireless handset to connect to a wireless communication network. I think that does address my issue.

The problem with including the word "solely" is exactly as I think you were suggesting and if I can elaborate on that a little bit. If we could look at the last exhibit to my testimony, I think this will show a bit about why it is that "solely" won't work. So this exhibit is a diagram of the Open Mobile Alliance's 2.0 client architecture and what it shows is that there's the operating system for the phone,
there's a second layer that's the service provider, interface layer and then there's a third layer that's the DRM engine which on top of that is the fourth layer which is for applications to play media and then you have the media files as a fifth layer.

What this shows is that the current way that we do is that media applications and audio-visual playback is done at a different layer than other functionality of the phone. But my understanding is that it is different from phone to phone and that it is possible for programmers and designers of the phone architecture to take pieces of different functions and include them in the different layers.

So, for example, if I have DRM that protects my audiovisual work, I need a key to unlock it and I can hide that key in a different layer of the phone. So I could hide that key at the platform system layer, at the interface layer, at the DRM layer, at the application layer. And some phones, my understanding is that some phones may do that and a lot of phones don't. It's not necessary that that be true, but it's possible that it be true and that's the problem with the formation of "solely" is that as we know with computer programs and legislation they rarely solely do one thing. The point is that even
once you get access, say, to let's say I hid the DRM key in my service provider layer, once I get access, I'm still not allowed to circumvent the DRM because this provision is so narrowly worded it just lets you access the software that lets the phone connect to a network.

GENERAL COUNSEL CARSON: Okay. Mr. Metalitz, do you have a view as to whether someone who does what Ms. Granick's clients want to do is in fact violating Section 1201(a)(1)?

MR. METALITZ: No, I don't know. I know that now someone has claimed that they are and I think I understand the logic behind that claim. I think Ms. Granick's submission discusses some of the cases that might throw that claim into some doubt, but I'm not sure whether her reading of those is correct or not.

GENERAL COUNSEL CARSON: All right. How about you, Ms. Granick? Is someone who's doing what your clients want to do violating Section 1201(a)(1)?

MS. GRANICK: I think yes. Under certain circumstances, it does and I think that the reason why Lexmark might not entirely take care of the phone unlocking problem is because not every phone will allow you to dump the code and read as the printer allowed you to read the code. So my concern is that
in a subsequent case where someone mounted a full
defense and said, "I'm an unlocker, but I'm going to
take shelter under the Lexmark rule" that it would be
a highly technical design piece of the phone, the fact
that the code is not open or not readable that would
make one person guilty of circumvention and another
person not guilty. So this is why I ask in my
submission today that the Copyright Office either
indicate that the Lexmark rule protects all cell phone
unlocking or grant the exemption for the unlocking.

GENERAL COUNSEL CARSON: Would you agree
with Mr. Metalitz that's there's not a whole lot that
we can take away from the court's ruling in Florida
that the court ruling didn't even state whether there
was a violation of 1201(a)(1) and even if you can
infer that from the court's ruling? We have no -- We
don't really understand why the court did what it did.

MS. GRANICK: I agree that we may not know
exactly why the court did what it did, but I totally
disagree that it means we don't understand what's
going on here. What's going on here is that major
wireless companies are using Section 1201(a) to go
after phone unlockers successfully and that's what we
need to know and that's why an exemption is required.
GENERAL COUNSEL CARSON: In your comment, you referred to a letter that I think it was one of your clients had received. I'm not sure which. In the comment, you said you had concluded was alleging a violation of Section 1201(b). Is that accurate?

MS. GRANICK: I had received -- A client contacted me and had received a cease-and-desist letter from a major cell phone manufacturer. The letter claimed that my client was violating the law by circumventing and said this is a violation of the Copyright law. But the letter did not claim specific sections of the Copyright law. So I as the lawyer thought about what provisions of copyright law an allegation of circumvention might be addressing and that was obviously Section 1201.

GENERAL COUNSEL CARSON: All right. The comment refers specifically to 1201(b) though which sort of puzzled me. I just wanted some clarification. Was that a typo or were you intending to say 1201(b)?

MS. GRANICK: I think that that's a typo because the letter did not say a specific section of 1201. The letter simply said you are circumventing and by circumventing, you're violating the Copyright Act and as the lawyer for this person, I said this is a DMCA case. So it was about Section 1201 but not
specifically indicating Section a or Section b.

GENERAL COUNSEL CARSON: Okay. And we understand that the client has chosen not to let us have a copy of that letter. Can you understand how we might have some difficulty relying upon your identification of that letter as carrying much weight?

MS. GRANICK: I don't think I understand that and this was a discussion that I had had with my client about it. His position was that he would like to let sleeping dogs lie.

GENERAL COUNSEL CARSON: Okay.

MS. GRANICK: The relevance of the letter is to show that the Section 1201(a) is a danger to cell phone unlockers and I think the Sol Wireless case amply demonstrates that.

GENERAL COUNSEL CARSON: There was some reference to an ongoing FCC proceeding. Can you give us any guidance as to what's happening there? What stage it is?

MS. GRANICK: No. I don't know what's going on at the FCC. I'm not sure I know what FCC proceeding to which you're referring.

GENERAL COUNSEL CARSON: I thought I'd seen a reference in the comments. Am I mistaken on that?
MS. GRANICK: I had talked about how the FCC as part of its number portability rulemaking had indicated how important competition in the wireless market is to United States telecom policy. But I'm not familiar with any actual FCC activity around the area of unlocking.

GENERAL COUNSEL CARSON: Okay. I probably misread that or misrecalled it anyway. One moment please. All right. You pointed out, Ms. Granick, that with your typical cell phone provider, I may be putting words in your mouth but I think I'm just paraphrasing what you said, that the cell phone provider already has a contractual relationship requiring you to continue service for maybe one year, maybe two years and so on and that's how they recoup the discount from their price at which they're selling you the cell phone.

MS. GRANICK: And then some.

GENERAL COUNSEL CARSON: Okay. TracFone, of course, is a little different as I understand it from the allegations in that at least the allegations of the TracFone case were that TracFone actually sells you the cell phone for less than they paid and the only way they make money is if you elect to continue using their service because there is absolutely no
minimum requirement with TracFone. That's my understanding of the allegations.

I guess a two-part question. (A) Is that your understanding of how TracFone works and (B) if that's the case, isn't there some reason to be more concerned that there's at least one cell phone company that doesn't adopt the model that the others have and really does arguably rely upon this device to ensure that it ultimately does make its money back and also as a means of giving customers cell phones at a very reasonable price, but ultimately making enough money off the transaction that it's a meaningful transaction for TracFone?

MS. GRANICK: I agree that this is what the TracFone case is about. I do not think that TracFone is entitled to DMCA anti-circumvention protection for the way they do things because nothing that Sol Wireless did was infringing and the DMCA is protecting copyrighted works, not people from, protecting and controlling circumvention of DRM and technological measures that control access to copyrighted works.

Here, the exemption is permitted if it furthers a public interest and it is noninfringing and it's not illegal behavior and the simple fact of
accessing that firmware to either reprogram, not
reprogram it, to either give it a different
instruction or to erase it is noninfringing. I think
the case itself shows that TracFone doesn't have to
rely on the DMCA because TracFone had other claims
that it could successfully bring against Sol Wireless
under both Trademark law and also under Unfair
Competitive law. So they also could have contract
claims. So they have a legal remedy that's
appropriate when you have an arguably bad actor like
Sol Wireless that's taking advantage of the TracFone
business model to improperly make money off of it.

But this is very different from the claim
in the lawsuit of unlocking and what Nokia and or
rather TracFone was able to do was to pile on an
additional claim because of Section 1201 that really
isn't appropriate for this kind of case. This kind of
case is readily dealt with with other sorts of Unfair
Competitive law including Trademark and state law.

GENERAL COUNSEL CARSON: Final question.
In order for us to recommend an exemption, we have to
conclude that persons who are users of works in this
particular class of works are being or are likely to
be adversely effected by the whole prohibition in
their ability to make noninfringing uses under this
title and I think we understand the nature of the use
that you're suggesting people need to be able to do.
They want to be able to connect to a different
wireless carrier. I think I can assume that you would
answer the following question no, which is is that an
infringing use. Mr. Metalitz, any reason for us to
conclude that what Ms. Granick's clients would like to
do is an infringing use?

MR. METALITZ: I think it's a
noninfringing -- Again, if I understand the
technology, it's an noninfringing use only to the
extent that it's covered by Section 117 with the
possible exception of the SIM card, the fourth
technique. But the other three, it seems to me are
adaptations and therefore, I don't know whether that
is a -- I think I understand the argument. I think
she's put it well as to why that (a) isn't an
adaptation and (b) if it is, it falls within the scope
of adaptations that are permissible under 117. I
think that determines whether that's a noninfringing
use.

GENERAL COUNSEL CARSON: Okay. Sorry.
I'll have one more question. Ms. Granick, I haven't
had time to look at all of what you gave us. You
refer to your testimony to publicly-available
documents that show the different layers of software
that are used. Have you given us all the documents
you're aware of or are there others that might be
useful for us that you know about?

MS. GRANICK: I gave you the documents
that I thought were understandable.

GENERAL COUNSEL CARSON: You may be
overestimating our abilities already, but all right.

MS. GRANICK: But they have, the Open
Media Alliance has a website that has many documents
on it that detail the technical specifications of that
particular standard and my understanding is that I
believe that most wireless devices currently use that
standard. I think that there's another standard
that's promoted or supported by MicroSoft which
doesn't have an open code. So it's proprietary and I
don't have documents that illustrate what it looks
like.

But my research and my discussions with
people who are computer programmers and who are
digital rights management experts is that it differs
from model to model, that there's absolutely no reason
why access to the programs that run the cell phone
have to implicate DRM techniques, that it may be
possible that DRM keys are stored in the same area or
space on the phone, but that there is no technological reason under either the OMA standard or the Windows standard that that has to be true. In other words, if this exemption were granted, copyright companies and cell phone manufacturers could simply put the keys in a space where they're not likely to be implicated by this exemption.

GENERAL COUNSEL CARSON: Thanks.

REGISTER PETERS: Jule.

ASSOC. REGISTER SIGALL: Thank you. I'm going to start with Mr. Metalitz. I just want to follow up on the question that David asked about the TracFone case and I think your understanding or your reading of it was the same as mine in terms of what TracFone was doing or what Sol Wireless was doing. I'm not sure which plaintiff is which.

But the defendant in this case, I read it too that they were replacing the firmware. They're erasing the original firmware and replacing it with another copy. In that circumstance, do you have any idea on whether that would be a violation of Section 1201 assuming that the firmware would be accurately characterized as a technological protection measure that effectively controls access I assume to itself? If you erase firmware and replace it with something...
else, would that be a 1201 violation?

MR. METALITZ: The allegation was that they were circumventing a technological measure and I'm not sure which, whether it was one of the four that were in Ms. Granick's submission or something else and that that gave them access to the firmware and then they were erasing part of the firmware and substituting something else. I think that was how I understood it and I'm not sure that is infringing.

ASSOC. REGISTER SIGALL: But it's a violation. I guess the question is what is their violation of 1201. What technological measure are they circumventing? I read it as the technological measure could have been the firmware itself, the original firmware. They were erasing that and replacing it with firmware that did what they wanted it to do. If it's not the original firmware, does anyone, either Ms. Granick or Mr. Metalitz, have a sense of what the technological protection measure at issue is in the TracFone case?

