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

WEDNESDAY
MARCH 29, 2006

MUMFORD ROOM
LM-649
JAMES MADISON BUILDING
LIBRARY OF CONGRESS
101 INDEPENDENCE AVENUE, SOUTHEAST
WASHINGTON, D.C.

PRESENT FROM THE U.S. COPYRIGHT OFFICE:

DAVID O. CARSON, General Counsel
ROBERT KASUNIC, Principal Legal Advisor, OGC
JULE L. SIGALL, Associate Register for Policy
and International Affairs
STEVE TEPP, Principal Legal Advisor, OGC

COMMENTERS:

JONATHAN BAND, Library Copyright Alliance
STEVEN METALITZ, Joint Reply Commenters
ALAN M. DINSMORE, American Foundation for the Blind
<table>
<thead>
<tr>
<th>I-N-D-E-X</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>First Panel: Computer Programs Block</td>
<td>7</td>
</tr>
<tr>
<td>Domains and Websites</td>
<td></td>
</tr>
<tr>
<td>Johnathan Band</td>
<td></td>
</tr>
<tr>
<td>Steven Metalitz</td>
<td></td>
</tr>
<tr>
<td>Second Panel: Literary Works distributed on e-book format when all existing e-book editions of the work, including digital text editions, made available by authorized entities</td>
<td>37</td>
</tr>
<tr>
<td>Alan Dinsmore</td>
<td></td>
</tr>
<tr>
<td>Jonathan Band</td>
<td></td>
</tr>
<tr>
<td>Steven Metalitz</td>
<td></td>
</tr>
</tbody>
</table>
 GENERAL COUNSEL CARSON: Good morning. I'm David Carson. I'm the Copyright Office General Counsel and I'd like to welcome everyone to this Washington, D.C. hearing in the Section 1201 rule making. Mary Beth Peters, a Registered Copyright, unfortunately is home sick today and cannot attend, but she will be reviewing the transcripts.

This hearing is part of the on-going rule making process mandated by Congress under Section 1201(a)(1), which is added to Title 17 of the United States Code.

Section 1201(a)(1) provides that the Librarian of Congress may exempt certain classes of works from the Prohibition against Circumvention of Technologic Measures that control access to copyrighted works. These exemptions last for three years and may be used by persons who are engaging in non-infringing uses.

The purpose of this rule making proceeding is to determine whether there are particular classes of works as to which users are or are likely to be adversely affected in their ability to make non-infringing uses, if they are prohibited from
circumventing the technological access control measures.

Pursuant to the Copyright Office's Notice of Inquiry, which was published in the Federal Register on October 3rd, 2005, the Office has received 74 initial comments proposing exemptions to the prohibition on circumvention and 35 reply comments, all of which are available for viewing and downloading from the Copyright Office's website.

This is our second day of hearings in this rule making. We had originally set aside four full days for hearings here in Washington and two days in Palo Alto, California, but based on the number of persons who requested to testify, we did not need all of those days. We have already conducted a hearing last week in Palo Alto on March 23rd and we will be conducting hearings over the course of two additional days after today. This Friday, March 31st in the morning and the afternoon and next Monday, April 3rd in the morning.

We intend to post the transcripts of all of the hearings on our website when they're available, a few weeks after the conclusion of the hearings.

The comments, reply comments and hearing testimony will form the basis of evidence in this rule
making, which after consultation with the Assistant
Secretary for Communications and Information in the
Department of Commerce, will result in the Register's
recommendation to the Librarian of Congress.

The Librarian will make a determination by
October 28th, 2006 on whether exemptions to the
prohibition against circumvention should be instituted
during the ensuing three year period and if exemptions
should issue, what particular classes of works should
be subject to those exemptions from the prohibition on
circumvention.

The format of this hearing will be divided
into three parts. First, witnesses will present their
testimony. This is your chance to make your case to
us in person, explaining the facts and making the
legal and policy arguments that support your claim
that there should or should not be a particular
exemption.

The statements of the witnesses will be
followed by questions from members of the Copyright
Office panel. The panel may be asking some tough
questions of the participants in an effort to define
and refine the issues and the evidence presented by
both sides. This is an ongoing proceeding and no
decisions have yet been made as to any critical issues
in this rule making.

In an effort to fully obtain relevant evidence, the Copyright Office reserves the right to ask questions in writing of any participants in these proceedings after the close of the hearings.

After the panel has asked its questions of the witnesses, we intend to give the witnesses the opportunity to ask questions of each other. If we haven't managed to come up with all of the tough questions that should be asked of each of you, we're confident that one of your fellow witnesses is likely to do the job for us.

With that, let me now introduce you the other members of the Copyright Office panel. I would request anyone with cell phones, please, turn off your ringer. First, to my right is Jule Sigall, the Associate Register for Policy and International Affairs. To my immediate left is Rob Kasunic, a Principle Legal Advisor in the Office of the General Counsel and to his left is Steve Tepp, another Principle Legal Advisor in the Office of the General Counsel.

Our first panel consists of Jonathan Band, testifying for the Library Copyright Alliance, and Steve Metalitz, testifying on behalf of a number of
joint reply commenters, and they're here to testify on
the following proposed exemption, which would be a
renewal of an exemption already existing, compilations
consisting of lists of internet locations blocked by
commercially marketed in-filtering software
applications that are intended to prevent access to
domains, websites or portions of websites, but not
including lists of internet locations blocked by
software applications that operate exclusively to
protect against damage to a computer or a computer
network, or lists of internet locations blocked by
software applications that operate exclusively to
prevent receipt of e-mail.

Mr. Band, you're here to testify in
support of this proposal, so we'll let you have the
floor first.

MR. BAND: Thank you very much. As you
mentioned, this is -- what we're seeking here is a
renewal of an existing exemption that was granted
three years ago and at the time, we argued that the
issue of censorware was of great public concern. That
significance has not diminished. If anything, it has
come back to the forefront.

As many of you know, there is this ongoing
litigation concerning COPA, the Child Online
Protection Act and one of the issues there is, the Government is arguing that filter -- is that censorware is not an effective means of protecting children and this is, of course, is falling from the Supreme Court's ruling. When the Supreme Court found COPA to be Unconstitutional, it argued that there were less restrictive means available of protecting children and one of the things they mentioned was filters or censorware, depending on your point of view and what you want to call them, and then the Government, again, is arguing that censorware is not an effective means and as part of that litigation, it's been trying to get information from search engines.

And so, there's been this whole satellite litigation over the information that Google needs to turn over. They issued subpoenas to Google and some of the other search engines there. Some of the search engines complied to varying degrees. Google filed a Motion to Quash and now that that has been worked out -- but in any event, the point is that the issue of censorware and the effectiveness of censorware is still an issue of great concern.

There also is ongoing litigation all the time about spyware, adware and you have companies that
again, are sort of -- that you can -- when you can put on your computer software that is searching for spyware and adware and then you have the companies that flags whether a certain program is spyware or adware and then there's, again, litigation by the companies that have put that software, claiming that they're not spyware or adware.

So again, this issue of, again, censorware, filters, whatever you want to call it, is a critical issue of significant public interest and in deed, even in the Grokster case, the Court talked about, again, these filtering technologies and ways of using technologies to prevent file sharing.

And so, we can see -- in the future you can only see an increase in the amount of the use of software to prevent access to certain products or to prevent access to certain websites.

And so, again, the listing, the database that lists what is on the black list or what isn't on the black list is an issue that will be -- remain of great significance and it's important for the public to have access to those lists, to be able to know what is being blocked, what is not being blocked.

Again, in the last round three years ago, there was a lot of discussion about whether these --
and this always goes to the effectiveness of these
programs. There was arguments that they were
typically both over-inclusive and under-inclusive and
the issue was how do you demonstrate that over-
inclusiveness and under-inclusiveness?

So again, this is an issue of great
concern. It remains an issue of great concern and it
will, if anything, continue to be or -- and issue of
growing concern.

Now, with respect to the specific
exemption that was granted three years ago, there's
been no suggestion in the reply comments that this
exemption has in any way caused any harm to content
providers, that it has been abused in any manner. And
so, there -- with respect to the issue of -- the
factors that are listed that the Librarian is to
consider the fourth factor, you know, the effective
circumvention on technological measures of the market
for the value of the copyrighted works, and there's
been no demonstration of any harm here over the past
three years.

Now, the -- in the reply comments there
was a suggestion, well, maybe this exemption has in
fact not been very used -- has not been used very
often and it is somewhat difficult to determine that
and this is, I think, going to be a bit of a recurring theme with respect to a lot of the existing exemptions -- the renewal of the existing exemptions, that it's going to be often difficult to show whether or not they have been used, because the people who use them are the end users. And so, unless you're able to find a specific end user who has in fact used it and is willing to stand up and say, "I have used this exemption," it is going to be difficult to demonstrate that it has been used.

That is a -- even more difficult than this situation for two reasons. One is that, as indicated in the reply comment filed by Seth Finkelstein, that there is a lot of bad blood, if you will, between the people who do the circumvention of censorware and the censorware companies. And, you know, they're always flaming each other on the internet and making all kinds of accusations against each other. And so, to the extent that there are people who are engaging in this kind of research, they want to keep their heads down because they don't want to be targets of retribution.

What makes it even worse in this specific instance is the fact that the software that is likely -- the censorware software, the software that would be
examined that you would have to engage in the
circumvention to determine what the black list of
blocked sites is, almost always in accompanied by an
End User License Agreement, a EULA. And that EULA
almost always prohibits any kind of reverse
engineering or circumvention of technological
protection measures.

So, you have sort of a catch-22 that
emerges in this situation, that, you know, an
exemption was granted three years ago. People want to
use the exemption. They can't use the exemption or
they're afraid to use the exemption because if they
do, they'll be sued for breach of contract and then,
they can't come to you now and say, "Well, we now want
to have a renewal of the exemption." But of course --
and, you know, we can -- the issue ultimately of
preemption of these End User License Agreements, when
you have a specific exception under the Copyright Law,
that issue has not been decided definitively by the
Supreme Court, hopefully some day they will, come to
the decision. The case law, as you know, is somewhat
unclear and there are decisions going both ways. But
certainly, the more recent Circuit Court decisions
have -- the Federal Circuit, the Baystate decision and
then the Davidson decision in the 8th Circuit suggests
that there isn't preemption and that that suggests that these users do have -- are right to fear a breach of contract suit and a liability for a breach of contract if they abide by the terms of the specific exemption you granted, but those terms happen to violate the EULA.

And so, we do have, again, as I indicated, a bit of a catch-22 here. Still, I think given that the -- there is a significant public interest, given that there has not been any demonstrated harm resulting from this exemption, I believe this exemption should be renewed. Thank you very much.

GENERAL COUNSEL CARSON: Thank you. Mr. Metalitz?

MR. METALITZ: Thank you very much. I appreciate the opportunity to be here again on behalf of the 14 organizations making up the joint reply commenters and I think I'll be very brief on this question. I think the issue here is how the Office and the Librarian are going to apply the standards that they derived from the statute and that they announce quite clearly, both in the registered recommendation of 2003 and in the Notice of Inquiry for this proceeding in 2005. And actually, the Seth Finkelstein reply comment reprints both of those
almost in full on page two.

And just to read the first sentence, exemptions are reviewed de novo and prior exemptions will expire, unless sufficient new evidence is presented in each rule making that that prohibition has or is likely to have an adverse effect on non-infringing uses. And the Register also noted three years ago, her disagreement with commenters who suggested that an exemption can be renewed if opponents of an exemption do not prove that adverse effects identified in a previous rule making have not been cured.

The burden of proof for an exemption rests with its proponents. The fact that an exemption was granted in the previous rule making creates no presumptions.

I think Mr. Band fits the description of a commenter who suggests the exemption should be renewed because no one has come forward with evidence that the problem that was demonstrated three years ago has disappeared. But I think that mistakes what the burden of production and burden of persuasion is in this proceeding.

I think if you look at Mr. Finkelstein's reply comment, it tells you a couple of things that
are relevant here. First of all, I think that's the main place that you would look because the Library Copyright Alliance filing actually says nothing. It says that this exemption ought to be renewed, but it provides no argument or evidence for its renewal.

Mr. Finkelstein's reply comment does. He says nothing has changed in the past three years in terms of the relevant law or the technological protection measure. Well, again, that may not be exactly the issue that this proceeding is designed to address. This proceeding asks the question, are people being inhibited or prevented in their ability to make non-infringing uses or are they likely to be so prevented in the next three years?

I don't think Mr. Finkelstein has much to say on that, because as he also mentions in his reply comment, I have been driven to abandon censorware decryption research.

