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UNITED STATES COPYRIGHT OFFICE

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

+ + + + +

37 CRF PARTS 201  
DOCKET NO. RM 2005-11A

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THURSDAY  
MARCH 23, 2006

+ + + + +

MOOT COURTROOM (ROOM 80)  
CROWN QUADRANGLE  
559 NATHAN ABBOTT WAY  
STANFORD LAW SCHOOL  
PALO ALTO, CALIFORNIA

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PRESENT FROM THE U.S. COPYRIGHT OFFICE:

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ROBERT KASUNIC, Principal Legal Advisor, OGC  
MARYBETH PETERS, U.S. Register of Copyrights  
JULE L. SIGALL, Associate Register for Policy  
and International Affairs

COMMENTERS:

JENNIFER STISA GRANICK, The Wireless Alliance  
STEVEN METALITZ, Joint Reply Commenters  
BREWSTER KAHLE, The Internet Archive

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

9:33 a.m.

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.

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1           In addition to this hearing today, we will  
2 also be conducting hearings in Washington over the  
3 next few days on March 29, March 31 and April 3. All  
4 of the information about the D.C. hearings is  
5 available on our website. We will post the  
6 transcripts of all of the hearings on our website a  
7 few weeks after the conclusion of the hearings.

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

20           Today, the format will be divided into  
21 three parts. First, it's the witnesses who will  
22 present their testimony. This is your chance to make  
23 your case in person, explain the facts, make the legal  
24 and policy arguments that support your claim that  
25 there should or should not be a particular exemption.

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1 The statements of the witnesses will be followed by  
2 the members of the Copyright Office panel. The panel  
3 will be asking questions of the participants in an  
4 effort to define and refine issues and the evidence  
5 presented by both sides.

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

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

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

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1 Office of the General Counsel.

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

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

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

17 FIRST PANEL

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

20 Introduction: My name is Jennifer  
21 Granick, and I represent the Wireless Alliance and  
22 Robert Pinkerton. The Wireless Alliance recycles and  
23 resells used, refurbished and new cellular products.  
24 The Alliance works with the industry, refurbishers and  
25 the Environmental Protection Agency to reduce toxic

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1 waste and to help bridge the digital divide. In the  
2 Alliance's experience, phones that are not locked to  
3 a specific carrier are much easier to recycle and  
4 resell.

5 Robert Pinkerton is an individual residing  
6 in Arlington, Virginia who traveled frequently in his  
7 former capacity as a Director of Government Solutions  
8 for Siebel Systems, a software company here in the  
9 Silicon Valley. Mr. Pinkerton, along with thousands  
10 of other Americans, has found that having a locked  
11 mobile phone has greatly interfered with his ability  
12 to communicate while traveling. We are asking the  
13 Copyright Office to grant an exemption under  
14 §1201(a)(1) to allow individuals to unlock their cell  
15 phones so that they use them with the carriers of  
16 their choice.

17 Brief Summary of Argument: As the  
18 litigation in *TracFone v. Sol Wireless* illustrates,  
19 Section 1201(a) is an actual threat to consumers  
20 seeking to unlock their cell phones. Cell phone  
21 unlocking is otherwise a legal and noninfringing  
22 activity and consumers should be able to unlock their  
23 phones without fear of liability. Unlocking to use  
24 the phone on the network of your choice is  
25 noninfringing. There is no option for most consumers

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1 other than unlocking. Unlocking does not enable  
2 infringement of the firmware on the phone. Nor does  
3 unlocking necessarily hobble content companies in  
4 their efforts to impose digital rights management on  
5 audio-visual content stored on the phone. The balance  
6 of harms - particularly competition and consumer  
7 choice, environmental considerations and the digital  
8 divide - greatly weighs in favor of this exemption.

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

21 The DMCA is the only reason consumers  
22 arguably cannot engage in the otherwise legitimate  
23 activity of phone unlocking. Even if courts rule that  
24 carrier locking is unlawful, as they soon may in the  
25 one of the lawsuits that's pending, for example, in

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1 California, the DMCA would still outlaw unlocking and  
2 we would still be here before the Copyright Office  
3 seeking an exemption. So the response that this is in  
4 the wrong forum is ridiculous. Only the DMCA prevents  
5 unlocking and only the Copyright Office can grant an  
6 exemption to the DMCA.

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

16 The lock is a technological protection  
17 measure that controls access to a copyrighted work,  
18 i.e., the mobile firmware. Therefore, circumventing  
19 that lock arguably violates Section 1201(a). Now we  
20 recognize that under the rule of *Lexmark*  
21 *International, Inc. v. Static Control Components*,  
22 which is at 387 F.3d 522 (6th Cir. 2004), a defendant  
23 in an anti-circumvention case could argue that  
24 unlocking is not illegal. In *Lexmark*, the Sixth  
25 Circuit held that circumventing a secret handshake

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1 between a toner cartridge and a printer did not  
2 violate the DMCA because the handshake did not  
3 "effectively" control access to a copyrighted work.  
4 Rather, the purchase of the printer gave the owner  
5 access to the printer code. Similarly, under some  
6 circumstances, we might find that purchasing a mobile  
7 phone may give the owner access to the firmware.

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

15 Litigation between TracFone and Sol  
16 Wireless illustrates that Section 1201(a) poses a real  
17 and actual threat to the noninfringing activity of  
18 cell phone unlocking. In *TracFone Wireless v. Sol*  
19 *Wireless Group, Inc.*, a small company in Florida was  
20 sued for purchasing prepaid wireless handsets,  
21 unlocking them and then reselling them for use on  
22 other wireless carriers' networks. Count Five of the  
23 complaint alleged that Sol Wireless violated Section  
24 1201(a)(1) by unlocking the handsets. On February 28,  
25 2006, the trial court issued a permanent injunction

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1 against Sol Wireless preventing them from "engaging in  
2 the alteration or unlocking of any TracFone phones."  
3 This outcome illustrates that, even after *Lexmark*,  
4 Section 1201(a) poses an actual harm to phone  
5 unlocking. This also disposes of the content  
6 industry's objection that the problem with phone  
7 unlocking and the DMCA is speculative.

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

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

20 Finally, the balance of harms is in favor  
21 of unlocking. We have argued that unlocking helps  
22 customers far more than it hurts wireless carriers,  
23 and the public has resoundingly agreed. All the reply  
24 comments filed in response to our requested exemption,  
25 with the sole exception of the content industry's

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1 reply, were in favor of our exemption, of granting our  
2 exemption. The thirteen comments tell personal  
3 stories about how locked phones deprive customers of  
4 the full value of their purchase. For example,  
5 Michael Ditmore had to buy a new phone simply because  
6 two carriers consolidated. Jonathan Butler's phone  
7 and Bluetooth accessories are now just "expensive  
8 paperweights." Everett Vinzant lost \$1200 because his  
9 carrier wouldn't unlock his phone.

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

23 The environment benefits from unlocking  
24 because more handsets can be sold on a secondary  
25 market and that means less toxic chemicals end up in

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1 landfills, incinerators and groundwater. As our  
2 written comments show, the proliferation of second-  
3 hand handsets will help address the digital divide  
4 problem, particularly in developing nations.

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

18 Granting an exemption for circumventing a  
19 process that allows a consumer to access the mobile  
20 phone firmware does not necessarily open the door to  
21 circumvention of a process that controls access to or  
22 copying of audio-visual works. The content industry's  
23 reply comments finesse this by saying that a mobile  
24 device's functions of accessing, receiving, playing  
25 back, storing and copying copyright materials may be

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1 controlled by the same programs that connect the user  
2 to the dial tone provided by a particular network.  
3 But the content industry knows how it protects its  
4 works on mobile phones and it provides no evidence  
5 that the protection is or must be controlled by the  
6 same firmware that operates the phone on the network  
7 of the customer's choosing.

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

19 Publicly available documents about mobile  
20 phone technology show that DRM and content playback  
21 happens at a different layer than locking. For  
22 example, the Open Mobile Alliance is a consortium of  
23 technology companies, including content providers,  
24 which is promoting an open digital rights management  
25 standard. The OMA standard is used by a significant

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1 percentage of the mobile device market. The OMA  
2 architecture places DRM functionality at a different  
3 layer than Service Provider functionality. And I have  
4 a picture which I have as an exhibit to my testimony  
5 which I'll give you. But I also have it available to  
6 put on a screen if we have the technological  
7 capability to do that. I'm almost done. So maybe we  
8 can do that in a moment. But this proves that DRM is  
9 not necessarily entwined with "accessing a dial tone."  
10 These are different functionalities.

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

21 In conclusion, this application for an  
22 exemption should be granted. Members of the public  
23 have written to the Copyright Office asking that the  
24 right to unlock their phones be returned to them.  
25 Unlocking promotes competition, environmentalism and

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1 social equality. At the same time, there is no  
2 evidence that unlocking encourages or enables  
3 infringement. The Copyright Office should remove the  
4 only legal barrier to this noninfringing, socially  
5 beneficial conduct, by either indicating that  
6 unlocking is not illegal under *Lexmark* or by granting  
7 the exemption. Thank you.

8 REGISTER PETERS: Thank you.

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

12 (Discussion off microphone.)

13 (Ms. Granick distributes exhibit.)

