

LIBRARY OF CONGRESS

+ + + + +

UNITED STATES COPYRIGHT OFFICE

+ + + + +

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

I-N-D-E-X

	Page
Introduction	3
First Panel: Computer Programs Block Domains and Websites Johnathan Band Steven Metalitz	7
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 Alan Dinsmore Jonathan Band Steven Metalitz	37

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

1:30 p.m.

1
2
3 GENERAL COUNSEL CARSON: Good morning. I'm
4 David Carson. I'm the Copyright Office General
5 Counsel and I'd like to welcome everyone to this
6 Washington, D.C. hearing in the Section 1201 rule
7 making. Mary Beth Peters, a Registered Copyright,
8 unfortunately is home sick today and cannot attend,
9 but she will be reviewing the transcripts.

10 This hearing is part of the on-going rule
11 making process mandated by Congress under Section
12 1201(a)(1), which is added to Title 17 of the United
13 States Code.

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

21 The purpose of this rule making proceeding
22 is to determine whether there are particular classes
23 of works as to which users are or are likely to be
24 adversely affected in their ability to make non-
25 infringing uses, if they are prohibited from

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 circumventing the technological access control
2 measures.

3 Pursuant to the Copyright Office's Notice
4 of Inquiry, which was published in the Federal
5 Register on October 3rd, 2005, the Office has received
6 74 initial comments proposing exemptions to the
7 prohibition on circumvention and 35 reply comments,
8 all of which are available for viewing and downloading
9 from the Copyright Office's website.

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

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

24 The comments, reply comments and hearing
25 testimony will form the basis of evidence in this rule

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 making, which after consultation with the Assistant
2 Secretary for Communications and Information in the
3 Department of Commerce, will result in the Register's
4 recommendation to the Librarian of Congress.

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in this rule making.

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

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

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

23 Our first panel consists of Jonathan Band,
24 testifying for the Library Copyright Alliance, and
25 Steve Metalitz, testifying on behalf of a number of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 joint reply commenters, and they're here to testify on
2 the following proposed exemption, which would be a
3 renewal of an exemption already existing, compilations
4 consisting of lists of internet locations blocked by
5 commercially marketed in-filtering software
6 applications that are intended to prevent access to
7 domains, websites or portions of websites, but not
8 including lists of internet locations blocked by
9 software applications that operate exclusively to
10 protect against damage to a computer or a computer
11 network, or lists of internet locations blocked by
12 software applications that operate exclusively to
13 prevent receipt of e-mail.

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

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

24 As many of you know, there is this ongoing
25 litigation concerning COPA, the Child Online

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Protection Act and one of the issues there is, the
2 Government is arguing that filter -- is that
3 censorware is not an effective means of protecting
4 children and this is, of course, is falling from the
5 Supreme Court's ruling. When the Supreme Court found
6 COPA to be Unconstitutional, it argued that there were
7 less restrictive means available of protecting
8 children and one of the things they mentioned was
9 filters or censorware, depending on your point of view
10 and what you want to call them, and then the
11 Government, again, is arguing that censorware is not
12 an effective means and as part of that litigation,
13 it's been trying to get information from search
14 engines.

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

24 There also is ongoing litigation all the
25 time about spyware, adware and you have companies that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 again, are sort of -- that you can -- when you can put
2 on your computer software that is searching for
3 spyware and adware and then you have the companies
4 that flags whether a certain program is spyware or
5 adware and then there's, again, litigation by the
6 companies that have put that software, claiming that
7 they're not spyware or adware.

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

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

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

24 Again, in the last round three years ago,
25 there was a lot of discussion about whether these --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and this always goes to the effectiveness of these
2 programs. There was arguments that they were
3 typically both over-inclusive and under-inclusive and
4 the issue was how do you demonstrate that over-
5 inclusiveness and under-inclusiveness?

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

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

22 Now, the -- in the reply comments there
23 was a suggestion, well, maybe this exemption has in
24 fact not been very used -- has not been used very
25 often and it is somewhat difficult to determine that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and this is, I think, going to be a bit of a recurring
2 theme with respect to a lot of the existing exemptions
3 -- the renewal of the existing exemptions, that it's
4 going to be often difficult to show whether or not
5 they have been used, because the people who use them
6 are the end users. And so, unless you're able to find
7 a specific end user who has in fact used it and is
8 willing to stand up and say, "I have used this
9 exemption," it is going to be difficult to demonstrate
10 that it has been used.

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

23 What makes it even worse in this specific
24 instance is the fact that the software that is likely
25 -- the censorware software, the software that would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 examined that you would have to engage in the
2 circumvention to determine what the black list of
3 blocked sites is, almost always in accompanied by an
4 End User License Agreement, a EULA. And that EULA
5 almost always prohibits any kind of reverse
6 engineering or circumvention of technological
7 protection measures.

8 So, you have sort of a catch-22 that
9 emerges in this situation, that, you know, an
10 exemption was granted three years ago. People want to
11 use the exemption. They can't use the exemption or
12 they're afraid to use the exemption because if they
13 do, they'll be sued for breach of contract and then,
14 they can't come to you now and say, "Well, we now want
15 to have a renewal of the exemption." But of course --
16 and, you know, we can -- the issue ultimately of
17 preemption of these End User License Agreements, when
18 you have a specific exception under the Copyright Law,
19 that issue has not been decided definitively by the
20 Supreme Court, hopefully some day they will, come to
21 the decision. The case law, as you know, is somewhat
22 unclear and there are decisions going both ways. But
23 certainly, the more recent Circuit Court decisions
24 have -- the Federal Circuit, the Baystate decision and
25 then the Davidson decision in the 8th Circuit suggests

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that there isn't preemption and that that suggests
2 that these users do have -- are right to fear a breach
3 of contract suit and a liability for a breach of
4 contract if they abide by the terms of the specific
5 exemption you granted, but those terms happen to
6 violate the EULA.

