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RULEMAKING HEARING: EXEMPTIONS FROM PROHIBITIONS ON
CIRCUMVENTION OF TECHNOLOGICAL MEASURES THAT CONTROL
ACCESS TO COPYRIGHTED WORKS

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THURSDAY,
MAY 15, 2003

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The hearing was held at 9:00 a.m. in room 2002-4C, UCLA Law School Moot Courtroom, Los Angeles, CA, Marybeth Peters, Register of Copyrights, presiding.

Present:

MARYBETH PETERS

Register of Copyrights

DAVID CARSON

General Counsel of Copyright

CHARLOTTE DOUGLASS

Principal Legal Advisor

ROBERT KASUNIC

Senior Attorney of Copyright

STEVEN TEPP

Policy Planning Advisor

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WITNESSES:

ROBIN GROSS
IP Justice

MIA GARLICK
IP Justice

STEVE METALITZ
Joint Reply Commenters

BILL KREPICK
Macrovision

DEAN MARKS
AOL Time Warner

GWEN HINZE
Electronic Frontier Foundation

REN BUCHOLZ
Electronic Frontier Foundation

ERNEST MILLER
Information Society Project,

Yale LS

KATHY GARMEZY
DGA

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A-G-E-N-D-A

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DVD - Tethered/alternative platforms
DVD - Non-infringing uses**

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

9:05 a.m.

1
2
3 MS. PETERS: Good morning. I'm Marybeth
4 Peters, the Register of Copyrights, and I would like
5 to welcome everyone to this fifth and last day of
6 hearings in the Section 1201 Anti-Circumvention
7 Rulemaking.

8 As many of you know, the purpose of the
9 rulemaking proceeding is to determine whether there
10 are any particular classes of works as to which users
11 are, or are likely to be, adversely affected in their
12 ability to make non-infringing uses if they are
13 prohibited from circumventing technological measures
14 that control access.

15 Today there are three sessions and the
16 very first one will look at audiovisual works and
17 motion pictures. Then we'll go to another part of
18 audiovisual works and motion pictures where we look at
19 public domain, ancillary, and sole source material.
20 We'll end up with region coding.

21 I think all of you know that the reply
22 comments and hearing testimony and any questions that
23 follow it will form the basis of the evidence in this
24 rulemaking which in consultation with the Assistant
25 Secretary for Communications and information of the

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1 Department of Commerce will result in my
2 recommendation for the Library of Congress.

3 I probably should point out that Jeff
4 Joyner, who is an attorney with the National
5 Telecommunications and Information Administration, is
6 here and he's part of this process. Mike Hughes is an
7 attorney for the General Counsel of the Library of
8 Congress is here and he, too, will play a role in this
9 process when the Library reviews my recommendation.

10 The librarian has to make the
11 determination by October 28th. He will have to
12 determine whether or not there will be any exceptions
13 against circumvention during the next three-year
14 period which is October 28, 2003, through October 28,
15 2006.

16 The entire record is posted on the
17 Copyright Office websites and that will include the
18 transcripts of all of the hearings. The transcripts
19 go up about one week after each hearing. They will go
20 up uncorrected but each witness will have the
21 opportunity to correct and then we will correct what
22 is up on our website.

23 Let me introduce the rest of the Copyright
24 Office panel before I go further. To my left is David
25 Carson, our General Counsel. To David's left is Steve

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1 Tepp who is Policy Planning Adviser in the Office of
2 Policy and International Affairs. To my right is Rob
3 Kasunic who is Senior Attorney Adviser in the Office
4 of the General Counsel. To his right is Charlotte
5 Douglass, Principal Legal Adviser in the Office of the
6 General Counsel.

7 Our goal is to have each panel to be
8 divided into three parts where first you present your
9 testimony. Secondly we ask questions and then if any
10 of you have questions of each other and they have not
11 arisen, then you will have an opportunity to do that.

12 Hopefully the questions will be difficult
13 and they will be equally difficult for everybody. You
14 should not read anything into any particular question.
15 You should not read anything into the tone of the
16 voice or the facial expression. We have made up our
17 minds about nothing. We are trying to scare you. No.
18 The whole purpose is to get as much evidence as we can
19 on the record so that we can go back and reflect.

20 One of the things I want to say is these
21 microphones may be misleading. These microphones lead
22 to the person who is recording the transcript. They
23 do not project voices out so each of you needs to
24 speak loudly so that the people behind you can hear
25 what is being said. If I see them straining, I'll

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1 just go, "Raise your voice."

2 The first panel is looking at DVDs that
3 are tethered, looking at alternative platforms, and
4 some non-infringing uses. The panel is made up of
5 Robin Gross of IP Justice, MIA Garlick of IP Justice,
6 Gwen Hinze and Ren Bucholz of Electronic Frontier
7 Foundation.

8 On this side of the table we have Bill
9 Krepick of Macrovision, Dean Marks of AOL Time Warner,
10 and Steve Metalitz. If you were here, you saw him a
11 lot yesterday. He is representing many copyright
12 owners and his comment is known as the joint reply
13 comment.

14 Let's start with the proponents and let's
15 start with IP Justice. I don't know how you're going
16 to divide it up.

17 MS. GROSS: Mia will deliver the
18 testimony.

19 MS. PETERS: Okay. Good.

20 MS. GARLICK: Good morning. IP Justice
21 welcomes this opportunity to testify to the Copyright
22 Office about the adverse impacts Americans are
23 experiencing in their ability to enjoy DVDs in non-
24 infringing ways.

25 The cause of this adverse impact is the

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1 access control technology employed by the movie
2 industry to DVDs. The magnitude of this harm warrants
3 the recommendation by the Copyright Office over the
4 exemptions proposed by IP Justice in its submitted
5 comments to permit circumvention in order to view a
6 DVD on an unsupported player.

7 We are mindful of the reasons given in the
8 last rulemaking for rejecting any exemptions in
9 relation to DVDs. IP Justice, therefore, wishes to
10 emphasize four important procedural factors in
11 relation to this proposed exemption. These procedural
12 matters are important because they shape the
13 substantive findings of the rulemaking.

14 First, we wish to remind the Copyright
15 Office that it's responsibility is to users and not to
16 copyright owners. Congress introduced the anti-
17 circumvention measures to encourage copyright owners
18 to make their works available digitally or, in the
19 words of the last rulemaking, the measures were
20 intended to be used for facilitating.

21 The responsibility of the Copyright Office
22 in this rulemaking is not to repeat Congress' logic
23 but to protect users and ensure access, not
24 availability of protected works such as DVDs. This
25 did not occur in the first rulemaking in 2000. In

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1 that rulemaking the Copyright Office gave undue
2 preference to the interest of copyright owners and in
3 doing so improperly reconsidered the interest of
4 copyright owners.

5 Second, the structure of this rulemaking
6 as interpreted by the Copyright Office effectively
7 precludes it from achieving its purpose. The
8 Copyright Office insists that the exemptions be
9 defined according to class of work. Adequate
10 protection of user rights requires that the exemptions
11 be dropped with reference to the type of user and the
12 circumstances of use.

13 For example, if a person watches a DVD at
14 home, they are not infringing the copyright owners
15 public performance right. But when they watch a movie
16 in a cinema, the public performance right is
17 implicated.

18 Third, the Copyright Office has set an
19 unduly high evidentiary standard given the nature of
20 the harm it is supposed to protect against. This led
21 to one of the Copyright Office's conclusions in the
22 first rulemaking that all allegations of harm were
23 hypothetical in nature.