MR. METALITZ: I'm not sure what it was and I don't think that the complaint really states that. I mean it states physically what was happening. They sent an investigator in there, but I'm not sure what kind of technological protection measure it was.
ASSOC. REGISTER SIGALL: Ms. Granick, do you have --

MS. GRANICK: I don't think the complaint makes it clear. My understanding is that there are several layers of software within the phone and that there are several different things you can do with the phone. For example, my client, the Wireless Alliance, has the ability with a phone to remove personal data like a contact book or your address book. It has the ability to install different software on the phone, but not alter the phone's bootloader or operating system and I suppose theoretically you also could have the opportunity to reflash the chip and totally redo all of the software within it. It's not clear from the allegations in TracFone which exactly they did.

I think that it's possible to get overly detailed about TracFone and whether TracFone is something that the Wireless Alliance or Mr. Pinkerton or any of the people who've submitted reply comments wanted to do. Sol Wireless did something wrong. They violated Trademark law. They were participating in unfair competition. They got punished.

The point is that by accessing the software that runs the phone they were subject to a viable claim of a violation of Section 1201(a) and...
this has a resounding ripple effect for all people who want to unlock their cell phones whether a customer like Mr. Pinkerton or a recycler like the Wireless Alliance.

ASSOC. REGISTER SIGALL: Let me follow up on that because that's what I'm trying to figure out. It's a question of whether they're accessing the underlying firmware or, as I read it, which may be the case, they're just sort of deleting the underlying firmware and replacing it with their own. I think that makes a very big difference as to whether it's a viable 1201 claim.

But David Carson has pointed out to me that the statute does to circumvent a technological measure includes to remove a technological measure. But I'm not so sure that's applicable in this case and it may be removed but it's removed to what end. It's not removed to enable access to some underlying copyrighted work. It's just removed. If you put it in the context of the Chamberlain vs. Skylink case, I don't think it's a violation of 1201 for me to blow up my garage door opener even though it might contain something that someone could argue is a program that is a technological measure.

MS. GRANICK: It would be a violation but
of a totally different explosives laws.

ASSOC. REGISTER SIGALL: Exactly. Or if you keep running it over with your car.

MS. GRANICK: I think if we look at the actual complaint, it does give us some idea. In the complaint in paragraph 10, it says that "Nokia installs at its factories special proprietary, prepaid software into the wireless phones and this software prevents the phones from being used without loading air time minutes from a TracFone prepaid air time card." And then it alleges that the defendant remove the prepaid software in paragraph 12.

So it doesn't say that the defendants removed the bootloader or the operating system or any of the other software that enables the phone to work. They simply remove the part of the software that pinned the phone to TracFone. So they did circumvent that pinning to TracFone and then ran the phone presumably with what we're calling the firmware, the bootloader, the operating system and the programs that make it connect and be a phone.

ASSOC. REGISTER SIGALL: Another question related to that, Mr. Metalitz brought up the claim by Nokia against a similar defendant. Do we have any understanding or who would be the owner of the
copyright in any of these computer programs, whether it be the firmware or the bootloader or the operating system or this firmware? The complaint that you just read seems to imply that it's proprietary to Nokia. The question is does Nokia own the underlying copyright works to which access is controlled? Do we have any sense or understanding of that?

MS. GRANICK: I do actually. It is probably licensed to Nokia by one of the major cell phone firmware manufacturers. There are several different operating systems and bootloaders that run on cell phones. There's Windows CE or Windows Mobile I believe they call it. There's Simbian or there's another open source one that's very popular and I'll remember the name in a moment and there's also Linux and I believe there are some other operating systems as well. So these are copyrighted programs that the manufacturers license to put on the phone and then there's probably some software that's proprietary to TracFone or Verizon or Sprint that ties it to that particular network.

ASSOC. REGISTER SIGALL: The reason I ask is the question in evaluating this case which you've offered as a precedent for inhibiting noninfringing use. Should we take into account I think what Mr.
Metalitz has pointed out which is you have another interested party, Nokia, should we take into account the fact that they did not bring a 1201 claim if they are either the owner of the underlying copyrighted work at issue or a licensee of the copyrighted work in having some interest in the copyrighted architecture? Should we figure that into account as to how serious this is a threat to people who own these copyrights and who might employ technological measures to protect them? Should we take into account how we evaluate this threat in light of the surrounding circumstances?

MS. GRANICK: I think that what that shows is exactly how noninfringing this use is. Nokia doesn't mind that people use the software on the phone to make the phone a phone and work. The people who care are the wireless carriers who want to lock the phones. So Nokia is perfectly fine with Sol Wireless using the phone as a phone. They got paid already. It's only the wireless carriers who want to tie the phones who care about the circumvention. I think the fact that Nokia didn't include that illustrates just how much this is about the non-fringing use and the tying and just how little it is about any kind of worries about copyright infringement.

ASSOC. REGISTER SIGALL: Mr. Metalitz, did
you want to react?

MR. METALITZ: Yes, I think the discussion that we've just had kind of emphasizing how much or how little the TracFone case demonstrates what Ms. Granick says it demonstrates which is that it's sending the message that 1201 is a threat to everybody that wants to unlock the firmware because as she points out, the allegation was not that the defendants unlocked the firmware. They unlocked this TracFone prepaid software which was owned by TracFone according to allegations of the complaint and they eliminated that and that was the activity and then they repackaged the phone and sold it with the TracFone name on it. That was the activity that really gave rise to the lawsuit.

I think 1201(a), first of all, 1201 is kind of a bit player in this entire litigation and I don't think we can draw any legal conclusion about the applicability of 1201 from this litigation and secondly, it's clear that the activity that TracFone was engaged in was not the activity that Ms. Granick and her clients wish to engage in. So perhaps we're put back to where we were at the time of the initial comment which was who is it that is stepping forward to say this is a violation of 1201.
Maybe there was a letter that said you're violating the Copyright Act and maybe that referred to 1201(a)(1) but 1201 isn't actually a part of the Copyright Act. But that distinction might have been lost on the author of that letter.

ASSOC. REGISTER SIGALL: As it is on most of the public probably.

MR. METALITZ: Yes. So I think we're left still with this question about is this a speculative concern or is it a realistic concern and I think the marginality of 1201 too really was at issue in the TracFone case and really I think to the complaint and I'm not contesting the validity of the complaint in the slightest that the complaint that Ms. Granick's clients and many of the reply commentors have against these major carriers, I just think it's quite marginal. 1201's role in this is quite marginal and that I think suggests that this may not be the forum for solving the problem that she's brought to our attention.

ASSOC. REGISTER SIGALL: Let me follow up on that last point you made. You talked about this might be better handled in the FCC or in an antitrust authority of some sort. Would those authorities have the ability, if they felt it necessary, to make clear
that Section 1201 liability doesn't apply and with respect to certain activity they think promotes competition or is more consistent with the Communications laws?

MR. METALITZ: No, I'm not sure that they could give a definitive ruling on that. I assume that if the FCC were considering this, they would probably ask the people on this panel for their views and as the Copyright Office for its views and others. If they paid attention to this issue at all, I think they might more likely say, unless it was brought to their attention, they might well operate on the assumption that the Copyright law didn't really have much to do with the dispute or the issue that was before them. But I don't think they're in the position to give a definitive ruling that would be binding on courts about the scope of 1201.

ASSOC. REGISTER SIGALL: Ms. Granick, in your oral statement you said people have already suffered, at least one person has already suffered, a penalty under the DMCA for this unlocking of phones. Was that a reference to the TracFone case or was there something else that you were trying to point out with that comment?

MS. GRANICK: A reference to the TracFone
ASSOC. REGISTER SIGALL: Okay. Let me follow up. I have just a couple more. Let me follow up on David's effort to come up with a more tailored exemption. He suggested some language and Mr. Metalitz suggested adding "solely" to that language. What if we instead of adding the word "solely" took David's language which more specifically called out what the exemption applied to, but said at the end that this computer program or this firmware that is identified does not also at the same time control access to another copyrighted work.

So along the lines, that Mr. Metalitz pointed out that sometimes if the program does two functions and one of those functions is protection of other content that's being transmitted to the cell phone that the exemption wouldn't apply. But where the functions are separated, then potentially the exemption would apply. Can I get your reaction to that? Let's start with Mr. Metalitz and then Ms. Granick.

MR. METALITZ: I think that would be an improvement. I think that would get to the same thing I was suggesting before.

MS. GRANICK: That would again not work
because all the wireless carriers would have to do is go to the software writers and say make me firmware that both does DRM and runs the phone at the same time and then the whole effect of the exemption is moot. I think the thing that's important to recognize is that the copyright owners have a choice here. The copyright owners can choose to put the DRM functionality anywhere on the phone. They have the choice of putting it with the firmware or outside of the firmware.

The wireless companies are going to want them to put it with the firmware if this exemption is modified or if this exemption is tailored in the way that you suggest. But if the exemption is in the way that Mr. Carson suggests the copyright owners who want to protect their content can just put the keys elsewhere. No problem. We know it's no problem because they're doing it today.

ASSOC. REGISTER SIGALL: But you acknowledge that this exemption that you've proposed shouldn't be used or result in the effect of a lessening of technological protections that are applied to other copyrighted works. Is that right?

MS. GRANICK: It shouldn't be used for that purpose and there is no reason why it necessarily
has to have any effect on protection of other copyrighted works.

ASSOC. REGISTER SIGALL: And to the extent that we can limit that unintended effect, we should try to do so in crafting the exemption do you think?

MS. GRANICK: I disagree because the copyright owners have complete discretion technologically to limit that risk themselves and for this exemption to make an effort to do that for them gives the wireless companies a tool to make the exemption moot.

ASSOC. REGISTER SIGALL: Two more questions. The first refers to your discussion in your initial comment, Ms. Granick, to the factors that were supposed to apply in considering exemptions. You mention that Factors 2 and 3 which would call the availability for use of works for nonprofit, archival, preservation and educational purposes and this is NO. 3, the impact that the prohibition on the circumvention of technological measures has on criticism, comment, news reporting, teaching, scholarship or research. In your comments, you said these are not relevant to the exemption. My question is is that the equivalent of saying that there will not be an negative impact on the availability of use
of works for nonprofit, archival, preservation or educational purposes and there will not be an negative impact on criticism, comment, news reporting, teaching and scholarship if the exemption is not granted.

MS. GRANICK: Definitely, I don't see an impact on criticism or comment. In terms of the availability for use by nonprofits, certainly there's an impact. The Wireless Alliance or other recycling companies like them who do phone recycling or companies who want to bring cell phone technology to developing nations could be nonprofits, but I read the factor as being about archival, preservation or education purposes and I think it would be a stretch for me to say that that is somehow implicated by what I'm asking for today.

ASSOC. REGISTER SIGALL: Okay. The last is a question you mentioned in reference to the Open Media Alliance information that you gave to us. You said that the Open Media Alliance has been adopted or is being used. Their work is being used by a significant percentage of the wireless and mobile marketplace. Do you have any quantification of significance?

MS. GRANICK: I understand that it's the majority of the wireless carriers at this point in
time. This is something that I understand from talking to people who are in the DRM world, but I don't have a number on that. So I didn't put that in my comments, my written comments. But there are two major wireless DRM formats. There's the MicroSoft one and the Open Media Alliance one and they are both used and they both have a relatively significant market share. I'm not sure which one is more than the other.