So, the activity of Mr. Finkelstein, which I think was very explicitly, the type of use that motivated the Office to recognize this exemption in 2000 and 2003. He's not doing it anymore. That's his testimony. Now, it's possible that other people are doing it, but I don't think there is any evidence on the record of that.
Mr. Band has pointed out that the general topic of censorware and filtering is still a very big topic of public interest and he's absolutely right about that. But the fact that, for example, in the Grokster case filtering was discussed, doesn't have anything to do with this exemption. This exemption isn't about filtering. It's only about a certain type of filtering that consists of a software application that includes lists of internet locations blocked by -- lists of internet locations or lists that have been intended to prevent access to domains, websites or portions or websites.

In the Grokster case, the issue wasn't access to a website or access to a domain, it's what happened after people had access to a domain, downloaded some software and were freely trading private copies online.

So, the fact it has something to do with filtering doesn't really tell you very much about whether there is still a need to recognize an exemption in order to allow the kind of activity that Mr. Finkelstein was engaged in, but is no longer engaged in.

Mr. Band has suggested two other reasons why -- I think I would characterize his statement as
reasons why you should recommend renewal of this exemption, even if there isn't evidence that people are making use of it or evidence that people are being inhibited in their non-infringing use because of Section 1201(a)(1).

The first was that the researchers need to keep their heads down because there's a lot of bad blood and harsh language flying around between some purveyors of filtering software and some of the researchers. I'm sure that's true. In fact, reading Mr. Finkelstein's comments, I think there's a lot of bad blood and a lot of harsh language flying around, including -- perhaps between researchers themselves. I'm not sure at what you point you can say that the heat of the rhetoric that's involved in a dispute such as this would by itself, justify deviating from the standard that the Register set out and that's contained in the Notice of Inquiry regarding evidence for recognizing an exemption a second time or a third time.

And the other -- his other point was that there's a catch-22 situation here because there may be contractual restrictions on circumvention. Well, if that's the case -- first of all, I don't think we've heard -- I'm not sure that that has been brought up
before. I don't think it's been brought up in this context before. But even if it's the case, the recognition of an exemption in this area doesn't really solve that problem. If there's a EULA and if it's enforceable and if it's not preempted, then people who violate it, presumably, may be subject to contractual remedies.

And so, the Copyright Office ruling one way or the other on this doesn't really change that situation. This only goes to whether they could be liable, regardless of contract, under 1201(a)(1) and there again, I think we -- I don't know that there's anything in the record to demonstrate that there are people out there who wish to make this use and if they're being inhibited in their ability to do so or would be inhibited in their ability to do so, if this exemption were not recognized for the next three year period.

So, our only message here really is to encourage the Register and ultimately, the Librarian to follow the statute and follow the standards that are set out in the -- in her recommendation in 2003 and the Notice of Inquiry of 2005 and apply those standards to the record before you -- with regard to this exemption. Thank you.
GENERAL COUNSEL CARSON: Thank you. Mr. Band, would you like to say anything in response?

MR. BAND: No.

GENERAL COUNSEL CARSON: Okay. We'll start our questioning with Steve Tepp then.

LEGAL ADVISOR TEPP: Thank you. Mr. Band, let me start with you. As has already been eluded, we had both in the 2000 and 2003 rule makings, direct testimony from someone engaged in the sort of activity for which exemption is sought, again, this year. And so, I think I need to start by asking you what evidence do you have that filtering software is or is likely to be in the next three years, distributed with access controls that prevent access to or control access to, the list of internet locations blocked by that software?

MR. BAND: Well, I, in preparation for this hearing, called around the likely suspects of people I know who are in -- who do work in this area and what they told me was basically this EULA point, that there -- that the software is out there. That the filtering software is still distributed. It is still distributed with technological protections, but that there are these EULA's and because of the EULA's and because of the recent case law, they are not
engaging in the circumvention, and that gives rise to
this catch-22 situation.

    But I don't have, you know, at this point,
I simply -- it's simply my conversations with people
who are in the field and I am relaying to you what
they have said.

    LEGAL ADVISOR TEPP: Okay. Let me take
this in one direction and then back in another. We
can either take that as sufficient evidence for
whatever the statutory standard is, and I think we've
articulated what -- how we read the standard, or not
because there doesn't appear to be much else in the
record to date in terms of evidence that this is or is
likely to be a continuing issue.

    So, let's start by assuming that it's not
enough evidence for the standard we've articulated.
Do you think that there is a standard supported by the
statute that would allow essentially the sentence
you've just said, that you've spoken to some likely
suspects in the field? Is there a standard by which
that's enough evidence for us to grant an exemption?

    MR. BAND: Well, I think that, again, this
is sort of a unique situation, given this peculiar
catch-22. I mean, there's no question that you did
feel three years ago that there was sufficient
evidence, and now we have a situation where because of these EULA's, that the community of likely people basically has sort of said, "Well, there's -- this is a pointless activity at this point because of the case law and because of the EULA's."

So, that again, it leads to, as I said, it's a catch-22. I think, again, that given the continuing importance of censorware and given the fact that knowing what is blocked and is not blocked is of continuing importance of continuing public interest, that it makes sense to leave the exemption in place so that when -- if and when the Supreme Court properly rules on this issue and decides that when you -- you know, that a shrinkwrap prohibition, contained in a mass-market product, that that is preempted by the specific provisions or specific exemptions in the Copyright Act or that are -- specific exemptions that are adopted by the Copyright Office and the Librarian pursuant to this rule making, that then there is an exemption in place to allow people to do this kind of research.

LEGAL ADVISOR TEPP: So, all right, then let me take it back the other way because you've sort of lead me there already with your answer. Even assuming that the evidence and the record is
sufficient to meet the standard to grant an exemption, or in this case, renew the exemption, it's essentially your testimony that it wouldn't matter, at least pending some other substantial change or event in the law or marketing practice?

MR. BAND: I think that it is probably likely that if this exemption is renewed, you will not all of the sudden see a torrent of research because of the EULA problem. And again, there is, you know, whether you want to call it a catch-22 or chicken-and-egg position, I would certainly hope that if the issue ever got before the Supreme Court, that the Copyright Office would file an amicus brief urging the Court to say, "Look, if we grant an exemption, then that should be controlling here and the fact that, again, you have these mass-market products, that would say you can't do that." That that should not override what Congress determines or what the Office determines.

LEGAL ADVISOR TEPP: Okay, thank you. I'll -- move onto the next person on the panel.

GENERAL COUNSEL CARSON: Jule, do you have any questions?

ASSOCIATE REGISTER SIGALL: I just want to clarify the question, one question. It's -- well, it's starts with Mr. Metalitz, but Mr. Band can answer
it as well.

Is it your interpretation of our prior rule makings and the statute that we cannot even consider any evidence related to an exemption from a past proceedings or is it off limits for us to consider that information in trying to determine whether an exemption should or should not be granted in this proceeding and if not, how do you propose that we should interpret that evidence or use such evidence, if we're allowed to review it?

MR. METALITZ: Well, I don't think that you are precluded from looking at the evidence in the last proceeding, particularly when you have a commenter who says, "I want to incorporate it by reference." You know, I think it's properly before you.

The problem is that he then goes onto say, "I don't do this work anymore." So, I don't think he's in a -- he's not in a very good position to say, nor does he ever say in this comment, that in fact, the type of use that lead to the exemption last time is one that people are still trying to make and if they're still prevented from making, because of the existence of 1201(a)(1), which was your decision last time.

So, I'm not objecting in principle to
referencing testimony that came in before. I think that's appropriate. But I think when it's brought in my somebody who then goes on to say, "I don't do this anymore and I don't have any further -- any information about this," about what the conditions are now or what they're likely to be in the next three years, then I don't think it's entitled to much weight.

MR. METALITZ: Mr. Band, do you have any thoughts on that?

MR. BAND: Well, I agree that obviously, these -- this rule making is not governed by the strict rules of evidence that govern the, you know, that govern Federal Courts and that it is appropriate for you to consider whatever you think appropriate. And so, certainly evidence presented in a prior proceeding is appropriate and, you know, reading the newspaper and just your general awareness of what's going on and the fact that, again, that these -- censorware is being used in a wide variety of context and will continue to be used, I think that again, all that is relevant information that you should consider.

GENERAL COUNSEL CARSON: All right, Mr. Band, you talked about things like spyware and adware, but I just want to make sure I understand. You're not
suggesting that this exemption would assist people who are trying to do research into spyware or adware, are you?

MR. BAND: No, it would be the database or the list of products, for example, or websites that are being blocked. So, if you -- let's say, if you get Norton utilities or Symantec and you put that on your computer, and then the idea is and the question is, what is that software blocking? And then -- so then the question becomes, how are they determining what is it blocking and second, what websites is it -- you know, what's being blocked?

And so, then you have a database inside that software and the issue is just getting access to that database, simply to know what is on the blacklist? What is being blocked?

GENERAL COUNSEL CARSON: Okay, but I want to make sure I understand what kind of blacklist you're talking about. You're talking about a blacklist, for example, relating to spyware or adware, perhaps?

MR. BAND: Well, it could be whatever. I mean, it could be spyware or adware or it could be again, this -- the exemption talks about a list of internet locations and, you know, but again, sometimes
this -- the software will block locations where you might access things that they -- that Symantec or Norton or whoever considers to be spyware or adware.

GENERAL COUNSEL CARSON: All right. Now, let me understand then what exemption you're asking the Office to recommend to the Librarian. Are you asking for -- since the verbatim renewal of the existing exemption, do you want that language to be tweaked in any respect?

MR. BAND: No, I think just renewal of the existing language.

GENERAL COUNSEL CARSON: All right, then how do -- I'm trying to understand what you just told us in the context of existing language, because the second part of the existing exemption says -- the lights up here aren't very good. I'll try to read it. One moment. "But not including lists of internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail."

And you may recall the comments we had last time, which led us to exclude those. That exclusion sounds inconsistent with what you're telling
us is part of what you're hoping this exemption would permit people to do. So, I just want to be clear on what you're asking for.

MR. BAND: Well, I guess the -- again, the definition of what spyware or adware is is up for debate and I guess the point is is that -- my point is this, is that there's a lot of software that blocks access to all kinds of things and that it's -- as a general matter, that research into that area is appropriate.

Now, it could very well be that again, if we're saying that, you know, the word operate exclusively might be, you know, a limiting factor, and so that you could have software that is doing many different things, blocking access to many different sites. And so that it would be appropriate to know what's being blocked.

Now again, it could very well be that if it's a product that is exclusively aimed at blocking certain kinds of things that would fall within this exemption, then that would be -- that would not be permitted.

GENERAL COUNSEL CARSON: Okay, let's talk about the EULA issue that you spent some time talking about. I want to make sure I understand A) what's in
the record and B) what you've told us you've heard from other people about the EULA issue.

First of all, I think I'm right that apart from what you've told us, there's nothing I'm aware of in our record thus far that talks about EULA's being any kind of impediment to people engaging in the kind of conduct that this exemption was designed to permit people to engage in. Is that correct?

MR. BAND: As far as I know, yes, that's right.

GENERAL COUNSEL CARSON: All right. Now, so basically, the only information we have right now about EULA's is what you tell us you've heard from other people. Have any of them told you that they have actually been threatened with suit for breach of a EULA if they engage in this kind of conduct?

MR. BAND: The conversations did not get that far.

GENERAL COUNSEL CARSON: All right.

MR. BAND: So, no, they have not.

GENERAL COUNSEL CARSON: So, we know there is some fear on the part of some people that they might be sued, but we don't know the basis for that fear. Is that a fair, accurate characterization of what we know right now?
MR. BAND: Well, no, I mean, they have said that they're aware of the EULA's and because of the -- and they say that's why they're not doing it. They don't want to -- but I don't know if they even met -- I mean, your question was, were they specifically threatened by any company and as far as -- I don't know whether they were or weren't. But I was told that it was -- they were concerned by virtue of the EULA's and then also, the recent -- the Baystate and the Davidson decisions and the publicity that went along with that, where people were found to be breaching a contract for, you know, at least in certainly the Baystate, for engaging in something that would clearly be permitted in the Copyright Act.

GENERAL COUNSEL CARSON: Okay. Do we even know whether a single person in the last three years, or not quite three years I guess, has taken advantage of this exemption in order to circumvent those controls so that that person could look at the list of websites blocked by any of this filtering software?

MR. BAND: I don't know.

GENERAL COUNSEL CARSON: Now, we've heard about what Mr. Finkelstein wrote and we've heard at least some, in my mind at this point, I think vague allegations that people are afraid to even to speak
out that they've been engaging in this conduct.

I have read Mr. Finkelstein's comment and maybe I missed it, but the most I could read in it was he -- a lot of people were calling him names, essentially. I mean, has it gone beyond that? I mean, I'm trying to figure out -- we're being asked, basically, to assume that there is a problem, to assume that people are engaging in this, but they're afraid to let other people know they're engaging in it because of some apprehension of what will happen to them. And what I have in front of me is, A) well, there are these EULA's out there. I might be sued for breaching a EULA and, B) people have been calling me names. Is it anything beyond that?