24 However, the adverse effects experienced
25 by users are likely of their very nature to be

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1 individual and discrete, difficult to measure and
2 quantifying. This does not detract from the existence
3 of such harm and it does mean that the Copyright
4 Office should accept as sufficient evidence news
5 reports and principled analyses of the likely harm
6 which take into account the interaction of the
7 circumvention measures with the limitations and
8 exceptions for users under traditional copyright
9 principles.

10 It also means that the Copyright Office
11 should give the comments and testimony supplied by
12 ordinary individuals as much, if not more, weight as
13 the views of corporations.

14 IP Justice urges the Copyright Office to
15 be mindful of the context in which this rulemaking
16 occurs. This is important in three respects. To
17 begin with, the context of this rulemaking is very
18 different to the first.

19 Then the prohibition on access
20 circumvention had not yet taken effect. Three years
21 later restricted access DVD technology is more
22 prevalent. Thus, the extent of the impact on users
23 must be greater because the anti-circumvention
24 measures are broader than copyright.

25 The second important factor the Copyright

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1 Office should take account of is that the impact of
2 any exemption will necessarily be limited. Acts of
3 circumvention of access controls are by their nature
4 inherently noncommercial and personal. Anyone who
5 seeks to take advantage of an exempted act of access
6 circumvention must be highly technically literate.

7 A person cannot require a circumvention
8 device or service from a third party, nor make it
9 available to someone else because to do so will
10 infringe the anti-trafficking provisions of Section
11 1201.

12 This means that only a limited number of
13 people are likely to be able to avail themselves of
14 any of the exemptions. Thus, the impact on the
15 copyright owner of any exemption will be limited.

16 Third, we would like to remind the
17 Copyright Office that despite Hollywood's promise
18 during the last rulemaking that Linux DVD player would
19 be forthcoming, it has three years later proved to be
20 vaporware. This means that a significant and growing
21 proportion of the population are unable to access the
22 DVDs they have purchased.

23 Against this background, IP Justice makes
24 the following four substantive comments. First, we
25 provided evidence in our submitted comments of the

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1 need to bypass an access control in order to view a
2 DVD on an unlicensed system.

3 Second, the Copyright Office held in the
4 last rulemaking that users do not enjoy an unqualified
5 right to access works on a particular machine or
6 device. This holding was inverted and misguided. It
7 is the copyright owners who do not have the right to
8 dictate technology design. Technology is a stable
9 article of commerce.

10 Indeed, Section 1201(c) (3) clearly states
11 that the anti-circumvention provisions do not require
12 the design of any particular technological device.
13 Users have a right to choose between technology
14 platforms. As a result, competition can occur among
15 technology providers to provide the best design, a
16 finding which restricts consumer choice, impermissibly
17 extends the copyright owner's monopoly.

18 Therefore, the Copyright Office cannot and
19 should not dismiss evidence of user harm based on
20 technology preference. It has never been the lure of
21 this country that copyright creates a right to dictate
22 the technology choices to the consumer.

23 DVDs are the personal property of their
24 owners and use restrictions by the movie studios
25 interfere with the owner's ability to use her property

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1 in lawful ways. It is not the burden of the DVD owner
2 to prove that she has the right to view a film she has
3 paid for. On the contrary, any impingements upon the
4 rights of the owner to lawful enjoyment of her
5 property must be justified by the law.

6 Third, in the last rulemaking the
7 Copyright Office incorrectly equated works available
8 in DVD format to those which are in analog format. In
9 doing so, the Copyright Office ignored the innovation
10 which digital technology makes possible. DVDs are not
11 the same as VHS.

12 DVDs consist of numerous features that are
13 not conceivable in analog format. They may contain
14 audio in different languages or subtitles, the ability
15 to jump between scenes, and additional commentary or
16 information by actors and directors.

17 Furthermore, the movie studios have little
18 incentive to continue to distribute VHS tapes in the
19 future when DVDs give them total control over what the
20 individual can do with the movie.

21 Fourth, and finally, there is no evidence
22 that user freedom of platform choice harms DVD
23 copyright owners. A person who wishes to view a DVD
24 on a platform of their choice is still a legitimate
25 consumer. They must purchase the DVD prior to viewing

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1 it.

2 The copyright owner is still compensated
3 for that DVD. Tethering, however, allows a copyright
4 owner to extend the monopoly and extract greater
5 monopoly rents through its licensing of DVD software
6 and hardware.

7 This is the reason why copyright owners
8 are reluctant to give consumers choice in their
9 technology platform. This is the reason why the movie
10 studio is content to ignore the platform preferences
11 of legitimate consumers.

12 The Copyright Office's duty is to the
13 interest of consumers including those who wish to
14 enjoy the DVDs they purchase on Linux or any
15 independently developed and, thus, unlicensed DVD
16 player. Thank you.

17 MS. PETERS: Okay. Thank you.

18 Gwen.

19 MS. HINZE: Thank you for the opportunity
20 to testify at today's hearings. In my comments this
21 morning I would like to firstly talk about the scope
22 of the exemption that EFF has sought. Secondly, to
23 address some of the comments that have been made in
24 opposition to the exemption that we have sought in the
25 joint comments.

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1 The Electronic Frontier Foundation has
2 proposed an exemption for audiovisual works released
3 on digital versatile disks that contain access control
4 measures that interfere with the ability to control
5 private performance, including the ability to skip or
6 fast forward through promotional material.

7 We are seeking an exemption to allow DVD
8 owners to eliminate un-fastforwardable advertisements
9 or, in the alternative, to take all necessary
10 technical steps to defeat the user operation, or UOP,
11 blocking feature to permit consumers to fast forward
12 through these commercials on DVD content that they
13 have lawfully acquired.

14 Copyright owners can use the UOP blocking
15 technology to mark certain portions of a DVD in a way
16 that disables the fast forward functionality of a
17 user's DVD player when the DVD is inserted into a
18 user's player.

19 This prevents viewers from fast forwarding
20 through that content. Most, if not all, DVD CCA
21 licensed DVD players respond to UOP blocking measures
22 incorporated into DVDs because DVD manufacturers are
23 required to produce DVD players that detect and
24 respond to UOP blocking commands as a condition of
25 obtaining a license from the DVD Format/Logo Licensing

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1 Corporation.

2 The use of this technology by copyright
3 owners to create zones of a DVD which consumers cannot
4 fast forward through clearly impedes a non-infringing
5 use by a consumer. Copyright owners do not enjoy any
6 exclusive rights over private performance in a
7 consumer's living room.

8 It is not one of the exclusive rights
9 granted to copyright owners under Section 106 of the
10 Copyright statute. A consumer does not infringe any
11 copyright right when she uses the fast forward
12 function on a DVD player to fast forward through
13 commercials on a DVD.

14 However, copyright owners are effectively
15 able to use UOP blocking to control what content
16 viewers watch prior to a feature presentation and,
17 therefore, can place a restriction on private
18 performance.

19 This restriction on private playback is
20 implemented through a set of interlocking licensing
21 schemes for DVD players which in turn are premised on
22 the use of an access control measure, CSS or content
23 scramble system.

24 The use of the UOP blocking in this way
25 also effectively removes the long-established

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1 limitation on copyright owner's distribution right in
2 the first sale doctrine recognized in Section 109 of
3 the Copyright statute.

4 There is nothing in the legislative
5 history of the Digital Millennium Copyright Act that
6 indicates that Congress intended to upset the
7 historical Copyright balance struck by Congress in the
8 Copyright statute or specifically to expand Section
9 106 or override Section 109.

10 An exemption is justified here to remove
11 this limitation on consumer's private performance and
12 to prevent copyright owners from using an access
13 control and the legal sanctions of Section 1201 to
14 control consumers' lawful uses such as fast forwarding
15 that fall entirely outside copyright owner's exclusive
16 rights.