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

21 I should say at the outset that our  
22 organizations are not mobile carriers or providers of  
23 wireless services for the most part, in fact, entirely  
24 and I'm not here to defend the policies of particular  
25 carriers or the rules that they impose about unlocking

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1 their phones or the vertical integration of the  
2 provision of the wireless service with the provision  
3 of the equipment used to access wireless services and  
4 many of the arguments that Ms. Granick has made I  
5 think quite forcefully, I don't have an quarrel with.  
6 I'm certainly not here to argue that it is not bad for  
7 the environment. The status quo is not bad for the  
8 environment and doesn't have some of the other  
9 potentially anti-competitive impacts that she's set  
10 forth in her testimony and in her submissions.

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

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

24 I think I found the reply comments  
25 interesting here because I think they present a

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1 slightly different picture than the Wireless Alliance  
2 presented in its initial comments. We see in the  
3 reply comments that the situation isn't quite as black  
4 and white as the initial comments suggested. There  
5 are carriers according to the reply comments who do  
6 allow unlocking of their phones. T-Mobile was  
7 mentioned and that carrier again according to the  
8 reply comments has some policies on this question that  
9 some people were concerned about, but it did appear,  
10 for example, from Mr. Weiseman's reply comment and Mr.  
11 Khaw's reply comment that these policies do allow  
12 unlocking or provide unlocking of the phones in order  
13 to make the kinds of changes that many of these  
14 commentators want to make.

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

23 Mr. Weiseman's comment also suggested to  
24 me, his reply comment, that there are other ways to  
25 deal with this problem. You can buy phones in Europe

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1 that work in the United States and that are unlockable  
2 in which the SIM card can be swapped out. So that  
3 potentially is another means of achieving the goal  
4 that some of the reply commentators want to achieve.

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

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

20 So I think looking at the full picture,  
21 there is also some sense that some of what is  
22 motivating the reply commentators is inconveniences that  
23 they encountered. There's one reply comment regarding  
24 research. I don't have his name at hand here, but I  
25 can get that for you. But there's one reply comment

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1 involving research and development of applications to  
2 work on the mobile platform and there the carrier does  
3 provide unlocked phones for developmental purposes.  
4 The researchers accidentally locked it again and had  
5 a lot of difficulty getting another one. I can  
6 understand their frustration, but again, I think this  
7 falls more into the inconvenience category.

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

21 With regard to *TracFone* case, obviously  
22 when we said that in our reply comments that there was  
23 no evidence in the record that anyone other than the  
24 petitioners had ever stated that this was a violation  
25 or could be a violation of 1201, we were unaware of

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1 the *TracFone* case. We learned of it from the reply  
2 comments of the Wireless Alliance and of course, our  
3 statement in our reply comments was incorrect in that  
4 regard. It did appear as one of many counts in a  
5 complaint brought by TracFone against Sol Wireless.

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

17 There is no provision in the injunction  
18 that refers to Section 1201. There is a provision in  
19 the injunction that enjoins the defendants from  
20 facilitating any unlocking of phones which I guess  
21 could cover the 1201 count in that case.  
22 Interestingly, the same injunction has been entered in  
23 a companion case brought by Nokia Corporation against  
24 Sol Wireless and the other defendants. That case did  
25 not have any count in it regarding Section 1201 and

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1 yet an identical injunction was entered. I think the  
2 wording is "facilitating or in any way assisting other  
3 persons or entities that the Sol Wireless knew or  
4 should have known were engaged in altering or  
5 unlocking any new Nokia wireless phone" and then the  
6 wording in the TracFone injunction is the same except  
7 it's "altering or unlocking any TracFone phone..."

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

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

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1 defendants.

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

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

25 It seems to me that in this case the

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

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

22 Finally, on the point of this spillover  
23 effect if you will of this proposed exemption on  
24 digital rights management and other technological  
25 protection measures for copyrighted material, the

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1 point that we would wish to emphasize is that at this  
2 point the services provided through a wireless phone  
3 are by no means limited to a dial tone, of course, and  
4 in fact in their economic significance, the access to  
5 copyrighted material may be the most important part of  
6 the transaction. I think Ms. Granick is correct that  
7 there may be no technological imperative that  
8 permission for accessing the dial tone and for  
9 accessing copyrighted material be located in the same  
10 layer of the software and I suspect she is much more  
11 expert than I am in what the actual practices of some  
12 of these carriers are. As I will emphasize again, we  
13 don't represent the carriers.

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

24 I just conclude by saying that I think the  
25 overall impression that I got from the submission,

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1 from the reply comments, from the testimony today,  
2 really that this is only a very small part of a larger  
3 picture. There are many concerns about alleged  
4 anticompetitive practices in this industry and I think  
5 there are some fora where those concerns could be  
6 comprehensively addressed.

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

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

25 REGISTER PETERS: Thank you. Ms. Granick,

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1 do you at this point want to refute in any way or say  
2 anything with regard to what Mr. Metalitz just said?

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

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

24 Additionally, I think what we're seeing  
25 with the *TracFone* case and now that that's been

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1 settled in a way that -- well, in the *TracFone* case,  
2 one of the terms of the final injunction, the  
3 permanent injunction, is that Sol Wireless will not  
4 unlock handsets anymore and the *Nokia* case didn't have  
5 that claim in it because Nokia didn't own the handset.  
6 TracFone owned the handset and that's why the Nokia  
7 suit didn't have that. But they were joint lawsuits  
8 that were consolidated and brought about the same set  
9 of facts. So they have the same permanent injunction  
10 entered.

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

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

24 MR. METALITZ: I would be glad to submit  
25 if they're not in the record already the injunctions

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1 that were entered in the *Nokia* and *TracFone* cases.  
2 They don't constitute, there's nothing in there that  
3 constitutes any type of finding that 1201(a) was  
4 violated. There's a recitation in the *TracFone*  
5 injunction that this was alleged. There is no such  
6 recitation in the *Nokia* injunction because it wasn't  
7 alleged. And then the injunctions just move on to  
8 what the defendants are not going to do and what  
9 they're not going to do is engage in the alteration or  
10 unlocking of any, I'm looking at the *TracFone* phone  
11 one here, any *TracFone* phones or "facilitating or in  
12 any way assisting other persons or entities to engage  
13 in the altering or unlocking."

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

22 REGISTER PETERS: Okay. Thank you. The  
23 order that we're going to go in is Rob Kusanic to my  
24 immediate left is going to go first and David, and  
25 then I'm taking the prerogative of going last, and

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1 then Jule and then if there's anything left, I'll  
2 participate. But let's start with you, Rob.

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

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

22 The people who follow the Copyright Office  
23 proceedings and who take the time to write in reply  
24 comments are probably among the most savvy of  
25 customers of wireless communications and the fact that

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1 these people were able to repeatedly call and hunt  
2 down someone at T-Mobile who gave them the right story  
3 and finally allowed them to unlock their phone does  
4 not mean that this is a viable real option for most of  
5 the customers, particularly in light of the  
6 anticompetitive and unfair competition practices of  
7 the company.

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

18 MS. GRANICK: T-Mobile, Cingular, Verizon  
19 and Sprint are the four major carriers and I think  
20 that the inclination is going to be exactly the  
21 opposite from what you suggested. It might be.  
22 Ninety-five percent of American customers only have a  
23 choice of one of those four companies, all of whom  
24 lock their phones and all of whom have a history of  
25 refusing to unlock phones for customers. Once they

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1 realize that this has gotten the imprimatur from the  
2 Copyright Office and from the court in Florida,  
3 they're going to continue to do so and as  
4 consolidations happen in the wireless industry,  
5 there's really no reason for any of these four  
6 companies to change their practices. The market is  
7 captured and there is not space for new entrance  
8 because the spectrum is sold. So I don't think that  
9 there is going to be any market pressure.

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

18 I don't think customers know. The  
19 companies don't tell them. There is not any  
20 information out there and basically, the companies  
21 tell them quite the opposite and it's worked very well  
22 for them. So market pressure requires an educated  
23 populace and a lot of demand and mostly people are  
24 thinking about keeping their phone number and getting  
25 something that works both at their home and their

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1 office and they're not informed enough about this to  
2 know that there's a problem until they encounter it.  
3 In all of the reply comments, every single one of  
4 these people was surprised when they found out that  
5 their phones were locked and I think that's the real  
6 reason there won't be a market demand.

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

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

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1 but I'm able to still use it with a different carrier  
2 and pay that other carrier in addition and keep my  
3 device.

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

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

21 MS. GRANICK: I'm not aware of anything  
22 that says that the purchaser of the phone has any kind  
23 of limitations as you're suggesting on the phone. So  
24 I'm not aware of that, but I can look into that. I  
25 don't think that this needs to come in under Section

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1 117 in order for it to be noninfringing because  
2 basically what customers who want to unlock their  
3 phones are doing are simply programming their phones  
4 so that it works on a different network. This does  
5 not impact any of the exclusive rights of the  
6 copyright owner because there is no copy and there's  
7 no distribution. They are simply programming as the  
8 software is designed to be programmed.

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

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

25 MS. GRANICK: The firmware, what I'm

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1 calling the firmware, is the bootloader and the  
2 operating system on the phone which is the programs  
3 that the phone needs in order to run on a network and  
4 the way that locking access is that or the way that  
5 unlocking access is the firmware is that when you  
6 unlock the phone it allows those programs to run. So  
7 by accessing, I mean using the program.