The reason why I point out this particular scheme is because I was able to find a picture on the internet of how it works which illustrates my point and I think helps make it understandable why it is that DRM isn't necessarily implicated by the exemption I'm requesting. But my understanding is that the other DRM technology that's the other major player out there has the exact same attribute or future which is that the DRM piece can be done separately from the firmware service provider piece.

ASSOC. REGISTER SIGALL: Okay. I actually lied. I do have one more question. I want to understand a little better about the band order locking that you discussed with David. Here's my understanding and you can correct this. My understanding is that the firmware or the software within a phone in the bank order locking situation has
instructions in it that the phone can only be used for particular frequencies for mobile communications and that in effect prevents people from taking that phone and moving it to another provider if that other provider is not on one of those frequencies. Right?

MS. GRANICK: Yes.

ASSOC. REGISTER SIGALL: But in that case, the user has access to a copyrighted work that functions completely as intended. Right?

MS. GRANICK: No, the user in all of these cases has one kind of access to the work which is that they can use the phone on Verizon, but they don't have access to the work in that they can't use the phone on Sprint and the same thing is true for bank order locking. It basically says you can use these frequencies but you can't access and run the cell phone software unless you are on our frequency.

ASSOC. REGISTER SIGALL: Again I'm trying to get an understanding of what exactly the -- So is this another instance of the separation between the firmware and some other programs that you mentioned, the bootloader program or some other programs or is it a case where all of the programs have been designed to work in a certain way to a particular frequency and they're just operating normally. But the way to
circumvent this would be simply to have a different computer program that would allow access on different frequencies.

MS. GRANICK: That's not my understanding of the way it works. My understanding of the way it works is it's a filter. So the phone is enabled. Software lets it run on any of the wireless frequencies. When Verizon gets it or orders it from the manufacturer, it says, "Disable the phone so that it can't run on the other guys' frequencies. Make it so that it can only run on mine" and all that you do when you unlock a phone that's band order locking is you say now it can run on all the frequencies it's designed to run on.

ASSOC. REGISTER SIGALL: Does this mean that the target of the exemption, if any, is not necessarily the firmware. Is it some other copyrighted computer program that might be in the phone whether it be a bootloader program or something that's not so easily changed?

MS. GRANICK: It's the programs that allow the handset to connect to the network and that includes the bootloader and the operating system and probably some other service provider or software files that make it a phone and not a computer and so those
are what need to be accessed or run in order to work a phone.

ASSOC. REGISTER SIGALL: Okay. That's it.

LEGAL ADVISOR KASUNIC: Yes, I have a couple more questions. First, following up on what Jule was asking about separate programs and I thought I heard when we're talking about the TracFone case that there's a possibility that copyright owned in the phone operating system by, in that case it would be Nokia, but that there was an add-on software that was put in by TracFone that is potentially other software and is that filter on the underlying operating system. So we might actually have a couple different computer programs involved. Isn't that possible?

MS. GRANICK: I think we probably do have a number of computer programs involved. You have the locking program, the service provider program, the operating system program, the bootloader program.

LEGAL ADVISOR KASUNIC: So is the second add-on program, is that a computer program or is that the technological protection measure?

MS. GRANICK: The technological protection measure is the lock and the lock differs from model to model of phone. There's a couple different kinds of locks, but that's the technological protection
measure. It prevents you from running or accessing whatever the software files that makes the phone run which is primarily the bootloader and the operating system but the other files that make it a phone.

LEGAL ADVISOR KASUNIC: So in the TracFone situation, that add-on computer program, that maybe is the technological protection measure as well. Right?

MS. GRANICK: I think in TracFone the add-on program is the technological protection measure.

LEGAL ADVISOR KASUNIC: But if it is a computer program, then that may still fall within 1201(f) in order to circumvent, in order to get into that, so that you can create some kind of different add-on program that would interoperate with the operating system to tell it --

MS. GRANICK: You don't need a different program.

LEGAL ADVISOR KASUNIC: You don't need to, but you could use 1201. You could create another computer program in order to interoperate with the operating system just as TracFone is doing, couldn't you?

MS. GRANICK: No, I think that misreads what was happening in TracFone and I think it is not what Section (f) is about. There's not reverse
engineering going on here. There is basically
deleting the TracFone prepaid software module which
locks the phone. Once that's gone, the phone works.

LEGAL ADVISOR KASUNIC: But I'm just
saying that even though it's not what the facts were
in TracFone, would there have been a way to comply
with an exemption maybe that didn't happen in that
particular case? But would there have been a way to
comply with another provision and then thus avoid this
problem?

MS. GRANICK: No, I don't see that because
there is nothing that you need to do with the TracFone
prepaid software, to reverse engineer or anything to
do with it that is required to make the phone work.
Nor is there any kind of other software program that's
required to make the phone work. All you need to do
to make the phone work is unlock it.

LEGAL ADVISOR KASUNIC: Okay. One thing
that just occurred to me, we're assuming, aren't we,
that when we're talking about changing and getting
access to another network that we're talking about
authorized access to that other network? I can't
decide when my contract runs out with Verizon in 30
years, whenever that is, that I can't then just decide
I want access now to Sprint and be able to change it
and get that without going through the authorization process to get access to their network. Right?

MS. GRANICK: That's correct. Sprint like all the carriers has a way to make sure that the phones that are connecting on their network are both authorized and billed.

LEGAL ADVISOR KASUNIC: Now does that have anything to do with what we're unlocking? Now the way that they're making sure that the phone is only getting access when it's approved, it's authorized, does that have anything to do with what we might be allowing people to circumvent? Could we in this exemption be opening up free access, universal access, to everybody on any service to any network they want without paying?

MS. GRANICK: I don't believe that that's the way that the access filtering on the service provider's side works. The phone is not what gets you access to the service provider. It's the service provider's network and database. So the phone is able to connect, but it's the network that lets it get phone service over the network. My understanding is that if I reprogrammed my phone to work on the Sprint network and tried to make a call over Sprint that I would not get the dial tone. I would have to go to my
Sprint store and buy minutes there and that would be the only way to do it.

LEGAL ADVISOR KASUNIC: One last thing and I may end up lying too, but in the TracFone situation, the way this model was set up to work, wasn't there something about that system? We're ultimately looking in the exemption at trying to benefit consumers in noninfringing activity. Wasn't TracFone's business model really advantageous to consumers in some way where they were buying expensive phones, offering them at a deep discount to consumers and then selling as much service, as much prepaid service, or as little prepaid service as the consumer wanted? If we end that type of what Congress might have called "use facilitating business model" might we not be harming consumers where that what we would be incentivizing by eliminating that potential would be that maybe the contracts the carriers give are just going to be more uniform and you won't have more variation and more opportunities for different types of business models?

MS. GRANICK: To say I'm agnostic on whether the TracFone business models benefits or harms consumers, but I do not think that this exemption will harm that business model. TracFone still has Trademark law, Unfair Competition law, Contract law to
go on selling cell phones in the way that they do.

The customer who buys the phone is still
going to be bound by all of those things and TracFone
is one player in this market, but there's a time at
which the contract ends and the phone is old and it's
headed for the landfill or it's headed for Africa and
it's locked and it's useless. So this is really
obviously and uncontroverted harm from cell phone
locking while the TracFones of the world and that
business model of the world continue to have legal
protection and legal support.

ASSOC. REGISTER SIGALL: Couldn't though
then TracFone -- Given that there was an exemption,
couldn't there be a different way of structuring those
that then would tie up the use again? In the TracFone
situation, there didn't seem like there was a
contractual relationship with the consumer. There
were contractual relationships between TracFone and
Nokia. But there was just the DRM was the only
obstacle and maybe some of the other areas of law that
you mentioned. But couldn't some company like
TracFone then add some new software, put contractual
restrictions on that software and then have a DRM to
enforce that contractual restriction and really that
would eliminate any ability to argue noninfringing use
then because you have a licensed use of the software, the DRM is enforcing that license?

MS. GRANICK: I don't agree necessarily that a violation of a license agreement is copyright infringement. But I do agree that it is a matter of contract law and a breach of contract law. So I don't think even if -- What I'm saying is even if there was a contract with TracFone, TracFone would be entitled to enforce that contract provision against their customers, but that is not something that necessarily has anything to do with copyright infringement and the action whether there's a contract or not of unlocking the cell phone so that you can use it is entirely noninfringing either because there are no exclusive rights that are infringed or because it comes in under Section 117.

MR. METALITZ: I just think in terms of the TracFone case Ms. Granick is trying to have it both ways. If 1201 is as central to this case and to the outcome of this case as she is maintaining, then I think TracFone's business model is very much at risk and that does have some impact on the digital divide. I'm not going to wade into that, but there are two basic models. You can have a subscription model and you can have a pay-as-you-go model. TracFone's was
the latter and for people that can't afford a subscription model, it may well be a very viable means of giving them at least some access to wireless services.

If, on the other hand, 1201 really was kind of a bit player in this case, then the fact that the case came out the way it did didn't really have anything to do with the claim about 1201 and the threat that we keep hearing about in this is from the major carriers, the four big guys, that are dominating the market and I just don't know that there's any evidence that they've ever made that threat. They obviously want to maintain their business models too and their business models may be vulnerable in these lawsuits in California and so on and so forth and it may well be that there's a lot of reasons why those models should not be allowed to continue in their current form. But I think this has very little to do with 1201.

MS. GRANICK: I think Mr. Metalitz is trying to have it both ways. His reply comments say of course it's not necessary that a submitter actually have been sued for violating Section 1201(a) or even directly threatened with such a suit before he or she can seek an exemption. The submitter must show that
it's not making a purely theoretical critique of the potential scope of the provision. TracFone shows that this is not purely theoretical and all of these technological niceties are going to be lost on the Wireless Alliances and the Rob Pinkertons of this country.

REGISTER PETERS: Before we conclude, Mr. Metalitz, do you have any questions of Ms. Granick?

MR. METALITZ: No, I think I don't. Thank you.

REGISTER PETERS: Ms. Granick, do you have any questions of Mr. Metalitz?

MS. GRANICK: Yes. Just one. If this matter were to go before the FCC and the FCC or the Antitrust Court were to say that cell phone locking is an antitrust violation, does that mean that customers could then unlock cell phones given the existence of 1201?

MR. METALITZ: That depends. I think we got into that earlier. It depends on whether 1201 really presents a barrier to them doing so or to them doing what you want to have done on behalf of your clients. Certainly, if the FCC ruled that the carriers can't lock their phones or can't lock their phones going forward, this issue would become moot.
eventually. There's obviously an installed base of phones that are still locked and potentially then we might find out whether this is a purely speculative and theoretical critique or whether there's really a threat from the major carriers under 1201 to this behavior by consumers.

MS. GRANICK: So assuming 1201 applies if the FCC said that phone locking was illegal, then wouldn't consumers have more of a need for unlocking their phones to counteract a problem that the antitrust authority --

MR. METALITZ: I see that as an issue that would be brought up in the FCC proceeding in that your clients among others would say that the FCC could handle that, for example, by requiring that the carriers swap the phones that are now locked for phones that are unlocked or that they adopt a T-Mobile policy or some variant of it that allows the phone to be unlocked upon request and what the terms and conditions of that would be I think that's another issue.

But certainly the FCC would have ways I would think of dealing with the problem without having to try to opine on whether Section 1201 applied or didn't apply in the case. I think if this model of
the locked phones is an anti-competitive model and anti-environment model and an anti-consumer model, those concerns can be brought to an agency that has the authority to adjudicate those concerns and I feel sure that they could find a way to not only solve the problem going forward but as well to deal with the installed base.