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

13 GENERAL COUNSEL CARSON: Thank you. Mr.
14 Metalitz?

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 almost in full on page two.

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

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

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

24 I think if you look at Mr. Finkelstein's
25 reply comment, it tells you a couple of things that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 are relevant here. First of all, I think that's the
2 main place that you would look because the Library
3 Copyright Alliance filing actually says nothing. It
4 says that this exemption ought to be renewed, but it
5 provides no argument or evidence for its renewal.

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

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

19 So, the activity of Mr. Finkelstein, which
20 I think was very explicitly, the type of use that
21 motivated the Office to recognize this exemption in
22 2000 and 2003. He's not doing it anymore. That's his
23 testimony. Now, it's possible that other people are
24 doing it, but I don't think there is any evidence on
25 the record of that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Mr. Band has pointed out that the general
2 topic of censorware and filtering is still a very big
3 topic of public interest and he's absolutely right
4 about that. But the fact that, for example, in the
5 Grokster case filtering was discussed, doesn't have
6 anything to do with this exemption. This exemption
7 isn't about filtering. It's only about a certain type
8 of filtering that consists of a software application
9 that includes lists of internet locations blocked by
10 -- lists of internet locations or lists that have been
11 intended to prevent access to domains, websites or
12 portions or websites.

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

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

24 Mr. Band has suggested two other reasons
25 why -- I think I would characterize his statement as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 reasons why you should recommend renewal of this
2 exemption, even if there isn't evidence that people
3 are making use of it or evidence that people are being
4 inhibited in their non-infringing use because of
5 Section 1201(a)(1).

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

21 And the other -- his other point was that
22 there's a catch-22 situation here because there may be
23 contractual restrictions on circumvention. Well, if
24 that's the case -- first of all, I don't think we've
25 heard -- I'm not sure that that has been brought up

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 before. I don't think it's been brought up in this
2 context before. But even if it's the case, the
3 recognition of an exemption in this area doesn't
4 really solve that problem. If there's a EULA and if
5 it's enforceable and if it's not preempted, then
6 people who violate it, presumably, may be subject to
7 contractual remedies.

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

19 So, our only message here really is to
20 encourage the Register and ultimately, the Librarian
21 to follow the statute and follow the standards that
22 are set out in the -- in her recommendation in 2003
23 and the Notice of Inquiry of 2005 and apply those
24 standards to the record before you -- with regard to
25 this exemption. Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 GENERAL COUNSEL CARSON: Thank you. Mr.
2 Band, would you like to say anything in response?

3 MR. BAND: No.

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

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

17 MR. BAND: Well, I, in preparation for
18 this hearing, called around the likely suspects of
19 people I know who are in -- who do work in this area
20 and what they told me was basically this EULA point,
21 that there -- that the software is out there. That
22 the filtering software is still distributed. It is
23 still distributed with technological protections, but
24 that there are these EULA's and because of the EULA's
25 and because of the recent case law, they are not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 engaging in the circumvention, and that gives rise to
2 this catch-22 situation.

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

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

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

22 MR. BAND: Well, I think that, again, this
23 is sort of a unique situation, given this peculiar
24 catch-22. I mean, there's no question that you did
25 feel three years ago that there was sufficient

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 evidence, and now we have a situation where because of
2 these EULA's, that the community of likely people
3 basically has sort of said, "Well, there's -- this is
4 a pointless activity at this point because of the case
5 law and because of the EULA's."

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

22 LEGAL ADVISOR TEPP: So, all right, then
23 let me take it back the other way because you've sort
24 of lead me there already with your answer. Even
25 assuming that the evidence and the record is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sufficient to meet the standard to grant an exemption,
2 or in this case, renew the exemption, it's essentially
3 your testimony that it wouldn't matter, at least
4 pending some other substantial change or event in the
5 law or marketing practice?

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it as well.

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

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

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

25 So, I'm not objecting in principle to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

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

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

23 GENERAL COUNSEL CARSON: All right, Mr.
24 Band, you talked about things like spyware and adware,
25 but I just want to make sure I understand. You're not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 suggesting that this exemption would assist people who
2 are trying to do research into spyware or adware, are
3 you?

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

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

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

22 MR. BAND: Well, it could be whatever. I
23 mean, it could be spyware or adware or it could be
24 again, this -- the exemption talks about a list of
25 internet locations and, you know, but again, sometimes

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 this -- the software will block locations where you
2 might access things that they -- that Symantec or
3 Norton or whoever considers to be spyware or adware.

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

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

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

23 And you may recall the comments we had
24 last time, which led us to exclude those. That
25 exclusion sounds inconsistent with what you're telling

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 us is part of what you're hoping this exemption would
2 permit people to do. So, I just want to be clear on
3 what you're asking for.

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

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

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

23 GENERAL COUNSEL CARSON: Okay, let's talk
24 about the EULA issue that you spent some time talking
25 about. I want to make sure I understand A) what's in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the record and B) what you've told us you've heard
2 from other people about the EULA issue.

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

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

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

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

19 GENERAL COUNSEL CARSON: All right.

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

21 GENERAL COUNSEL CARSON: So, we know there
22 is some fear on the part of some people that they
23 might be sued, but we don't know the basis for that
24 fear. Is that a fair, accurate characterization of
25 what we know right now?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. BAND: Well, no, I mean, they have said
2 that they're aware of the EULA's and because of the --
3 and they say that's why they're not doing it. They
4 don't want to -- but I don't know if they even met --
5 I mean, your question was, were they specifically
6 threatened by any company and as far as -- I don't
7 know whether they were or weren't. But I was told
8 that it was -- they were concerned by virtue of the
9 EULA's and then also, the recent -- the Baystate and
10 the Davidson decisions and the publicity that went
11 along with that, where people were found to be
12 breaching a contract for, you know, at least in
13 certainly the Baystate, for engaging in something that
14 would clearly be permitted in the Copyright Act.

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

21 MR. BAND: I don't know.

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 out that they've been engaging in this conduct.