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

22           More specifically for SPC locking, you  
23 can't tell your phone point to Sprint instead of  
24 Verizon unless you put in the SPC code. That's how  
25 you tell the phone it's okay and if you don't put in

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1 that code and tell the phone it's okay, then the phone  
2 will not run.

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

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

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

22 LEGAL ADVISOR KASUNIC: Just to think of  
23 this in the context of some other cases that have  
24 looked at issues with the difference between running  
25 a program and being able to perhaps view the computer

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1 program, this is firmware. Is there any way to view  
2 of the code of this program even though you might not  
3 be able to make it run?

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

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

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

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1 network to network.

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

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

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

18 MR. METALITZ: About the applicability of  
19 1201(f)?

20 LEGAL ADVISOR KASUNIC: Yes.

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

23 LEGAL ADVISOR KASUNIC: Okay. Last  
24 question. What benefit do you think that -- In  
25 looking at some of the reply comments it seemed that

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1 most people were looking for help elsewhere to get  
2 them to do what they wanted to do. What benefit do  
3 you think an exemption would actually serve these  
4 individuals in a situation where they would have the  
5 ability to circumvent but they would not through the  
6 exemption, unlike for instance something like 1201(f)  
7 that also affects the trafficking provisions  
8 potentially, this would not offer any opportunity for  
9 someone to come along with a service or to traffic in  
10 a device that would allow these consumers to affect  
11 this change? So what benefit would you see for the  
12 exemption?

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

23 Similarly, I think individuals would be  
24 able to do this by either guessing the code or by  
25 calculating what the unlocked code is. Many of the

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1 unlocked codes are based on the kind of hardwired  
2 number that's associated with the handset. I believe  
3 it's called an ESN number or an EIN number and I think  
4 consumers who can find the EIN number by looking at  
5 the hardware of the phone and can calculate the  
6 unlocked codes from that. So it would help Wireless  
7 Alliance and it would help consumers as well.

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

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

23 And then I think your question about  
24 whether the person doing this is in fact the owner of  
25 the copy or simply a licensee is on point. I don't

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1 have any idea what the contracts say in this case, but  
2 I guess you would have to look at that. I think the  
3 SIM locking a little different, but at least for the  
4 first three, it strikes me that this is preparation of  
5 an adaptation. So it's noninfringing character I  
6 think would rise or fall based on whether 117 covers  
7 it.

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

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

25 LEGAL ADVISOR KASUNIC: So it's almost

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1 like a filter in a sense that you have this capacity  
2 to see the whole thing and you're being limited to a  
3 certain spectrum in some case.

4 MS. GRANICK: Exactly.

5 LEGAL ADVISOR KASUNIC: Thank you.

6 REGISTER PETERS: Your turn.

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

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

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

24 MS. GRANICK: Correct.

25 GENERAL COUNSEL CARSON: The one that I

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1 wasn't sure I followed within this scheme, maybe you  
2 can just elaborate, is in what respect is the band  
3 order locking. From the description, it didn't quite  
4 become clear to me how that actually was an access  
5 control, but maybe you can clarify.

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

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

24 MR. METALITZ: Yes, we're concerned about  
25 that, what might be the impact.

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1                   GENERAL COUNSEL CARSON: Let me ask then  
2 both of you whether it would be of assistance to maybe  
3 narrow the scope of what's being proposed here like  
4 whether this makes you any happier, whether this makes  
5 you any unhappier. But if we said "Computer programs  
6 in the form of firmware," and I guess one question  
7 would be is it always firmware, if it is that's safe  
8 I suppose, "that enable wireless telecommunications'  
9 handsets to connect to a wireless communication  
10 network."

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

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

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1 would be allayed.

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

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

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

23 MR. METALITZ: It would I suppose and that  
24 is exactly the kind, I would think that's exactly the  
25 kind of issue that an agency like the FCC or an

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1 antitrust authority would be concerned with as to  
2 whether they're bundling the service that is regulated  
3 by the FCC. Well, I hesitate to assert what is or  
4 isn't regulated by the FCC, but clearly they have a  
5 different role to play with regard to the dial tone  
6 than they have with regard to access to all this other  
7 material and it would certainly make sense for the FCC  
8 to tell the wireless carriers what you can or can't  
9 do, what's your freedom of action in this area.

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

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

21 MR. METALITZ: It certainly would become,  
22 I assume it would become a contractual issue, a  
23 licensing issue, between content providers and  
24 wireless carriers as to how that was managed because  
25 the content providers would want to have some security

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1 about how access to their material was managed.

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

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

11 GENERAL COUNSEL CARSON: Okay.

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

18 The problem with including the word  
19 "solely" is exactly as I think you were suggesting and  
20 if I can elaborate on that a little bit. If we could  
21 look at the last exhibit to my testimony, I think this  
22 will show a bit about why it is that "solely" won't  
23 work. So this exhibit is a diagram of the Open Mobile  
24 Alliance's 2.0 client architecture and what it shows  
25 is that there's the operating system for the phone,

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1 there's a second layer that's the service provider,  
2 interface layer and then there's a third layer that's  
3 the DRM engine which on top of that is the fourth  
4 layer which is for applications to play media and then  
5 you have the media files as a fifth layer.

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

14 So, for example, if I have DRM that  
15 protects my audiovisual work, I need a key to unlock  
16 it and I can hide that key in a different layer of the  
17 phone. So I could hide that key at the platform  
18 system layer, at the interface layer, at the DRM  
19 layer, at the application layer. And some phones, my  
20 understanding is that some phones may do that and a  
21 lot of phones don't. It's not necessary that that be  
22 true, but it's possible that it be true and that's the  
23 problem with the formation of "solely" is that as we  
24 know with computer programs and legislation they  
25 rarely solely do one thing. The point is that even

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1 once you get access, say, to let's say I hid the DRM  
2 key in my service provider layer, once I get access,  
3 I'm still not allowed to circumvent the DRM because  
4 this provision is so narrowly worded it just lets you  
5 access the software that lets the phone connect to a  
6 network.

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

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

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

20 MS. GRANICK: I think yes. Under certain  
21 circumstances, it does and I think that the reason why  
22 Lexmark might not entirely take care of the phone  
23 unlocking problem is because not every phone will  
24 allow you to dump the code and read as the printer  
25 allowed you to read the code. So my concern is that

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1 in a subsequent case where someone mounted a full  
2 defense and said, "I'm an unlocker, but I'm going to  
3 take shelter under the Lexmark rule" that it would be  
4 a highly technical design piece of the phone, the fact  
5 that the code is not open or not readable that would  
6 make one person guilty of circumvention and another  
7 person not guilty. So this is why I ask in my  
8 submission today that the Copyright Office either  
9 indicate that the Lexmark rule protects all cell phone  
10 unlocking or grant the exemption for the unlocking.

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

19 MS. GRANICK: I agree that we may not know  
20 exactly why the court did what it did, but I totally  
21 disagree that it means we don't understand what's  
22 going on here. What's going on here is that major  
23 wireless companies are using Section 1201(a) to go  
24 after phone unlockers successfully and that's what we  
25 need to know and that's why an exemption is required.

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1                   GENERAL COUNSEL CARSON: In your comment,  
2 you referred to a letter that I think it was one of  
3 your clients had received. I'm not sure which. In  
4 the comment, you said you had concluded was alleging  
5 a violation of Section 1201(b). Is that accurate?

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

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

20                   MS. GRANICK: I think that that's a typo  
21 because the letter did not say a specific section of  
22 1201. The letter simply said you are circumventing  
23 and by circumventing, you're violating the Copyright  
24 Act and as the lawyer for this person, I said this is  
25 a DMCA case. So it was about Section 1201 but not

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1 specifically indicating Section a or Section b.

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

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

11 GENERAL COUNSEL CARSON: Okay.

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

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

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

23 GENERAL COUNSEL CARSON: I thought I'd  
24 seen a reference in the comments. Am I mistaken on  
25 that?

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1 MS. GRANICK: I had talked about how the  
2 FCC as part of its number portability rulemaking had  
3 indicated how important competition in the wireless  
4 market is to United States telecom policy. But I'm  
5 not familiar with any actual FCC activity around the  
6 area of unlocking.

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

18 MS. GRANICK: And then some.

19 GENERAL COUNSEL CARSON: Okay. TracFone,  
20 of course, is a little different as I understand it  
21 from the allegations in that at least the allegations  
22 of the *TracFone* case were that TracFone actually sells  
23 you the cell phone for less than they paid and the  
24 only way they make money is if you elect to continue  
25 using their service because there is absolutely no

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1 minimum requirement with TracFone. That's my  
2 understanding of the allegations.

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

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

23 Here, the exemption is permitted if it  
24 furthers a public interest and it is noninfringing and  
25 it's not illegal behavior and the simple fact of

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1 accessing that firmware to either reprogram, not  
2 reprogram it, to either give it a different  
3 instruction or to erase it is noninfringing. I think  
4 the case itself shows that TracFone doesn't have to  
5 rely on the DMCA because TracFone had other claims  
6 that it could successfully bring against Sol Wireless  
7 under both Trademark law and also under Unfair  
8 Competition law. So they also could have contract  
9 claims. So they have a legal remedy that's  
10 appropriate when you have an arguably bad actor like  
11 Sol Wireless that's taking advantage of the TracFone  
12 business model to improperly make money off of it.