MS. GRANICK: Let's assume the same set of circumstances. 1201 arguably applies and the court says that cell phone locking is not a violation of Antitrust law. Is there any reason other than 1201(a) that you think that cell phone unlocking is a violation of the Digital Millennium Copyright Act or some Copyright law?

MR. METALITZ: Whether the circumvention of a technological protection measure, if that equates to unlocking, then 1201 would be the place you would look for that in the federal law. Now there may be other laws applicable as you've pointed out.

MS. GRANICK: But you agree there's nothing infringing about it.

MR. METALITZ: Infringing about?

MS. GRANICK: Unlocking.

MR. METALITZ: It's irrelevant whether it's infringing or not. The question for this
The proceeding is whether a band on circumvention of technological protection measures is having an adverse impact on noninfringing use.

MS. GRANICK: And I guess if I could rephrase then, the act of using your cell phone on a different network is a noninfringing use. Is that correct?

MR. METALITZ: I don't know whether it's infringing use or not.

MS. GRANICK: I have no further questions.

REGISTER PETERS: Thank you very much. Ms. Granick, you get to leave us. Mr. Metalitz gets to stay. When we go back and we look at all of the testimony that we've received as well as of what you gave us, we may well have additional questions. So you may well be hearing from us.

MS. GRANICK: Thank you.

REGISTER PETERS: Thank you and, Mr. Metalitz, we will begin in another ten minutes with the next panel.

MR. METALITZ: (Nods.)

REGISTER PETERS: Off the record.

(Whereupon, the foregoing matter went off the record at 11:30 a.m. and went back on the record at 11:47 a.m.)
SECOND PANEL

REGISTER PETERS: On the record. We're going to continue with the second panel and the exemptions that are to be discussed are the ones proposed by Mr. Kahlen of the Internet Archive. The first one is Computer Programs and Video Games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access and the second one which is a new one is Computer Programs and Video Games distributed in formats that require obsolete operating systems or obsolete hardware as a condition of access.

Steve was part of a previous panel. So he knows how we're going to do this, but for your benefit, it's three parts. First, you present your testimony. In other words, you're making your case, explaining the facts and making the legal and policy arguments that support your claim for these exemptions and then both of you do that and then actually the second part is us asking questions and trying to define the issues better and to get additional evidence and the third part is we give you the opportunity to ask questions of each other.

So let's start. It's your floor, Brewster, to make the case for your proposed
MR. KAHLE: Thank you. It's been three years and I very much appreciate the exemption that was granted to the libraries and archives or those of us that are motivated to try to archive these materials last time. What we asked for last time was basically allow us to try to preserve software and how the exemption came down was to go and make it so that it was software that was obsolete media.

Based on that exemption, we feel safe to do our job of making digital copies of these materials and we did. We've posted some on the site, but I'd say it's actually more of now there's a movement towards digital archiving that is actually doing pretty well. I would say three years ago it was a little trendy. We weren't in the mainstream, but this whole digital preservation area has become all the rage. All the libraries and archives around the world, national libraries, university and even independent libraries and archives like ours are now seeing that this is a bigger issue. So the exemption class is still as relevant as ever and in fact, I'd say it's more so because we're now starting to get other people, not just us, wanting to do these things.

What it ended up being as the exemption
was a real limitation on what it is we were trying to do and what I'd like to say here in terms of both the exemptions that we're proposing is we can live in the obsolete world. But I think we need to tweak what it means to be obsolete especially in this sort of world where you have a lot of interacting components. So trying to make it so that things aren't commonly for sale or whatever is something that we can live with.

The idea that the underlying media is obsolete only covers some of our problem because we're starting to see things like CD ROMs aren't obsolete but they require hardware or an operating system that is obsolete to be able to make the copy and be able to show did it work. What we would like to do is find a mechanism of class of works that we're allowed to do the whole pass.

Let me be concrete and clear. We have things that are based on old floppy technologies, old dongles, old things like that. We now have the capability, thanks to you guys, of doing that. But there are other classes of works that are run on old Amegas, Commodores, old Apple computers, old operating systems, but the media is still okay in the sense that it's still a 3.25 inch floppy or maybe it's a five inch floppy. You can still find the hardware such
that at least our interpretation of what the exemption
was didn't grant us the ability to break the access
protections to get a working system together and
that's what we're looking for.

I have some examples here of things that
are sort of obsolete hardware where the media is still
relevant. This is a Compaq for DLT tape. You can
still buy them on the market, but the way that it was
formatted was based on a DLT 4000. We've tried buying
old tape drives and things like that on eBay to be
able to try to recover this stuff and it's getting
dicey. It's just getting old enough. Even though the
media is relevant, the bits can't be read onto
computer systems that still work.

We also have obsolete operating systems.
So we have perfectly reasonable floppies. I mean up
until only a few years ago, there were floppy drives
like this that were sold. Yet these are for old
generation Apple operating systems that ran on the
68,000 chip which isn't even the last one. It went
from 68,000 to the Power PC and now we're onto the
Intel and they've dropped emulation. So to be able to
archive these things, we have to basically go and put
together a whole system and anything that is dependent
on obsolete infrastructure is what we were trying to
carve in this particular exemption.

If we did it wrong, but that was our intent was to just say if there's something underneath that's gone obsolete, let we librarians and archives spring into action. We're not looking to distribute these things on the net. I haven't seen any mass rogue librarianship sort of rising up with that last exemption going and breaking access protections and spewing things all over the net.

I think we've seen, we have three years of experience saying it didn't negatively impact the market that we can tell. We have the other copyright protections that keep us I think from the market in a reasonable way. Thank you.

REGISTER PETERS: Okay. Steve.

MR. METALITZ: Yes. Thank you very much. I would agree with what was just said that the exemption that was granted three years ago was a lot narrower than the one that you originally asked for three years and I think the new exemption that you're asking for this time kind of slides back into the broader area that the Copyright Office rejected last time. So I think the relevant issue is how have circumstances changed and so forth to perhaps lead to a different result.
Let me just say, first of all, on the existing exemption I think that the Internet Archive has done in my view a better job than anybody else of explaining how they've used the existing exemption, first demonstrating that they have used it which not all the beneficiaries of existing exemptions have even explained and, second, explaining how they've used and, third, explaining why they still need it which I think is really they've taken on the persuasive task that this rulemaking requires.

Our only concern about the existing exemption is it somewhat overlaps with our concern with the new proposed exemption and that has to do with programs and games that were released in a format that has become obsolete and had this original-only access control and therefore they fall within the existing exemption. But subsequently, they've been introduced in a format that is not obsolete and this is really the whole issue of legacy games and classic games and other types of copyrighted products that have sort of risen from the dead and are now suddenly finding themselves with a new market.

That's really our concern with the broader exemption that's being proposed which goes beyond obsolete formats into the obsolete operating systems.
and hardware. There's a lot of these titles that do have a new life now and both in our reply comments, the joint reply comments that we filed on behalf of 14 groups and also in somewhat more detail in the reply comments of Time Warner, there's some discussion of how this market is developing and thriving and that's a factor that wasn't really present in the exemption that we were talking about three years ago.

It really has two consequences I think. One is the idea that -- Well, let me actually point out three consequences of this. First, the proposal last time was evaluated by the Copyright Office as coming very close to defining a particular class of works based on a category of user or on the characteristics of users, in other words, libraries and archives and the Copyright Office has already determined in the previous rulemaking that that is not a permissible basis for defining a particular class of works as Congress intended.

And what saved it, I think, three years ago was the conclusion that was reached which I think is quite supportable that there's not going to be very many people other than libraries and archives who have the equipment to be able to read these obsolete formats in the first place and therefore, circumvent.
They're the only ones that are in the position to circumvent the technological protection measures and do the preservation work that they're talking about so that as a matter of fact even though the exemption to applicable to everybody, it's likely to be exercised only by this smaller group of users and therefore the potential impact on large, broader markets is minimized.

I'm not sure that's the case with the broader exemption because as we've seen there is a broad market for this. This is not just of interest to librarians and archives and again the ground rules really haven't changed. We can't have a particular class of work that says librarian and archival use of works falling into this category. It's going to be a category that's accessible to or available to any user. So the premise for why the exemption that was granted in 2003 met the definition of a particular class of works and had a minimal impact on other markets I think may not be present here anymore.

The second fact about the development of these markets and classic games, legacy games, that originally came out in obsolete formats with obsolete operating systems is, as I've said, we have to relook at what would be the impact of an exemption on
existing markets and we have to look at that with the view in mind that the exemption would be available to anybody if it were granted and I think it's clear that this could have a pretty deleterious impact on the investment that's ongoing now to bring these games back to market and allow people to play them in very convenient formats and in very convenient ways even if they don't have the original old hardware at their disposal.

And, third, I think the fact that you have a cite such as the one that's discussed in the Time Warner submission in which Time Warner or TBS has entered into licensing agreements with the copyright owners of many different kinds of old games, legacy games or classic games or whatever you want to call them, and I think Nintendo is following a similar strategy with Nintendo revolution, this shows that one of the problems that the Internet Archive was encountering which was nobody supporting these games anymore, we can't go to anybody to get the dongle or to get the hardware that would enable us to get to the game and copy it for preservation purposes. That may not be true for all of these other games because obviously TBS is able to find the copyright proprietors of these games and they have licensing
agreements with them. I guess Nintendo is doing the same thing.

I don't know whether they are buying up these games or whether they're just entering into licensing agreements, but either way, somebody who is relatively findable in the market is supporting these games in their new formats and therefore, would be accessible to the archive if they came and said, "We want the ability to circumvent technological protection measures so that we can archive the old game in its old format." Somebody is home when that query is made or somebody is much more likely to be home than in the circumstance that was discussed three years ago. That I think is another changed circumstance that has to be taken into account.

Again, just to sum up, I think we don't have a major concern about the existing exemption except that we would like it clarified that when a game or a computer program is covered by the exemption, is back on the market in a non-obsolete format, that this exemption would not apply and if the circumvention was taking place after the non-obsolete format came out on the market. And, secondly, we have a lot of concerns about the proposed expansion of this exemption or as I think the commentor originally put
it, the expansion of the dongles exemption to cover all situations in which there is obsolete hardware or obsolete operating systems involved. For the reasons I've stated, we have a number of concerns about that.

In terms of the definition of obsolete, I think that's a very good point that was raised and there may be questions or uncertainties about what constitutes obsoleteness in the current environment and of course, in the rulemaking last time, there was reference to the definition of obsolete in the Section 108 and an adaptation of that definition to this circumstance. That definition speaks about if you could only find it in a second-hand store, then it's obsolete and that may make sense in some circumstances, but as was just mentioned, eBay exists and there are a lot of other very mainstream markets that could qualify as second-hand stores in a sense.

If something is readily available on eBay, I'm not sure it would be accurate to refer to it as obsolete in the same sense that it's meant in Section 108. We discuss in our reply comment another site which is offering these operating systems that were referred to and I guess they're second-hand. I don't think they're new from the factory, but I think the fact that it's available on oldsoftware.com may
suggest that it's not obsolete because that's a place where you can acquire that operating system.

So it may be useful to get a greater degree of clarity about what actually constitutes obsoleteness in this context and that certainly would apply to the existing exemption as well as to any new exemption that the Copyright Office decides to recognize in this area. Thank you.