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

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

18 GENERAL COUNSEL CARSON: Okay. Mr.
19 Metalitz, I gather the thrust of your case has been
20 that no one has really come forward with any facts.
21 Putting that aside for the moment, are you or the
22 people you represent contesting the legal and policy
23 determinations that were made by the Register three
24 years ago when, based upon the facts in front of her
25 then, she recommended an exemption?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. METALITZ: No, we're not contesting
2 that.

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

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

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

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

22 MR. BAND: Well, my -- the research has
23 been quite interesting in this area. It is a very
24 small community and as I forget, one of you mentioned,
25 that a lot of -- this small community seems to be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 turning on itself a lot and -- there are a lot of
2 internal arguments and I'm not quite sure, it's a bit
3 of a mystery, what the basis of those disputes are.
4 They don't seem to be substantive, but they do
5 certainly seem to fight a lot among each other.

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

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

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

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

24 LEGAL ADVISOR KASUNIC: Okay, and then
25 before this implosion within this community, how much

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 comment, criticism, news reporting, teaching,
2 scholarship or research, are you aware of that has
3 been possible as a result of the exemption?

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

20 And again, but I have no idea on what
21 basis -- you know, what basis -- you know, what
22 evidence they are using to show that these filters are
23 not effective. I mean, for all I know, the Government
24 is out there circumventing as we speak, relying on
25 this exemption.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 GENERAL COUNSEL CARSON: You'd need
2 subpoenas to get the list.

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

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

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

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

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

25 MR. METALITZ: Yes, I think that would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 an appropriate consideration. I don't know that
2 there's any evidence to suggest that anyone is getting
3 -- trying to get into this field and is inhibited by
4 Section 1201(a)(1).

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

12 GENERAL COUNSEL CARSON: Steve Tepp has
13 another question.

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

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

18 LEGAL ADVISOR TEPP: Just to clarify, in
19 your initial comment, you made the argument about the
20 need to continue existing exemptions to prevent back-
21 sliding. And a particular example you gave was in the
22 e-book context and we'll get to that shortly. But I
23 just wanted to clarify, because from what it sounds
24 like you've said this afternoon, that's not the
25 argument you're making here, that -- but rather that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 there continue to be access controls, the
2 circumvention of those being a legal issue, both in
3 terms of 1201(a)(1) and the EULA's that we've been
4 discussing. Is that correct?

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

9 LEGAL ADVISOR TEPP: Okay. Thank you.

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

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

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

17 MR. BAND: I have no questions.

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it's 2:16 p.m. now. I guess we will reconvene at 3:15
2 p.m. Thank you.

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

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

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

22 As with the earlier panel today, we'll let
23 each of the three witnesses speak. We'll start with
24 Mr. Dinsmore then Mr. Band then Mr. Metalitz. We'll
25 then have questions from the panel and finally, if any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of the witnesses would like to ask questions of each
2 other, that will be the final phase.

3 With that, Mr. Dinsmore, you may proceed.

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

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

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

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

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

25 Our interest in access to books and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

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

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

21 So, with all of the progress, why do we
22 support the exemption? Quite simply because we don't
23 think that we are there yet. Access still does not
24 work in the seamless fashion necessary to give a blind
25 reader the same use available to someone who can read

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealgross.com

1 print. That is why this limited exemption should stay
2 in place.

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

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

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

23 It allows us to look at chapters the way
24 a blind person would look at a chapter, that is to go
25 back exactly the way we do. To be able to look at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 footnotes, to preview indices and also, to look at
2 items like the chapter headings.

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

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

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

22 It is the Screen Reader with its text-to-
23 speech system, usually resident in a computer, which
24 does allow blind persons to do everything with the
25 book that we do. That is, as I said, to flag pages,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 highlight portions, scan text for key words. It's
2 also significant in that it voices and allows
3 navigation through the commands necessary to recognize
4 and to access copy-protect systems.

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

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

19 We tested five e-books, which we
20 downloaded with Adobe or Microsoft Reader formats. Of
21 the five books, only one was accessible. I should
22 add, we referenced this in our submitted statement
23 that during the tests, help through the download
24 process often required the assistance of a sighted
25 person.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 A number of critical issues became
2 apparent as we conducted as close to a real world test
3 to gain access to digital e-books through the read-
4 aloud function and to attempt to enable the Screen
5 Reader to render the text in a specialized format.

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

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

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

25 Our evaluation pointed out two other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 significant problems. The site we used, Amazon.com,
2 does not indicate in advance whether content will be
3 accessible. Messages provided by the Microsoft Reader
4 software, indicating that content cannot be accessed
5 by a Screen Reader, are not voiced by the Screen
6 Reader or by the Microsoft text-to-speech
7 supplementary software. In that case, sighted
8 assistance was required to confirm that the content
9 could not be read.

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

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

20 This set of circumstances is narrow and we
21 hope that three years from now we will be able to say
22 that the system works and we don't need this anymore.
23 But for now, if we lose it, blind readers are stuck.
24 If they attempt to access under those circumstances,
25 they can't be held liable for a copyright violation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 In conclusion, we found that important works
2 were inaccessible due to copy controls. As the
3 statute anticipates, the Copyright Office will create
4 exemptions when groups, which would be otherwise
5 excluded, are harmed by this situation. We believe
6 evidence exists to support another exemption period.

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

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

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

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

22 And to some extent, some of the disconnect
23 between the testimony that the AFB submitted and then,
24 the reply comments, really focused on the fact that
25 for some of these works in the survey, they were --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 they could be accessed with the read-aloud function,
2 but they could not be used with the Screen Reader
3 function. And I think it's critically important, as
4 Mr. Dinsmore has explained, that the Screen Reader
5 function be enabled, if necessary.

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

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

23 And I think at that point, then it becomes
24 very clear that the problem and the survey
25 demonstrates that in many -- at least, out of these

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 five, that in four instances of the five, the Screen
2 Reader functionality did not work.