MR. BAND: I can't speak for Mr. Finkelstein. I don't know if litigation was actually threatened.

GENERAL COUNSEL CARSON: Okay. Mr. Metalitz, I gather the thrust of your case has been that no one has really come forward with any facts. Putting that aside for the moment, are you or the people you represent contesting the legal and policy determinations that were made by the Register three years ago when, based upon the facts in front of her then, she recommended an exemption?
MR. METALITZ: No, we're not contesting that.

GENERAL COUNSEL CARSON: All right. So basically, as far as you're concerned, your case or your negative case, I guess, is nobody has made the factual showing and that's basically it?

MR. METALITZ: We really just think you should apply the standard that you've stated you will apply, as far as what's needed to demonstrate a basis for an exemption.

GENERAL COUNSEL CARSON: Okay. Any questions, Mr. Kasunic?

LEGAL ADVISOR KASUNIC: I have just a couple of short ones. Following up on David's question about how many people have used the exemption, given your -- this is to Mr. Band, given your informal survey of people who may or may not have taken advantage of the exemption, could you in any way quantify, in any way, how many people might take advantage of this in the next three period, of course, without naming any names?

MR. BAND: Well, my -- the research has been quite interesting in this area. It is a very small community and as I forget, one of you mentioned, that a lot of -- this small community seems to be
turning on itself a lot and -- there are a lot of internal arguments and I'm not quite sure, it's a bit of a mystery, what the basis of those disputes are. They don't seem to be substantive, but they do certainly seem to fight a lot among each other.

But we're really talking about a very small community. I mean, because we're really -- what you're really talking about is people who are interested enough in the -- basically, in the First Amendment issues here about sites that are being -- access to which is being blocked and have the technical ability to do the kind of circumvention. And that's a very, very small universe of people.

So, but what that would suggest is that if the exemption were granted, even though the work is important, and you know, putting the EULA issue aside, we're not really talking about opening the flood gates here to the possibility of infringement.

LEGAL ADVISOR KASUNIC: Could you quantify that in any way? I mean, besides Seth Finkelstein.

MR. BAND: In the various -- I've seen basically six names of people who are -- consider themselves to be researchers in this area.

LEGAL ADVISOR KASUNIC: Okay, and then before this implosion within this community, how much
comment, criticism, news reporting, teaching, scholarship or research, are you aware of that has been possible as a result of the exemption?

MR. BAND: Well, I do know that again, in the last rule making, I mean, there was quite a bit of -- there had been quite a bit of press attention to the issue of both, the over-inclusiveness and the under-inclusiveness of these filters and there had been a lot of reports -- one of the issues in the last rule making was the effectiveness of different research methodologies, meaning the difference between circumvention, as opposed to doing sort of random surveys, and -- but I don't know. I simply have not studied carefully the docket in the COPA case, the Child Online Protection Act case where again, the Government is in essence, arguing that these filters are not sufficiently effective. I suspect that somewhere in that docket there is quite a bit of research about the effectiveness.

And again, but I have no idea on what basis -- you know, what basis -- you know, what evidence they are using to show that these filters are not effective. I mean, for all I know, the Government is out there circumventing as we speak, relying on this exemption.
GENERAL COUNSEL CARSON: You'd need subpoenas to get the list.

MR. METALITZ: They might have a law enforcement exemption too, in some cases.

MR. BAND: No, that's actually -- that's right. They would have the law enforcement exemption under the DMCA. They wouldn't need to rely on this.

GENERAL COUNSEL CARSON: Jule, did you have a follow-up?

ASSOCIATE REGISTER SIGALL: Just a quick follow-up. I'm trying to understand the relevance of the fact that Mr. Finkelstein has abandoned the activity, particularly in light of the requirement that we're to consider the potential effects of an exemption or a non-exemption over the next three years.

And I guess, the question is to Mr. Metalitz, don't we have to consider that there's the likelihood that someone might actually enter the activity -- begin the activity over the next three years and might face the same problems that where presented to us in 2003 and in 2000, even though one person who proposed and obtained the exemption the last time is no longer doing it?

MR. METALITZ: Yes, I think that would be
an appropriate consideration. I don't know that there's any evidence to suggest that anyone is getting -- trying to get into this field and is inhibited by Section 1201(a)(1).

There's nothing that I saw in Mr. Finkelstein's submission that suggests that he might get back into it and I think his reasons not to, don't really have anything to do with Section 1201(a)(1), but I'd hesitate to characterize what they are. But I don't think that this -- there's any evidence there that this is holding him back.

GENERAL COUNSEL CARSON: Steve Tepp has another question.

LEGAL ADVISOR TEPP: Just one follow-up for Mr. Band. Sorry to pick on you.

MR. BAND: Well, there's only two of us here.

LEGAL ADVISOR TEPP: Just to clarify, in your initial comment, you made the argument about the need to continue existing exemptions to prevent backsliding. And a particular example you gave was in the e-book context and we'll get to that shortly. But I just wanted to clarify, because from what it sounds like you've said this afternoon, that's not the argument you're making here, that -- but rather that
there continue to be access controls, the
circumvention of those being a legal issue, both in
terms of 1201(a)(1) and the EULA's that we've been
discussing. Is that correct?

MR. BAND: That's right. I'm not aware of
a back-sliding issue here because as far as I know,
the censorware companies are still using the
 technological protections fully.

LEGAL ADVISOR TEPP: Okay. Thank you.

GENERAL COUNSEL CARSON: All right. Mr.
Metalitz, would you care to ask any questions of Mr.
Band?

MR. METALITZ: No, I don't have any
questions to ask.

GENERAL COUNSEL CARSON: All right. Mr.
Band, I'll give you the same courtesy.

MR. BAND: I have no questions.

GENERAL COUNSEL CARSON: All right. Well,
I think we've reached the end of this panel. We are
scheduled to reconvene for the only other panel today
at, I believe it's 3:15 p.m., isn't it? Let me double
check. Yes, 3:15 p.m. Let me just ask whether Mark
Richert is in the room? All right. Well, then I was
going to suggest we might start before that, but we
need all of our witnesses and we don't have them. So,
it's 2:16 p.m. now. I guess we will reconvene at 3:15 p.m. Thank you.

(Whereupon, the foregoing hearing went off the record for recess at approximately 2:15 p.m.)

GENERAL COUNSEL CARSON: This panel in on the following proposed exemption. Literary Works distributed an e-book format when all existing e-book editions of the work, including digital text editions, made available by authorized entities, contain access controls that prevent the enabling of the e-books read-aloud function and that prevent the enabling of Screen Readers to render the text into a specialized format.

We have three witnesses for this panel. Two of them, speaking in support of the proposed exemption, and one in opposition. The two supporters are Mr. Alan Dinsmore on behalf of the American Foundation for the Blind and Jonathan Band on behalf of the Library Copyright Alliance. And in opposition, Steven Metalitz on behalf of a group of joint reply commenters.

As with the earlier panel today, we'll let each of the three witnesses speak. We'll start with Mr. Dinsmore then Mr. Band then Mr. Metalitz. We'll then have questions from the panel and finally, if any
of the witnesses would like to ask questions of each other, that will be the final phase.

With that, Mr. Dinsmore, you may proceed.

MR. DINSMORE: Thank you very much. Is this working okay over there for you? Okay. What a wonderful day for indoor work. I appreciate the opportunity to substitute at the last minute for Mark Richert who was called away for a Board of Trustees meeting for the Foundation.

My name is Alan Dinsmore and I'm the Associate Director for Advocacy for the American Foundation for the Blind.

AFB is please to have this opportunity to discuss the exemption for literary works distributed in an e-book format.

I should add for the record that AFB is a publisher and is a member of AAP and as a publisher of print materials and electronic materials, we share publisher's concerns with respect to copyright.

We hoped that some background also about our activities in access to print materials may help establish the case for continuation of the present exemption. We have already filed comments, as you know, in the initial part of the proceeding.

Our interest in access to books and
periodicals dates back to the early 30's when we worked with RCA to take advantage of the early record technology for long-play records, if anybody remembers that, to build the foundation for the Library of Congress as popular books for the blind and print handicapped program.

Most recently, we have been reviewing the usability of technology products and have worked with both Microsoft and Adobe and Screen Reader manufacturers, both in technology evaluation and product development. We have also had a long standing relationship with AAP as a partner in the development of legislation involving standards and distribution systems for text books for elementary and secondary students who are blind or who cannot use regular print.

The world of the e-book, which is the heart of the matter in this proceeding, is exciting. It can offer a tremendous amount of access, as one author put it, surpassing Guttenberg.

So, with all of the progress, why do we support the exemption? Quite simply because we don't think that we are there yet. Access still does not work in the seamless fashion necessary to give a blind reader the same use available to someone who can read
print. That is why this limited exemption should stay in place.

Why aren't we there yet? Some background about read-aloud systems, which you will probably hear about today, and text-to-speech Screen Readers may help us understand access issues, which are at the heart of our case for this exemption.

It is important to remember that in e-books, the text will remain the central element. The text can be accessed in two ways. Text to speech, a reader resident and a computer or a read-aloud resident in a downloadable package. There is a significant difference.

The text is usually stored in access via a Screen Reader, usually computer based, which can be used for searching and indexing. This is a form of structured navigation which enables a blind user to manipulate, that is to read and analyze just like those of us in the room read and analyze, going back and forth through a book, using tagged elements, to get the geography of the book and also, to locate yourself within the book.

It allows us to look at chapters the way a blind person would look at a chapter, that is to go back exactly the way we do. To be able to look at
footnotes, to preview indices and also, to look at items like the chapter headings.

Curiously, this power of structural navigation, which is based on the navigation tools which should be in the e-book, has not persuaded many mainstream electronic book technologists, even though international digital publishing form is working hard to finalize versions of a publication structure and to standardize rights expression language for Digital Rights management's systems.

So, what about read-aloud? Read-aloud is essentially what you are going to either see or if you're a blind person, hopefully hear, when you go to an e-book accessing site, for instance, Amazon.com, which is one that we used.

The read-aloud system, what does it do? Compared to text in its present iterations, not much. It voices what's on the screen. Some of it has a stop control. Some of it doesn't have a stop control. It is difficult to navigate and also, if the book is not structured well, it really isn't readable at all.

It is the Screen Reader with its text-to-speech system, usually resident in a computer, which does allow blind persons to do everything with the book that we do. That is, as I said, to flag pages,
highlight portions, scan text for key words. It's also significant in that it voices and allows navigation through the commands necessary to recognize and to access copy-protect systems.

If the copy-protect system is constructed in such a way that it doesn't identify the Screen Reader's attempts to read the screen, and identifies it as a possible unauthorized file download, which it may do, since that's how a Screen Reader operates by creating a file and holding it in a buffer, so that a blind user can manipulate it with the commands resident in the system, it will not allow that system to work.

Our statements submitted for your written record outlines our evaluation process and we hope, shows evidence of the adverse effects that copy protection measures have even today to the category specified in the exemption.

We tested five e-books, which we downloaded with Adobe or Microsoft Reader formats. Of the five books, only one was accessible. I should add, we referenced this in our submitted statement that during the tests, help through the download process often required the assistance of a sighted person.
A number of critical issues became apparent as we conducted as close to a real world test to gain access to digital e-books through the read-aloud function and to attempt to enable the Screen Reader to render the text in a specialized format.

Before beginning to download content, we did download the readers, which you have to do. The Screen Reader, in some case, voiced just simply an extended question marks. Choosing the accessibility quick-check in some of the download systems that you can use for read-aloud provided a feedback that {quote}, "The document security systems prevented access by Screen Readers." This important bit of intelligence was available only after buying the book.

In another experience, no message was spoken with a Screen Reader. In other cases, the only message was, "Text-to-speech functionality cannot be used with owner exclusive books. Do you want to continue reading the e-book without text-to-speech?"

In those cases, a person who is blind is left, if they can get through the security system, only with the read-aloud functions. Default to a read-aloud system in a downloadable system is basically a one-size fits all and it doesn't work.

Our evaluation pointed out two other
significant problems. The site we used, Amazon.com, does not indicate in advance whether content will be accessible. Messages provided by the Microsoft Reader software, indicating that content cannot be accessed by a Screen Reader, are not voiced by the Screen Reader or by the Microsoft text-to-speech supplementary software. In that case, sighted assistance was required to confirm that the content could not be read.

We hope to reach a time when structured e-books and copyright-protect systems, which can recognize a Screen Reader function is fair use or a fully navigable voice system, resident in the e-book Reader are more the norm.

Until that time, we think it is fair to allow a blind user who encounters the access issues we describe to have the coverage of this exemption, when the access controls do not enable the books read-aloud function and prevent the enabling of Screen Readers.