REGISTER PETERS: Before we ask any questions, Brewster, do you have any questions of Steve with regard to what he just said or do you want to comment at all on what he just said?

MR. KAHLE: Yeah. I think it does make sense to comment on some of the points and sort of what's different about digital materials than bringing a book out in a second edition or something like that, or making a facsimile. We're dealing with materials that run on old machines and even if something is brought back out again, I don't know, we'd love to see Pong and all of those sorts of things that you remember back out again, but usually they're brought out on top of a current platform. They're run on Windows or MacIntoshes or Linex or something that's sort of the current world and the older versions are dying, so the original materials.
And we in the libraries and archives world are very oriented towards the authentic. So even if we break an access protection of an old Pong something or other, I don't know, some old game or these old things, there are all sorts of limitations in terms of what it is that we can do with it based on Copyright law which seems to have worked perfectly fine for one in terms of not massively impacting the market, but also these are old versions that require something really antique to even run these things.

So the idea that there's an library and an archive that has a copy in it that you have to go to the library and archive to see that one copy running on an emulated environment massively impacting and trashing Time Warner from selling emulated, repurposed software on newer platforms, I find hard to make that leap. In fact, we in the libraries and archives world often help those in the publisher world to help them in getting materials that they can then go and sell.

This isn't quite a software example, but when Yahoo turned ten years old, they wanted to go and show what their old website looked like and they told us that they had to come to the Internet Archive to go and get their old webpages so they could print them out and show them off of what was Yahoo like ten years
before because they didn't archive things. In general, the history of commercial companies archiving materials that are no longer commercially viable has not a lot of positive, sometimes it's there, sometimes it's stashed some place.

Another example is in the "Forrest Gump" movie that a lot of the news clips were taken from the Vanderbilt Television and News Archives. So there's a long history of libraries and archives actually helping to revive things in the commercial world and we tend to be oriented towards that.

So I would suggest that the Copyright law is pretty strong that the last exemption that we got and even if it were broaden in the way that I think was intended originally but was not put in place isn't driving a truck through a barrier that pirates are going to be hiding themselves as librarians or going and breaking these access protections and then going off and selling them.

I think if somebody were going to go and try to break the law by going and making massive quantities of the original copies of some old games or software titles, I don't think they would be dragging themselves through this exemption system. They are breaking enough other laws that I don't think this one
is going to be your big guard against that.

   You suggested why not license things
because if these guys can go and put together ports
forward of old games and titles why can we go and find
these people and we've tried. We talked a bit about
it the last time, but there's a set of collection of
experiences that I found astonishing which was the
replies to the orphan works request for comments from
the libraries and archives world where people
documented just how hard is it to go and get access to
materials that are commercially unviable.

   For the commercially viable materials,
yes, there's probably somebody to talk to
theoretically. When things are commercially unviable
which is the vast majority of the things that we deal
with in the sense that they're not currently being
promoted out there in the market, there's just no one
to talk to and we also find for even things that are
commercially viable in new versions trying to get
anybody to talk to us about old versions running on
Ataris or Commodores, there's just no one to talk to.

   So there might be cases that if there is
going to be a thriving market in this we could find
more people to talk to, but I don't really think it's
going to carry the day of what the intent of digital
preservation is. I think those are the points that I remember out of your talk.

REGISTER PETERS: Steve, do you have anything that you want with Brewster at this point.

MR. METALITZ: No, I think it would be just --

REGISTER PETERS: Okay, let's start the questioning with David.

GENERAL COUNSEL CARSON: Okay. Steve, most of my questions are probably for you which is interesting because I didn't have any questions when you two started, but you've provoked a lot of thoughts.

MR. METALITZ: That's always a danger.

GENERAL COUNSEL CARSON: Let's start with the point you made about the fact that a lot of the software apparently is now being made available again. And you pointed to the Time Warner comment.

MR. METALITZ: Right.

GENERAL COUNSEL CARSON: I just want to make sure I understand the information you're referring to. Is there anything besides what was in the Time Warner comment that you were meaning to refer to in terms of old software and games being made available again?
MR. METALITZ: In our reply comments, we talked about a couple of others. There's one called StarROMs.com. This is footnote 70 of the joint reply comments. There's a reference to a news release from Nintendo that, I think, talks about, if I recall it correctly, this is footnote 69 and I haven't gone back and checked it, but I think it talks about making a lot of back catalog games available on the new Nintendo platform.

GENERAL COUNSEL CARSON: Okay.

MR. METALITZ: So, yes, this is a niche market. Bruce is right. Of course, it doesn't extend to every title, but there are a number of titles and some that he mentioned, he mentioned Pong and I guess that's one of the ones that's on GameTap which is the Time Warner site that has 300 games. It began with 300 games and now there is a number of others. They say they have licensed 1,000 games from 17 publishers. So this is starting to make a significant dent anyway in the box that he brought here.

GENERAL COUNSEL CARSON: Okay, now on GameTap there wasn't enough -- either I didn't read it carefully enough or there wasn't enough information in the Time Warner reply comment for me to be clear. Are these games available for download or are they simply
games that you can play online?

MR. METALITZ: I think these basically --
I believe you play on line. There may be a download
as well, I don't know and I can try to find out the
answer to that question.

GENERAL COUNSEL CARSON: Okay, and Rob has
pointed me to another -- this is Time Warner as well.
It appears to be game available online. That would be
of interest to me because one of my questions would
be, I guess, to the extent that you're suggesting that
perhaps, the activity that is the subject of this
exemption may not necessarily be as -- there may not
be quite as much of a need for an exemption now to the
extent that these games are coming back on the market.
Is it fair to say that there might be a difference
with respect to whether they're simply available
online today, although who knows about tomorrow if the
pull the plug on this site, versus, yes, you can buy
they again and acquire them again, and play them as
long as you like. Is that a fair distinction?

MR. METALITZ: Well, it would be two
different markets or two different segments of the
market but if a broad exemption were granted that
would allow people to circumvent the access controls
on the originals, it could impinge on either of those
markets, I suppose. I mean, it would basically allow people to get in basically the same position, if you will, and I take the point that this is not what the internet archive is going to do. I don’t doubt that for a minute. The problem is, of course, with an exemption, a lot of other people might be able to take advantage of it.

GENERAL COUNSEL CARSON: That gets back to the more fundamental part of your testimony that really had me worried. And I want to make sure I understand how Section 1201(a) works. It’s taken me about six years but I thought I finally understood it and now you’ve managed to unravel everything that I thought I understood.

When there is an exemption as a result of this rulemaking, for example, the existing exemption, it’s not the case, is it, that anyone on earth who wants to take advantage of this exemption to circumvent the controls on an old game by, for example, the original early access control by doing whatever needs to be done so that they can play it off their hard drive, for example, instead, can do so, is it? I mean, was that the effect of this exemption when we did that? Were we saying anyone on earth is free to circumvent in order to make use?
MR. METALITZ: Well, first of all, if the use that they're making is an infringing use, they may be liable for infringement, although --

GENERAL COUNSEL CARSON: Right.

MR. METALITZ: -- you're asking a much harder question, I think, which is are they liable for a violation of 1201(a)(1)(a).

GENERAL COUNSEL CARSON: Yeah, I didn't think it was a hard question until I heard your testimony.

MR. METALITZ: Well, the legislation allows you to exempt particular classes of works. And now you're getting your statute -- you're going to have me at a disadvantage here, because I didn't bring mine, unfortunately.

GENERAL COUNSEL CARSON: All right.

MR. METALITZ: I think the short answer is, we don't know definitively in the sense that anyone has brought a 1201(a)(1) lawsuit in which an exemption was put up as a defense, and this issue could be adjudicated if it was -- you know, again, just take a look at the exemption that was granted in -- you know, that's at issue in this case or that was granted three years ago. That exemption is for a class of work, computer programs and video games.
distributed in formats that, you know, have certain characteristics.

If someone claimed that exemption, there's nothing in there that says you can claim that exemption of you are a library or archive under Section 108 but you can't claim that exemption if you're not a library or archive. So I assume that somebody could claim that exemption even if they weren't a library or archive and even if what they subsequently did with the work was very different than what the Internet archive is doing.

Now, certainly it's true that what motivated the copyright office to grant that exemption was the kinds of uses that the internet archive was making and I think the -- as I read the decision in 2003, and I'm just, you know, reading it to try to see how it fits into this construct, the reason why this -- the concern that others besides the internet archive or other libraries and archives would use this exemption for other purposes was somewhat ameliorated by the conclusion that was drawn that really not very many people are going to have the ability to use the original media or hardware other than a library or archive and probably other than the internet archive and the others that are following the trend that, you
know, they've started.

There may be a broader group now, but still the average person probably isn't going to be doing this. But that doesn't mean that if the average person -- someone who is not an internet archive or not an archive or library under 108, does it, I don't see anything in it that says you can't claim that exemption.

Now, if what they then do with the work after they've gained access to it is infringing, clearly the thrust of the testimony three years ago was, what we're going to do with it is covered by Section 108 and perhaps by other exemptions, too, but a lot of it was Section 108 and that's fine. And if what somebody else is doing with it, though, isn't covered by 108, they're going to be liable for infringement. But that doesn't mean that they're not liable for a 1201(a)(1) violation -- excuse me, that they are liable for a 1201(a)(1) violation if what they did was circumvent and access control on a computer program and video game that meets the description in the exemption.

GENERAL COUNSEL CARSON: Well, that's interesting. Unfortunately, I don't have our actual regulatory text in front of me. Well, maybe he does.
No, I don't think he does either, because what I really need is the very beginning of 37 Code of Federal Regulations, Section 201.40 and we -- hold on, hold on. All right, let me read you the regulatory text which I think can be fairly stated to be Copyright Offices's interpretation. I'll read you the statutory text which I think that interpretation flows from. I'd be interested in your reaction.

All right, this is, again, Section 201.40(d) of 37 CFR, starting at the pertinent place, "The Librarian has determined that the prohibition against circumvention of technological measures that effectively control access to copyrighted work set forth in 17 USC 1201(a)(1)(a) shall not apply to persons who engage in noninfringing uses of the following four classes of copyrighted works." If you go to Section 1201(a)(1)(b) which is the statutory authority for this proceeding, it says, "The prohibition contained in Subparagraph (a) shall not apply to persons who are users of a copyrighted work which is in a particular class of works if such persons are or are likely to be in the succeeding three-year period adversely effected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works".
I thought I'd finally worked out that what this means is that when there's an exemption it is not an across-the-board exemption for anyone on earth to circumvent, but only for people who are engaging in noninfringing uses to circumvent. But I gather that maybe there's not a consensus that that's what it means.

MR. METALITZ: Well, I don't think those two tests you read are exactly the same, the statutory test and the regulatory test, but obviously, the regulations are binding and they -- I'm not here necessarily to make an argument that they exceed what's in the statute. But they would lead to the conclusion that the case I've described where somebody other than a library or archive who takes advantage of this exemption 3 or the existing exemption, but then goes on to do something infringing with the work, cannot claim the exemption as well.

My point is a little bit different than that although that obviously covers a lot of what I was talking about. But there could also be circumstances in which someone circumvents the protections and doesn't do anything with the work, leaves it in the clear for others to use for example. I mean, this is one of the reasons we have 1201(a)(1)
is because people -- Congress was concerned that people would commit an act of circumvention but might not themselves go on to do some infringing use but would, in effect, facilitate or make it possible for others to do an infringing use, and yet, it might not be captured by the contributory infringement doctrine.