3 And let me point out that even to the
4 extent that maybe of those four, that in three
5 instances, the read-aloud function did work. That
6 still indicates that in one instance, even the read-
7 aloud function didn't work. So, that means that in
8 that one book, neither the read-aloud function nor the
9 Screen Reader function worked. So, you can say,
10 "Well, you know, it's just one book." But if you
11 says, "Okay, based on five, that's 20 percent." And
12 I guess that really goes to the bigger point that
13 whether it's 10 percent of the books denied this
14 functionality or 20 percent or 50 percent or 80
15 percent of the e-books, it really doesn't matter. The
16 point is, as long as there are some e-books that
17 visually disabled readers need to access, then the
18 unavailability of the Screen Reader function is
19 critical. If you are a student and the book is
20 assigned reading and you can't use that book, it
21 doesn't do you any good, the fact of knowledge that
22 many other books are out there that you -- that are
23 Screen Reader enabled, the fact that the book that you
24 need to use is not Screen Reader enabled is a serious
25 problem.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And the basic problem -- the continuing
2 problem of the visually disabled community with access
3 to books -- it was recognized recently by the AAP.
4 They announced just earlier this month, the
5 alternative format solution initiative and it's
6 specifically targeted at trying to increase the
7 availability of materials to the blind and to the
8 visually disabled.

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

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

21 But even, you know, we're sort of not
22 conceding that it is not being used by individuals out
23 in the field. But even if it were the case that
24 people weren't using the exemption, this is where the
25 back-sliding issue that I raised in -- that we raised

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in our written comments comes to play. I mean, the
2 fact that there is an exemption on the books that does
3 allow circumvention for the purpose of enabling Screen
4 Readers by itself, gives an incentive for e-books
5 publishers to enable Screen Readers. And I think that
6 eliminating the exemption would diminish the
7 likelihood that publishers would do that.

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

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

21 And finally, the final point I'd like to
22 make is, there has been no demonstration that this
23 exemption has caused any problems, that -- and again,
24 to the extent that it is -- again, even if it is not
25 being used regularly or in large -- or frequently,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 between the fact that there is this back-sliding issue
2 and the fact that there has been no evidence of any
3 harm, I just have to wonder why publishers are opposed
4 to the existence of this exemption, which is important
5 to this under-served community. Thank you very much.

6 GENERAL COUNSEL CARSON: Okay, Mr.
7 Metalitz, you can speak now.

8 MR. METALITZ: Thank you, and thank you,
9 once again, for the chance to present the perspectives
10 of the joint reply commenters, 14 organizations,
11 including the AAP and the University presses, as well
12 as 12 others.

13 First, I'd like to just clarify the
14 record, based on the introduction to the testimony
15 that you gave, Mr. Carson, and we're not here in
16 opposition to this -- to the recognition of this
17 exemption. We are here urging the Register and
18 ultimately, the Librarian, to apply the standards that
19 they set forth in the -- that they derive from the
20 statute and that they set forth in the 2003
21 recommendation and in the 2005 Notice of Inquiry
22 regarding the burden of proof and the quantum of proof
23 that is necessary for recognition of an exemption.
24 And in particular, to apply the rule that exemptions
25 don't renew automatically. Exemptions only --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 exemptions expired unless sufficient new evidence is
2 presented in each rule making and to refer directly to
3 what Mr. Band said just a moment ago, the exemption
4 isn't renewed simply because the opponents of the
5 exemption don't prove that the adverse effects in a
6 previous rule making have not been cured.

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

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

22 I think that the testimony today from Mr.
23 Dinsmore has been very illuminating and I think it
24 does help to supplement the record and that's why it's
25 a little bit hard to say whether the record currently

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 would meet the standard that you've set it whether it
2 doesn't, because it's a bit of a moving target.

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

13 I think the most important point that we
14 were trying to make in our reply comment with respect
15 to the five titles was that in each case, the AFB only
16 looked at one edition of those e-books. And in, I
17 believe, four out of the five cases, there were in
18 fact more than one edition available and the issue is
19 not contrary perhaps to what Mr. Band was saying,
20 although I'm not sure that he meant this. The issue
21 is not whether every edition is accessible, either
22 through Screen Reader or through the read-aloud
23 function. The issue is whether any edition is
24 accessible. And I think that's quite clear in both
25 the text of the existing exemption and in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 explanation of it that was provided in the
2 recommendation that the Register made in 2003 on page
3 74. It stated the exemption would not apply to a work
4 if at the time of circumvention, an e-book version is
5 on the market for which either the read-aloud function
6 or Screen Readers are enabled.

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

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

20 Now, I will say, all we did was look at
21 what statements and representations were made about
22 those editions. We didn't test them the way AFB has
23 done. So, we're not asserting, necessarily, that 60
24 percent or 80 percent of those titles are accessible,
25 but we are asserting that the publisher is claiming

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that 60 percent of those -- or the distributor,
2 someone is claiming that 60 percent of those are
3 accessible and that's probably what needs to be
4 verified.

5 Additionally, again, quoting from page 74,
6 "If the e-book or an accessible digital text is
7 available through an authorized entity, under Section
8 121, such as Bookshare.org, the exemption to the
9 prohibition will not apply." And in 2003, there were
10 11,000 titles available through Bookshare. I checked
11 the Bookshare.org website this morning and they now
12 state that they have 26,000 titles available. So,
13 there certainly is an increased availability through
14 that method and I believe there may well be an
15 increased availability through the commercial
16 publications as well.

17 This -- I am a bit concerned about --
18 well, let me put it this way. I'm happy to hear what
19 Mr. Dinsmore said about, you know, we're making some
20 progress and maybe three years from now, we won't need
21 this exception anymore. I think that -- we were a
22 little concerned by the statement in the initial
23 comments that said, "As digital publishing matures,
24 this situation can only grow worse." We hope that it
25 will grow better and we hope we're -- that publishers

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 are working to make it better. I'll certainly concede
2 that we're not at 100 percent yet and we're not even
3 at 100 percent of the test that's in the exemption,
4 which is, does any edition have these features? But
5 I think we are making progress and hopefully that will
6 -- the need for this will diminish over time.