17 The opponents of this exemption have made
18 three main arguments. First, the joint comments
19 submitted by the MPAA and the other joint commenters
20 claim that EFF has failed to meet the burden of
21 establishing that the use of this technology has had
22 a substantial adverse impact on consumers' non-
23 infringing use.

24 The joint commenters argue that the fact
25 that we have identified, and I quote, "Only a handful

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1 of titles" with such technology means that we have not
2 met this burden and that any harm caused to consumers
3 is a mere inconvenience."

4 I have three comments in response. First,
5 I would like to address the standard of proof
6 required. Unlike the motion picture industry
7 represented here, it is not possible for consumers to
8 provide comprehensive figures for the numbers of DVDs
9 released in the United States which have UOP blocked
10 for fast forwarding for two reasons.

11 First, affected DVDs are not labeled so a
12 consumer can only learn that a DVD has blocked fast
13 forwarding if he or she inserts it into a DVD player
14 and is not able to fast forward.

15 Second, even if individual users are aware
16 that a DVD contains content that cannot be fast
17 forwarded through, there is no centralized place or
18 method for recording and collecting this data.

19 It would be fundamentally inequitable to
20 require consumers to identify every single title
21 affected in order to meet the threshold burden in this
22 proceeding. Such a standard would undermine Congress'
23 intended purpose as stated in the Commerce Committee
24 Report to provide a fail-safe mechanism to protect
25 consumers' non-infringing uses.

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1 In our view, it should be sufficient proof
2 if the record contains evidence of a qualitative
3 adverse impact on a user's ability to make a non-
4 infringing use of a work and evidence that a number of
5 DVD titles carry that feature.

6 Second, as to proof of current substantial
7 adverse effect, the evidence on the record in this
8 proceeding clearly establishes that it is not just a
9 handful of titles that are affected. Sixty-six
10 individual consumers submitted comments to the
11 Copyright Office in this proceeding in support of our
12 exemption. These comments describe their first-hand
13 experience of encountering non-fast forwardable
14 promotional material on over 40 popular titles.

15 These titles include Lilo and Stich,
16 Beauty and the Beast, The Little Mermaid, The Lion
17 King, Toy Story I and II, Monsters, Inc., a Very Merry
18 Pooh Year, Bob the Builder, About a Boy, Blue Crush,
19 American Pie II, The Sixth Sense, Ice Age, The Red
20 Violin, Shawshank Redemption, The Bourne Identity,
21 Baby Mozart, and Rudolph the Rednosed Reindeer.

22 An assessment of the substantial adverse
23 impact on consumers requires consideration of both the
24 number of titles which may contain UOP blocking, and
25 the number of units of each of those titles that has

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1 been sold to consumers.

2 All of the titles I mentioned are
3 extremely popular and were high-volume sellers.
4 According to the 2002 year-end sales report from Video
5 Business in 2002 Monsters, Inc. sold 11.8 million
6 units, Ice Age sold 7 million units, Lilo Stich sold
7 6.6 million units, Beauty and the Beast sold 4.3
8 million units. In total there are, just with those
9 four titles alone, 29.7 million units in consumer
10 households that may have been affected by the in
11 ability to fast-forward through commercial
12 advertising. This is hardly an insignificant impact.

13 Third, in assessing the impact of these
14 technological measures on non-infringing use, the
15 nature of the harm to individual consumers must be
16 taken into account. In the case of each of the 66
17 consumers who filed comments with the Copyright
18 Office, the harm was significant and rose beyond a
19 mere inconvenience.

20 They were simply not able to avoid the
21 objectionable material. The harm was redoubled when
22 they were not able to prevent their children from
23 viewing the objectionable material on various Disney
24 titles.

25 A number of parents commented that they

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1 had specifically purchased DVDs as a means of
2 controlling their children's exposure to commercial
3 advertising and were understandably upset when they
4 couldn't fast forward through that material. That is
5 not a mere inconvenience.

6 The second argument made our by opponents
7 is that the problem is amenable to a market solution
8 and, therefore, does not warrant granting an
9 exemption. In support of this argument they have
10 pointed out that 99 percent of the DVD releases of
11 Tarzan, one of the titles referenced in EFF's December
12 comments, are no longer being released by Buena Vista
13 Entertainment with unskippable commercials.

14 They also state that Buena Vista changed
15 that three years ago in response to market feedback.
16 Even if it is true that 99 percent of the Tarzan
17 releases do not contain unskippable ads, which of
18 course it's not possible for consumers to verify,
19 there are 1 percent of the presumably millions of
20 Tarzan DVDs sold which contain unskippable material.

21
22 In addition, the 66 comments filed by
23 consumers in this proceeding indicate that the
24 practice is still going on and has not stopped
25 voluntarily. The bulk of the comments submitted list

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1 DVD titles purchased or rented in 2003 or 2002.

2 For instance, commenters complained that
3 on titles rented or purchased as recently as January
4 2003 including About A Boy, The Red Violin, Baby
5 Dolittle's World of Animals, A Knight's Tale, and
6 Universal's The Bourne Identity, they were not able to
7 fast forward through promotional material. DVD
8 publishers clearly have not decided to stop releasing
9 DVDs with promotional material with disabled fast
10 forwarding despite consumer's complaints.

11 It is unclear that DVD publishers would
12 have any business incentive to do so. It is precisely
13 for this reason that we believe it is appropriate and
14 justified for the Copyright Office and the Library of
15 Congress to step in and grant an exemption to allow
16 consumers to lawfully bypass non-fast forwardable
17 commercials.

18 The third argument made by our opponents
19 is that, and I quote, "It is far from clear that this
20 feature is an access control within the meaning of the
21 statute." Given that the DVD CCA claims trade secret
22 protection for its multi-tiered licensing scheme, EFF
23 has not been able to view the various license terms to
24 determine exactly which technological protection
25 measures on the DVDs are invoked in disabling fast

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1 forward functionality on a user's DVD player.

2 The joint commenters' use of "this
3 feature" presumably refers to UOP blocking. If so, it
4 misconstrues our argument. We do not claim that UOP
5 blocking is an access control and we have not sought
6 an exemption to circumvent UOP blocking.

7 Our argument as explained in our
8 submission is that given that UOP responsiveness
9 appears to be a requirement for a DVD CCA licensed DVD
10 player it would be impossible for a consumer to
11 override the UOP blocking response on their DVD player
12 without circumventing CSS.

13 This is because the interlocking set of
14 licenses from DVD CCA and the other DVD licensing
15 entities are premised on the use of CSS. It is the
16 act of circumventing CSS that would put a consumer at
17 risk of legal liability under Section 1201(a).

18 It's the position of the copyright owners
19 in litigation in two law suits, the Remeirdes case in
20 the 2nd Circuit, and as recently as March 2003 in the
21 opposition papers filed in the 321 Studios case which
22 is before the court this morning, that CSS is an
23 access control for the purposes of Section 1201.

24 The fourth argument I would like to
25 address is an argument about availability of works.

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1 There is no credible evidence that the use of
2 unskippable or un-fast forwardable advertising is
3 integral to any business model that benefits the
4 public. It is not at all clear that the ability to
5 embed unskippable content meaningfully encourages the
6 distribution of creative works that would not
7 otherwise be made available.

8 A threat by copyright owners to withhold
9 content if they are not able to insert mandatory
10 commercials on DVDs seems implausible. If the
11 exemption were granted copyright owners would continue
12 to have the ability to insert ads but consumers who
13 had the know how would be allowed to avoid viewing
14 these.

15 Finally, I would like to emphasize that
16 the exemption that EFF is seeking is narrow. It is
17 narrowly tailored to permit consumers to make a non-
18 infringing use of DVDs that they have lawfully
19 acquired.