GENERAL COUNSEL CARSON: But they're not circumventing to make a noninfringing use, which I think is what the provision requires.

MR. METALITZ: Well maybe they're not circumventing to make any use at all. I mean, that -- and that's -- it just seems to me that there's no -- the way the regulation is phrased as you read it means that if the -- it's proven in the case that the use that flowed from the circumvention was infringing, then that vitiates the defense to the 1201(a)(1) claim that the class of works -- the work I was -- that I gave access to fell within the particular class of work.

GENERAL COUNSEL CARSON: I think one can go farther than that and say if I circumvent and then make no use, I'm not within the scope of that exemption because the exemption, at least in the regulation applies to someone who engages in
noninfringing uses of those classes. If I don't engage in any use, I'm not engaging in a noninfringing use.

MR. METALITZ: Okay, well, you know, in the previous panel we had a little discussion, as you recall, about whether someone gains access to software and all they do with it is erase it, is that -- I guess that's a use and I guess it's a noninfringing use or it may well be in some circumstances, so in that case, I think that falls within that category.

The statutory -- I appreciate what you're saying about the way the regulation is phrased. The statute just says people who would be significantly impacted in their ability to make noninfringing uses. I don't think that necessarily means that in a particular case the fact that the use you made was not noninfringing, would disqualify you from claiming the exemption but I think it probably is true under the way the regulation is phrased if you would be disqualified from doing that.

GENERAL COUNSEL CARSON: All right, let me then --

MR. METALITZ: Now, this is all well and good. There's also kind of a meta issue here which is how this in interpreted and how this would be
communicated to the public and what message the public
would get from it, but I understand that you're
looking just at what the strict legal impact of the
exemption would be.

GENERAL COUNSEL CARSON: Let me open a
bigger can of worms and probably upset everyone else
sitting next to me here. I think as you observed, at
least the prior jurisprudence, if you will, of the
copyright office in these rulemakings is that we can
exempt classes of works and I would add for
noninfringing uses, but we cannot, in terms of
determining a class of works, as part of the
definition of that class, import the use.

So say, for example, we are exempting the
kinds of works that are in front of us right now for
use by libraries or archives in their preservation
activities. Is that necessarily the case, is that
necessarily how one has to interpret what we can do
under Section 1201(a)(1)(b) and ©?

MR. METALITZ: No, it's not necessarily
the case and others have interpreted it differently
but you have interpreted it that way consistently in
the first two rulemakings and in your 2005 Notice of
Inquiry, you said you're going to interpret it that
way, but it is open to people to argue differently.
I think you stated that in the Notice of Inquiry.

GENERAL COUNSEL CARSON: And given the risks you've pointed out, it's not just going to be wonderful people like Brewster Kahle who are doing this but people who might just want to do it so they don't have to go out and buy the new reissued version. Wouldn't you want to be urging us to reinterpret it?

MR. METALITZ: Well, I think there is some attraction to that but I think our reading of the statute is to say -- is similar to the way you and your colleagues have read it, that the focus needs to be on characteristics of the work or perhaps characteristics of the type of technological protection measure and not on the characteristics of the user because we're not here defining an exemption for -- to copyright protection such as 108 where Congress has defined who can exercise it, who can't. We're talking about a separate prohibition and Congress seemed to instruct you to proceed in the manner that you've done.

I think what you have concluded in the previous two rulemakings is a -- is probably the best reading of what Congress intended but I recognize there are a lot of arguments to the contrary and you've heard them all and you've posed a number of
them in the previous rulemakings and you've come down
where you've come down.

GENERAL COUNSEL CARSON: Right, that's all
I've got.

REGISTER PETERS: Okay, Rob?

LEGAL ADVISOR KASUNIC: Okay, let's start
with your -- Steve, your views on limiting the
exemption, the potential exemption if there is a
rerelease of the software. Isn't that -- would that
not potentially lead to a problem of copyright owner's
planned obsolescence of particular works? I mean, if
you have a situation where you can just keep having
the formats change and having to buy a new machine for
it, is there really a problem with having people who
purchased, legitimately purchased one format having
some kind of legitimate machine but then not being
able to access that? Do they really just each time
that machine breaks have to then upgrade to the whole
new -- the whole new system, just because it's
available on the market in a new way?

MR. METALITZ: Well, I think the market
realities are probably a little bit different, that
people may have a nostalgic attraction to their old
machines and their old operating systems but many of
them anyway want to do other things with computers and
with these technologies and therefore, they're lucky
to upgrade to get the greater -- you know, they're
going to be using new computers and having new
operating systems and if the game becomes available on
those systems, which I think is the case with GameTap
and some of these others, it seems as though that
would satisfy their demand to be able to continue to
play the old games. I'm not sure that answers your
question.

LEGAL ADVISOR KASUNIC: I'm not sure
either, but let's see. I guess stepping aside for a
minute from the activities of the internet archive,
there were a couple comments that were referenced in
Brewster's reply comments that have to do with
individuals who bought certain computer programs on
certain operating system platforms. And then when
they upgraded the operating system wanted to be able
to use their programs with that new system. Now,
wouldn't that seem to also be covered under -- as a
noninfringing use under -- potentially under 117 for
modifying that program in order to utilize it on the
machine?

MR. METALITZ: Well, when I -- there were
two reply comments, I think that were referenced.

LEGAL ADVISOR KASUNIC: Yeah, comment 19
and 21.

MR. METALITZ: Yeah, when I read Mr. Robinson's comment, which I think is 21, which I think states it pretty well. He describes how most of his programs would run on the old operating system. In fact, the new operating system was designed to allow you to run in classic mode, which meant running as if it were emulating the old operating system, I guess.

But two of his programs wouldn't run in that way for some reason. There was some problem there. When I read this I thought, well, this sounds to me a lot like the kind of activity that would fall within Section 1201(f) with the interoperability because you're trying to get your old application to run on OS10, to interoperate with the new operating system and although it's supposed to be able to do it, for some reason, it doesn't do it. So can you use 1201(f) to achieve the interoperability or can someone make the tools available to you to achieve that interoperability? It struck me that that scenario sounded more like a 1201(f) scenario.

LEGAL ADVISOR KASUNIC: Well, that was part of my next question. In terms of the second proposal by Internet Archive to -- in relation to operating systems and I'm glad that you raised
1201(f), I get tired of being the one raising it in every case, but wouldn't it seem that in order to make something compatible, in order to emulate an operating system, where you were just looking at what the interoperable features were to make that program work, wouldn't it seem that 1201(f) would cover that situation?

MR. METALITZ: I think so, the way it's described here if I understand the problem he was driving at.

LEGAL ADVISOR KASUNIC: You're talking about comment number --

MR. METALITZ: 21, yeah.

LEGAL ADVISOR KASUNIC: What about in the broader context, though, in terms of the overall proposal for an exemption that there's a need to have a separate exemption for operating systems that become obsolete, would 1201(f) be satisfactory, sufficient in that kind of situation in more general cases, where an operating system became obsolete?

MR. METALITZ: I don't know whether it would entirely solve this problem, but I think it would -- it seems to me that what you're trying to do in most of these cases is to get an old application to run on a new operating system. And if you -- that is
kind of the 1201(f) situation. They're independently created computer programs and you may need a tool to enable that to happen and you may need to get information that requires circumvention in order for that to -- in order for that to occur. So at least as far as obsolete operating systems, I would think that there might be a number of cases in which 1201(f) would apply.

I guess that has two -- you could draw two conclusions from that. One is, perhaps this exemption is not necessary in those circumstances, and second, as the Copyright Office has concluded in the part two rulemakings, Congress has addressed this to the extent that it thought that an exemption ought to be recognized and that -- and in that case, I think the Office said in their recommendation that there's a heavier burden to try to show why you should revisit a decision that Congress apparently made.

LEGAL ADVISOR KASUNIC: Well, that's a question David asked, was, is there even -- where's the technological protection measure in that situation? Do you think that just having an application program relate to an operating system is in fact, a technological protection measure controlling access to that application?
MR. METALITZ: I'm very skeptical that it is. I don't know that -- I know there was some discussion in the last rulemaking about technologies that control access when the malfunction and you concluded that if the technology is not working the way it was intended to work, then it can't be -- then the effects of that can't be considered to be an effective technologic protection measure within the meaning of the statute.

Here I don't -- I don't know that you could say that the fact that this program was written to run on, you know, OS-9 means that OS-9 is a technological protection measure that controls access to this work. To the extent that is true, of course, then maybe there isn't any circumvention occurring at all.

LEGAL ADVISOR KASUNIC: Let me ask Brewster, if -- not to get to necessarily the legal aspect of 1201(f) but is -- when you're trying to make something interoperable with an obsolete operating system, are you creating another emulation of that operating system? Are you creating another program that is making that video game or computer program work on your server or on your preservation system?

MR. KAHLE: Boy, is this subtle.
MR. KAHLE: Yes, we're making copies of software that we can then run in emulated environments, at least that would be the end goal.

LEGAL ADVISOR KASUNIC: And what's that mean by emulated environment? I'm just asking, what do you do to emulate the environment?

MR. KAHLE: There's programs that exist, say on Windows XP that will try to emulate a Windows 3.1 environment such that if you were to have a copy of a piece of software or what was on discs and such, it would make a virtual environment that would look like it's accessing a floppy drive or ROM or older hard drive style. So as I understand just by me deep reading of Section (f) here, that what we're looking to do is make copies and break access protections of the original software and be able to make copies of those, not just for the purpose of identifying compatibility points; we're looking to make copies onto newer media and then running those to make sure that we have a full fledged working copy. Is that --

LEGAL ADVISOR KASUNIC: Okay, I think so, but in order to make it run in that other environment, then you're trying to figure out in either the game that you have or maybe with the operating system that
it worked with, you're investigating in one of those two places what made them work together. What made --

MR. KAHLE: We are trying to investigate and then leverage on an ongoing basis whatever it is that made them work together. It's not just a one-time sort of study project. It's to try to -- we're looking so that if anything is obsolete somewhere along the chain, that we're allowed to archive it, that we're allowed to do an noninfringing work of archiving the materials if some piece, hardware operating system is -- I'm sure you understand that, but that's probably not your question.

LEGAL ADVISOR KASUNIC: No, that's helpful. Let's see. One question I had in looking through your comment was that you're still in the process of doing some of the work that you began under the last -- under the initial exemption and that this is -- but this is something that, given this obsoleteness, is something that's going to be continuing, isn't it, in terms of this is not a short-term --

MR. KAHLE: This is not a short-term. It's becoming more and more important as time goes on as more of our culture moves into digital media, that we've seen -- the trend that we're on isn't slowing
down. So we see not only the work that we may have been pioneering in the last three years in trying to get an understanding of how to do it; we see these digital preservation efforts as becoming more and more important as more of our culture goes digital. We don't see it -- but there is this issue about what does obsolete mean and I think we have to take a broader view, I think than, you know can something be found in a garage sale someplace as a concept of what obsolete is.

We should try to make it easy to be librarians at a time that it's actually becoming very difficult.

LEGAL ADVISOR KASUNIC: Now, for your unique problems for preservation, has this been -- is this something that's being considered to your knowledge, within the context of other potential statutory limitations that would be -- that would be a long-term solution whereas the way this is going now, you'll be back every three years in perpetuity to continually request this exemption.