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

20 GENERAL COUNSEL CARSON: Final question.  
21 In order for us to recommend an exemption, we have to  
22 conclude that persons who are users of works in this  
23 particular class of works are being or are likely to  
24 be adversely effected by the whole prohibition in  
25 their ability to make noninfringing uses under this

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1 title and I think we understand the nature of the use  
2 that you're suggesting people need to be able to do.  
3 They want to be able to connect to a different  
4 wireless carrier. I think I can assume that you would  
5 answer the following question no, which is is that an  
6 infringing use. Mr. Metalitz, any reason for us to  
7 conclude that what Ms. Granick's clients would like to  
8 do is an infringing use?

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

22 GENERAL COUNSEL CARSON: Okay. Sorry.  
23 I'll have one more question. Ms. Granick, I haven't  
24 had time to look at all of what you gave us. You  
25 refer to your testimony to publicly-available

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1 documents that show the different layers of software  
2 that are used. Have you given us all the documents  
3 you're aware of or are there others that might be  
4 useful for us that you know about?

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

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

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

19 But my research and my discussions with  
20 people who are computer programmers and who are  
21 digital rights management experts is that it differs  
22 from model to model, that there's absolutely no reason  
23 why access to the programs that run the cell phone  
24 have to implicate DRM techniques, that it may be  
25 possible that DRM keys are stored in the same area or

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1 space on the phone, but that there is no technological  
2 reason under either the OMA standard or the Windows  
3 standard that that has to be true. In other words, if  
4 this exemption were granted, copyright companies and  
5 cell phone manufacturers could simply put the keys in  
6 a space where they're not likely to be implicated by  
7 this exemption.

8 GENERAL COUNSEL CARSON: Thanks.

9 REGISTER PETERS: Jule.

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

17 But the defendant in this case, I read it  
18 too that they were replacing the firmware. They're  
19 erasing the original firmware and replacing it with  
20 another copy. In that circumstance, do you have any  
21 idea on whether that would be a violation of Section  
22 1201 assuming that the firmware would be accurately  
23 characterized as a technological protection measure  
24 that effectively controls access I assume to itself?  
25 If you erase firmware and replace it with something

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1 else, would that be a 1201 violation?

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

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

21 MR. METALITZ: I'm not sure what it was  
22 and I don't think that the complaint really states  
23 that. I mean it states physically what was happening.  
24 They sent an investigator in there, but I'm not sure  
25 what kind of technological protection measure it was.

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1           ASSOC. REGISTER SIGALL: Ms. Granick, do  
2 you have --

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

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

23           The point is that by accessing the  
24 software that runs the phone they were subject to a  
25 viable claim of a violation of Section 1201(a) and

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1 this has a resounding ripple effect for all people who  
2 want to unlock their cell phones whether a customer  
3 like Mr. Pinkerton or a recycler like the Wireless  
4 Alliance.

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

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

25 MS. GRANICK: It would be a violation but

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1 of a totally different explosives laws.

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

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

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

22 ASSOC. REGISTER SIGALL: Another question  
23 related to that, Mr. Metalitz brought up the claim by  
24 Nokia against a similar defendant. Do we have any  
25 understanding or who would be the owner of the

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1 copyright in any of these computer programs, whether  
2 it be the firmware or the bootloader or the operating  
3 system or this firmware? The complaint that you just  
4 read seems to imply that it's proprietary to Nokia.  
5 The question is does Nokia own the underlying  
6 copyright works to which access is controlled? Do we  
7 have any sense or understanding of that?

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

22 ASSOC. REGISTER SIGALL: The reason I ask  
23 is the question in evaluating this case which you've  
24 offered as a precedent for inhibiting noninfringing  
25 use. Should we take into account I think what Mr.

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1 Metalitz has pointed out which is you have another  
2 interested party, Nokia, should we take into account  
3 the fact that they did not bring a 1201 claim if they  
4 are either the owner of the underlying copyrighted  
5 work at issue or a licensee of the copyrighted work in  
6 having some interest in the copyrighted architecture?  
7 Should we figure that into account as to how serious  
8 this is a threat to people who own these copyrights  
9 and who might employ technological measures to protect  
10 them? Should we take into account how we evaluate  
11 this threat in light of the surrounding circumstances?

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

25 ASSOC. REGISTER SIGALL: Mr. Metalitz, did

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1           you want to react?

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

16                       I think 1201(a), first of all, 1201 is  
17          kind of a bit player in this entire litigation and I  
18          don't think we can draw any legal conclusion about the  
19          applicability of 1201 from this litigation and  
20          secondly, it's clear that the activity that TracFone  
21          was engaged in was not the activity that Ms. Granick  
22          and her clients wish to engage in. So perhaps we're  
23          put back to where we were at the time of the initial  
24          comment which was who is it that is stepping forward  
25          to say this is a violation of 1201.

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1           Maybe there was a letter that said you're  
2 violating the Copyright Act and maybe that referred to  
3 1201(a)(1) but 1201 isn't actually a part of the  
4 Copyright Act. But that distinction might have been  
5 lost on the author of that letter.

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

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

21           ASSOC. REGISTER SIGALL: Let me follow up  
22 on that last point you made. You talked about this  
23 might be better handled in the FCC or in an antitrust  
24 authority of some sort. Would those authorities have  
25 the ability, if they felt it necessary, to make clear

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1 that Section 1201 liability doesn't apply and with  
2 respect to certain activity they think promotes  
3 competition or is more consistent with the  
4 Communications laws?

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

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

25 MS. GRANICK: A reference to the *TracFone*

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1 case.

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

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

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

25 MS. GRANICK: That would again not work

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1 because all the wireless carriers would have to do is  
2 go to the software writers and say make me firmware  
3 that both does DRM and runs the phone at the same time  
4 and then the whole effect of the exemption is moot.  
5 I think the thing that's important to recognize is  
6 that the copyright owners have a choice here. The  
7 copyright owners can choose to put the DRM  
8 functionality anywhere on the phone. They have the  
9 choice of putting it with the firmware or outside of  
10 the firmware.

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

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

24 MS. GRANICK: It shouldn't be used for  
25 that purpose and there is no reason why it necessarily

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1 has to have any effect on protection of other  
2 copyrighted works.

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

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

12 ASSOC. REGISTER SIGALL: Two more  
13 questions. The first refers to your discussion in  
14 your initial comment, Ms. Granick, to the factors that  
15 were supposed to apply in considering exemptions. You  
16 mention that Factors 2 and 3 which would call the  
17 availability for use of works for nonprofit, archival,  
18 preservation and educational purposes and this is NO.  
19 3, the impact that the prohibition on the  
20 circumvention of technological measures has on  
21 criticism, comment, news reporting, teaching,  
22 scholarship or research. In your comments, you said  
23 these are not relevant to the exemption. My question  
24 is is that the equivalent of saying that there will  
25 not be an negative impact on the availability of use

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1 of works for nonprofit, archival, preservation or  
2 educational purposes and there will not be an negative  
3 impact on criticism, comment, news reporting, teaching  
4 and scholarship if the exemption is not granted.

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

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

24 MS. GRANICK: I understand that it's the  
25 majority of the wireless carriers at this point in

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1 time. This is something that I understand from  
2 talking to people who are in the DRM world, but I  
3 don't have a number on that. So I didn't put that in  
4 my comments, my written comments. But there are two  
5 major wireless DRM formats. There's the MicroSoft one  
6 and the Open Media Alliance one and they are both used  
7 and they both have a relatively significant market  
8 share. I'm not sure which one is more than the other.

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

19 ASSOC. REGISTER SIGALL: Okay. I actually  
20 lied. I do have one more question. I want to  
21 understand a little better about the band order  
22 locking that you discussed with David. Here's my  
23 understanding and you can correct this. My  
24 understanding is that the firmware or the software  
25 within a phone in the bank order locking situation has

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1 instructions in it that the phone can only be used for  
2 particular frequencies for mobile communications and  
3 that in effect prevents people from taking that phone  
4 and moving it to another provider if that other  
5 provider is not on one of those frequencies. Right?

6 MS. GRANICK: Yes.

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

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

18 ASSOC. REGISTER SIGALL: Again I'm trying  
19 to get an understanding of what exactly the -- So is  
20 this another instance of the separation between the  
21 firmware and some other programs that you mentioned,  
22 the bootloader program or some other programs or is it  
23 a case where all of the programs have been designed to  
24 work in a certain way to a particular frequency and  
25 they're just operating normally. But the way to

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1 circumvent this would be simply to have a different  
2 computer program that would allow access on different  
3 frequencies.

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

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

21 MS. GRANICK: It's the programs that allow  
22 the handset to connect to the network and that  
23 includes the bootloader and the operating system and  
24 probably some other service provider or software files  
25 that make it a phone and not a computer and so those

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1 are what need to be accessed or run in order to work  
2 a phone.

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

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

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

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

22 MS. GRANICK: The technological protection  
23 measure is the lock and the lock differs from model to  
24 model of phone. There's a couple different kinds of  
25 locks, but that's the technological protection

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1 measure. It prevents you from running or accessing  
2 whatever the software files that makes the phone run  
3 which is primarily the bootloader and the operating  
4 system but the other files that make it a phone.