20 The exemption would only permit users to
21 eliminate mandatory advertisements on DVDs or,
22 alternatively, to take all necessary steps to defeat
23 the UOP blocking response on a DVD player for the
24 limited purpose of giving consumers the ability to
25 fast forward through advertisements.

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1 This exemption is not an invitation to copyright
2 infringement. First, to the extent the copyright
3 owners are concerned about potential copyright
4 infringement they would still retain all rights and
5 remedies currently available to them under copyright
6 law including the ability to bring a suit for
7 infringement.

8 Second, as Section 1201(a)(1)(D) makes
9 clear the Librarian of Congress can only grant an
10 exemption to permit non-infringing uses of a class of
11 works. Finally, copyright owners can control the
12 scope of any potential adverse effect of this
13 exemption by limiting the number of DVD releases that
14 contain unskippable content.

15 In balancing the harms here, any harm to
16 copyright owners from granting this exemption is
17 minimal since the exemption would only apply to a
18 limited number of titles and since copyright owners
19 could control the scope of impact of the exemption by
20 limiting releases containing unskippable content.

21 By contrast, the present harm to consumers
22 who have acquired these disks without any way to know
23 prior to purchase of their unskippability, and without
24 any way to restore control of their private non-
25 infringing use, is substantial. Thank you.

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1 MS. PETERS: Thank you. Let's go to this
2 side of the table. Let's start with Mr. Krepick.

3 MR. KREPICK: Thanks very much.
4 Macrovision Corporation, one of the world's leading
5 suppliers of copy protection and digital rights
6 management technology, recommends that no exemptions
7 be granted for any of the 50 requested submissions of
8 copyrighted works under the DMCA, general ban on
9 circumventing technologies and devices.

10 On February 20, 2003, we submitted a
11 detailed statement to the Library of Congress
12 Copyright Office outlining our opposition to any
13 exemptions under Section 1201 of the DMCA. I would
14 refer the rulemaking proceeding participants to that
15 submission for additional detail.

16 Essentially we believe that the current
17 anti-circumvention provisions of Section 1201 of the
18 Act have not resulted in any material adverse effects
19 on consumers, educational institutions, consumer
20 electronics manufacturing, PC manufacturers, or any
21 other class of content users or distributors. In
22 fact, we believe the reverse has been true.

23 Since the enactment of the DMCA the
24 unbridled success of the DVD business from both a
25 hardware and software standpoint is the best proof

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1 supporting both strong copyright laws and anti-
2 circumvention provisions to help content owners manage
3 and distribute their content in the new digital world
4 in which we operate.

5 As way of background, Macrovision has a
6 unique perspective on the subject matter as we are
7 neither a content owner nor a hardware manufacturer.
8 Rather, we are an independent technology supplier that
9 has developed flexible copy protection and digital
10 rights management solutions to help content owners
11 distribute their digital content in a secure manner
12 while retaining a variety of enabling features that
13 will allow consumer to time shift and space shift
14 content that has been acquired legitimately.

15 From our standpoint it is important to
16 note that those who are arguing to exempt certain
17 classes of copyright works under Section 1201 refer to
18 anti-copy protection trilogy of fair use, first sale
19 doctrine, and the Sony Betamax case.

20 In aggregate, these conditions are
21 deposited as evidence that consumers have been granted
22 special entitlements, or even legal rights, to make
23 any number of copies of digital content or to play
24 digital content on any number of devices, or to use
25 any type of illegal circumvention technology to gain

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1 access to content for their own purpose.

2 I am not a lawyer and I realize this anti-
3 copy protection trilogy evokes a tremendous amount of
4 case law discussion laced with plenty of emotion, but
5 I believe that rules for licensing and distributing
6 digital content entered a whole new realm in the 1990s
7 and ushered in a brave new world of digital copyright
8 law.

9 Some proponents of copyright anarchy
10 suggest that copy protection, access control, digital
11 rights management technology should be circumvented
12 wherever consumers are not able to freely copy and
13 distribute content with the same "ease and versatility
14 that they have historically exercised and the rights
15 they retain under copyright historical balance."
16 That's from some comments that IP Justice submitted on
17 December 17th, 2002.

18 The problem with this misguided thinking
19 is that is it based on the perception that copyrights
20 historical balance is the same in the year 2003 as it
21 was in 1990. This is just not the case. With
22 tremendous technological advances in PCs, optical disk
23 burner devices, digital compression technologies, and
24 the Internet, the historical copyright balance is
25 tremendously off kilter and the copyright owners are

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1 at a severe disadvantage when it comes to controlling
2 their digital content.

3 The digital world has eclipsed the old
4 familiar analog copyright domain and exposed digital
5 content to mass misappropriation. Sadly, many
6 consumer activists and hardware manufacturers are
7 blind to this new technological reality and have not
8 accepted the fact that content owners need to license
9 their content with more controls than they have in the
10 past. Otherwise, they will not have any content to
11 license in the future.

12 It should be clear that when a content
13 owner licenses access to their digital content, they
14 are allowed to establish rules for usage and those
15 rules may cover certain types of format and playback
16 devices. For example, DVD or video cassette, MP3,
17 cable broadcast TV, video on demand, etc. And

18 certain privileges with respect to public
19 or private performance and certain provisions with
20 respect to copying or not copying by way of example.

21 Before the advent of the Internet peer-to-
22 peer file sharing services, ubiquitous optical disk
23 burners, and video encoders that could easily
24 transform and compress analog video to digital video,
25 it was easy to say that if a consumer bought content,

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1 they were at liberty to employ it with impunity.

2 This no longer pertains in the digital
3 world since the digital domain is essentially without
4 borders. Essentially, digital technology has exposed
5 content owners to having their content ripped off
6 literally and distributed by both professional pirates
7 and casual consumer copiers.

8 In order to resolve this untenable
9 situation, we believe that several steps must be
10 taken. First of all, we believe there should be more
11 cooperation from both the hardware and content
12 community.

13 We believe there should be deployment of
14 new generation of copy protection and digital rights
15 management technologies. We believe that the
16 copyright laws should be strengthened and legislation
17 that support copy right protection and DRM
18 technologies. Finally, that worldwide enforcement of
19 such laws that encompass the physical world of optical
20 disk and the online world of the Internet.

21 Through these hearings we believe the
22 Copyright Office is in a unique position to
23 independently gather data and assess the current state
24 of affairs with respect to digital copyright statutes.

25 Moreover, we believe that you can send a

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1 strong message to content owners, hardware
2 manufacturers, consumers, and congressional
3 representatives that we need to strengthen our digital
4 copyright laws and not weaken them by giving out
5 exemptions to bypass or circumvent various copy
6 protection, access control, and digital rights
7 management technologies.

8 We have read through the submittals
9 including those from AOL Time Warner, DVD CCA, the
10 Interactive Digital Software Association, the MPAA,
11 RIAA, and the Software Information Industry
12 Association. We find that these documents are well
13 researched, well articulated reflecting views that are
14 very much in line with our position.

15 We know that the Copyright Office is
16 dealing with a tremendous volume of input but we
17 encourage the Copyright Office to carefully consider
18 these submissions before making a decision on the DMCA
19 anti-circumvention exemptions.

20 We also encourage the Copyright Office to
21 consider expanding its view and enroll in the broader
22 area of copyright law and legislation and to help our
23 various legislators formulate the appropriate
24 copyright law amendments and digital media laws that
25 favor stronger copyright protection reforms in order

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1 to shift the copyright balance more toward the content
2 owners and away from the consumer activists and the
3 hardware manufacturers and the PC companies.