This set of circumstances is narrow and we hope that three years from now we will be able to say that the system works and we don't need this anymore. But for now, if we lose it, blind readers are stuck. If they attempt to access under those circumstances, they can't be held liable for a copyright violation.
In conclusion, we found that important works were inaccessible due to copy controls. As the statute anticipates, the Copyright Office will create exemptions when groups, which would be otherwise excluded, are harmed by this situation. We believe evidence exists to support another exemption period.

We thank you for the opportunity to provide this statement and we will be happy to answer questions.

GENERAL COUNSEL CARSON: Thank you, Mr. Dinsmore. Mr. Band, you may continue.

MR. BAND: Once again, I'm happy to testify before you on behalf of the Library Copyright Alliance in support of this exemption.

Mr. Dinsmore explained very clearly the significant difference between the read-aloud function and Screen Readers. Even though they sound alike, they're very different and the -- in essence, he was explaining how the Screen Reader provides much more functionality and is far more useful to the visually disabled reader than the read-aloud function.

And to some extent, some of the disconnect between the testimony that the AFB submitted and then, the reply comments, really focused on the fact that for some of these works in the survey, they were --
they could be accessed with the read-aloud function, but they could not be used with the Screen Reader function. And I think it's critically important, as Mr. Dinsmore has explained, that the Screen Reader function be enabled, if necessary.

And it could be that some of the confusion might come out of the wording of the existing exemption where it talks about that -- contain access controls that prevent the enabling of the e-books read-aloud function and that prevent the enabling of Screen Readers. That suggests that you can only circumvent if you cannot use either one or the other and if that's what it means, then that's a problem for this community because the truth is, if you can't access the -- if you can't enable the Screen Reader, then you really don't -- what you have is not very useful.

And so, probably the exemption would need to be reworded so that the "and" is replaced with an "or", so that if the -- if you can't enable the e-book read-aloud function or the Screen Reader, then you're allowed to circumvent.

And I think at that point, then it becomes very clear that the problem and the survey demonstrates that in many -- at least, out of these
five, that in four instances of the five, the Screen Reader functionality did not work.

   And let me point out that even to the extent that maybe of those four, that in three instances, the read-aloud function did work. That still indicates that in one instance, even the read-aloud function didn't work. So, that means that in that one book, neither the read-aloud function nor the Screen Reader function worked. So, you can say, "Well, you know, it's just one book." But if you says, "Okay, based on five, that's 20 percent." And I guess that really goes to the bigger point that whether it's 10 percent of the books denied this functionality or 20 percent or 50 percent or 80 percent of the e-books, it really doesn't matter. The point is, as long as there are some e-books that visually disabled readers need to access, then the unavailability of the Screen Reader function is critical. If you are a student and the book is assigned reading and you can't use that book, it doesn't do you any good, the fact of knowledge that many other books are out there that you -- that are Screen Reader enabled, the fact that the book that you need to use is not Screen Reader enabled is a serious problem.
And the basic problem -- the continuing problem of the visually disabled community with access to books -- it was recognized recently by the AAP. They announced just earlier this month, the alternative format solution initiative and it's specifically targeted at trying to increase the availability of materials to the blind and to the visually disabled.

And so, this is a big problem. It is a continuing problem and even though it's great that there are more and more e-books available, and hopefully that trend continues, the fact remains that still, many of them do not have the -- are not Screen Reader enabled and that is a problem.

Now, the reply comments also indicate that there's no evidence that people are using this exemption and again, there's a bit of a difficulty of finding exact -- specific instances because that is a -- it is something that end users would be doing, not people at the level of the Foundation.

But even, you know, we're sort of not conceding that it is not being used by individuals out in the field. But even if it were the case that people weren't using the exemption, this is where the back-sliding issue that I raised in -- that we raised
in our written comments comes to play. I mean, the
fact that there is an exemption on the books that does
allow circumvention for the purpose of enabling Screen
Readers by itself, gives an incentive for e-books
publishers to enable Screen Readers. And I think that
eliminating the exemption would diminish the
likelihood that publishers would do that.

And again, even if it only diminishes it
at the margin, the margin is still significant.
Again, if you are that student who can't access the
book, the assigned reading for a class, that is a big
problem.

And so, even if we're dealing with a
relatively small number of cases, that is significant
enough and I think that the existence of an exemption
and to the extent that it does have an impact a
publisher's behavior and the decision to make things
available in a Screen Reader function, knowing that
users would be able to circumvent the protection if it
wasn't enabled, is significant.

And finally, the final point I'd like to
make is, there has been no demonstration that this
exemption has caused any problems, that -- and again,
to the extent that it is -- again, even if it is not
being used regularly or in large -- or frequently,
between the fact that there is this back-sliding issue
and the fact that there has been no evidence of any
harm, I just have to wonder why publishers are opposed
to the existence of this exemption, which is important
to this under-served community. Thank you very much.

GENERAL COUNSEL CARSON: Okay, Mr.

MR. METALITZ: Thank you, and thank you,

First, I'd like to just clarify the
record, based on the introduction to the testimony
that you gave, Mr. Carson, and we're not here in
opposition to this -- to the recognition of this
exemption. We are here urging the Register and
ultimately, the Librarian, to apply the standards that
they set forth in the -- that they derive from the
statute and that they set forth in the 2003
recommendation and in the 2005 Notice of Inquiry
regarding the burden of proof and the quantum of proof
that is necessary for recognition of an exemption.
And in particular, to apply the rule that exemptions
don't renew automatically. Exemptions only --
exemptions expired unless sufficient new evidence is presented in each rule making and to refer directly to what Mr. Band said just a moment ago, the exemption isn't renewed simply because the opponents of the exemption don't prove that the adverse effects in a previous rule making have not been cured.

So again, it's not the burden of the -- those opposing an exemption to come forward with evidence that there's no longer a problem. It is the burden of those proposing the exemption to meet the statutory standards and the standards that have been set in the previous rule makings to justify the exemption.

I think we would certainly agree, as we did three years ago, that it's a fact that blind and visually impaired people enjoy less comprehensive access to literary works than do fully sighted people. For this proceeding, the question at hand really is how much -- to what extent, if any, is that attributable to the existence of Section 1201(a)(1), which prohibits circumvention of access controls?

I think that the testimony today from Mr. Dinsmore has been very illuminating and I think it does help to supplement the record and that's why it's a little bit hard to say whether the record currently
would meet the standard that you've set it whether it
doesn't, because it's a bit of a moving target.

I think the -- and I take his point about
the difference between the read-aloud function and the
Screen Reader function. I think that that's a
significant point and I think Mr. Band is correct in
his reading of the existing exemption, that if either
of these functions is enabled, then the exemption
doesn't apply. That was certainly the basis on which
we took a look at the five titles that the AFB
surveyed and looked, at least, at the statements that
were made about different additions of those titles.

I think the most important point that we
were trying to make in our reply comment with respect
to the five titles was that in each case, the AFB only
looked at one edition of those e-books. And in, I
believe, four out of the five cases, there were in
fact more than one edition available and the issue is
not contrary perhaps to what Mr. Band was saying,
although I'm not sure that he meant this. The issue
is not whether every edition is accessible, either
through Screen Reader or through the read-aloud
function. The issue is whether any edition is
accessible. And I think that's quite clear in both
the text of the existing exemption and in the
explanation of it that was provided in the recommendation that the Register made in 2003 on page 74. It stated the exemption would not apply to a work if at the time of circumvention, an e-book version is on the market for which either the read-aloud function or Screen Readers are enabled.

So, I guess I'd like to unpack two points from that. One is, as I had mentioned, the existing exemption says either function. And secondly, is there an e-book version on the market? Not, is every e-book version that is on the market -- does every e-book version on the market meet this test, but just, does any version meet this test?

So, I don't think that the survey that the AFB conducted could be considered complete unless they've taken -- unless they've checked out these other editions to see whether, in fact, they meet the test. And the fact that one edition doesn't, doesn't -- isn't determinative.

Now, I will say, all we did was look at what statements and representations were made about those editions. We didn't test them the way AFB has done. So, we're not asserting, necessarily, that 60 percent or 80 percent of those titles are accessible, but we are asserting that the publisher is claiming
that 60 percent of those -- or the distributor, someone is claiming that 60 percent of those are accessible and that's probably what needs to be verified.

Additionally, again, quoting from page 74, "If the e-book or an accessible digital text is available through an authorized entity, under Section 121, such as Bookshare.org, the exemption to the prohibition will not apply." And in 2003, there were 11,000 titles available through Bookshare. I checked the Bookshare.org website this morning and they now state that they have 26,000 titles available. So, there certainly is an increased availability through that method and I believe there may well be an increased availability through the commercial publications as well.

This -- I am a bit concerned about -- well, let me put it this way. I'm happy to hear what Mr. Dinsmore said about, you know, we're making some progress and maybe three years from now, we won't need this exception anymore. I think that -- we were a little concerned by the statement in the initial comments that said, "As digital publishing matures, this situation can only grow worse." We hope that it will grow better and we hope we're -- that publishers
are working to make it better. I'll certainly concede that we're not at 100 percent yet and we're not even at 100 percent of the test that's in the exemption, which is, does any edition have these features? But I think we are making progress and hopefully that will -- the need for this will diminish over time.

Just two final points. First, there are a number of issues raised in the AFB comments and in Mr. Dinsmore's testimony that really aren't issues -- they aren't properly put at the doorstep of the copyright owner, I think. It's more the question of the distributor, if the information on a website, for example, doesn't clearly state whether or not these features are enabled on a particular book. We certainly would hope that they would state that and I don't think it's a relevant consideration for this proceeding, exactly what the marketing practices of Amazon or any other book seller might be, as far what they disclose or how clearly they disclose this.

And finally, just one additional point that we would like to make, the 2003 -- or the 2002, 2003 proceeding, the AFB asked for an exemption to cover all literary works and the Register properly turned that definition of a class as over broad. This is on page 72 of the 2003 recommendation. And after
considering a number of factors, came out with the exemption that you see -- that is in place now. And it wasn't clear, entirely clear to us, whether AFB was asking for this same exemption to be continued verbatim, or whether they were asking to go back to the literary class. That seemed to be their initial statement in the comment. If it's the later, of course, we have a concern about the breath of that.

Now, today we've also heard from Mr. Band and other proposal, to change this exemption so that it -- so that in effect, both of these functions would have to be enabled before circumvention could be prohibited and, you know, we'll obviously have to take a look at that. But we would like to clarify that we're still talking within the frame work of this -- of the exemption that exists now, rather than going back to a much broader one, such as the one AFB initially asked for in 2003. Thank you.

GENERAL COUNSEL CARSON: Thank you. Before we get to the questions, Mr. Dinsmore, Mr. Band, if you have heard anything since you have stopped speaking that you'd like to respond to.

MR. BAND: Well, the only thing that I would add is not -- I agree with Steve's point about the any edition, so that any reasonably accessible
edition would -- if one reasonably accessible edition
did have the Screen Reader function available, then
that would obviously be sufficient to mean that a
person could not take advantage of the exemption. You
certainly would not -- it certainly would not be
required that every exemption -- every edition,
however, still, there is always the issue about, you
know, reasonable availability and the fact that you
might -- you know, there might be some website
somewhere or some seller somewhere on the other side
of the country that's making something available, but
you have not -- again, let's say if it's physical e-
book that they're selling in the stores somewhere or
that you can't get to, then that might not be good
enough. But certainly, if it's on the internet or
something and there's an easy way for a visually
disabled person to get it, then you would not be able
to take advantage of that exemption.

GENERAL COUNSEL CARSON: So, subject,
perhaps, to a reasonable availability requirement,
you're okay with that aspect of the existing
exemption, Mr. Band?

MR. BAND: Right.

GENERAL COUNSEL CARSON: And Mr. Metalitz,
would you be comfortable with a reasonable
availability requirement?

MR. METALITZ: Yes, all I was responding to was the survey, in which there -- Microsoft and Adobe are the two main formats and in several cases, AFB only tested one of those formats.

GENERAL COUNSEL CARSON: Got it.

MR. METALITZ: And if the other one was enabled, and in some cases, it was stated that they were so enabled, then the results would have been different.

GENERAL COUNSEL CARSON: How about you on that subject, Mr. Dinsmore?

MR. DINSMORE: I'm comfortable with that. I think that the -- that Mr. Metalitz does raise an interesting point with respect to the comment that I made with regard to the lack of information about the availability of copyright protect on the site and that is not something that is under the control of the publishers. I don't even know whether this is something that is within the control of any rule making, but we put it to you that this is a major problem in a lot of digital rights management right now, and that is a person who is blind or visually impaired doesn't really have any way of getting to know whether or not there are restrictions on the use
of what they buy until they buy it.

GENERAL COUNSEL CARSON: No, you see that.
We understand that. All right. Rob Kasunic, you can
start with your questions.