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

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

10 LEGAL ADVISOR KASUNIC: But if it is a  
11 computer program, then that may still fall within  
12 1201(f) in order to circumvent, in order to get into  
13 that, so that you can create some kind of different  
14 add-on program that would interoperate with the  
15 operating system to tell it --

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

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

23 MS. GRANICK: No, I think that misreads  
24 what was happening in TracFone and I think it is not  
25 what Section (f) is about. There's not reverse

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1 engineering going on here. There is basically  
2 deleting the TracFone prepaid software module which  
3 locks the phone. Once that's gone, the phone works.

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

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

18 LEGAL ADVISOR KASUNIC: Okay. One thing  
19 that just occurred to me, we're assuming, aren't we,  
20 that when we're talking about changing and getting  
21 access to another network that we're talking about  
22 authorized access to that other network? I can't  
23 decide when my contract runs out with Verizon in 30  
24 years, whenever that is, that I can't then just decide  
25 I want access now to Sprint and be able to change it

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1 and get that without going through the authorization  
2 process to get access to their network. Right?

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

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

16 MS. GRANICK: I don't believe that that's  
17 the way that the access filtering on the service  
18 provider's side works. The phone is not what gets you  
19 access to the service provider. It's the service  
20 provider's network and database. So the phone is able  
21 to connect, but it's the network that lets it get  
22 phone service over the network. My understanding is  
23 that if I reprogrammed my phone to work on the Sprint  
24 network and tried to make a call over Sprint that I  
25 would not get the dial tone. I would have to go to my

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1 Sprint store and buy minutes there and that would be  
2 the only way to do it.

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

21 MS. GRANICK: To say I'm agnostic on  
22 whether the TracFone business models benefits or harms  
23 consumers, but I do not think that this exemption will  
24 harm that business model. TracFone still has  
25 Trademark law, Unfair Competition law, Contract law to

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1 go on selling cell phones in the way that they do.

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

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

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1 then because you have a licensed use of the software,  
2 the DRM is enforcing that license?

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

17 MR. METALITZ: I just think in terms of  
18 the *TracFone* case Ms. Granick is trying to have it  
19 both ways. If 1201 is as central to this case and to  
20 the outcome of this case as she is maintaining, then  
21 I think TracFone's business model is very much at risk  
22 and that does have some impact on the digital divide.  
23 I'm not going to wade into that, but there are two  
24 basic models. You can have a subscription model and  
25 you can have a pay-as-you-go model. TracFone's was

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1 the latter and for people that can't afford a  
2 subscription model, it may well be a very viable means  
3 of giving them at least some access to wireless  
4 services.

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

20 MS. GRANICK: I think Mr. Metalitz is  
21 trying to have it both ways. His reply comments say  
22 of course it's not necessary that a submitter actually  
23 have been sued for violating Section 1201(a) or even  
24 directly threatened with such a suit before he or she  
25 can seek an exemption. The submitter must show that

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1 it's not making a purely theoretical critique of the  
2 potential scope of the provision. TracFone shows that  
3 this is not purely theoretical and all of these  
4 technological niceties are going to be lost on the  
5 Wireless Alliances and the Rob Pinkertons of this  
6 country.

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

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

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

13 MS. GRANICK: Yes. Just one. If this  
14 matter were to go before the FCC and the FCC or the  
15 Antitrust Court were to say that cell phone locking is  
16 an antitrust violation, does that mean that customers  
17 could then unlock cell phones given the existence of  
18 1201?

19 MR. METALITZ: That depends. I think we  
20 got into that earlier. It depends on whether 1201  
21 really presents a barrier to them doing so or to them  
22 doing what you want to have done on behalf of your  
23 clients. Certainly, if the FCC ruled that the  
24 carriers can't lock their phones or can't lock their  
25 phones going forward, this issue would become moot

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1 eventually. There's obviously an installed base of  
2 phones that are still locked and potentially then we  
3 might find out whether this is a purely speculative  
4 and theoretical critique or whether there's really a  
5 threat from the major carriers under 1201 to this  
6 behavior by consumers.

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

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

22 But certainly the FCC would have ways I  
23 would think of dealing with the problem without having  
24 to try to opine on whether Section 1201 applied or  
25 didn't apply in the case. I think if this model of

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1 the locked phones is an anti-competitive model and  
2 anti-environment model and an anti-consumer model,  
3 those concerns can be brought to an agency that has  
4 the authority to adjudicate those concerns and I feel  
5 sure that they could find a way to not only solve the  
6 problem going forward but as well to deal with the  
7 installed base.

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

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

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

22 MR. METALITZ: Infringing about?

23 MS. GRANICK: Unlocking.

24 MR. METALITZ: It's irrelevant whether  
25 it's infringing or not. The question for this

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1 proceeding is whether a band on circumvention of  
2 technological protection measures is having an adverse  
3 impact on noninfringing use.

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

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

10 MS. GRANICK: I have no further questions.

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

17 MS. GRANICK: Thank you.

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

21 MR. METALITZ: (Nods.)

22 REGISTER PETERS: Off the record.

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

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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

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1 exemptions.

2 MR. KAHLE: Thank you. It's been three  
3 years and I very much appreciate the exemption that  
4 was granted to the libraries and archives or those of  
5 us that are motivated to try to archive these  
6 materials last time. What we asked for last time was  
7 basically allow us to try to preserve software and how  
8 the exemption came down was to go and make it so that  
9 it was software that was obsolete media.

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

25 What it ended up being as the exemption

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

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

17 Let me be concrete and clear. We have  
18 things that are based on old floppy technologies, old  
19 dongles, old things like that. We now have the  
20 capability, thanks to you guys, of doing that. But  
21 there are other classes of works that are run on old  
22 Amegas, Commodores, old Apple computers, old operating  
23 systems, but the media is still okay in the sense that  
24 it's still a 3.25 inch floppy or maybe it's a five  
25 inch floppy. You can still find the hardware such

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1 that at least our interpretation of what the exemption  
2 was didn't grant us the ability to break the access  
3 protections to get a working system together and  
4 that's what we're looking for.

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

15 We also have obsolete operating systems.  
16 So we have perfectly reasonable floppies. I mean up  
17 until only a few years ago, there were floppy drives  
18 like this that were sold. Yet these are for old  
19 generation Apple operating systems that ran on the  
20 68,000 chip which isn't even the last one. It went  
21 from 68,000 to the Power PC and now we're onto the  
22 Intel and they've dropped emulation. So to be able to  
23 archive these things, we have to basically go and put  
24 together a whole system and anything that is dependent  
25 on obsolete infrastructure is what we were trying to

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1 carve in this particular exemption.

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

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

15 REGISTER PETERS: Okay. Steve.

16 MR. METALITZ: Yes. Thank you very much.  
17 I would agree with what was just said that the  
18 exemption that was granted three years ago was a lot  
19 narrower than the one that you originally asked for  
20 three years and I think the new exemption that you're  
21 asking for this time kind of slides back into the  
22 broader area that the Copyright Office rejected last  
23 time. So I think the relevant issue is how have  
24 circumstances changed and so forth to perhaps lead to  
25 a different result.

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1           Let me just say, first of all, on the  
2 existing exemption I think that the Internet Archive  
3 has done in my view a better job than anybody else of  
4 explaining how they've used the existing exemption,  
5 first demonstrating that they have used it which not  
6 all the beneficiaries of existing exemptions have even  
7 explained and, second, explaining how they've used  
8 and, third, explaining why they still need it which I  
9 think is really they've taken on the persuasive task  
10 that this rulemaking requires.

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

23           That's really our concern with the broader  
24 exemption that's being proposed which goes beyond  
25 obsolete formats into the obsolete operating systems

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1 and hardware. There's a lot of these titles that do  
2 have a new life now and both in our reply comments,  
3 the joint reply comments that we filed on behalf of 14  
4 groups and also in somewhat more detail in the reply  
5 comments of Time Warner, there's some discussion of  
6 how this market is developing and thriving and that's  
7 a factor that wasn't really present in the exemption  
8 that we were talking about three years ago.

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

20 And what saved it, I think, three years  
21 ago was the conclusion that was reached which I think  
22 is quite supportable that there's not going to be very  
23 many people other than libraries and archives who have  
24 the equipment to be able to read these obsolete  
25 formats in the first place and therefore, circumvent.

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1 They're the only ones that are in the position to  
2 circumvent the technological protection measures and  
3 do the preservation work that they're talking about so  
4 that as a matter of fact even though the exemption to  
5 applicable to everybody, it's likely to be exercised  
6 only by this smaller group of users and therefore the  
7 potential impact on large, broader markets is  
8 minimized.

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

21 The second fact about the development of  
22 these markets and classic games, legacy games, that  
23 originally came out in obsolete formats with obsolete  
24 operating systems is, as I've said, we have to relook  
25 at what would be the impact of an exemption on

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1 existing markets and we have to look at that with the  
2 view in mind that the exemption would be available to  
3 anybody if it were granted and I think it's clear that  
4 this could have a pretty deleterious impact on the  
5 investment that's ongoing now to bring these games  
6 back to market and allow people to play them in very  
7 convenient formats and in very convenient ways even if  
8 they don't have the original old hardware at their  
9 disposal.

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

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1 agreements with them. I guess Nintendo is doing the  
2 same thing.