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

20 And finally, just one additional point
21 that we would like to make, the 2003 -- or the 2002,
22 2003 proceeding, the AFB asked for an exemption to
23 cover all literary works and the Register properly
24 turned that definition of a class as over broad. This
25 is on page 72 of the 2003 recommendation. And after

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 considering a number of factors, came out with the
2 exemption that you see -- that is in place now. And
3 it wasn't clear, entirely clear to us, whether AFB was
4 asking for this same exemption to be continued
5 verbatim, or whether they were asking to go back to
6 the literary class. That seemed to be their initial
7 statement in the comment. If it's the later, of
8 course, we have a concern about the breath of that.

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

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

23 MR. BAND: Well, the only thing that I
24 would add is not -- I agree with Steve's point about
25 the any edition, so that any reasonably accessible

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 edition would -- if one reasonably accessible edition
2 did have the Screen Reader function available, then
3 that would obviously be sufficient to mean that a
4 person could not take advantage of the exemption. You
5 certainly would not -- it certainly would not be
6 required that every exemption -- every edition,
7 however, still, there is always the issue about, you
8 know, reasonable availability and the fact that you
9 might -- you know, there might be some website
10 somewhere or some seller somewhere on the other side
11 of the country that's making something available, but
12 you have not -- again, let's say if it's physical e-
13 book that they're selling in the stores somewhere or
14 that you can't get to, then that might not be good
15 enough. But certainly, if it's on the internet or
16 something and there's an easy way for a visually
17 disabled person to get it, then you would not be able
18 to take advantage of that exemption.

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

23 MR. BAND: Right.

24 GENERAL COUNSEL CARSON: And Mr. Metalitz,
25 would you be comfortable with a reasonable

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 availability requirement?

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

6 GENERAL COUNSEL CARSON: Got it.

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of what they buy until they buy it.

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 change is probably well worth looking at.

2 MR. BAND: The and/or part.

3 MR. DINSMORE: Right.

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

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

23 MR. DINSMORE: Well, the context is
24 probably very, very important because there's much
25 more than context involved. It does do that. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Screen Reader also allows you to navigate reliably
2 through that context. There are not currently very
3 many products that we're aware of that we would
4 characterize as read-aloud and have an equivalent
5 function to that. That's very important because if
6 you think about how you handle any document, there are
7 certainly some popular novels that are real page
8 turners, that you go through just as fast as you can.
9 That's not normally the way we do this.

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

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

21 MR. DINSMORE: It's frankly, very difficult
22 to know. We have talked, for example, with the
23 National Association of Blind Students who still find
24 it extremely difficult to get access to books and most
25 of them prefer a Screen Reader approach, primarily

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 because of the kind of book that they are using.

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

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

15 MR. DINSMORE: No.

16 MR. BAND: No.

17 MR. DINSMORE: It's very difficult to find
18 that, by the way, because this is usually a private
19 act that someone is doing and in order to find the
20 kind of information that is needed to go into to, in
21 effect, being able to turn off the switch, is
22 complicated. It's not something that, in fact, I
23 believe is even lawful to advertise that you have
24 something like that. So, it's very difficult to track
25 that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 But we prefer to keep that exemption, in
2 the case that someone does find that they cannot meet
3 their needs in another format, they cannot meet their
4 needs with another -- or any other edition, that if
5 they can find a way to do that, they're not going to
6 be prosecuted.

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

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

22 LEGAL ADVISOR KASUNIC: But then, just as
23 you said, then that would not be covered by the
24 exemption, so the exemption is not helping those
25 services.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. BAND: Well, that's right, because of
2 the way 1201 is written and the way the exemption is
3 written, so -- but you know, that's right. This
4 exemption presumably would -- well again, that would
5 be a matter of legal interpretation that's above
6 certainly my pay grade, as to whether an exemption
7 would somehow apply to a person providing the service
8 to do -- perform an exemption that is permitted under
9 the -- or provide a technology to enable someone else
10 to do it is permitted under the -- under an exemption.
11 But that's an issue for another day.

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

25 MR. BAND: Well, ultimately, obviously that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

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

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

23 LEGAL ADVISOR KASUNIC: Mr. Dinsmore,
24 before turning to the particular e-book cited in AFB's
25 comments, I'd like to clarify a little bit about some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 general issues regarding e-book formats. And I'd like
2 to find out a little, and specific about the Microsoft
3 Reader format. It was my understanding, and I'm not
4 sure that that's correct, that these lit.files are
5 essentially image files, such that they're not
6 generally compatible with Screen Readers as being
7 image files and difficult to -- they're not OCRed in
8 that format. Can you explain a little about the
9 Microsoft Reader format and whether that generally is
10 something that is problematic?

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

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

25 Increasingly, we're looking at some that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

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

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

19 The Reader software that that is using has
20 various kinds of capabilities to look at and to
21 analyze what's on the screen and to give some signal
22 as to what's on the screen and ask you for some
23 decisions about how you might want to function. But
24 it's really usually, if you thinking about, you know,
25 the PDF issues, it's really that text itself and how

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it's structured.

2 LEGAL ADVISOR KASUNIC: Is there more of a
3 problem with certain file formats than others? You
4 keep mentioning PDF --

5 MR. DINSMORE: Yes.

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

9 MR. DINSMORE: The formats that are most
10 accessible are those that have structure to them and
11 that's something that the publisher puts into the work
12 and it is done more commonly in other kinds of work
13 like textbooks right now. By structure I mean, it has
14 a way in which either a very upgraded read-aloud
15 function or currently, a pretty good Screen Reader
16 function, can actually have something on the screen.
17 PDF is almost like a picture and it doesn't support.
18 Although Adobe now has some systems that will work
19 with that and will make it more accessible, it is
20 still problematic in that respect, which is why we
21 were very encouraged at some of the work that, I
22 think, used to be the Open E-Book Forum, I think it's
23 now the International Digital Book Forum, is looking
24 at in terms of creating some sort ways in which books
25 will be structured, because I think they are also

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 conscious that there are not only blind, there are
2 visually impaired users out there. There are some
3 sighted users who would like to use better navigation
4 tools than currently exist.