LEGAL ADVISOR KASUNIC: Okay. Well first, I'd like to start to Mr. Band and Mr. Dinsmore, just
to clarify the scope of the proposed exemption because
it did seem that in the written comments, it was --
the exemption was very general in terms of the
literary works themselves, but then since then and it
seems like in the testimony, your testimony, that it's
focused more on a renewal of the existing exemption,
but following up with that as well, what I'm hearing
from both Mr. Band and Mr. Dinsmore is that at least
our understanding of the current exemption is -- maybe
insufficient as well.

So, could you just -- are you both in
agreement that this is -- the proposal should be for
the existing exemption and not something broader than
that and address the point about whether, perhaps,
that word "and" should be changed to "or" and why?

MR. DINSMORE: We seek the exemption as it
exists and is granted in 2003. We're not seeking what
we originally proposed and I think that the experience
that we have been looking at indicates that that
change is probably well worth looking at.

MR. BAND: The and/or part.

MR. DINSMORE: Right.

MR. BAND: Right, because I must say, I must confess that I did not understand until a conference call we had yesterday, that there really was a difference between Screen Readers and read-aloud function. It didn't -- I know that it had been talked about before, but I really hadn't completely understood it until Mr. Dinsmore on a call yesterday explained it to me and then I -- once I started, you know, because I was trying to understand what was in the testimony, the reply comments, and so, once I understood it, that's when I understood that the "and" really needs to be an "or", given that these are very, very different kinds of functionalities with very different abilities.

LEGAL ADVISOR KASUNIC: Is there anything beyond just the fact of that a Screen Reader will allow the text to be put into context? Is that the sole reason for needing the Screen Reader, as opposed to the read-aloud function?

MR. DINSMORE: Well, the context is probably very, very important because there's much more than context involved. It does do that. The
Screen Reader also allows you to navigate reliably through that context. There are not currently very many products that we're aware of that we would characterize as read-aloud and have an equivalent function to that. That's very important because if you think about how you handle any document, there are certainly some popular novels that are real page turners, that you go through just as fast as you can. That's not normally the way we do this.

So, the context is extremely important, but also being able to navigate, to understand what page am I at? If I'm at page 22 and I want to go back to page 19, I can do it without getting a re-dump of everything that is, in effect, on the screen, which is what most of the read-aloud functions will do, or about the only thing, I should say more correctly, that they will allow you to do.

LEGAL ADVISOR KASUNIC: Well then, how much has the fact that the current exemption did not go that far affected used of the exemption?

MR. DINSMORE: It's frankly, very difficult to know. We have talked, for example, with the National Association of Blind Students who still find it extremely difficult to get access to books and most of them prefer a Screen Reader approach, primarily
because of the kind of book that they are using.

   Now, as far as the exemption itself and its existence, I would have to say that it's very difficult to tell what that has had in terms of -- or what effect that has had. But we still think that it is worth pursuing, even with its restricted scope, simply because if someone does find that situation where they need to find a way of getting into that book, they -- and they can't find another book, they ought not to be able to be prosecuted for a copyright violation.

   LEGAL ADVISOR KASUNIC: Now, are either you, Mr. Dinsmore, or Mr. Band, aware of anyone who has utilized the exemption?

   MR. DINSMORE: No.

   MR. BAND: No.

   MR. DINSMORE: It's very difficult to find that, by the way, because this is usually a private act that someone is doing and in order to find the kind of information that is needed to go into to, in effect, being able to turn off the switch, is complicated. It's not something that, in fact, I believe is even lawful to advertise that you have something like that. So, it's very difficult to track that.
But we prefer to keep that exemption, in the case that someone does find that they cannot meet their needs in another format, they cannot meet their needs with another -- or any other edition, that if they can find a way to do that, they're not going to be prosecuted.

MR. BAND: Let me just amplify on the point that Mr. Dinsmore made about the advertising. I mean, obviously if a person is -- again, a visually disabled person really can't do this by himself. I mean, he needs the help of someone who can see in order to do the circumvention. But if someone were to be advertising those circumvention services, that would be a 1201 violation by itself, perhaps, even with the existence of the exemption.

And so, again, you know, there -- it is likely -- it is possible that there are people out there who are providing these services to friends and so forth, but there's no -- no one is advertising the providing of the service, so again, it's hard to track what is actually going on out in the field.

LEGAL ADVISOR KASUNIC: But then, just as you said, then that would not be covered by the exemption, so the exemption is not helping those services.
MR. BAND: Well, that's right, because of the way 1201 is written and the way the exemption is written, so -- but you know, that's right. This exemption presumably would -- well again, that would be a matter of legal interpretation that's above certainly my pay grade, as to whether an exemption would somehow apply to a person providing the service to do -- perform an exemption that is permitted under the -- or provide a technology to enable someone else to do it is permitted under the -- under an exemption. But that's an issue for another day.

LEGAL ADVISOR KASUNIC: Okay, well, Mr. Band, based on your argument about back-sliding, I wonder how supportable is that argument? Is there any evidence that it's more likely than not that authors or publishers or software companies like Adobe will begin to make e-books inaccessible in the absence of an exemption, keeping in mind that the record tended to indicate in the last rule making that much of the inaccessibility was simply due to the default in some of the software, that the default was for the Adobe writing -- the program to be accessibility turned off, which since that last edition of the Adobe program, has been changed?

MR. BAND: Well, ultimately, obviously that
would be -- I wouldn't have that kind of information. That would be a matter of, you know, the marketing decisions of various software companies. But the fact does remain that there are products out there that are not Screen Reader enabled. I mean, and that -- you know, so this is a persistent problem. So, one doesn't have to sort of hypothesize that it will -- that there is -- whether or not there is a problem. There clearly are, as the survey indicated and, you know, one could do a bigger survey and find far more works, that we're -- it's simply not available.

LEGAL ADVISOR KASUNIC: Although I'm focusing on back-sliding, not on the existence of works.

MR. BAND: Right, and there would -- it would be -- if -- I agree that I -- there's no way to prove the back-sliding without getting discovery of Adobe and Microsoft and I don't think you have that power in this proceeding. But -- and so, you know, obviously that is a degree of speculation on my part. But at the same time, you know, the whole -- the case for the exemption does not ride solely on that basis.

LEGAL ADVISOR KASUNIC: Mr. Dinsmore, before turning to the particular e-book cited in AFB's comments, I'd like to clarify a little bit about some
general issues regarding e-book formats. And I'd like
to find out a little, and specific about the Microsoft
Reader format. It was my understanding, and I'm not
sure that that's correct, that these lit.files are
essentially image files, such that they're not
generally compatible with Screen Readers as being
image files and difficult to -- they're not OCR'd in
that format. Can you explain a little about the
Microsoft Reader format and whether that generally is
something that is problematic?

MR. DINSMORE: The formats are problematic
for a couple of reasons. One has to do with the
format itself and that is, whether or not the current
edition of that particular kind of software has the
kind of text-to-speech navigation that is necessary.
Some are beginning to move in that direction, but not
many.

The second thing goes back to, I think
what you related to a little bit earlier, and that is,
is there structure within the text that this
particular device, whether it's a Screen Reader or
whether it's a downloadable, read-aloud function
system, is that structured in such a way that either
one of those systems can operate?

Increasingly, we're looking at some that
are deployed with structure in them, particularly in
the textbook arena. In some others, it is still the
case that it's basically an unstructured PDF format
and if you got to it either way, you would have great
difficulty reading it. You might not have difficulty
reading it, for example, if it was simple text. You
may be able to do some work within the Screen Reader
system with -- to do that, but to navigate something
that would be more in the character say, of a textbook
that has columns and figures and various kinds of on-
tagged formats, would be difficult.

LEGAL ADVISOR KASUNIC: What about the,
specifically, the Microsoft Reader format? Is that an
image file? And is that compatible with Screen
Readers, generally?

MR. DINSMORE: I think it's probably not
correct to say that it's an image file. What it's
looking at might be an image file.

The Reader software that that is using has
various kinds of capabilities to look at and to
analyze what's on the screen and to give some signal
as to what's on the screen and ask you for some
decisions about how you might want to function. But
it's really usually, if you thinking about, you know,
the PDF issues, it's really that text itself and how
LEGAL ADVISOR KASUNIC: Is there more of a problem with certain file formats than others? You keep mentioning PDF --

MR. DINSMORE: Yes.

LEGAL ADVISOR KASUNIC: -- which is an Adobe format. Is that the more accessible format in your experience?

MR. DINSMORE: The formats that are most accessible are those that have structure to them and that's something that the publisher puts into the work and it is done more commonly in other kinds of work like textbooks right now. By structure I mean, it has a way in which either a very upgraded read-aloud function or currently, a pretty good Screen Reader function, can actually have something on the screen. PDF is almost like a picture and it doesn't support. Although Adobe now has some systems that will work with that and will make it more accessible, it is still problematic in that respect, which is why we were very encouraged at some of the work that, I think, used to be the Open E-Book Forum, I think it's now the International Digital Book Forum, is looking at in terms of creating some sort ways in which books will be structured, because I think they are also
conscious that there are not only blind, there are
visually impaired users out there. There are some
sighted users who would like to use better navigation
tools than currently exist.

  LEGAL ADVISOR KASUNIC: So, then that
structure is something that is completely independent
of the format and will carry -- if the structure is in
the text, it will carry over to whatever format that
that's put in? Whether PDF --

  MR. DINSMORE: No, actually, the structure
will be the format that is in the book. And if you
have a -- some of the newer Microsoft products and in
fact, some of the newer Adobe products, if that's got
structure, that this devices software can in effect --
metaphorically put its hand on, then it can read it.
If it doesn't have structure, if one of the common
things with the older formats, and there are a lot of
those legacy formats around, essentially, it's a
picture and that Screen Reader doesn't know what to do
with it, and in addition, the read-aloud function
probably doesn't know what to do with it either.
That's why in some cases, we've got something like
just a string of question marks, out of either the
Screen Reader or the resident read-aloud function.

  LEGAL ADVISOR KASUNIC: What does the
Microsoft text-to-speech component do or add to the Microsoft Reader?

MR. DINSMORE: The newer ones have a better navigation system, which is a voiced system. It still is not superior to being able to download and use your Screen Reader. In effect, it latches onto fewer things. It allows you some navigation and one of the important differences in the newer devices is that it voices that navigation.

For example, in some of the older read-aloud systems, what you have on the screen might be a dialog box, which most of us are familiar with, that says yes or no or A, B or C. The problem for a blind person there is the older systems give them no indication of what's in that box and how to position anything.

The difference in a newer system, the newer Microsoft systems, for example, is that it would allow you to look at what's in the box. It would tell you what the key item is and what your commands should be and it would also, and this is very important, give you some feedback as to what you had done.

This is one of the other problems that is a problem with the older legacy read-aloud systems, is that they're somewhat like voice technology of old.
It's great. It speaks out on the screen, but once you're asked to do something, it doesn't tell you whether you did it or not. And that can be crucial when you're trying to navigate even text that is properly structured.

LEGAL ADVISOR KASUNIC: And if I could just ask what the different types of Screen Readers that are dominant? I know -- I think you mentioned the Window Eyes as one form.

MR. DINSMORE: There are several different manufacturers and the price of the product depends a great deal on the quality of the speech that it's going to give you. It runs from about $400 up to about $1,800. And what's the difference? It's basically you're getting, as you move, upgrade, you're getting better speech and that's important also. If you're truly a blind techie who has been raised in the system, you're probably not going to be all that terribly uncomfortable with the quality of the mechanical speech that is available at the lower end. You can deal with it. But once you've heard the better stuff, the newer more synthesized devices that have various ways in which you can command the speech to perform, you're going to be a lot happier. Those are where the major differences are.
LEGAL ADVISOR KASUNIC: Now, turning to the five books that you had -- that AFB had used as representative samples for this test, I wanted to go through each of those and just see whether you had any other thoughts about some things that I had looked at with those.

First of all, with *The Imitation of Christ* that AFB looked at in the Microsoft format, I looked at that in other formats and did look at, as Mr. Metalitz's comment pointed out, that the e-book.com is another source for some of these works, that that particular work was available in Adobe format and that with -- if it was downloaded in the Adobe or the Adobe Reader, that is actually -- accessibility was allowed. I did that myself. I went a little further and did that myself and accessibility was allowed and the read-aloud function was enabled.

Now, do you have any reason to -- was there any reason for only looking at it in the Microsoft Reader format?

MR. DINSMORE: No, we had, frankly, a limited amount of time and money to spend on this and one of the problems that we found with most of these is that you had to buy the book to find out whether it was accessible.
With regard to your reading experience, I wouldn't have any way of evaluating that, unless I actually heard what the performance was of the speech and whether or not you went through all of the navigability features that a blind user would have to use, or would might not have to use, but might desire to use.