4 I'll talk a little bit about the four or
5 five classes of copyright works that we have comments
6 on. The first is copy protection for DVD. The
7 argument is made that consumers have a right to make
8 backup copies of DVDs for their own personal
9 libraries.

10 The only precedent for this seems to stem
11 from the early days of unreliable computer floppy
12 disks when PC and software manufacturers realized that
13 hardware and storage technology was somewhat
14 unreliable. Fast forward now to the late 1990s and
15 optical disk formats are extremely durable and
16 reliable and there is little need for backup.

17 In the video markets Macrovision's copy
18 protection technologies have been used on video
19 cassettes dating back to the 1980s and on DVDs from
20 the inception of the format in 1997.

21 Consumers have become quite accustomed to
22 the fact that they not only have an FBI logo on the
23 cassette or the DVD warning against unauthorized
24 copying, but the vast majority of content has been
25 copy protected and the consumers have not been allowed

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1 to make any copies.

2 In the music space there has been no such
3 copy protection available until last year so consumers
4 came to believe they were entitled to make copies of
5 all of their music CDs. The entitlement situation in
6 music space has no legal basis and has simply grown
7 out of the unchallenged consumer habits formed over
8 time because of the absence of copy protection and DRM
9 technology.

10 Macrovision's Mark Belinsky addressed copy
11 protection in the music market yesterday in his
12 testimony. We believe that whether one is discussing
13 CDs for audio or DVDs for video, the content owners
14 should be the ones who set the licensed terms for the
15 use of their content. If they want to allow copies,
16 they should be able to charge a higher price, or they
17 should be able to simply prevent copying if they so
18 choose.

19 If they want to allow content to be played
20 on certain PCs or certain playback devices, they
21 should have the right to set those license terms. If
22 consumers don't want to buy the content under such
23 restricted conditions, the free market mechanism will
24 provide ample feedback to the content owner regarding
25 the advisability of selling content under such

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1 restricted terms. In short, we believe there is
2 neither a need nor a legal precedent for any
3 circumvention exemptions in the DVD area.

4 In the area of access controls, the
5 arguments made in favor of allowing circumvention of
6 access controls run very much parallel with the
7 arguments to circumvent certain copy protection
8 controls.

9 In these instances opponents argue that
10 digital rights management technologies can be used to
11 prevent consumers from gaining access to legitimately
12 purchased content and other formats, or on other
13 devices that they might own.

14 This argument cuts to the central issue of
15 who owns the content and who has the right to license
16 it with certain restrictions. The content owner may
17 choose to license their video for DVD CSS format only,
18 or they may well choose not to support it on MPEG 4 or
19 the DVX format.

20 If the consumer cannot find a legitimate
21 authorized version of the video in any format other
22 than CSS, then the consumer should not have the right
23 to transcode the video from CSS into MPEG 4 or DVX.

24 It is as simple as buying into the
25 proposition that content owners have control over

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1 their content with the right to license it in certain
2 formats for certain distribution channels, for certain
3 time windows, and for certain operating system
4 platforms. There is no valid reason to exempt anyone
5 under Section 1201 to circumvent any access control
6 technology.

7 In terms of tethered content, the argument
8 is made that there are legitimate needs to move
9 content from one PC to another and that copyright law
10 has never been construed to allow authors to prevent
11 a content owner's freedom to access lawfully purchased
12 content where and how they choose.

13 Arguments are made that consumers want to
14 play content, music or video, on other devices in the
15 car or other portable devices and somehow this want is
16 translated into an entitlement. Although this
17 transportability or space shifting, device shifting,
18 feature is desirable, content owners are not legally
19 bound to supply these features.

20 In fact, if they do supply these features,
21 they need assurance that the content will not be
22 shared with the world over pier-to-pier networks or
23 through unauthorized optical disk copies. Macrovision
24 has DRM technology that can allow the end user to move
25 content between devices, but the technology is

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1 designed to give the content owner control over the
2 contents licensing or usage rules.

3 If a content owner chooses to license
4 content and to tether to a single PC, that is the
5 content owner's right. If the consumer chooses not to
6 buy the content with that restriction, then the
7 consumers can look for competitive products with more
8 liberal usage rules. The free market economy can
9 dictate success.

10 Again, there is no reason to bypass the
11 copyright law or to require an exemption under Section
12 1201. Content that is digitized and downloaded to a PC
13 or other digital device exposes content owners to huge
14 risks in ways unimaginable just five years ago. The
15 copyright laws must be strengthened and not weakened
16 in this regard.

17 The next comment I have is on stifling
18 innovation. Consumer electronics and IT companies and
19 consumer groups frequently make the point that strong
20 copyright laws tend to stifle innovation because they
21 essentially put manufacturers in a straight jacket
22 with respect to innovation.

23 If this is so, why have sales of DVD
24 hardware and DVD disks been the fastest growing
25 consumer electronic success story ever? Certainly it

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1 was not because there were copyright control handcuffs
2 that restrained innovation for the manufacturers. The
3 argument that copyright protection standards would
4 stifle innovation is hollow to the core.

5 In fact, if anything the content community
6 can argue that actions by copyright anarchists will do
7 more to stifle innovation than the implementation of
8 copyright protection and DRM technologies since the
9 unabated proliferation of pier-to-pier file sharing,
10 circumvention software, and unlicensed compression
11 formats will force content owners to reduce
12 investments in new programs due to revenue
13 deterioration.

14 The hardware companies cannot continue to
15 turn a blind eye toward the content owner's plight.
16 They must be part of the solution and not part of the
17 problem. The U.S. has the most robust content
18 development business in the world accounting for some
19 5 percent of our gross domestic product. The harm to
20 our society will come from weak or compromised digital
21 copyright laws, not from stronger, more targeted laws.

22 A few comments on regional coding. The
23 argument is made that consumers should be able to
24 bypass regional controls that are built in the DVD and
25 PC game console devices since consumers may want to

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1 import games or videos from one region of the world
2 and play them in a device that is designed to play
3 content that is coded for another region.

4 Macrovision does not have technology in
5 this space, but we are sympathetic to the content
6 owner's plight in that they built their advertising
7 marketing and distribution strategies and campaigns
8 for a given title around different release dates in
9 different parts of the world.

10 There are a variety of reasons for this
11 but suffice it to say that the content owners have
12 valid business reasons for wanting to control the
13 timing of the releases of their product in different
14 parts of the world.

15 When the regional coding systems are
16 hacked, or the hardware is chipped, it is a clear case
17 of contributory copyright infringement since content
18 owners' copyright licenses are violated with respect
19 to specific terms, dates, time periods, locations, and
20 formats for release.

21 Often times Macrovision's copy protection
22 technology is hacked along with the regional coding.
23 Even CSS encryption hacks. The content owners then
24 find themselves in double or triple jeopardy situation
25 where one hack has multiple infringing and

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1 circumventing components. Again, we believe there is
2 no valid reason for regional coding exemptions to be
3 allowed under Section 1201.

4 The last comment that I have is on the
5 nonskippable or unskippable DVD or TV advertising
6 features. The argument is put forth by those who want
7 a special exemption to circumvent the nonskip features
8 for DVD or TV advertising relates to an assumption
9 that consumers should be able to modify the content
10 and/or the playback devices that they legally acquire.

11 What is again left out of this equation is
12 the notion that the content owners have the right to
13 package their content as they see fit and to license
14 the right to use it according to specific terms, one
15 of which might be to require viewing or listening to
16 the program with integrated advertising.

17 Rather than allowing consumers to bypass
18 the content owner's packaging by endorsing
19 circumvention, the appropriate action by the Copyright
20 Office would be to allow the market place to determine
21 the outcome and to have consumers vote with their
22 pocketbooks regarding whether they want to buy or rent
23 programs with built-in nonskippable advertising.