MR. KAHLE: I sure hope that we learn from these and bake these into law. The cost of this is actually quite high. The first round, the sort of pro bono billings that we thankfully didn't have to pay
were about $30,000.00. I asked these two capable young lawyers what they, you know, had spent on this project and it was, they thought, certainly over 200 hours of work, and, you know, it's fabulous that we can get access to these folks for kind of wee libraries but that's probably not going to be for a long-term case, so to the extent that we can get this stuff changed upstream would be fantastic. But I think we should -- there are Section 108s and there are other things that are going on to try to fix other areas of the law.

But this is working. I mean, it worked. We got it three years ago. Things seem to take a long time in Washington. So please at least give us the next three years and hopefully, you know, we'll have good folks to help us three years from now if we haven't fixed it more broadly. But please, do recommend broader changes.

LEGAL ADVISOR KASUNIC: I think that's all I have.

REGISTER PETERS: I have a question and it's just my own edification. In your comment you expanded a little bit and said that there's also a problem with regard to periodically migrating materials and which are going to basically migrate
every three years. Is that right?

MR. KAHLE: Yes.

REGISTER PETERS: I'm trying to figure out, I had somehow thought that if there was a TPM attached to a work, and the work became obsolete and you circumvented it, you had it in a format that really was probably copy-free. I'm trying to pick up what's the issue with regard to TPMs and migrating material to keep it fresh in your case every three years.

MR. KAHLE: As long as making further copies to preserve these materials is not restricted in some way in the law, then I think we're safe. I mean, you're correct, in general we try to put things into an archival form that has not gotten underlying TPM in it. So to the extent that we've done that, and if just keeping it moving forward is not infringing, and not deemed as breaking access controls again, then you're right, we don't have a problem there.

REGISTER PETERS: Let me -- then, let me try to understand. If, in fact, you use the exemption in order to gain access to the work to make a preservation copy or an archival copy, in what instances would the technological protection measure still be embedded so that every time you wanted to
make another copy you had the same issue?

MR. KAHLE: Let me see if there's anything that --

MS. KIM: I think the libraries themselves might not be able to (inaudible).

REGISTER PETERS: Could you just speak into the microphone, I can't hear you, and could you identify yourself for the record.

MS. KIM: My name is June Kim. I'm a law student at the American University, Washington College of Law and I think as he explained before, maybe migration itself does not necessarily trigger the MCA liability because what migration does is once -- even though we save the digital work in certain like more stable format, just to make it more stabilized for the next generations, we might need to move those digital works to another medium, but that does not --

REGISTER PETERS: No, my question is, but does that really invoke circumventing a technological protection measure?

MS. KIM: We don't think so, no. So maybe you just wanted to emphasize what they do and their activities. So it doesn't necessarily trigger the MCA liability on migration activity itself. Does that answer your question?
REGISTER PETERS: Yes, I'm not going to bore people. I'm still struggling with an operating system question.

MR. KAHLE: You can bore them later.

REGISTER PETERS: I understand the exemption that we created in the past when we talked about systems, and certainly with regard to a dedicated system like you had the Commodore and you had to use that machine and Nintendo had a particular machine. That probably was a technological measure that basically controlled access. But if, in fact, it's an open system as in it was just a Microsoft system, it's hard for me to see how an operating system is a technological protection measure to a particular work.

MR. KAHLE: I hope that the idea of being on an obsolete operating system isn't a technological measure access control measure. It would be helpful if that were stated someplace just to sort of make it clear. So if it were just such that basically the idea of the old happenstance of what it required to run something isn't deemed to be a key that is required would be helpful to just put on the record. But the motivation for the second exemption is broader than that, though that is a --
REGISTER PETERS: Okay.

MR. KAHLE: If the operating system is a technological measure, then it's a problem but even if it's not, if you take materials that have access control mechanisms that we need to be able to break, the question is, when can we break them. And is it based on the underlying media being obsolete like CD ROMs or floppies or some such.

If you're dealing with a dongle that is really tied, just because it's kind of fun when we pull out these things. If you've got, you know, one of these, what the heck is a one of these, but it definitely requires something else to plug into and so that's pretty clear that the medium is, you know, there's a message on that one.

REGISTER PETERS: Got it.

MR. KAHLE: The other case is if you have media DVDs, CD's that are still relevant but just depend on something else, then we want to break the axis control mechanisms if something else in the chain is obsolete and maybe we didn't verse that correctly but that was the motivation.

REGISTER PETERS: Okay, so let me take an example. David wants to follow up. Let me take an example that isn't here yet, DVDs.
MR. KAHLE: Yes.

REGISTER PETERS: And the DVD player that we now have becomes obsolete and the new player it would be not wise to go this way, but the new players don't actually accommodate the older DVDs.

MR. KAHLE: Right.

REGISTER PETERS: Is that the kind of situation that you're --

MR. KAHLE: No, at least not in the sense of DVD as carrying around a movie.

REGISTER PETERS: Yeah.

MR. KAHLE: No, we're really talking about software, video games. Your computer comes with a DVD player in it.

REGISTER PETERS: Right.

MR. KAHLE: And it's what's used to cart round bytes that run on another operating system or it requires sort of a chain of materials to make that function.

REGISTER PETERS: Okay.

MR. KAHLE: That's what we're after in this. It's just for games. It's things that are software oriented. Three years ago we were trying to sort of pull out why doesn't this apply to sort of, you know, DVD movies or audio CD's is those really
aren't software or game things. They may evolve into that, so, you know, three years from now we may be back with some other sorts of problems.

REGISTER PETERS: Okay.

MR. KAHLE: But at this point, it's things that depend on these other pieces. Does that help?

REGISTER PETERS: Yes, for the moment.

I'm going to -- Jule.

ASSOC. REGISTER SIGALL: At the risk of further prolonging this issue, but there's a point that I need some clarification on; my understanding of the existing exemption is that it applies in the case where a particular computer program looks to the presence of the original media in order to verify the copy being used is an authentic one and the problem was that if you made -- you were free to make a copy of the bytes on the disk but because you didn't have either the floppy disk drive or the hardware to plug in the original media, the program isn't going to work because it has to look first for that original media in order to operate. Is that a fair characterization of the kind of situation the existing exemption is -- was intended to cover?

MR. KAHLE: That's one case and there's another case where we actually couldn't make copies
because the -- or at least the common copying programs
that were available for going from one floppy to
another would have run into troubles. This is the
sort of thing that was done in the 1980's back before
they found that digital rights management wasn't too
good an idea for the industry, but there was an era
when they thought that digital rights management
called a copy protection was a problem and it was not
just original only, it was that they -- it was made
difficult to go and make copies.

These are the old machines where you had
to have the floppy in the floppy drive and making a
copy, a verbatim copy of that disc was difficult.

ASSOC. REGISTER SIGALL: I see.

MR. KAHLE: June is bringing up that to be
able to make sure that we've got these things archived
well, we're going to need to emulate these things in
a sort of fictitious environment to verify did we get
things right. So even if we were able to make an --
you gave me a magic program that said, "Okay, I can
take this and make another one of these and it's going
to turn out red and be beautiful and it's going to be
valid", we want to be able to run things.

ASSOC. REGISTER SIGALL: Well, okay, then
the next question I have is in this new exemption th
at you're requesting we've been talking about, is it also the case that the software you'd like to use, is it the case that the access controls you would like to circumvent, are those access controls that again, call or look to original media to control access or are they just generalized access controls that are not necessarily tied to any particular device or operating system?

MR. KAHLE: The latter, that they're more general access control mechanisms that depend on some form of -- something in the chain that's obsolete. So we're looking to archive anything that's basically gone obsolete and we're trying to broaden the definition of obsolete.

ASSOC. REGISTER SIGALL: You may have done this already and I apologize if I'm asking you to do it again, but can you give me an example of that last situation where something in the chain has gone obsolete but that the access control isn't necessarily one that relied on that bit of hardware in the chain to work, to control access? Is there something in mind?

MR. KAHLE: Let me see if I can get some good -- yes, there are things like password protections, numbers that have to be keyed in, license
keys and we've received some of these and we were
looking over some of the materials that we've
received. For instance, here is PhotoShop 3.0 and on
the materials that were donated, they've written it
down on the actual floppy itself and I think we've all
done that.

ASSOC. REGISTER SIGALL: It's funny on a
post-it?

MR. KAHLE: Not on a post-it. It's
scratched actually on the floppy itself. And if we
were not to -- if we didn't have that, if we were so
studly to be able to crack the underlying license
access method of going to preventing access, we would
like the right to be able to, and a clear-cut sort of
authority to say get it going, to try to get that --
even though this is a floppy that's still fairly
relevant, it's a floppy that runs -- you can still buy
computers that have this media in it, and it's not an
original only access control system.

This is for the MacIntosh before they even
talked about which Mac OS versions things were, so
this is old. So, you know, probably mid-'80s kind of
era and we'd like to basically be able to bring these
back to life and so the original exemption sort of had
this and of two clauses which narrowed it. It was an
original only and obsolete media and we'd suggest not
even the obsolete media without the original only is
what it would take to do the sorts of things that
we're finding and it is an ongoing issue.

Just for you know, what it's like to be in
an archive. That box arrived last week with all sorts
of really great software in it that now we have to
start to paw through and try to get Leisure Suite
Larry back to life. So it's a very relevant issue,
but the original only access protections was sort of
a digital rights management system of the early '80s
and we're finding that there are other types of
software that, I think would make sense to have in our
libraries and archives.

ASSOC. REGISTER SIGALL: Okay, so as I
understand it now, I think your exemption really is
one that says you're entitled to circumvent an access
control for any -- where any -- where any hardware or
device is obsolete, not necessarily where the access
control -- where condition of access is an obsolete
device or the access control relies on that.

MR. KAHLE: The medium that the software
resides on may not be obsolete. CD ROMs may not be
obsolete. Floppy might not be obsolete but something
along the chain makes it so that it is an obsolete
system. I think we were trying, as I understand it, to try to distance ourselves from the market to try to say, "Hey, okay, take care of the old stuff and we can live with that". I don't think it's the right thing but you know, we can live with that, just make it so that if anything's obsolete in these -- because in the characteristics in the world that we're working in for this proposed exemption, it's a multi-device, multi-piece of software complex world. It's not just a DVD player plugging into your TV.

ASSOC. REGISTER SIGALL: I guess my last point would be the list of things in that chain that might be obsolete and in your mind which would trigger the applicability of the exemption could be relatively long in the sense that it's not just -- it's not just a CPU, it's not just a floppy drive or some sort of input device. It could be those things. It could be the operating system software. Do you have any sense of if that list is cabined or restricted in any way to the kinds of things that you'd have to do a test of obsolescence on?

MR. KAHLE: Well, we listed obsolete operating systems or obsolete hardware as a condition of access. That was how we tried to frame it in such a way that it didn't sound like we were, you know,
saying everything. It's just that the set of problems that we're dealing with. So if it requires these -- something that's gone obsolete that allow us to break up access protection on the original thing that would -- is required. Maybe that answers your question.

ASSOC. REGISTER SIGALL: I guess I'm just trying to think if hardware, if that's sort of too general and too vague to really get at exactly when this exemption should apply and when it shouldn't. It may be over-inclusive. That's the --

MR. KAHLE: Something that might save you from -- well, save us, define it away from other areas that a lot of other people take as valuable is going and saying that it's computer programs and video games. So that limits the scope to -- in some sense.