LEGAL ADVISOR KASUNIC: I was just simply trying to determine whether it was accessible in any format. And the same thing with *The Business of Software*, I think as Mr. Metalitz's comment also pointed out that that was available through ebook.com and also, some of the information on e-book seemed to go somewhat further than the Amazon site in terms of providing some of the information about accessibility and that also appeared to be -- I didn't download that particular work, but did -- it was stated within that information, that the read-aloud function was available and it was not -- it was somewhat unclear, though, whether that was accessible as well.

So, that goes to at least two of the particular books that were -- that AFB had only looked at in Microsoft format.

As for the *The Amber Spyglass*, that was also available in Adobe and Moby Pocket Reader and
after looking at that in the Adobe format, it turned out that that was even in the Adobe format, that the read-aloud function and accessibility features were turned off on that particular work.

But one thing I did find was that that was available -- it seemed to be available through the Talking Book Service. Now, would that be a reasonable place to obtain?

MR. DINSMORE: It depends on the purpose for your book. You know, the Talking Books actually have very, very limited navigable features. They are a very nice performance. It's professional speech of a very, very high grade. But it's -- although this is going to be changing rather soon we understand, it's a cassette. If you ever try to navigate anything in a cassette, you're in for a very disappointing, very disappointing situation. So, it is really not the same access.

This is why we make the point that if you consider how you read a book and in deed, some of us will, for various reasons, read a book from cover to cover. Some of us will not do that for the reason that we are assigned various chapters. Some us will want to go back because we've been tracking very nicely what the author has said and then just
completely lost the point.

Using an audio system and a cassette, I wish I had one to demonstrate to see how really frustrating it can be for even a sighted person.

LEGAL ADVISOR KASUNIC: Well then, is this something that is sensibly handled through the exemption, because the exemption can only allow certain things to be exempted, but can't necessarily give the optimal format that would enable accessibility for blind and visually impaired. Do you have any comment on that?

MR. DINSMORE: Well, I think we could have a long discussion and there probably are some fine legal points here that I would not be fully capable of making, but the comparability issues, as to whether it really says one should be -- you should get something through this proceeding that is better than something else, I think what we are most concerned about is how useable, how comparable that is to somebody else's reading experience.

If the purpose is such that we can only say, "We can just give you the back of the bus on this," and that's it, then I think we have real problems and I think we would certainly encourage you to look very carefully at whether or not we really
want to have an argument that just because something is available in an audio text format, or a not very suitable read-aloud function, that there is no problem.

LEGAL ADVISOR KASUNIC: And as to the scope of the problem, given the fact that out of these five works that were used as representative samples, that there was -- seemed to be some accessibility, and even the only one I didn't mention was *The Most Dangerous Game* study guide from Gale's short stories for students, and in the comment, it seemed that there was -- the problem there was structure, was it not? It wasn't that -- the document wasn't structured, so it -- there -- even, it may be accessible to Screen Reader, but that it would not be optimal. Is that true?

So, what -- how representative are these five examples of the market place generally?

MR. DINSMORE: Well, we tried to make that kind of selection. We clearly were not capable of taking a sample of the entire market place. But the reason we selected these and the reason we used certain kinds of the readers in some cases and not in others was, you know, number one, to try to show what was available and try to show some comparability about
what might be available with different products.

I wish we had the opportunity to do a full market survey on that. But I think what you would generally find, and this is based on a lot of the experience that we have had, because we have evaluated Screen Readers and we have evaluated read-aloud functions, and in fact, had been a member of the Open Ebook Forum for a period of time, is that not a lot of what you will find is accessible. It is an old read-aloud function, often, and I think as well, you would probably find situations where because of the copy-protect system, the Screen Reader would in effect be shut down. The reason for that is, it is trying to make an unauthorized copy, which is the way it does its business, which is essentially to pulls what's in the screen, copy it, put it into a buffer, so that the functions of the Screen Reader can work.

So, I wish we had better, but I really think that based on what are experience is, the answer to your question is, you know, if we went farther and farther, I'm not sure we would do better in terms of the performance of these systems.

LEGAL ADVISOR KASUNIC: Thank you.

GENERAL COUNSEL CARSON: Jule, any questions?
ASSOCIATE REGISTER SIGALL: Just a couple. First, explore this suggestion that you -- we would change the exemption to an "or" instead of an "and" between the two types of features that might be controlled or limited by the -- by an access control. I'm trying to get a sense of what the effect of such a change would be, because right now as the statute -- as the exemption reads, something is subject to the exemption only where the access controls limits both the read-aloud function and the Screen Reader function.

If we changed it to an "or", we then add two more categories of format that might be subject to the exemption. One is where the read-aloud function was disabled because of an access control, yet Screen Reader was still possible because of -- despite an access control or because of a lack of an access control.

Mr. Dinsmore, do you have any sense of how common an occurrence that is, a case where a format doesn't -- prevents the read-aloud, but Screen Readers can still interact with the format in a way that's accessible to the blind?

MR. DINSMORE: No, I don't. I don't have a break-out on that.
ASSOCIATE REGISTER SIGALL: Okay. And I guess on the converse situation, do you have any sense whether there's -- it seemed -- I took from your testimony that the converse may be more true, where read-aloud may be enabled, but Screen Reader interaction with the format is not possible.

MR. DINSMORE: I think from the experience that we've had, the answer would be yes. It's probably more an occurrence that the Screen Reader is going to be disabled by copy-protect systems.

ASSOCIATE REGISTER SIGALL: You also mentioned that there are a variety of Screen Reader software programs on the marketplace of varying qualities and I presume they have varying features and functionality.

Is it the case that a particular format might be accessible with one type of Screen Reader software, but not another type of Screen Reader software? Has that been in your experience?

MR. DINSMORE: If the format is properly structured, there's not much likelihood that one Screen Reader is going to be able to read it and another won't be able to read it at all.

ASSOCIATE REGISTER SIGALL: So, the accessibility to someone doesn't necessarily depend on
doesn't depend on the type of Screen Reader software they may be using in your case?

          MR. DINSMORE: No.

          ASSOCIATE REGISTER SIGALL: Okay.

          GENERAL COUNSEL CARSON: All right, let's continue that. First of all, I think I heard, Mr. Dinsmore, that Screen Readers are far more preferable and more useful than simply a read-aloud function, is that correct?

          MR. DINSMORE: Yes.

          GENERAL COUNSEL CARSON: All right, and I'm sort of inferring from what I'm hearing from you -- some of my understanding of how that would be. You talked about context. Let me just make sure I'm getting another thing that I think I am inferring, I don't think I heard you say it. But I'm imagining that the kind of thing you're talking about might be, for example, if there's a table of contents, a Screen Reader might let you navigate that table of contents so you can hear what chapter seven is and you can go straight to chapter seven. Whereas a read-aloud function would not allow you to do that? Am I correct in imagining that, or is that just --

          MR. DINSMORE: Yes, I think your imagination is pretty much on target.
GENERAL COUNSEL CARSON: Okay, good. That's very helpful in understanding it. Well then, what that's leading me to think is that -- and I'm just imagining what your preferences might be, and let's see if I'm right, and then if I am right, I'd like to hear you elaborate on why we might need to go in that direction in your view.

What it's sort of sounding like to me is that the read-aloud function from your point of view is pretty irrelevant and that the exemption we ought to be granting would simply not even mention the read-aloud function and it would permit circumvention, unless the literary work is available in an edition that permits the enabling of Screen Readers. Isn't that really what you want?

MR. DINSMORE: Well, what we would really like to have is, you know, all books are accessible with either one of those.

GENERAL COUNSEL CARSON: We can't do that for you.

MR. DINSMORE: Pardon me?

GENERAL COUNSEL CARSON: We can't do that for you.

MR. DINSMORE: Darn, we thought we would try again.
GENERAL COUNSEL CARSON: What I mean is, we can't make all books accessible, is what I'm saying.

MR. BAND: You can't do tech mandates? That's not part of this proceeding?

GENERAL COUNSEL CARSON: Well, if you like it, Jonathan, we'll reconsider. No, but seriously.

MR. DINSMORE: Generally, the Screen Reader is the far more, currently, the far more accessible way for someone to use that book.

GENERAL COUNSEL CARSON: Now, I think I'm hearing you make a case, but I just want to see if I'm right. It sounds to me the case you're trying to make, or perhaps, the case you should be trying to make is if a book is available only -- if a book is available where the read-aloud is accessible, but the Screen Reader isn't, that's not good enough and my people ought to be able to circumvent the access control in order to use a Screen Reader if all that's available for them is the read-aloud function. I mean, is that your case and if so, you might want to elaborate a little bit, because I seem to be hearing you at least leading up to that.

MR. DINSMORE: Well, I think that's the direction we would like to head in this. The Screen Reader is always a better system. The read-aloud
function does not have that navigability, typically, although improvements are being made.

So, if someone is trying to snag that book online, that e-book, it is usually far better for them to be able to do it with a Screen Reader and hopefully, not to have that Screen Reader disabled because one of the typical things that happens, which I think I mentioned before a couple of times is, the way the Screen Reader functions, it is with a very generally configured copy-protect system, going to be shut out because the copy-protect system will see this as a copying system and it doesn't have any authority to let that system make that copy.

GENERAL COUNSEL CARSON: Mr. Metalitz, what's your reaction to the proposition that, perhaps, I'm urging more strongly, although I'm not actually urging anything -- the proposition that we just talked about, that perhaps the read-aloud function shouldn't even be considered because not even a poor substitute?

MR. METALITZ: Well, I've been given a lot to think about here this afternoon, because of course, that's not what the existing exemption -- if the existing exemption procedure were different premise, which is that either of these -- as long as you have either of these in some available edition, you're
okay. And I think I'm a little confused now about whether the proponents are seeking the existing exemption or the "or", you know, changing the "and" to an "or", or as you have just suggested, Mr. Carson, eliminating the reference to read-aloud function and just saying that if the Screen Reader is not enabled, then it's okay to circumvent.

I guess the two problems I have -- the three problems I have -- first, we need something -- it's something we need to learn more about and maybe offline we can pursue this in a little more detail the AFB.

Second, I'm not sure that they're -- from what I'm hearing, there may not be a real black and white difference here between the read-aloud function and the Screen Reader function and Mr. Dinsmore has a couple of times, referred to an upgraded read-aloud function or the more modern and improved read-aloud functions that do have some navigabilities.

So, it doesn't seem to be a binary situation, but more of a spectrum, and I'm not sure whether it makes sense to, you know, treat them as binary situations where one is good enough and one isn't.

The third reaction that I have is, you
know, as this -- the question really is -- I'm really hearing two things that are a bit troubling. One is that this -- that publishers really shouldn't be able to prevent circumvention unless they have -- unless 100 percent of their titles are accessible. And second, maybe they need to have the state of the art form of accessibility, the best form of Screen Reader function before they can say, "Well, no, there can't be circumvention."

Obviously, that has some -- could have economic impacts. It could have market impacts. Who is going to decide what is the best form of Screen Reader functionalities? Does everybody agreed on which is better and which isn't? Does everybody agreed on the circumstances in which the read-aloud function is close enough to the Screen Reader functionality that it ought to be treated the same way and does everyone agree on the situations in which the read-aloud function is so inferior and lacks navigability that it really is a different animal and shouldn't be treated the same way?

So, these are some of the concerns that I have from what I'm hearing and that again, make it a little difficult to evaluate because if we're talking about the existing exemption, I think I understand
what that entails, but I'm not sure that I really understand what it would mean to either change the "and" to an "or" or basically eliminate the read-aloud function all together as something that's constitutes accessibility -- enough accessibility to make the exemption inapplicable.

MR. BAND: If I could just respond to that. It seems to me that in particular, because we are talking about a spectrum and it's also a moving spectrum, that it changes over time, that probably eliminating a category makes less sense than simply replacing the "and" with an "or", because that makes it as flexible as possible and, you know, because -- you know, the technologies evolve and I think that just makes more sense because it could be in certain cases that -- you know, having an upgrade read-aloud is good enough and that's not enabled and you should be able to circumvent to get that. And, you know, because that might be what -- you know, that might be the kind of software the user has and that might be really all that's required for that particular work and the particular use that the student, for example, wants to make of it.

So, I just think that that would be the better approach, rather than sort of carving out
categories because also then, that leads into a whole definitional quandary, along the lines of what Steve was saying and as a result, I think that we -- you sort of avoid all of that by simply replacing the "and" with an "or".

MR. METALITZ: Excuse me, but as I would understand, the significance of that, if you had the state of the art read-aloud function with navigability that was enabled, someone could still circumvent because you didn't have the Screen Reader function. But on the other hand, you might have a very -- relatively primitive Screen Reader function and that couldn't be circumvented because it's a Screen -- I mean, would you be able to circumvent in that situation to get to the read-aloud function?