24 Macrovision as a technology provider
25 understands that certain technologies can be

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1 implemented to prevent ad skipping and we would
2 encourage the Copyright Office to affirm that these
3 technologies should be added to the category of
4 legally protected digital copyright control technology
5 under the DMCA and they should have no circumvention
6 exemptions either.

7 Thank you very much for the opportunity to
8 present this.

9 MS. PETERS: Thank you.

10 Mr. Marks.

11 MR. MARKS: Good morning. My name is Dean
12 Marks and I'm Senior Counsel, Intellectual Property,
13 for AOL Time Warner. Thank you very much for the
14 opportunity to appear before you today. It hardly
15 seems like three years have passed since the last time
16 I appeared before you up at Stanford. I had to throw
17 away my shirt from that last appearance having been
18 grilled so hard by David Garson.

19 Anyway, here we are again today. Because
20 AOL Time Warner has already submitted written reply
21 comments, and because you have already heard from
22 another AOL Time Warner witness, Shira Perlmutter, at
23 the recent hearings in Washington, I will not take the
24 panel's time to repeat or further endorse statements
25 that we have already made.

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1 Instead, I just wanted to make the
2 following very brief observations about the DVD
3 market. In 2000, the year of the last hearing for
4 this rulemaking, there were approximately 13 million
5 households in the U.S. with DVD players. By year end
6 2002 that number had risen to over 40 million.

7 In 2000 182 million DVD disks were sold
8 into the U.S. market. In 2002 the number of disks
9 sold in the U.S. was 685 million and nearly 1 billion
10 are projected to be sold in 2003.

11 Between 2000 and 2003 the average retail
12 price of a DVD in the U.S. dropped by more than 10
13 percent. The decrease in price of DVD players and DVD
14 ROM drives has been even more dramatic. DVD players
15 are now available for under \$100 in the U.S. and DVD
16 ROM drives are widely available for under \$40.

17 Perhaps of even greater interest to the
18 panel are the following facts. In 2000 less than
19 4,000 titles were available in the U.S. market on DVD.
20 As of April 2003 over 22,000 titles are available on
21 DVD in the U.S. In 2000 less than 300 Japanese anime
22 titles were distributed in the U.S. in DVDs playable
23 on U.S. Region I DVD players. As of April of this
24 year that number has grown to over 1,400 anime titles.

25 In 2000 approximately 600 foreign language

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1 feature films were distributed in the U.S. on DVD by
2 distributors serving the U.S. DVD player market. That
3 is, Region I players, Region I disks. As of April of
4 this year the number of such DVD foreign language
5 feature film titles distributed in the U.S. market,
6 again for Region I players and disks, had risen to
7 over 1,700 titles.

8 The source for these facts and figures is
9 this DVD release report which is a published report
10 and this is one revised as of April 23, 2003. If it
11 is of interest to the Copyright Office, I would be
12 happy to submit this for the record.

13 These facts demonstrate that in the
14 intervening years since the last rulemaking
15 proceeding, access to works via the DVD format has
16 grown dramatically. The technical protection measures
17 used to protect copyrighted works on DVDs from
18 unauthorized access including the regional coding
19 access control and, and this is critical, the
20 associated legal regimes and legal protections that go
21 along with these technical protection measures, have
22 been crucial to giving content owners the requisite
23 security to release their works on DVD on this high
24 quality digital format.

25 Indeed, these technical and legal

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1 protections have not served to stymie access to works.
2 Quite to the contrary. They have materially
3 contributed to the stunning success of DVD and the
4 increased availability and access to the U.S. public
5 of an ever growing, ever richer variety of works
6 including foreign works.

7 In the final rule issued in the prior
8 rulemaking proceeding, the Copyright Office found
9 that, "It appears that technological measures on DVDs
10 have increased the availability of audiovisual works
11 to the general public, even though some portions of
12 the public have been inconvenienced."

13 The facts outlined above indicate that in
14 the intervening three years the preservation of the
15 legal integrity of the DVD technological measures has
16 led to a virtual explosion in the availability of
17 audiovisual works to the U.S. public.

18 The request for exemptions sought in this
19 current rulemaking proceeding with respect to DVD are
20 by in large similar to the ones sought in the previous
21 rulemaking. The rationale articulated by the
22 Copyright Office and the Library of Congress in 2000
23 for rejection of these requests still applies today.

24 Indeed, I believe the rationale is even
25 stronger today because many, if not all of the non-

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1 infringing uses sought to be achieved via the
2 exemption requests, can actually be satisfied through
3 means that do not involve circumvention conduct.

4 Today these non-circumventing means are
5 available more inexpensively and with less burden to
6 users than they were in 2000. I'm sure we will get
7 into all of these issues in greater detail so I will
8 leave off here and look forward to your questions.
9 Thank you.

10 MS. PETERS: Thank you.

11 Mr. Metalitz.

12 MR. METALITZ: Thank you very much. Good
13 morning. It's a pleasure to be back here with you
14 again. I'm going to make just very brief general
15 comments and then we will get to the questions which
16 I know we are eagerly awaiting.

17 Some of these comments apply, I think,
18 also to some of the discussion in the last panel
19 yesterday afternoon because I think the thrust of most
20 of the proposed exemptions that we are hearing about
21 this morning really boil down to the ability to
22 platform shift or to move between formats or between
23 devices, among devices, and so forth, which is similar
24 to the issues that were discussed yesterday about CDs.

25 I just want to make three general

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1 observations about this. First, there is really
2 nothing new in this issue. If you look at the history
3 of copyright markets, there is nothing new about
4 copyright owners deciding to release their material in
5 fewer than all the formats that are available in the
6 market place. There are many examples, some of which
7 we site in the reply comments.

8 The law has never required copyright
9 owners to make their material available to every
10 format for every machine or device that exist in the
11 market place. Certainly nothing in Title 17 has ever
12 required this. The DMCA did not change that. This is
13 the backdrop against which we have to look at these
14 claims for exemption.

15 Second, I don't think we should indulge in
16 the presumption that what is necessary to be done in
17 order to platform shift is non-infringing activity.
18 To the contrary, I think the general rule is that it
19 would be infringing activity.

20 In most cases platform shifting involves
21 making a copy and, obviously, that implicates the
22 reproduction right and you would have to look at
23 whether any applicable defenses were there. We
24 shouldn't assume that platform shifting activity is
25 non-infringing.

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1 Third, I think there is strong evidence
2 and what Mr. Marks has summarized is a very good
3 example of it, that the release of copyrighted
4 material in a way that is not playable on all formats
5 or on all platforms can be a use facilitating
6 strategy. There is really no better example than the
7 explosive growth of the DVD.

8 When you think about all of the different
9 formats that have been floated or tried or introduced
10 over the years, and I'm not thinking here primarily of
11 audiovisual works but in software and everything else,
12 the landscape is littered with the failures of these
13 different formats.

14 What is really astounding about DVD is how
15 successful it has been, how the public has embraced
16 it, and how it has increased the availability of all
17 these titles to the public really in a manner that is
18 unprecedented.

19 But the same argument could be made as far
20 as software that is linked to a particular machine or
21 device or a database that might be accessible only
22 from devices on a particular university network
23 operating under a site license.

24 The issues are not really that different
25 in all those circumstances and they demonstrate that

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1 the strategy of making copyrighted material available
2 without necessarily catering to every single format in
3 the market, or every single platform in the market,
4 can be a useful facilitating strategy and just what
5 Congress was intending to encourage in the DMCA.