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

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

25 LEGAL ADVISOR KASUNIC: What does the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Microsoft text-to-speech component do or add to the
2 Microsoft Reader?

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

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

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

23 This is one of the other problems that is
24 a problem with the older legacy read-aloud systems, is
25 that they're somewhat like voice technology of old.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 It's great. It speaks out on the screen, but once
2 you're asked to do something, it doesn't tell you
3 whether you did it or not. And that can be crucial
4 when you're trying to navigate even text that is
5 properly structured.

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

10 MR. DINSMORE: There are several different
11 manufacturers and the price of the product depends a
12 great deal on the quality of the speech that it's
13 going to give you. It runs from about \$400 up to
14 about \$1,800. And what's the difference? It's
15 basically you're getting, as you move, upgrade, you're
16 getting better speech and that's important also. If
17 you're truly a blind techie who has been raised in the
18 system, you're probably not going to be all that
19 terribly uncomfortable with the quality of the
20 mechanical speech that is available at the lower end.
21 You can deal with it. But once you've heard the
22 better stuff, the newer more synthesized devices that
23 have various ways in which you can command the speech
24 to perform, you're going to be a lot happier. Those
25 are where the major differences are.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 LEGAL ADVISOR KASUNIC: Now, turning to the
2 five books that you had -- that AFB had used as
3 representative samples for this test, I wanted to go
4 through each of those and just see whether you had any
5 other thoughts about some things that I had looked at
6 with those.

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

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

21 MR. DINSMORE: No, we had, frankly, a
22 limited amount of time and money to spend on this and
23 one of the problems that we found with most of these
24 is that you had to buy the book to find out whether it
25 was accessible.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 With regard to your reading experience, I
2 wouldn't have any way of evaluating that, unless I
3 actually heard what the performance was of the speech
4 and whether or not you went through all of the
5 navigability features that a blind user would have to
6 use, or would might not have to use, but might desire
7 to use.

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

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

24 As for the The Amber Spyglass, that was
25 also available in Adobe and Moby Pocket Reader and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 after looking at that in the Adobe format, it turned
2 out that that was even in the Adobe format, that the
3 read-aloud function and accessibility features were
4 turned off on that particular work.

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 completely lost the point.

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

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

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

21 If the purpose is such that we can only
22 say, "We can just give you the back of the bus on
23 this," and that's it, then I think we have real
24 problems and I think we would certainly encourage you
25 to look very carefully at whether or not we really

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 want to have an argument that just because something
2 is available in an audio text format, or a not very
3 suitable read-aloud function, that there is no
4 problem.

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 what might be available with different products.

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

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

23 LEGAL ADVISOR KASUNIC: Thank you.

24 GENERAL COUNSEL CARSON: Jule, any
25 questions?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 ASSOCIATE REGISTER SIGALL: Just a couple.
2 First, explore this suggestion that you -- we would
3 change the exemption to an "or" instead of an "and"
4 between the two types of features that might be
5 controlled or limited by the -- by an access control.
6 I'm trying to get a sense of what the effect of such
7 a change would be, because right now as the statute --
8 as the exemption reads, something is subject to the
9 exemption only where the access controls limits both
10 the read-aloud function and the Screen Reader
11 function.

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

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

24 MR. DINSMORE: No, I don't. I don't have
25 a break-out on that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 ASSOCIATE REGISTER SIGALL: Okay. And I
2 guess on the converse situation, do you have any sense
3 whether there's -- it seemed -- I took from your
4 testimony that the converse may be more true, where
5 read-aloud may be enabled, but Screen Reader
6 interaction with the format is not possible.

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

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

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

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

24 ASSOCIATE REGISTER SIGALL: So, the
25 accessibility to someone doesn't necessarily depend on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 doesn't depend on the type of Screen Reader software
2 they may be using in your case?

3 MR. DINSMORE: No.

4 ASSOCIATE REGISTER SIGALL: Okay.

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

10 MR. DINSMORE: Yes.

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

24 MR. DINSMORE: Yes, I think your
25 imagination is pretty much on target.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 GENERAL COUNSEL CARSON: Okay, good.
2 That's very helpful in understanding it. Well then,
3 what that's leading me to think is that -- and I'm
4 just imagining what your preferences might be, and
5 let's see if I'm right, and then if I am right, I'd
6 like to hear you elaborate on why we might need to go
7 in that direction in your view.

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

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

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

21 MR. DINSMORE: Pardon me?

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

24 MR. DINSMORE: Darn, we thought we would
25 try again.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 GENERAL COUNSEL CARSON: What I mean is, we
2 can't make all books accessible, is what I'm saying.

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

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

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

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

23 MR. DINSMORE: Well, I think that's the
24 direction we would like to head in this. The Screen
25 Reader is always a better system. The read-aloud

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 function does not have that navigability, typically,
2 although improvements are being made.

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

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

20 MR.METALITZ: Well, I've been given a lot
21 to think about here this afternoon, because of course,
22 that's not what the existing exemption -- if the
23 existing exemption procedure were different premise,
24 which is that either of these -- as long as you have
25 either of these in some available edition, you're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 okay. And I think I'm a little confused now about
2 whether the proponents are seeking the existing
3 exemption or the "or", you know, changing the "and" to
4 an "or", or as you have just suggested, Mr. Carson,
5 eliminating the reference to read-aloud function and
6 just saying that if the Screen Reader is not enabled,
7 then it's okay to circumvent.