ASSOC. REGISTER SIGALL: Okay.

REGISTER PETERS: Yes, David.

GENERAL COUNSEL CARSON: All right, you may have come close to clearing up some of my confusion, Brewster, because my question really was very similar to Jule's; just exactly what are the access controls that we're concerned with and I think what I'm hearing from you is it could be any of a number of kinds of access controls. It's not the access controls we should be focusing on, although I
think that's to some degree what we were focusing on three years ago.

What we should be focusing on in whether we're dealing with something that is -- where the format -- the format meaning the hardware or operating system is obsolete. Is that a fair summation of what you're looking for?

MR. KAHLE: Yes.

GENERAL COUNSEL CARSON: Any kind of access control, computer game or computer program or video game on a format, format meaning operating system or hardware that is obsolete. That sort of sums it up?

MR. KAHLE: Yes.

GENERAL COUNSEL CARSON: All right, Steve, is that -- as I just sort of summed up what Brewster is asking for, was that your understanding coming in today and if it wasn't does that -- does anything you've said up till now change?

MR. METALITZ: No, I think that was at least close to it. I think we may have gotten on a little tangent here about whether that obsolete operating system or hardware was a TPM and I think Brewster has cleared up that it doesn't -- you know, he's not depending on the argument it's a TPM.
As I understand it, take that PhotoShop 3 example again, whether or not you could crack the password on that in your proposal would turn on whether that was designed to run on an operating system that is obsolete or whether it was designed to run on an operating system that is not obsolete. It may be old, but not obsolete.

GENERAL COUNSEL CARSON: Right.

MR. METALITZ: It seems to me that's just kind of a -- it almost seems that it's a fortuitous occurrence as to whether or not the TPM should be circumventable. You know, that has nothing to do with the TPM. It has nothing to do with the work. It just has to do with the environment in which that work was first released or in which that copy was released. And PhotoShop is probably not a good example, but if that were a game, that might well have been released on some obsolete operating system but it may also be available today in a non-obsolete operating system and I think we've given plenty of examples of when that's the case.

I think this is much more an issue for video games and for other types of computer programs because the market impact of PhotoShop 3.0 is going to be nil at this point. But the market impact
potentially of Pong and some of these other games that are on GameTap and so forth is not nil. I'm not going to argue it's the end of the video game industry as we know it, but it's become a significant market and I think allowing this broad exemption that turns just on the fortuitous question of what environment applied at the time that was originally released could have a big impact on that market.

   MR. KAHLE: If an infringing move were made -- I'm sorry, that's not --

   GENERAL COUNSEL CARSON: Just one more line of questioning, I think. One of the exchanges we had had to do with all right, what if someone now has come out and reissued that game in some form or another and if I understand one of Brewster's responses to that, and Brewster, correct me if I've got that wrong because I may have, is that the reissue isn't necessarily identical to the original.

   MR. KAHLE: Correct.

   GENERAL COUNSEL CARSON: All right. And I gather -- I don't know if you're in a position to say this; is that your experience or is that your conjecture at this point?

   MR. KAHLE: I think it's required, because if you're going to reissue these -- we're talking
about something that is on an obsolete platform. If you're going to bring it on a non-obsolete platform, it's going to be somehow different. So it is necessarily different. It's this sort of underlying shifting sands that we have in our digital environment. We're just -- it's hard to keep things running. So they basically keep coming out with new things and they tend to make improvements or it runs a little bit better or some such, and we are inclined towards archiving the originals with authenticity and personally, if it were between going and breaking my own copy and running up emulators and the like as opposed to going out and buying GameTap for 30 bucks, sign me up for GameTap.

I mean, if I wanted access to Pong, I certainly wouldn't go and bust the prongs out of a 1975 piece of hardware. Sorry, that's just my -- so I don't know that librarians are going to be a threat to -- or as you point out, others. If something is commercially viable and it's available, having copies made may not be -- of the old versions, may not be the biggest market threat to the problem that that product manager is going to have.

GENERAL COUNSEL CARSON: Like, I assume first of all, you've got to understand Brewster's
point of view from a preservationist's point of view
and having understood that, what is your response in
terms of how we should be evaluating that?

MR. METALITZ: Well, first of all, I want
to acknowledge what he said, that the -- what
archivists do and what preservationists do is very
important to preserving the cultural background here
and I know there are many examples of what you said
where the copyright owner doesn't have the old version
any more whether it's the Yahoo website or a film or
whatever. There are many instances where it's the
preservationists and the archivists who have taken
this seriously and the copyright owner for whatever
reason, has not. And so we're all better off that
there are -- that these archives exist and that
there's this level of cooperation which I think is
ongoing.

And I'm also sure you're right that just
the fact that, you know, these thousand titles have
been licensed from 32 different publishers or whatever
the numbers were for GameTap doesn't mean necessarily
that you could easily get in touch with that
publisher, although I think it definitely increases
the likelihood of it compared to probably a lot of
other things in this box.
GENERAL COUNSEL CARSON: Yeah.

MR. METALITZ: I think the impact is going to be at the margin as it usually is. Now that there is a growing market for legacy games, and this has to do with demographics and marketing and a lot of other things, there are going to be decisions made about investing in bringing these works back to market. It's not usually a technological investment, it may be other kinds of investment. And you're right, if there's a strong thriving market for one of these legacy games, it's going to be much less threatened by an exemption that would be accessible, broadly accessible for this type of use.

It's more where there's a question about whether to bring this back to the market or not and that's where I think the impact would probably be greatest. But I think in terms of we're not asserting here -- we're not questioning here what use the internet archive would make of these if they were granted this exemption.

GENERAL COUNSEL CARSON: And did I understand you earlier to be suggesting that before one should be able to do what the internet archive is doing in this area, wouldn't you have to seek out the copyright owner and get permission?
MR. METALITZ: Well, that goes to a question of, you know, of their activities under Section 108. There are some things they're not required to seek permission for but there might be many instances in which it may make more sense to seek permission and it's not only the Section 108 issue but of course, there's also an orphan works issue that is kind of underlying here. And one of the problems that I recall you brought up three years ago is these aren't even being supported by anybody. How would we go find somebody to ask them to give us a dongle if they had it or the lens lock or these other weird technological protection measures that were in existence 15 years ago, 20 years ago. We can't even find these people.

And I'm sure that is sometimes the case with what's in your box. All I'm saying is I think the market has developed in a way that's probably somewhat easier to find these people today than it was three years ago and the market may continue in that direction and if you can find them, then presumably if -- this increases the likelihood that you'll be able to do this without having to get into the circumvention issue.

MR. PHILLIPS: So I gather you're not
suggesting that if we were to re-issue this exemption either as it was or in some modified form, you're not suggesting that we should sort of throw in a condition that --

MR. METALITZ: No.

GENERAL COUNSEL CARSON: Okay.

MR. METALITZ: No, if -- as far as the act of circumvention is concerned, there are two ways you could do it. One is if you're authorized by the copyright owner or by the -- or the other is if you follow the exemption.

GENERAL COUNSEL CARSON: Okay, I've got it. Thank you.

LEGAL ADVISOR KASUNIC: One more question.

REGISTER PETERS: Okay.

LEGAL ADVISOR KASUNIC: I'm just trying to clarify about the new market for the works and what the harm is and I think what Brewster was getting at part of the question is whether there is infringing activity going on or noninfringing activity may be relevant to that. Does the use of an old copy of -- old authorized copy of a program, effect a new existing market for that or a re-release of that product?

One way, maybe not such a good analogy to
make but let's try it. Take for instance, in another context like the I Tunes example. If I have records and say my say turntables become obsolete and even if -- let's even imagine that maybe some of those records had some kind of original only or some kind of TPM on it, would it harm the market for I Tunes if I was able to utilize those works, if I was able to emulate my turntable in order to use the works that I lawfully have?

In many cases I would say it's more of a pain in the neck to try and emulate it and not go to I Tunes and buy it or go to that service, but does that really effect the market for the -- the new market?

MR. METALITZ: Well, I'm not sure -- I'm going to hesitate to go down the path that you're suggesting in terms of your particular hypothetical but I think what we're talking about here really is a form of format shifting and something that's in one format and you want to shift it -- I mean, they don't want to access -- the internet archive doesn't want access to this in order to play it on the original machine. They want to shift the format to a TPM free format and one that they can also periodically migrate to new formats along the way.
In that sense, this is not different from the other format shifting proposals that have been before you this time and three years ago. The only limitation is that the operating system or the hardware fortuitously needs to be obsolete on the copy that they have available. So I think there is a potential market impact here that's the same as with regard to the format shifting issue generally.

Now, again, I don't think there's any objection to the uses that the internet archives is proposing to make and the format shifting they're proposing to do and some of their format shifting is noninfringing under 108. Maybe, I mean, I assume so.

LEGAL ADVISOR KASUNIC: Well, isn't that -- isn't that the distinction or the potential distinction there at least in this circumstance, the noninfringing -- there is a noninfringing use of preservation that may be covered, whereas in format shifting or space shifting or that, that we don't clearly -- we don't have any necessary basis for noninfringing use there. There's no statutory exemption like 108 that would apply maybe. So that distinction between noninfringing and reproduction or a reproduction of that work in some other medium that would potentially infringe, then separates those two.
MR. METALITZ: Well you and I might agree with that but obviously, a lot of people that have commented in this proceeding wouldn't agree with that. They think that the format shifting is a noninfringing use and in fact, even an archive is not relying solely on 108, they're relying on 117 and they're relying on 107. They're relying on fair uses as an element of the noninfringing use that they're making. So the fact that the next person who comes along and does this is not an archive and is engaged in some other activity, you know, we would have to know more about what that activity was to determine whether Section 107 might apply.

LEGAL ADVISOR KASUNIC: And 107 in this context is unique to the user, I mean, the claim for that, so it could be very different for a non-archive user.

MR. METALITZ: Yes.

LEGAL ADVISOR KASUNIC: What about that for 117 and the issue of an archive, do you have any view of that in relation to what Internet Archive is doing? How does that fit with them?

MR. METALITZ: That's the owner of -- I mean, that's the owner of the copy issue but I assume that they are -- you know, have become the owner of
the copy -- are you asking about what they're doing or what someone who is not a Section 108 archive would do? I'm not sure what your question is.

LEGAL ADVISOR KASUNIC: Yeah, what about -- well, just in relation to a Section 108 archive, do you think that this fits?

MR. METALITZ: Well, I think, you know, certainly what they are doing might well -- without looking again at the exact wording of 117, I think 117 even cross-references the definition of archive in 108 but I may be wrong about that. But we do know there are a lot of people on the internet who think that basically any copy they make is an archival copy even if they don't possess an original. And there's widespread misinformation about that and people certainly will rely on Section 117 to justify this type of activity and that will be their argument for why it's -- the use they're making is noninfringing and therefore, they're also not liable for a 1201(a)(1) violation.

REGISTER PETERS: Okay, Steve, do you have any questions of Brewster?

MR. METALITZ: No, I don't, thank you.

REGISTER PETERS: Brewster, do you have any questions of Steve?
MR. KAHLE: No.

REGISTER PETERS: If not, I want to thank both of you. This was very informative and it gives us a lot to think about. As you know, we may well have additional questions and if so, we'll put them in writing and make them part of the record. But thank you both very much.

MR. KAHLE: Very much appreciate it.

Thank you.

(Whereupon, at 1:14 p.m. the above-entitled matter concluded.)