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

16 Again, just to sum up, I think we don't  
17 have a major concern about the existing exemption  
18 except that we would like it clarified that when a  
19 game or a computer program is covered by the  
20 exemption, is back on the market in a non-obsolete  
21 format, that this exemption would not apply and if the  
22 circumvention was taking place after the non-obsolete  
23 format came out on the market. And, secondly, we have  
24 a lot of concerns about the proposed expansion of this  
25 exemption or as I think the commentor originally put

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1 it, the expansion of the dongles exemption to cover  
2 all situations in which there is obsolete hardware or  
3 obsolete operating systems involved. For the reasons  
4 I've stated, we have a number of concerns about that.

5 In terms of the definition of obsolete, I  
6 think that's a very good point that was raised and  
7 there may be questions or uncertainties about what  
8 constitutes obsolescence in the current environment  
9 and of course, in the rulemaking last time, there was  
10 reference to the definition of obsolete in the Section  
11 108 and an adaptation of that definition to this  
12 circumstance. That definition speaks about if you  
13 could only find it in a second-hand store, then it's  
14 obsolete and that may make sense in some  
15 circumstances, but as was just mentioned, eBay exists  
16 and there are a lot of other very mainstream markets  
17 that could qualify as second-hand stores in a sense.

18 If something is readily available on eBay,  
19 I'm not sure it would be accurate to refer to it as  
20 obsolete in the same sense that it's meant in Section  
21 108. We discuss in our reply comment another site  
22 which is offering these operating systems that were  
23 referred to and I guess they're second-hand. I don't  
24 think they're new from the factory, but I think the  
25 fact that it's available on oldsoftware.com may

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1 suggest that it's not obsolete because that's a place  
2 where you can acquire that operating system.

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

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

13 MR. KAHLE: Yeah. I think it does make  
14 sense to comment on some of the points and sort of  
15 what's different about digital materials than bringing  
16 a book out in a second edition or something like that,  
17 or making a facsimile. We're dealing with materials  
18 that run on old machines and even if something is  
19 brought back out again, I don't know, we'd love to see  
20 Pong and all of those sorts of things that you  
21 remember back out again, but usually they're brought  
22 out on top of a current platform. They're run on  
23 Windows or MacIntoshes or Linex or something that's  
24 sort of the current world and the older versions are  
25 dying, so the original materials.

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1           And we in the libraries and archives world  
2           are very oriented towards the authentic. So even if  
3           we break an access protection of an old Pong something  
4           or other, I don't know, some old game or these old  
5           things, there are all sorts of limitations in terms of  
6           what it is that we can do with it based on Copyright  
7           law which seems to have worked perfectly fine for one  
8           in terms of not massively impacting the market, but  
9           also these are old versions that require something  
10          really antique to even run these things.

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

20           This isn't quite a software example, but  
21          when Yahoo turned ten years old, they wanted to go and  
22          show what their old website looked like and they told  
23          us that they had to come to the Internet Archive to go  
24          and get their old webpages so they could print them  
25          out and show them off of what was Yahoo like ten years

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1 before because they didn't archive things. In  
2 general, the history of commercial companies archiving  
3 materials that are no longer commercially viable has  
4 not a lot of positive, sometimes it's there, sometimes  
5 it's stashed some place.

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

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

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

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1 is going to be your big guard against that.

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

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

22 So there might be cases that if there is  
23 going to be a thriving market in this we could find  
24 more people to talk to, but I don't really think it's  
25 going to carry the day of what the intent of digital

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1 preservation is. I think those are the points that I  
2 remember out of your talk.

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

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

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

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

14 MR. METALITZ: That's always a danger.

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

19 MR. METALITZ: Right.

20 GENERAL COUNSEL CARSON: I just want to  
21 make sure I understand the information you're  
22 referring to. Is there anything besides what was in  
23 the Time Warner comment that you were meaning to refer  
24 to in terms of old software and games being made  
25 available again?

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1 MR. METALITZ: In our reply comments, we  
2 talked about a couple of others. There's one called  
3 StarROMs.com. This is footnote 70 of the joint reply  
4 comments. There's a reference to a news release from  
5 Nintendo that, I think, talks about, if I recall it  
6 correctly, this is footnote 69 and I haven't gone back  
7 and checked it, but I think it talks about making a  
8 lot of back catalog games available on the new  
9 Nintendo platform.

10 GENERAL COUNSEL CARSON: Okay.

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

21 GENERAL COUNSEL CARSON: Okay, now on  
22 GameTap there wasn't enough -- either I didn't read it  
23 carefully enough or there wasn't enough information in  
24 the Time Warner reply comment for me to be clear. Are  
25 these games available for download or are they simply

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1 games that you can play online?

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

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

21 MR. METALITZ: Well, it would be two  
22 different markets or two different segments of the  
23 market but if a broad exemption were granted that  
24 would allow people to circumvent the access controls  
25 on the originals, it could impinge on either of those

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1 markets, I suppose. I mean, it would basically allow  
2 people to get in basically the same position, if you  
3 will, and I take the point that this is not what the  
4 internet archive is going to do. I don't doubt that  
5 for a minute. The problem is, of course, with an  
6 exemption, a lot of other people might be able to take  
7 advantage of it.

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

15 When there is an exemption as a result of  
16 this rulemaking, for example, the existing exemption,  
17 it's not the case, is it, that anyone on earth who  
18 wants to take advantage of this exemption to  
19 circumvent the controls on an old game by, for  
20 example, the original early access control by doing  
21 whatever needs to be done so that they can play it off  
22 their hard drive, for example, instead, can do so, is  
23 it? I mean, was that the effect of this exemption  
24 when we did that? Were we saying anyone on earth is  
25 free to circumvent in order to make use?

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1 MR. METALITZ: Well, first of all, if the  
2 use that they're making is an infringing use, they may  
3 be liable for infringement, although --

4 GENERAL COUNSEL CARSON: Right.

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

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

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

16 GENERAL COUNSEL CARSON: All right.

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

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1 distributed in formats that, you know, have certain  
2 characteristics.

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

12 Now, certainly it's true that what  
13 motivated the copyright office to grant that exemption  
14 was the kinds of uses that the internet archive was  
15 making and I think the -- as I read the decision in  
16 2003, and I'm just, you know, reading it to try to see  
17 how it fits into this construct, the reason why this  
18 -- the concern that others besides the internet  
19 archive or other libraries and archives would use this  
20 exemption for other purposes was somewhat ameliorated  
21 by the conclusion that was drawn that really not very  
22 many people are going to have the ability to use the  
23 original media or hardware other than a library or  
24 archive and probably other than the internet archive  
25 and the others that are following the trend that, you

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1 know, they've started.

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

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

23 GENERAL COUNSEL CARSON: Well, that's  
24 interesting. Unfortunately, I don't have our actual  
25 regulatory text in front of me. Well, maybe he does.

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1 No, I don't think he does either, because what I  
2 really need is the very beginning of 37 Code of  
3 Federal Regulations, Section 201.40 and we -- hold on,  
4 hold on. All right, let me read you the regulatory  
5 text which I think can be fairly stated to be  
6 Copyright Offices's interpretation. I'll read you the  
7 statutory text which I think that interpretation flows  
8 from. I'd be interested in your reaction.

9 All right, this is, again, Section  
10 201.40(d) of 37 CFR, starting at the pertinent place,  
11 "The Librarian has determined that the prohibition  
12 against circumvention of technological measures that  
13 effectively control access to copyrighted work set  
14 forth in 17 USC 1201(a)(1)(a) shall not apply to  
15 persons who engage in noninfringing uses of the  
16 following four classes of copyrighted works." If you  
17 go to Section 1201(a)(1)(b) which is the statutory  
18 authority for this proceeding, it says, "The  
19 prohibition contained in Subparagraph (a) shall not  
20 apply to persons who are users of a copyrighted work  
21 which is in a particular class of works if such  
22 persons are or are likely to be in the succeeding  
23 three-year period adversely effected by virtue of such  
24 prohibition in their ability to make noninfringing  
25 uses of that particular class of works".

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1 I thought I'd finally worked out that what  
2 this means is that when there's an exemption is it is  
3 not an across-the-board exemption for anyone on earth  
4 to circumvent, but only for people who are engaging in  
5 noninfringing uses to circumvent. But I gather that  
6 maybe there's not a consensus that that's what it  
7 means.

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

19 My point is a little bit different than  
20 that although that obviously covers a lot of what I  
21 was talking about. But there could also be  
22 circumstances in which someone circumvents the  
23 protections and doesn't do anything with the work,  
24 leaves it in the clear for others to use for example.  
25 I mean, this is one of the reasons we have 1201(a)(1)

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1 is because people -- Congress was concerned that  
2 people would commit an act of circumvention but might  
3 not themselves go on to do some infringing use but  
4 would, in effect, facilitate or make it possible for  
5 others to do an infringing use, and yet, it might not  
6 be captured by the contributory infringement  
7 doctrine.

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

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

21 GENERAL COUNSEL CARSON: I think one can  
22 go farther than that and say if I circumvent and then  
23 make no use, I'm not within the scope of that  
24 exemption because the exemption, at least in the  
25 regulation applies to someone who engages in

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1 noninfringing uses of those classes. If I don't  
2 engage in any use, I'm not engaging in a noninfringing  
3 use.