MR. BAND: Conceivably, I mean, if the read-aloud function isn't enabled, you know, and I don't see --

MR. METALITZ: Wouldn't you have to have both in order to prevent -- in order to come outside the scope of the exemption? I think if it's "or", then you have to have both and whether one is better than the other, one really isn't very functional, you would still have to have both and as it stands now, if you have either, then you're okay, as I understand it.
MR. BAND: Well, I guess the question is, who's who and who's okay? I mean, from my perspective, it just seems to make sense that look, we want to -- the goal here is to help the visually disabled and in a way that is not having any impact, any negative impact right now on the publishers and I don't foresee this ever having any negative impact on the publishers. It's going to be used really in very rare circumstances because -- for all the reasons we already enumerated.

And so, I think simply providing a little bit more functionality and providing a little bit more flexibility is completely appropriate under these circumstances.

GENERAL COUNSEL CARSON: Mr. Dinsmore, maybe you can tell us a little more about what a state of the art read-aloud function would do and whether those so-called state of the art functions probably -- well, whether they are or aren't sufficient for the use that people would normally need, because I -- at the moment, I admit, I'm sort of confused. It sounds like it isn't just black or white. It is a spectrum and I'd like to figure out how the read-aloud, or at least the better read-aloud fits into that.

I think I may be hearing that a really
good read-aloud system might be fine, but a not so
good read-aloud system wouldn't. Is that where we are
or is that not where we are?

MR. DINSMORE: You know, it's one of the
most difficult things and the regulatory process it to
make bets on technology. Most of us in the past who
have tried to that, have placed the wrong bets.

To answer your question, at the present
time, the kinds of read-aloud functions that we have
found, that is when you download the book, are not the
best state of the art. Those have not been picked up
and deployed very commonly.

So, if we were talking about the situation
as we know it today, the Screen Reader is almost
always preferable because of all of the elements that
I mentioned.

Now, are the other devices, the other
read-aloud functions getting close to that? The
answer is yes, they are getting close to it. In terms
of fully navigability, probably not there yet.

GENERAL COUNSEL CARSON: Let me suggest
something else and get your reaction to it, and you
may have to think about this. You may not have an
initial reaction that's very reliable. But it's
starting to strike me that what you call it isn't so
important, it's what it does and if we're going to have another exemption for another three years, perhaps instead of talking about a Screen Reader or a read-aloud function, if there's a way to come up with a statement that describes what it does, what the feature that you want to be able to use does in a way that A) satisfies the people who need to be able to get access to these works who can't right now, and B) is reasonably clear, so that anyone trying to look at a regulation that incorporates that description into the regulation can say, "Okay, yes, I can see that this qualifies or this doesn't," and you don't have to start guessing about whether you're within or outside the scope of the regulation or the exemption.

Maybe that's the way to go. Does anyone have any immediate reaction to that proposition, whether that's something worth exploring or not?

MR. DINSMORE: It's an interesting approach because in the world of technology regulation what we have found, and this may be where we would want to go with this, is an example would be Section 508 of the Rehabilitation Act that talks about electronic access technology. They steadfastly moved away from the direction of trying to tell people what technology you had to buy. They established a performance standard.
That's not difficult to do.

If you are talking about, you know, the utility of someone's reading experience, this is one of the reasons why were -- we thought it was important to talk about what text-to-speech is all about, because that is the closest thing that can give you a performance standard comparable to what to any of us would be using when we're accessing a book, just in a conventional print format, to be able to move through that book, to be able visually, as we do it, to look at the structure of the book, to know where we are in the book and to know some things, also, about the book before we decide whether we want to buy it.

GENERAL COUNSEL CARSON: Are there some standards out there that maybe some other agency and other context has already endorsed or issued that might essentially do that job right now, or is that -- are we not there now?

MR. DINSMORE: This would be speculation on my part, because I'd have to look at it more carefully, but the Access Board has -- the U. S. Access Board, has standards under Section 508 for electronic information access. I don't know whether they specifically speak to this kinds of functions, but it's a process that has been used for establishing
performance standards.

GENERAL COUNSEL CARSON: All right, well, let me give you some homework. It would be useful to know a couple of things. One, it would be useful to know whether there are some standards out there, whether they are set by some Government agency or some other institution of some sort that carries some bit of authority and that might be useful in this context, so that we don't have to worry, what do I call it? We just worry about what does it do. And if it's clear what is does, then that's what we're talking about, maybe that's what we do. And I encourage all three of you and your clients to have some interaction, if that helps in seeing where all of you are on that. Because I think we're moving in a direction that certainly, any of us up here thought we were moving in when we walked into room and certainly, to me and from reading the comments, I got the impression maybe to just about everyone, the distinction between a Screen Reader and read-aloud function, it was certainly, I won't say entirely lost on me, because I remember from three years ago sort of getting the distinction, but nobody was making much of the distinction at the time, which is why you see the exemption you see.

What we're hearing today is that there may
be some major distinctions between the two and there may be reasons why one of them, at least in its old fashion sense, doesn't really do that job and the other one does.

So, it would be helpful for everyone, I think, to start focusing on that and figuring out, all right, what is it that the blind need to be able to use that they're not able to use right now. And ideally, if there can be some consensus by the various people who have come forward to talk about this exemption on it, that's great. If there can't be, then we'd probably like to hear from you separately on that and we may send you a letter very shortly just giving you some kind of time table for more on that because we want to get this thing -- we want to keep moving on this. But that's something that I think would be very useful for us.

MR. DINSMORE: That's an interesting proposition and it is for us, because we have been in the business of testing a lot of this technology, basically evaluating it from a "Consumer Report" point of view. Not so much best buy or best rated, but basically, and this may speak to something that you're after here, how does this thing function?

GENERAL COUNSEL CARSON: Anyone else have
any reaction to that at the moment?

MR. BAND: I think it's a good -- it sounds like a very good idea because again, you're talking about changing technology and, you know, as I indicated before, the distinction between the two technologies was -- it had been lost on me until yesterday and also again, these things are going to change. And so, it does make sense to focus more on functions than on Screen Readers. I mean, who knows what a Screen Reader is and who knows what it will be in five years.

GENERAL COUNSEL CARSON: Any thoughts at this point, Steve?

MR. METALITZ: I imagine -- I think it's a good idea to find out if there are performance standards out there that may have or already have, you know, addressed this. I think, you know -- I don't know the answer to that and I think one concern would be are these aspirational standards that, you know, this is what we're aiming for down the road or are these more descriptive about what products that are out in the market today now do. Because of course, publishers are -- here, are somewhat at the mercy at technologists for this. I mean, the publishers are -- you know, the technologists are vendors to the
publishers and what's available to them, in terms of
the different -- you know, the different formats is a
limited universe and I'm sure there are market
pressures one way or the other.

But it's certainly something we -- is
worth taking a look at.

GENERAL COUNSEL CARSON: Okay, that's
great. Let's switch topics a little bit. This is a
question, I guess, at least in the first instance for
Steve, but I'd be interested in all of your reactions.

We're dealing here with an existing exemption and we're in effect, being asked to renew it, although I'm not sure renew is work we would ever really use because I think everyone understands that we evaluate de novo. But when you have a situation where there's an existing exemption and people are asking that we have that exemption for another three years, is it necessary, and if it's not necessary, how important is it to know whether people have actually been using that exemption during the three years in which it has been in place? So, I'll start with you, Mr. Metalitz.

MR. METALITZ: Well, I think it would be important to know that as a general matter because that might tell you something about how great the need
is for having a similar exemption in the future. It's not -- as I think the Register pointed out in the recommendation the last time, it's not always just a quantitative question, even on the censorware exemption we were talking about earlier today. Very few people were using it, but still, it had -- she said there was some significant value to it.

So, it's not a mechanical thing of saying only if 3,000 people have used it, should it be renewed. But I think it would shed light on the question, which is really the ultimate question for this panel, which is is the prohibition that's in the statute, absent in exemption, creating a significant problem with regard to non-infringing use?

One strong indicator of that might be that people are making a lot of use of the exemption or order to make their non-infringing uses.

So, I think it would be very valuable to have that. I recognize, as people said before, it's not always possible to determine that. And it's going to vary depending on the characteristic of the exemption, I think. We have -- in the hearing last week, I think we had testimony about -- from one person who is using the existing exemption and he described -- that is the internet archive, and he
described, you know, fairly, specifically how he's using it and why he wants to continue using it and so forth and I think that was very illuminating.

And in the absence of that, I think it's harder for you to answer the question that you've been asked to answer.

GENERAL COUNSEL CARSON: Anyone else have any reaction on that question?

MR. BAND: Well, I think in general, you know, it's a relevant factor like everything should be relevant and everything should be considered. I think here in this instance, it's perhaps less relevant because -- again, as I agree with Steve that it is relevant to the extent that it shows -- indicates that there is a problem, the fact that people have taken advantage of the exemption suggests that there really is a problem.

Here, that seems to be less compelling or the need for that kind of evidence seems to be a little less compelling, given that the nature of the problem is obvious, meaning it is clear that there are e-books out there that are not Screen Reader enabled and that is a problem for someone who is visually disabled.

So, the fact that -- and, you know, again,
you have a bit of a catch-22. The fact that it's going to be very difficult for them to use the exemption, given the fact that they need to get someone to help them to do it, so it's going to be that much harder to find the evidence of their using it.

But still, the underlying point is that it's -- the nature of the problem here is -- in this case, is very apparent. And I'd also suggest that when you're maybe anticipating a -- your next question, that when you're looking at the renewal issue, that the negative impact of the exemption and whether there has been any negative impact, is very significant because that, you know, that shouldn't be relevant especially again, to the fourth factor here, the effect of the circumvention on the market. And if there's been no -- there's no evidence submitted by anyone that it has had a negative impact, then that is significant.

Now, it could mean that the exemption is maybe -- in some instances, maybe not that important an exemption in the grand scheme of things. But the fact that it has had no negative impact, I think, is very probative on certainly this factor.

GENERAL COUNSEL CARSON: Steve, would you
agree there's -- we have no reason to believe that the
existing exemption has had any negative impact on the
exemption?

MR. METALITZ: Yes, I don't think there's
any evidence of negative impact, but I'm not sure
quite what conclusion to draw from that. There could
be two reasons for that. One is that it really
doesn't affect the market that much. The other reason
might be no one has ever used it. Obviously, if no
one had used it, then of course there would be no
impact from it. So, I'm not sure you can really draw
too much of a conclusion from that.

I would agree with Jonathan that in this
case, there is no question that there are some e-books
out there that aren't enabled and certainly, that are
not enabled for a Screen Reader, but also that are not
enabled for read-aloud, just looking at the existing
exemption. I don't think it follows ipso facto that
the exemption -- the same exemption should be
recognized because partly this is a question of degree
and partly is a question of causation really, the
extent to which the reduced accessibility or lack of
accessibility by visually impaired people is the
result of this prohibition. So, I don't think it --
I don't think we can say well, because the problem has
not totally gone away, therefore, we should have the same exemption. I'm not suggesting that you're saying that. But I -- and I do agree with you that this is a little -- may be a little bit different than perhaps, say the internet archive exemption where I think without having somebody explain how they're actually using the exemption, it wouldn't be so apparent why it was needed.

GENERAL COUNSEL CARSON: Anything, Mr. Dinsmore, on this topic?

MR. DINSMORE: I'm intrigued with the possibility that there is some connection with what you are putting before us in terms of a possible task, in terms of looking at a performance standard. We have not been party to these other exemptions. But I am thinking that one of the things that may have happened there is in those other exemptions, there was actually a product that someone could demonstrate that they were using and probably could also show how the exemption very clearly affected that.

I would not like to see this particular exemption have a preponderance of evidence on the numbers of times that someone was unable to access. But I think if you -- with a Screen Reader, for example, that if you put forth something like a
performance standard, it will probably be easier for
that kind of evidence to be gathered because you'll
have better knowledge of just what it is you're asking
this thing to function. What's the mode that it's
suppose to be functioning in? And it will probably be
easier for us to ask people, "Were you able to get it
to function that way?" We have a more specific
question we can ask.

MR. BAND: But if I could also just go back
to what Steve was saying, I mean, you know, he's right
that the way the statute is worded in 1201(a)(1)(b)
and I guess (c) also talks about if such persons are
reluctantly -- adversely affected by virtue of the
prohibition in their ability to make non-infringing
uses, but here again, you have the problem that I
think -- and again, this is also ultimately a problem
that goes to the structure of 1201(a) that we've been
talking about before, which is to say that there is no
question that -- you know, the problem -- the root
problem here is the DRM, right. It's that -- the fact
is that it's not enabled. That's the problem. And we
all agree that that's what's causing the problem here,
that it's not -- that a certain functionality, by
virtue of the DRM, is not enabled.