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

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

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

25 The third reaction that I have is, you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 know, as this -- the question really is -- I'm really
2 hearing two things that are a bit troubling. One is
3 that this -- that publishers really shouldn't be able
4 to prevent circumvention unless they have -- unless
5 100 percent of their titles are accessible. And
6 second, maybe they need to have the state of the art
7 form of accessibility, the best form of Screen Reader
8 function before they can say, "Well, no, there can't
9 be circumvention."

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

22 So, these are some of the concerns that I
23 have from what I'm hearing and that again, make it a
24 little difficult to evaluate because if we're talking
25 about the existing exemption, I think I understand

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 what that entails, but I'm not sure that I really
2 understand what it would mean to either change the
3 "and" to an "or" or basically eliminate the read-aloud
4 function all together as something that's --
5 constitutes accessibility -- enough accessibility to
6 make the exemption inapplicable.

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

24 So, I just think that that would be the
25 better approach, rather than sort of carving out

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 categories because also then, that leads into a whole
2 definitional quandary, along the lines of what Steve
3 was saying and as a result, I think that we -- you
4 sort of avoid all of that by simply replacing the
5 "and" with an "or".

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

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

19 MR. METALITZ: Wouldn't you have to have
20 both in order to prevent -- in order to come outside
21 the scope of the exemption? I think if it's "or",
22 then you have to have both and whether one is better
23 than the other, one really isn't very functional, you
24 would still have to have both and as it stands now, if
25 you have either, then you're okay, as I understand it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. BAND: Well, I guess the question is,
2 who's who and who's okay? I mean, from my
3 perspective, it just seems to make sense that look, we
4 want to -- the goal here is to help the visually
5 disabled and in a way that is not having any impact,
6 any negative impact right now on the publishers and I
7 don't foresee this ever having any negative impact on
8 the publishers. It's going to be used really in very
9 rare circumstances because -- for all the reasons we
10 already enumerated.

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

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

25 I think I may be hearing that a really

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 good read-aloud system might be fine, but a not so
2 good read-aloud system wouldn't. Is that where we are
3 or is that not where we are?

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

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

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

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

21 GENERAL COUNSEL CARSON: Let me suggest
22 something else and get your reaction to it, and you
23 may have to think about this. You may not have an
24 initial reaction that's very reliable. But it's
25 starting to strike me that what you call it isn't so

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 important, it's what it does and if we're going to
2 have another exemption for another three years,
3 perhaps instead of talking about a Screen Reader or a
4 read-aloud function, if there's a way to come up with
5 a statement that describes what it does, what the
6 feature that you want to be able to use does in a way
7 that A) satisfies the people who need to be able to
8 get access to these works who can't right now, and B)
9 is reasonably clear, so that anyone trying to look at
10 a regulation that incorporates that description into
11 the regulation can say, "Okay, yes, I can see that
12 this qualifies or this doesn't," and you don't have to
13 start guessing about whether you're within or outside
14 the scope of the regulation or the exemption.

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

18 MR. DINSMORE: It's an interesting approach
19 because in the world of technology regulation what we
20 have found, and this may be where we would want to go
21 with this, is an example would be Section 508 of the
22 Rehabilitation Act that talks about electronic access
23 technology. They steadily moved away from the
24 direction of trying to tell people what technology you
25 had to buy. They established a performance standard.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 That's not difficult to do.

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 performance standards.

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

25 What we're hearing today is that there may

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 be some major distinctions between the two and there
2 may be reasons why one of them, at least in its old
3 fashion sense, doesn't really do that job and the
4 other one does.

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

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

25 GENERAL COUNSEL CARSON: Anyone else have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 any reaction to that at the moment?

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

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

14 MR. METALITZ: I imagine -- I think it's a
15 good idea to find out if there are performance
16 standards out there that may have or already have, you
17 know, addressed this. I think, you know -- I don't
18 know the answer to that and I think one concern would
19 be are these aspirational standards that, you know,
20 this is what we're aiming for down the road or are
21 these more descriptive about what products that are
22 out in the market today now do. Because of course,
23 publishers are -- here, are somewhat at the mercy at
24 technologists for this. I mean, the publishers are --
25 you know, the technologists are vendors to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 publishers and what's available to them, in terms of
2 the different -- you know, the different formats is a
3 limited universe and I'm sure there are market
4 pressures one way or the other.

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

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

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

23 MR. METALITZ: Well, I think it would be
24 important to know that as a general matter because
25 that might tell you something about how great the need

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is for having a similar exemption in the future. It's
2 not -- as I think the Register pointed out in the
3 recommendation the last time, it's not always just a
4 quantitative question, even on the censorware
5 exemption we were talking about earlier today. Very
6 few people were using it, but still, it had -- she
7 said there was some significant value to it.

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

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

18 So, I think it would be very valuable to
19 have that. I recognize, as people said before, it's
20 not always possible to determine that. And it's going
21 to vary depending on the characteristic of the
22 exemption, I think. We have -- in the hearing last
23 week, I think we had testimony about -- from one
24 person who is using the existing exemption and he
25 described -- that is the internet archive, and he

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 described, you know, fairly, specifically how he's
2 using it and why he wants to continue using it and so
3 forth and I think that was very illuminating.

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

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

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

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

25 So, the fact that -- and, you know, again,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

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

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

25 GENERAL COUNSEL CARSON: Steve, would you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 agree there's -- we have no reason to believe that the
2 existing exemption has had any negative impact on the
3 exemption?

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

13 I would agree with Jonathan that in this
14 case, there is no question that there are some e-books
15 out there that aren't enabled and certainly, that are
16 not enabled for a Screen Reader, but also that are not
17 enabled for read-aloud, just looking at the existing
18 exemption. I don't think it follows ipso facto that
19 the exemption -- the same exemption should be
20 recognized because partly this is a question of degree
21 and partly is a question of causation really, the
22 extent to which the reduced accessibility or lack of
23 accessibility by visually impaired people is the
24 result of this prohibition. So, I don't think it --
25 I don't think we can say well, because the problem has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not totally gone away, therefore, we should have the
2 same exemption. I'm not suggesting that you're saying
3 that. But I -- and I do agree with you that this is
4 a little -- may be a little bit different than
5 perhaps, say the internet archive exemption where I
6 think without having somebody explain how they're
7 actually using the exemption, it wouldn't be so
8 apparent why it was needed.