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

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

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

23 MR. METALITZ: Now, this is all well and  
24 good. There's also kind of a meta issue here which is  
25 how this is interpreted and how this would be

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1       communicated to the public and what message the public  
2       would get from it, but I understand that you're  
3       looking just at what the strict legal impact of the  
4       exemption would be.

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

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

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

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1 I think you stated that in the Notice of Inquiry.

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

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

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

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1           them in the previous rulemakings and you've come down  
2           where you've come down.

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

5                       REGISTER PETERS: Okay, Rob?

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

21                      MR. METALITZ: Well, I think the market  
22          realities are probably a little bit different, that  
23          people may have a nostalgic attraction to their old  
24          machines and their old operating systems but many of  
25          them anyway want to do other things with computers and

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1 with these technologies and therefore, they're lucky  
2 to upgrade to get the greater -- you know, they're  
3 going to be using new computers and having new  
4 operating systems and if the game becomes available on  
5 those systems, which I think is the case with GameTap  
6 and some of these others, it seems as though that  
7 would satisfy their demand to be able to continue to  
8 play the old games. I'm not sure that answers your  
9 question.

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

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

25 LEGAL ADVISOR KASUNIC: Yeah, comment 19

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1 and 21.

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

9 But two of his programs wouldn't run in  
10 that way for some reason. There was some problem  
11 there. When I read this I thought, well, this sounds  
12 to me a lot like the kind of activity that would fall  
13 within Section 1201(f) with the interoperability  
14 because you're trying to get your old application to  
15 run on OS10, to interoperate with the new operating  
16 system and although it's supposed to be able to do it,  
17 for some reason, it doesn't do it. So can you use  
18 1201(f) to achieve the interoperability or can someone  
19 make the tools available to you to achieve that  
20 interoperability? It struck me that that scenario  
21 sounded more like a 1201(f) scenario.

22 LEGAL ADVISOR KASUNIC: Well, that was  
23 part of my next question. In terms of the second  
24 proposal by Internet Archive to -- in relation to  
25 operating systems and I'm glad that you raised

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1 1201(f), I get tired of being the one raising it in  
2 every case, but wouldn't it seem that in order to make  
3 something compatible, in order to emulate an operating  
4 system, where you were just looking at what the  
5 interoperable features were to make that program work,  
6 wouldn't it seem that 1201(f) would cover that  
7 situation?

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

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

13 MR. METALITZ: 21, yeah.

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

21 MR. METALITZ: I don't know whether it  
22 would entirely solve this problem, but I think it  
23 would -- it seems to me that what you're trying to do  
24 in most of these cases is to get an old application to  
25 run on a new operating system. And if you -- that is

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1 kind of the 1201(f) situation. They're independently  
2 created computer programs and you may need a tool to  
3 enable that to happen and you may need to get  
4 information that requires circumvention in order for  
5 that to -- in order for that to occur. So at least as  
6 far as obsolete operating systems, I would think that  
7 there might be a number of cases in which 1201(f)  
8 would apply.

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

19 LEGAL ADVISOR KASUNIC: Well, that's a  
20 question David asked, was, is there even -- where's  
21 the technological protection measure in that  
22 situation? Do you think that just having an  
23 application program relate to an operating system is  
24 in fact, a technological protection measure  
25 controlling access to that application?

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1 MR. METALITZ: I'm very skeptical that it  
2 is. I don't know that -- I know there was some  
3 discussion in the last rulemaking about technologies  
4 that control access when the malfunction and you  
5 concluded that if the technology is not working the  
6 way it was intended to work, then it can't be -- then  
7 the effects of that can't be considered to be an  
8 effective technologic protection measure within the  
9 meaning of the statute.

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

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

25 MR. KAHLE: Boy, is this subtle.

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1 (Laughter)

2 MR. KAHLE: Yes, we're making copies of  
3 software that we can then run in emulated  
4 environments, at least that would be the end goal.

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

8 MR. KAHLE: There's programs that exist,  
9 say on Windows XP that will try to emulate a Windows  
10 3.1 environment such that if you were to have a copy  
11 of a piece of software or what was on discs and such,  
12 it would make a virtual environment that would look  
13 like it's accessing a floppy drive or ROM or older  
14 hard drive style. So as I understand just by me deep  
15 reading of Section (f) here, that what we're looking  
16 to do is make copies and break access protections of  
17 the original software and be able to make copies of  
18 those, not just for the purpose of identifying  
19 compatibility points; we're looking to make copies  
20 onto newer media and then running those to make sure  
21 that we have a full fledged working copy. Is that --

22 LEGAL ADVISOR KASUNIC: Okay, I think so,  
23 but in order to make it run in that other environment,  
24 then you're trying to figure out in either the game  
25 that you have or maybe with the operating system that

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1 it worked with, you're investigating in one of those  
2 two places what made them work together. What made --

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

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

22 MR. KAHLE: This is not a short-term.  
23 It's becoming more and more important as time goes on  
24 as more of our culture moves into digital media, that  
25 we've seen -- the trend that we're on isn't slowing

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1 down. So we see not only the work that we may have  
2 been pioneering in the last three years in trying to  
3 get an understanding of how to do it; we see these  
4 digital preservation efforts as becoming more and more  
5 important as more of our culture goes digital. We  
6 don't see it -- but there is this issue about what  
7 does obsolete mean and I think we have to take a  
8 broader view, I think than, you know can something be  
9 found in a garage sale someplace as a concept of what  
10 obsolete is.

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

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

22 MR. KAHLE: I sure hope that we learn from  
23 these and bake these into law. The cost of this is  
24 actually quite high. The first round, the sort of pro  
25 bono billings that we thankfully didn't have to pay

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1 were about \$30,000.00. I asked these two capable  
2 young lawyers what they, you know, had spent on this  
3 project and it was, they thought, certainly over 200  
4 hours of work, and, you know, it's fabulous that we  
5 can get access to these folks for kind of wee  
6 libraries but that's probably not going to be for a  
7 long-term case, so to the extent that we can get this  
8 stuff changed upstream would be fantastic. But I  
9 think we should -- there are Section 108s and there  
10 are other things that are going on to try to fix other  
11 areas of the law.

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

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

21 REGISTER PETERS: I have a question and  
22 it's just my own edification. In your comment you  
23 expanded a little bit and said that there's also a  
24 problem with regard to periodically migrating  
25 materials and which are going to basically migrate

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1 every three years. Is that right?

2 MR. KAHLE: Yes.

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

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

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

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1 make another copy you had the same issue?

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

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

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

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

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

21 MS. KIM: We don't think so, no. So maybe  
22 you just wanted to emphasize what they do and their  
23 activities. So it doesn't necessarily trigger the MCA  
24 liability on migration activity itself. Does that  
25 answer your question?

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1 REGISTER PETERS: Yes, I'm not going to  
2 bore people. I'm still struggling with an operating  
3 system question.

4 MR. KAHLE: You can bore them later.

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

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

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1 REGISTER PETERS: Okay.

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

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

16 REGISTER PETERS: Got it.

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

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

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1 MR. KAHLE: Yes.

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

6 MR. KAHLE: Right.

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

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

11 REGISTER PETERS: Yeah.

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

15 REGISTER PETERS: Right.

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

20 REGISTER PETERS: Okay.

21 MR. KAHLE: That's what we're after in  
22 this. It's just for games. It's things that are  
23 software oriented. Three years ago we were trying to  
24 sort of pull out why doesn't this apply to sort of,  
25 you know, DVD movies or audio CD's is those really

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1 aren't software or game things. They may evolve into  
2 that, so, you know, three years from now we may be  
3 back with some other sorts of problems.

4 REGISTER PETERS: Okay.

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

7 REGISTER PETERS: Yes, for the moment.  
8 I'm going to -- Jule.

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

24 MR. KAHLE: That's one case and there's  
25 another case where we actually couldn't make copies

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1 because the -- or at least the common copying programs  
2 that were available for going from one floppy to  
3 another would have run into troubles. This is the  
4 sort of thing that was done in the 1980's back before  
5 they found that digital rights management wasn't too  
6 good an idea for the industry, but there was an era  
7 when they thought that digital rights management  
8 called a copy protection was a problem and it was not  
9 just original only, it was that they -- it was made  
10 difficult to go and make copies.

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

14 ASSOC. REGISTER SIGALL: I see.

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

24 ASSOC. REGISTER SIGALL: Well, okay, then  
25 the next question I have is in this new exemption th

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1 at you're requesting we've been talking about, is it  
2 also the case that the software you'd like to use, is  
3 it the case that the access controls you would like to  
4 circumvent, are those access controls that again, call  
5 or look to original media to control access or are  
6 they just generalized access controls that are not  
7 necessarily tied to any particular device or operating  
8 system?

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

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

23 MR. KAHLE: Let me see if I can get some  
24 good -- yes, there are things like password  
25 protections, numbers that have to be keyed in, license

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1 keys and we've received some of these and we were  
2 looking over some of the materials that we've  
3 received. For instance, here is PhotoShop 3.0 and on  
4 the materials that were donated, they've written it  
5 down on the actual floppy itself and I think we've all  
6 done that.