6 I've given my speech yesterday about the
7 digital cornucopia so I won't repeat that but I think
8 this is really part of that feature. I think to
9 evaluate these claims for exemption, I would, of
10 course, encourage you to look back at what you decided
11 in the year 2000 where many of these issues were
12 ventilated.

13 I think you will conclude when you do that
14 that the proponents not only have to convince you that
15 you made the wrong decision in 2000, which certainly
16 the testimony you've heard here suggest it. The
17 proponents are taking on that burden.

18 They also have to show that even if you
19 were wrong then, you are still wrong now under a
20 circumstance in which the availability of the product
21 and the availability of alternatives, as Mr. Marks
22 referred to and I'm sure we will get into in more
23 detail in the question and answer period, the
24 availability of alternatives is also increased that
25 would enable people to gain access in a myriad of ways

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1 to this material. I think that makes the burden that
2 much more difficult.

3 I do want to say a word about the
4 unskippable DVD advertising issue. I have to say I
5 find this puzzling. I kind of think if you looked up
6 de minimis non curat lex in Black's Law Dictionary you
7 would find a citation in Ms. Hinze's testimony.

8 I think to think that because you might
9 have to wait 30 seconds to access or to see the movie
10 that you've gotten on DVD, to say that rises to the
11 level of substantial adverse impact as cognizable in
12 this proceeding. I find it hard to get my mind around
13 that.

14 I think the other point that came out
15 clearly today is that the inability to skip DVD
16 advertising to the extent it occurs, and I think there
17 is a dispute about the extent, whether it's in more
18 than a handful of cases, but to the extent that it
19 does occur, I think the EFF testimony makes it clear
20 that it is not due to an access control. I think if
21 you look at the definition of access control in the
22 statute, I think that is the right conclusion.

23 Their argument appears to be that although
24 the inability to fast forward in some circumstances is
25 not an access control, it is part of the licensing

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1 requirements for an access control and, therefore, you
2 should be allowed to circumvent the access control, in
3 this case CSS, in order to overcome this inability to
4 fast forward. I think that is what they are saying
5 here.

6 I think this is a classic example of the
7 tail wagging the dog, or perhaps, to put it a little
8 more graphically, it's an invitation for the copyright
9 industries to trim their fingernails with a chain saw.

10 They are basically saying that because
11 people have to wait 30 seconds to watch the movie,
12 they should be entitled to strip off all protection
13 from these movies, put them in the clear, and let
14 anything -- remove all the protections that CSS
15 provides. I think that is taking this argument a
16 little bit too far.

17 And, again, the argument that the
18 unskippable ads don't benefit the public, I think we
19 could conceive that and still point out that as the
20 Copyright Office found -- is recommended and the
21 Librarian found, the availability of CSS very much
22 does benefit the public. The use of CSS on DVDs has
23 been a substantial factor in increasing the
24 availability of copyrighted material for non-
25 infringing uses.

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1 I don't think the EFF can have it both
2 ways here. If the problem is something that is not
3 CSS, then perhaps they could be asked. I think there
4 was a reference to that in Mr. Krepick's testimony
5 about how you would deal with that problem without
6 inflating it to the much larger issue of CSS.

7 Again, I appreciate the opportunity to
8 provide these general observations and I look forward
9 to your questions.

10 MS. PETERS: Thank you very much. Let me
11 start by trying to get something clear. I think I
12 know it but I want to verify it. When, in fact, there
13 is an exception granted and somebody can circumvent an
14 access control, say, for example, if, in fact, one
15 were granted and it involved a DVD so it was CSS, when
16 you circumvent at that point you strip off all the
17 protection so now is it a DVD that is in the clear?
18 Or when you circumvent it is there still protection
19 attached to it?

20 MR. MARKS: Let me try and answer that
21 because the CSS system involves several different
22 functional components. There's the encryption, the
23 CSS encryption. It's called the contents scramble
24 system which is the 40 bit encryption on the disk
25 which scrambles the content.

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1 There are flags on the disk that indicate
2 the regional coding which is separate and apart from
3 the CSS encryption itself. There are something called
4 the APS trigger bits, and Bill can correct me if I'm
5 getting this wrong with the macrovision, which are the
6 bits that trigger macrovision being applied to the
7 content when it travels out the analog output. Each
8 of those, while they are required under the CSS
9 license, are separate functional components.

10 Therefore, I don't think it's necessarily
11 the case that circumvention of CSS is required to
12 address one of the components. For example, the UOP,
13 which I frankly do not consider an access control
14 technology, that you have to say in order to address
15 something with the UOP it requires circumvention of
16 the CSS encryption itself. I do not believe that is
17 the case.

18 MS. PETERS: Okay. Let's take the UOP.
19 At the end of the day they have made their case
20 turning that button that says on, do not fast forward
21 off. What do they have to circumvent?

22 MR. MARKS: Right. As far as I understand
23 it, and this is something that I think, frankly, we
24 would need to look into some more. I don't believe
25 there is any requirement of the CSS license as to how

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1 the UOP functions as far as my review of the CSS
2 license goes although it's mostly been the content
3 provider license rather than the hardware adopter
4 license.

5 There is nothing in the CSS license that
6 requires, you know, in linking the encryption or in
7 decrypting the CSS encryption system you must not
8 allow consumers to fast forward if this certain code
9 is in there. I don't believe there is any nexus
10 between the CSS encryption nor the license for the CSS
11 encryption that details obligations about what can and
12 cannot happen with the UOP.

13 There certainly are obligations that flow
14 from the CSS license, for example, as to whether the
15 compressed content once it's decrypted can be made
16 available on a user accessible bus, for example.

17 There are all sorts of robustness and
18 compliance requirements as to what a hardware
19 manufacturer needs to do to treat the content once
20 it's decrypted. I do not believe there are any
21 requirements dealing with this fast forwarding issue.

22 MR. MARKS: Okay. I'm going to go over
23 here. Yeah.

24 MS. HINZE: First I would like to make it
25 clear if there was any doubt about what I said before.

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1 My opening remarks included a statement that said EFF
2 is not contending that UOP blocking is an access
3 control. I would like to make that clear.

4 MS. PETERS: But you said --

5 MS. HINZE: Our argument is that there is
6 a condition of a license which requires this. What's
7 required for instance, for someone to take the benefit
8 of our exemption would be a modification of their DVD
9 player. Now, DVD CCA licensed players include a
10 number of different licenses. One of them is a CSS
11 license.

12 The particular feature, UOP, as I
13 understand it -- again, I would like to preface my
14 comments by pointing out that the entire licensing
15 regime is subject to trade secret protection and it's
16 something that EFF has not been able to review -- that
17 from various sources, including Jim Taylor, who is a
18 DVD expert and is the author of this book "DVD
19 Demystified" and runs the most technically
20 comprehensive DVD online information.

21 According to his understanding, and
22 according to other sources we have been able to see
23 publicly, the requirement for UOP blocking
24 responsiveness is something that is in the DVD Format/
25 Logo Licensing Corporation license. In order to get

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1 access to the trade secrets and the DVD trademark to
2 put on your silver box, you need to respond to UOP
3 blocking. That's what your DVD player has to do.

4 For instance, there may be two ways to
5 meet our exemption. The first one would be to take
6 your DVD CCA licensed DVD player and modify it to turn
7 off the UOP feature. As we understand it, because of
8 the condition of the licenses and because each of the
9 licenses, in turn, are premised on the use of --
10 licenses and this set of interlocking licenses are
11 premised on the use of CSS.

12 Our understanding from what we've been
13 able to find out publicly is that it does involve a
14 CSS violation in order to get under the envelope and
15 into the actual player.

16 The second way you might be able to
17 achieve our exemption would be to create your own
18 player. You could, for instance, if you were
19 technologically savvy enough you could create your own
20 software player to do this.