But then, you know, to say whether, you
know -- are they -- so is a person who is adversely affected by the DRM, are they also adversely affected by the inability to circumvent the DRM? You know, I think that at some point it's kind of a -- yes, it's a different issue, but it really is ultimately the same issue. Particularly here, or particularly again, if you did not have the prohibition on the technology, then I'm sure there would have been a market for that, that people would be making that technology available and, you know, in a relatively easy way to use.

But because there is the prohibition on the technology and it's not clear that the exemption that was granted three years ago applies to the technology --

GENERAL COUNSEL CARSON: I think it's pretty clear is doesn't, isn't it?

MR. BAND: Well, you know, I bet you the Federal Circuit would interpret that differently. In fact, I'm pretty confident. I think the Federal Circuit would interpret that differently.

But, you know, the other Circuits, probably not. Second Circuit, probably it would interpret it, you know, in a different way. But the -- I think the point is, all I'm saying is that these various issues sort of collapse into each other.
And so, again, it seems to me that -- you know, to say, well, is the problem the DRM or is the problem the prohibition on the circumvention of the DRM? At the end of the day, it's the same thing.

MR. METALITZ: Well, let me just -- I think you need to take a slightly broader view of this because one factor, for example, one issue is are there other ways of making this used that don't involve using this product that has a DRM on it? And that's, I think, certainly a relevant consideration here. I don't know what the -- I mean, we have some evidence about that in terms of book -- book sense.

GENERAL COUNSEL CARSON: Bookshare.

MR. METALITZ: Yes, Bookshare, thank you. You know, that there are more titles, a lot more titles, two or three times as many titles available now and I think that's a factor and it doesn't -- so, that suggests that since DRM-free or TPM-free editions are available, that may help people make these non-infringing uses. Again, maybe not in the optimal manner, but I think it's also very clear that the goal here is not to ensure that everyone is able to make a non-infringing use in their optimal or most preferred manner. But the fact that they can make these uses without circumventing is quite relevant to whether
there should be an exemption in this area.

I'm not saying it takes care of the entire problem, but it's certainly a factor to be taken into account and it doesn't have to do with, you know, it's not the same thing as whether you have to circumvent the DRM.

GENERAL COUNSEL CARSON: All right. Well, you mentioned Bookshare and I wanted to ask about that and I'm going to direct this question, at least initially, to Mr. Dinsmore, just because I suspect he knows more about Bookshare than anyone else here. He may disabuse of that notion in a moment. We'll find out. But what exactly is it that Bookshare does and then the second part of that question would be once we know what it does, is that an acceptable substitute for being able to use a Screen Reader on the e-book?

MR. DINSMORE: Bookshare is basically using a scanning technology for their books, okay. A scanning technology is not the same thing as what you're going to get when you have a properly formatted book. The scanning technology is very much dependant on a number of things, that is the quality of the book in the first place, the quality of the materials that -- sorry, not the materials, but the quality of the technology that you're using for optical character
recognition. The final problem with that is, while you do have a book that is accessible -- it is accessible to you, you can read this book. You don't have navigation features to this.

So, are you having use of the book, which was why we make that distinction. Sure, you can read the book or someone -- some system may read the book for you. But is that using the book in the same way that we would use the book?

GENERAL COUNSEL CARSON: So, with Bookshare, I'm gathering maybe, what you're getting with Bookshare is equivalent of the old fashion plain vanilla read-aloud function and nothing more? Or is that over-simplification?

MR. DINSMORE: It's close to that, yes.

GENERAL COUNSEL CARSON: Okay. Steve, do you know anything that might --

MR. METALITZ: I don't know anything more, but I do know that this was part of the landscape that the Office and the Librarian took into account three years ago and I think it should still be part of the landscape. Again, I'm sure it is not delivering the optimal experience, based on what Mr. Dinsmore said. But it is a way that people can make these non-infringing uses.
MR. BAND: But of course, 26,000 books is just a fraction of --

MR. METALITZ: Sure.

GENERAL COUNSEL CARSON: Well, that's a good question.

MR. METALITZ: It's a bigger fraction than we had.

GENERAL COUNSEL CARSON: A fraction of what, because one question I would have and probably no one here knows, but maybe someone has a sense, 26,000 books in Bookshare. How many e-books are out there? How many e-book titles are out there, rather?

MR. DINSMORE: There are -- you've probably got better information on this than I do.

MR. METALITZ: My clients certainly do, but I don't.

MR. DINSMORE: Well, you shouldn't be speaking for your client, but maybe just as a member, so we might have -- maybe we've got emeritus associate status for statistics in that. I think there is something like 70,000 titles published every years.

GENERAL COUNSEL CARSON: E-book titles?

MR. DINSMORE: Not e-book titles, 70,000 titles.

GENERAL COUNSEL CARSON: Okay. E-books are
obviously a fraction of that.

MR. DINSMORE: They're about 7,000.

GENERAL COUNSEL CARSON: Okay.

MR. DINSMORE: But it's growing. I think the stats are available through the -- what used to be the Open E-book Forum and I'm sorry, I keep forgetting the title of it, but if you search on Open Ebook Forum, it will take to the new international -- let me see if I have it here. They have very good statistics on the numbers of e-books that are being published.

So, it's -- you know, you are getting into some real comparison problems. You may 26,000 titles available, whether that represents anything but a fraction of the universe of titles, it's hard to say.

GENERAL COUNSEL CARSON: And for all we know, that's counting the books that aren't available in e-book form. Who knows? Maybe someone does know. I don't know.

Steve, let me ask you, the first words out of your mouth here were, "We don't oppose this exemption." But you then went on to say essentially, you do think that people need to meet their burdens of proof and so on. So, I'm not quite clear where you and your clients are on this. Are your clients here telling us that this is not an exemption based on the
record before us that ought to exist for the next three years, or are you telling us just be cautious? Or are you telling us -- what are you telling us?

MR. METALITZ: Well, I think when we came here, we were prepared to tell you that, you know, it's obviously your decision and your recommendation about whether the exemption that was approved in 2003 should be approved in 2006, but that we would not have a strong objection to it, if you felt that it met the standards that you've laid out before.

I think what we've heard today kind of scrambles the egg a little bit here because we've heard a lot of suggestions about changes to it. I mean, I think we know that the idea of a class of literary works period is off the table, which is good news. But we've heard about a lot of possible changes to it and I don't know -- I think we're going to have to explore that further before we can really take a position on whether that should be recognized.

GENERAL COUNSEL CARSON: Okay. All right. Let's see if Steve has any questions.

LEGAL ADVISOR TEPP: I had several -- well --

GENERAL COUNSEL CARSON: I finished mine.

LEGAL ADVISOR TEPP: Okay, I will. We're
also over the time allotted, so I don't want to belabor anything.

Let me boil it down to one sort of fundamental question. Is a basic read-aloud function better than nothing?

MR. METALITZ: You're directing --

LEGAL ADVISOR TEPP: It's for Mr. Band, but if you'd like to add anything, Mr. Metalitz, please do.

MR. DINSMORE: You know, I don't think there really is a distinction like that. There is a basic read-aloud -- if you were talking about a book, certainly, a basic read-aloud function, if you've got nothing else. If you couldn't get an audio tape. If you couldn't get someone to read the book to you, even, it would be preferable.

But I'm not sure that we want to make that distinction. I don't think it's -- I think it's one that gets us, from our point of view, into a lot of trouble. If you get just read-aloud only, you're not getting much. Arguably, better than absolutely nothing, but I don't think we'd want to be there.

LEGAL ADVISOR TEPP: Very well. Okay.

GENERAL COUNSEL CARSON: Okay. I did have one more question. This is -- I think this is
probably solely for you, Mr. Dinsmore, although anyone else can comment. When I saw that you basically gave us a sample of five e-books you checked out, that was a rather disappointing sample from my point of view because I'm not sure how much one can tell whatever the percentages are within that five. You've explained your constraints and I understand that.

But apart from that sample, does your organization have other information, just based on what you're hearing from your members, anecdotal evidence and so on, in which you can give us a sense of the scope of the problem today with respect to people who need to be able to get this kind of access to works, who are finding that their experience is that they frequently, often, sometimes, you tell me, unable to get that kind of access?

MR. DINSMORE: I think the best example I can give is the most recent one, which was a telephone conference we had just a week ago with the board members of the National Association of Blind Students. And we were asking them what their experiences were in this area. Generally speaking, the experiences were not good. They usually had to rely on getting someone to scan a book for them and that gets us back to a lot of the problems that you have in the original
condition of the book and the kind of technology --

the OCR technology that is available to you.

They were not delivered, even in those
cases -- we're talking about textbooks here, they were
not delivered usually in a timely fashion so that the
student was usually behind and they had to make use of
readers in some cases, which is a very old fashion way
of doing it and not a very convenient or really usable
one, if you're trying to study.

So, I think in those cases, we're talking
about people who have had serious problems getting a
hold of text, either conventional text or e-text.

GENERAL COUNSEL CARSON: Okay.

ASSOCIATE REGISTER SIGALL: I'd like to
follow up on that.

GENERAL COUNSEL CARSON: Go ahead.

ASSOCIATE REGISTER SIGALL: You mentioned
that you had -- that your organization does product
evaluations of, I assume, Screen Readers and e-book
formats and anything that would be related to those.

In the course of that, does your
organization or any other organization assess for its
members or for the people, the audience of that work,
how inter-operable or how these Screen Readers
interact with different formats? Do you make
assessments about whether a particular reader or particular formats generally work better with Screen Readers versus not, or do you evaluate the products in such a way that would be relevant to our task here of trying to evaluate the exemption?

MR. DINSMORE: Usually we do. What we try to do, because we -- because of the nature of our organization, we can't rate products and say best buy.

What we try to do, and we have used panels of individuals who are blind, is to set up a series of functions that something ought to be able to perform and then what we do is we describe how, say five different Screen Readers were able to perform those functions. The bottom line for the reader is, what performs best for you? How are you going to use this?

ASSOCIATE REGISTER SIGALL: Do you assess e-book formats in a similar way, whether it be Microsoft's format versus Adobe's format versus other formats out there, based on similar criteria of accessibility?

MR. DINSMORE: We've done that both with Microsoft and Adobe products.

ASSOCIATE REGISTER SIGALL: And is this publically available information that we might be able to get?
MR. DINSMORE: It should be available on our website. There is an electronic text of Access World Solutions. If I can find a way of getting that information to you when we adjourn, I'll be happy to give you the way you can get to the material.

ASSOCIATE REGISTER SIGALL: I may have follow-up questions that -- to seek that information too.

GENERAL COUNSEL CARSON: Rob, anymore questions? All right, well, I think this is a very good example of how hearings sometimes can be very, very helpful. I don't think anyone up here, anyway, walked into the room thinking we were going to come out with what we've come out with. I'm not sure what we've come out with, but I think the issues, as they are before us now, are somewhat different than they were -- in our perception when we walked into the room.

I think we will be writing to you very shortly asking for some more information. But let me give you some general guidance right now.

We -- although October 28th seems a long way away, for us to get from here to there, it's a lot of work on our part. We had to make a recommendation to the Librarian. He needs to consider that. So,
we're going to probably want to effectively close the record on this thing no later than a month from now. That's my prediction.

We've talked about a couple of different variations on the same theme, I think. Jonathan Band has suggested maybe we substitute "or" for "and" and maybe that's one possible way of dealing with this. I suggested it's too strong a word, but hearing everything I heard, it occurred to me that perhaps just not even mentioning read-aloud, if read-aloud doesn't seem to be terribly useful in general, might be another way. Or then, there's the functional approach, basically to say, "All right, this is what you've got to be able to," and if it won't -- if there's an access control that is preventing you from using a program that does this, then you can circumvent. That may be another way.

I'd like you all to give some thought to that. If it's possible for you to talk among yourselves -- I mean, if we heard from the three of you in a couple of weeks, "You know, we think we've worked it out and here's something that satisfies all of us," that's just the ideal situation for every single person in this room. We may not get there, but that would be helpful.
And as I said, you'll probably get a letter from us where we might try to spell this out a little more and also spell out some deadlines a little more, but our goal, pretty clearly, is going to be that by a month from now, we want to have heard everything we're going to hear from you, so we can really get down to starting to look at what we have in front of us and make some decisions.

And of course, not withstanding what I've just said to you and the direction of a lot of the comments we've had here, no one should assume that this means anything with respect to whether there is even going to be a recommendation of an exemption or not. But the conversation thus far today has been -- a good deal of it has been on, all right, if there's an exemption, what's the nature of it? And that's sort of the troublesome part, troublesome in that we're not quite sure we see the easy answer to that and that's what we're going to hope that we get some more guidance from you folks on.

All right, thank you very much.

ASSOCIATE REGISTER SIGALL: We'll adjourn until Friday morning.

(Whereupon, the foregoing hearing was concluded at approximately 5:00 p.m.)