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

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

20 This is for the MacIntosh before they even  
21 talked about which Mac OS versions things were, so  
22 this is old. So, you know, probably mid-`80s kind of  
23 era and we'd like to basically be able to bring these  
24 back to life and so the original exemption sort of had  
25 this and of two clauses which narrowed it. It was an

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1 original only and obsolete media and we'd suggest not  
2 even the obsolete media without the original only is  
3 what it would take to do the sorts of things that  
4 we're finding and it is an ongoing issue.

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

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

22 MR. KAHLE: The medium that the software  
23 resides on may not be obsolete. CD ROMs may not be  
24 obsolete. Floppy might not be obsolete but something  
25 along the chain makes it so that it is an obsolete

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1 system. I think we were trying, as I understand it,  
2 to try to distance ourselves from the market to try to  
3 say, "Hey, okay, take care of the old stuff and we can  
4 live with that". I don't think it's the right thing  
5 but you know, we can live with that, just make it so  
6 that if anything's obsolete in these -- because in the  
7 characteristics in the world that we're working in for  
8 this proposed exemption, it's a multi-device, multi-  
9 piece of software complex world. It's not just a DVD  
10 player plugging into your TV.

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

22 MR. KAHLE: Well, we listed obsolete  
23 operating systems or obsolete hardware as a condition  
24 of access. That was how we tried to frame it in such  
25 a way that it didn't sound like we were, you know,

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1 saying everything. It's just that the set of problems  
2 that we're dealing with. So if it requires these --  
3 something that's gone obsolete that allow us to break  
4 up access protection on the original thing that would  
5 -- is required. Maybe that answers your question.

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

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

16 ASSOC. REGISTER SIGALL: Okay.

17 REGISTER PETERS: Yes, David.

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

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1 think that's to some degree what we were focusing on  
2 three years ago.

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

8 MR. KAHLE: Yes.

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

14 MR. KAHLE: Yes.

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

20 MR. METALITZ: No, I think that was at  
21 least close to it. I think we may have gotten on a  
22 little tangent here about whether that obsolete  
23 operating system or hardware was a TPM and I think  
24 Brewster has cleared up that it doesn't -- you know,  
25 he's not depending on the argument it's a TPM.

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1           As I understand it, take that PhotoShop 3  
2           example again, whether or not you could crack the  
3           password on that in your proposal would turn on  
4           whether that was designed to run on an operating  
5           system that is obsolete or whether it was designed to  
6           run on an operating system that is not obsolete. It  
7           may be old, but not obsolete.

8           GENERAL COUNSEL CARSON: Right.

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

22                 I think this is much more an issue for  
23          video games and for other types of computer programs  
24          because the market impact of PhotoShop 3.0 is going to  
25          be nil at this point. But the market impact

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1 potentially of Pong and some of these other games that  
2 are on GameTap and so forth is not nil. I'm not going  
3 to argue it's the end of the video game industry as we  
4 know it, but it's become a significant market and I  
5 think allowing this broad exemption that turns just on  
6 the fortuitous question of what environment applied at  
7 the time that was originally released could have a big  
8 impact on that market.

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

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

19 MR. KAHLE: Correct.

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

24 MR. KAHLE: I think it's required, because  
25 if you're going to reissue these -- we're talking

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1 about something that is on an obsolete platform. If  
2 you're going to bring it on a non-obsolete platform,  
3 it's going to be somehow different. So it is  
4 necessarily different. It's this sort of underlying  
5 shifting sands that we have in our digital  
6 environment. We're just -- it's hard to keep things  
7 running. So they basically keep coming out with new  
8 things and they tend to make improvements or it runs  
9 a little bit better or some such, and we are inclined  
10 towards archiving the originals with authenticity and  
11 personally, if it were between going and breaking my  
12 own copy and running up emulators and the like as  
13 opposed to going out and buying GameTap for 30 bucks,  
14 sign me up for GameTap.

15 I mean, if I wanted access to Pong, I  
16 certainly wouldn't go and bust the prongs out of a  
17 1975 piece of hardware. Sorry, that's just my -- so  
18 I don't know that librarians are going to be a threat  
19 to -- or as you point out, others. If something is  
20 commercially viable and it's available, having copies  
21 made may not be -- of the old versions, may not be the  
22 biggest market threat to the problem that that product  
23 manager is going to have.

24 GENERAL COUNSEL CARSON: Like, I assume  
25 first of all, you've got to understand Brewster's

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1 point of view from a preservationist's point of view  
2 and having understood that, what is your response in  
3 terms of how we should be evaluating that?

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

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

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1 GENERAL COUNSEL CARSON: Yeah.

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

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

21 GENERAL COUNSEL CARSON: And did I  
22 understand you earlier to be suggesting that before  
23 one should be able to do what the internet archive is  
24 doing in this area, wouldn't you have to seek out the  
25 copyright owner and get permission?

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1           MR. METALITZ: Well, that goes to a  
2 question of, you know, of their activities under  
3 Section 108. There are some things they're not  
4 required to seek permission for but there might be  
5 many instances in which it may make more sense to seek  
6 permission and it's not only the Section 108 issue but  
7 of course, there's also an orphan works issue that is  
8 kind of underlying here. And one of the problems that  
9 I recall you brought up three years ago is these  
10 aren't even being supported by anybody. How would we  
11 go find somebody to ask them to give us a dongle if  
12 they had it or the lens lock or these other weird  
13 technological protection measures that were in  
14 existence 15 years ago, 20 years ago. We can't even  
15 find these people.

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

25           MR. PHILLIPS: So I gather you're not

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1 suggesting that if we were to re-issue this exemption  
2 either as it was or in some modified form, you're not  
3 suggesting that we should sort of throw in a condition  
4 that --

5 MR. METALITZ: No.

6 GENERAL COUNSEL CARSON: Okay.

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

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

14 LEGAL ADVISOR KASUNIC: One more question.

15 REGISTER PETERS: Okay.

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

25 One way, maybe not such a good analogy to

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1 make but let's try it. Take for instance, in another  
2 context like the I Tunes example. If I have records  
3 and say my say turntables become obsolete and even if  
4 -- let's even imagine that maybe some of those records  
5 had some kind of original only or some kind of TPM on  
6 it, would it harm the market for I Tunes if I was able  
7 to utilize those works, if I was able to emulate my  
8 turntable in order to use the works that I lawfully  
9 have?

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

15 MR. METALITZ: Well, I'm not sure -- I'm  
16 going to hesitate to go down the path that you're  
17 suggesting in terms of your particular hypothetical  
18 but I think what we're talking about here really is a  
19 form of format shifting and something that's in one  
20 format and you want to shift it -- I mean, they don't  
21 want to access -- the internet archive doesn't want  
22 access to this in order to play it on the original  
23 machine. They want to shift the format to a TPM free  
24 format and one that they can also periodically migrate  
25 to new formats along the way.

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1           In that sense, this is not different from  
2 the other format shifting proposals that have been  
3 before you this time and three years ago. The only  
4 limitation is that the operating system or the  
5 hardware fortuitously needs to be obsolete on the copy  
6 that they have available. So I think there is a  
7 potential market impact here that's the same as with  
8 regard to the format shifting issue generally.

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

14           LEGAL ADVISOR KASUNIC: Well, isn't that  
15 -- isn't that the distinction or the potential  
16 distinction there at least in this circumstance, the  
17 noninfringing -- there is a noninfringing use of  
18 preservation that may be covered, whereas in format  
19 shifting or space shifting or that, that we don't  
20 clearly -- we don't have any necessary basis for  
21 noninfringing use there. There's no statutory  
22 exemption like 108 that would apply maybe. So that  
23 distinction between noninfringing and reproduction or  
24 a reproduction of that work in some other medium that  
25 would potentially infringe, then separates those two.

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1 MR. METALITZ: Well you and I might agree  
2 with that but obviously, a lot of people that have  
3 commented in this proceeding wouldn't agree with that.  
4 They think that the format shifting is a noninfringing  
5 use and in fact, even an archive is not relying solely  
6 on 108, they're relying on 117 and they're relying on  
7 107. They're relying on fair uses as an element of  
8 the noninfringing use that they're making. So the  
9 fact that the next person who comes along and does  
10 this is not an archive and is engaged in some other  
11 activity, you know, we would have to know more about  
12 what that activity was to determine whether Section  
13 107 might apply.

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

18 MR. METALITZ: Yes.

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

23 MR. METALITZ: That's the owner of -- I  
24 mean, that's the owner of the copy issue but I assume  
25 that they are -- you know, have become the owner of

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1 the copy -- are you asking about what they're doing or  
2 what someone who is not a Section 108 archive would  
3 do? I'm not sure what your question is.

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

7 MR. METALITZ: Well, I think, you know,  
8 certainly what they are doing might well -- without  
9 looking again at the exact wording of 117, I think 117  
10 even cross-references the definition of archive in 108  
11 but I may be wrong about that. But we do know there  
12 are a lot of people on the internet who think that  
13 basically any copy they make is an archival copy even  
14 if they don't possess an original. And there's  
15 widespread misinformation about that and people  
16 certainly will rely on Section 117 to justify this  
17 type of activity and that will be their argument for  
18 why it's -- the use they're making is noninfringing  
19 and therefore, they're also not liable for a  
20 1201(a)(1) violation.

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

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

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

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1 MR. KAHLE: No.

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

8 MR. KAHLE: Very much appreciate it.  
9 Thank you.

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

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