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

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

21 I would not like to see this particular
22 exemption have a preponderance of evidence on the
23 numbers of times that someone was unable to access.
24 But I think if you -- with a Screen Reader, for
25 example, that if you put forth something like a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 performance standard, it will probably be easier for
2 that kind of evidence to be gathered because you'll
3 have better knowledge of just what it is you're asking
4 this thing to function. What's the mode that it's
5 suppose to be functioning in? And it will probably be
6 easier for us to ask people, "Were you able to get it
7 to function that way?" We have a more specific
8 question we can ask.

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

25 But then, you know, to say whether, you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

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

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

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

21 But, you know, the other Circuits,
22 probably not. Second Circuit, probably it would
23 interpret it, you know, in a different way. But the
24 -- I think the point is, all I'm saying is that these
25 various issues sort of collapse into each other.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And so, again, it seems to me that -- you
2 know, to say, well, is the problem the DRM or is the
3 problem the prohibition on the circumvention of the
4 DRM? At the end of the day, it's the same thing.

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

13 GENERAL COUNSEL CARSON: Bookshare.

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 there should be an exemption in this area.

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

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

17 MR. DINSMORE: Bookshare is basically using
18 a scanning technology for their books, okay. A
19 scanning technology is not the same thing as what
20 you're going to get when you have a properly formatted
21 book. The scanning technology is very much dependant
22 on a number of things, that is the quality of the book
23 in the first place, the quality of the materials that
24 -- sorry, not the materials, but the quality of the
25 technology that you're using for optical character

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 recognition. The final problem with that is, while
2 you do have a book that is accessible -- it is
3 accessible to you, you can read this book. You don't
4 have navigation features to this.

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

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

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

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. BAND: But of course, 26,000 books is
2 just a fraction of --

3 MR. METALITZ: Sure.

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

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

8 GENERAL COUNSEL CARSON: A fraction of
9 what, because one question I would have and probably
10 no one here knows, but maybe someone has a sense,
11 26,000 books in Bookshare. How many e-books are out
12 there? How many e-book titles are out there, rather?

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

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

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

22 GENERAL COUNSEL CARSON: E-book titles?

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

25 GENERAL COUNSEL CARSON: Okay. E-books are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 obviously a fraction of that.

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

3 GENERAL COUNSEL CARSON: Okay.

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

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

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

19 Steve, let me ask you, the first words out
20 of your mouth here were, "We don't oppose this
21 exemption." But you then went on to say essentially,
22 you do think that people need to meet their burdens of
23 proof and so on. So, I'm not quite clear where you
24 and your clients are on this. Are your clients here
25 telling us that this is not an exemption based on the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 record before us that ought to exist for the next
2 three years, or are you telling us just be cautious?
3 Or are you telling us -- what are you telling us?

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

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

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

22 LEGAL ADVISOR TEPP: I had several -- well
23 --

24 GENERAL COUNSEL CARSON: I finished mine.

25 LEGAL ADVISOR TEPP: Okay, I will. We're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 also over the time allotted, so I don't want to
2 belabor anything.

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

6 MR. METALITZ: You're directing --

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

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

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

23 LEGAL ADVISOR TEPP: Very well. Okay.

24 GENERAL COUNSEL CARSON: Okay. I did have
25 one more question. This is -- I think this is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 probably solely for you, Mr. Dinsmore, although anyone
2 else can comment. When I saw that you basically gave
3 us a sample of five e-books you checked out, that was
4 a rather disappointing sample from my point of view
5 because I'm not sure how much one can tell whatever
6 the percentages are within that five. You've
7 explained your constraints and I understand that.

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 condition of the book and the kind of technology --
2 the OCR technology that is available to you.

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

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

13 GENERAL COUNSEL CARSON: Okay.

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

16 GENERAL COUNSEL CARSON: Go ahead.

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

21 In the course of that, does your
22 organization or any other organization assess for its
23 members or for the people, the audience of that work,
24 how inter-operable or how these Screen Readers
25 interact with different formats? Do you make

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 assessments about whether a particular reader or
2 particular formats generally work better with Screen
3 Readers versus not, or do you evaluate the products in
4 such a way that would be relevant to our task here of
5 trying to evaluation the exemption?

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

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

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

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

23 ASSOCIATE REGISTER SIGALL: And is this
24 publically available information that we might be able
25 to get?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. DINSMORE: It should be available on
2 our website. There is an electronic text of Access
3 World Solutions. If I can find a way of getting that
4 information to you when we adjourn, I'll be happy to
5 give you the way you can get to the material.

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

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

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

22 We -- although October 28th seems a long
23 way away, for us to get from here to there, it's a lot
24 of work on our part. We had to make a recommendation
25 to the Librarian. He needs to consider that. So,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we're going to probably want to effectively close the
2 record on this thing no later than a month from now.
3 That's my prediction.

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

18 I'd like you all to give some thought to
19 that. If it's possible for you to talk among
20 yourselves -- I mean, if we heard from the three of
21 you in a couple of weeks, "You know, we think we've
22 worked it out and here's something that satisfies all
23 of us," that's just the ideal situation for every
24 single person in this room. We may not get there, but
25 that would be helpful.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And as I said, you'll probably get a
2 letter from us where we might try to spell this out a
3 little more and also spell out some deadlines a little
4 more, but our goal, pretty clearly, is going to be
5 that by a month from now, we want to have heard
6 everything we're going to hear from you, so we can
7 really get down to starting to look at what we have in
8 front of us and make some decisions.

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

21 All right, thank you very much.

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

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

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701