21 The problem with that is that the
22 copyright owners on the other side of the room have
23 made a stated position in litigation that playback of
24 a DVD on a nonauthorized, non-DVD CCA licensed player
25 is a violation of Section 1201(a). From that point of

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1 view an exemption would be required for a consumer to
2 do what I just said.

3 MS. PETERS: Let me just step back a
4 minute. Both sides say that the UOP is not an access
5 control. The only thing we have authority to even
6 consider is an access control. If, in fact, it's not
7 an access control, I don't see how we help you.

8 MS. HINZE: The two examples I've given
9 you of the way --

10 MS. PETERS: But our basically saying that
11 you can circumvent, we can't say you can circumvent
12 anything.

13 MS. HINZE: In either case it's necessary
14 to circumvent CSS. CSS is an access control. CSS is
15 regarded as an access control by the copyright owners.
16 They have stated that position in the Remeirdes case
17 in the 2nd Circuit Appeal briefs that they filed and,
18 as I said, most recently in March 2003 papers in the
19 321 Studios case they have made their position that
20 CSS is an access control.

21 The Librarian and Copyright Register in
22 the 2000 rule also addressed the nature of CSS as both
23 an access and a copy control. Because it requires a
24 CSS violation. In this case, in order to actually make
25 the UOP modification, a circumvention of CSS would

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1 require an exemption.

2 MS. PETERS: Okay. I'm going to go to
3 Dean. The question I'm going to have over here is
4 this side of the table seems to basically in a lot of
5 what it's advocating is that fair use, whatever your
6 reasoning is, that licenses that are put in place by
7 content owners should be overridden. I'm coming back
8 there but think about that while I go over here.

9 MR. MARKS: I just wanted to raise a point
10 of clarification because I believe, as Ms. Hinze who
11 just spoke, when she mentioned that as far as her
12 understanding goes that the UOP functionality and
13 responsiveness as a requirement of the DVD format
14 license, that may well be the case.

15 If that is the case, that adds to my
16 clarification of the situation because the DVD format
17 license is quite separate and apart from the CSS
18 license. They are two completely separate licenses.
19 They are administered by completely separate licensing
20 organizations.

21 CSS, which is the access control
22 technology license, which is administered by the DVD
23 Copy Control Association, is separate and apart from
24 the DVD format license.

25 My understanding is that you can take a

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1 DVD format license and not take -- in fact, I'm quite
2 sure of this -- need not take a CSS license if what
3 your desire is is to put content onto a DVD in the
4 clear without any access control technologies. There
5 is no requirement by the DVD format license that you
6 take a CSS license in order to put content out and
7 make content available on DVD.

8 There is another case, and I'm not
9 positive about this so I state this as an uncertainty
10 and I will try and find out whether this is the case
11 or not. I am not sure that you are even required to
12 take a DVD format license in order to put content onto
13 DVDs. I believe the format license is tied to the DVD
14 logo. If you want to use the DVD logo, you must take
15 a format license. If you are prepared to pay the
16 patent holders who license the DVD patents for the
17 format itself, you can do so without taking a DVD
18 format license. I believe that is the case. I will
19 check on that and get back to you.

20 MS. HINZE: May I comment on that?

21 MS. PETERS: Sure.

22 MS. HINZE: My understanding is that the
23 DVD Format Licensing Logo Corporation license actually
24 gives access to --

25 MS. PETERS: Can you speak up?

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1 MS. HINZE: Sorry. The DVD Format Logo
2 Licensing Corporation license gives access to two
3 things. One is the logo and the second thing is the
4 trade secrets, that are involved in the DVD
5 technology. I am not in a position obviously as a
6 nonindustry spokesperson to know whether or not it is
7 a requirement.

8 What I would like to point out to the
9 Copyright Office is that the EFF made assiduous
10 efforts to try to find whether such a player exists on
11 the market whether there is, in fact, a DVD CCA
12 licensed player that advertises nonresponsiveness to
13 UOP blocking.

14 We were not able to find that. We can't
15 verify that it's not an actual requirement to not take
16 a DVD CCA license -- I'm sorry, DVD Format Logo
17 Licensing Corporation license.

18 We believe, based on what we have seen
19 available publicly, that it is a requirement and that
20 requirement as part of the interlocking set of
21 licenses is premised on the use of CSS as, if you
22 like, the outer layer that surrounds the box.
23 Therefore, in order to modify a UOP feature that is
24 included in a box, by virtue of that license would
25 require a violation of CSS.

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1 MS. PETERS: Thank you.

2 Steve.

3 MR. METALITZ: Even if we assume that what
4 was just said is true, it's hard to see how the first
5 scenario that Ms. Hinze described about disabling the
6 UOP blocking is a violation of 1201(a)(1). It might
7 be a violation of some of these licenses.

8 MS. PETERS: Right.

9 MR. METALITZ: But if it's not a violation
10 of 1201(a)(1), then it's not part of this proceeding.

11 MS. HINZE: Well, I guess my response
12 would be if it's clear that violating CSS is not a
13 violation of 1201(a)(1) in the first of the two
14 responses I gave, modifying an existing DVD CCA
15 licensed player, my understanding is that the
16 copyright owners have had the stated position that
17 circumventing CSS is, in fact, a violation of
18 1201(a)(1).

19 My second suggested way that this
20 exemption might actually take place in practice would
21 be for someone to build their own unlicensed DVD CCA,
22 software version of the DVD player which wouldn't
23 respond to UOP blocking.

24 My understanding of the copyright owners'
25 position based on, as I've said, the two lawsuits

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1 where they have made this their position, is that any
2 playback of the DVD in a non-DVD CCA authorized player
3 violates Section 1201(a)(1). That is, as I understand
4 it, the position that was taken in both the Remeirdes
5 case in the 2nd Circuit and in the 321 Studios case
6 currently pending in the court.

7 MR. MARKS: I think, with all due respect,
8 there is a little confusion going on because --

9 MS. PETERS: That would not be hard.

10 MR. MARKS: You are absolutely correct
11 that the copyright owners do take the position that
12 circumvention of the CSS encryption system is a
13 violation of 1201(a) and is a circumvention of an
14 effective access control technology. We agree on
15 that.

16 I think we also agree on the fact that UOP
17 responsiveness in and of itself is not an access
18 control technology. Where there seems to be some area
19 of disagreement and confusion is whether it is
20 possible to circumvent the UOP without circumventing
21 CSS.

22 My view, but I am a lawyer and I'm not an
23 engineer and I will try and find out something about
24 this, is that it is possible to defeat the UOP without
25 circumventing CSS, but I don't know that for sure.

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1 What I do know is that this notion of interlocking
2 licenses and requirements built one on the other I do
3 not believe to be the case because the licenses are
4 separate.

5 If UOP responsiveness is required by the
6 DVD format license, then the argument or complaint is
7 with the DVD format license, not with CSS as an access
8 control technology, which is licensed by the DVD CCA.
9 I wanted to just make another point of clarification.

10 The content owners and others do take the
11 position that if somebody builds a DVD player that is
12 not licensed through the DVD Copy Control Association
13 which decrypts CSS encrypted DVDs, that that is an
14 unauthorized activity, is an illegal activity because
15 those devices aren't authorized to get to the
16 decryption keys and, therefore, those devices are
17 violative of the anti-circumvention device provisions.
18 But anyone is free to build a DVD player that can play
19 non-encrypted DVDs, non-CSS encrypted DVDs. The CSS
20 license doesn't control that.

21 MS. PETERS: Can you consider what we were
22 just talking about as a follow-up question and
23 actually come back to us with clearing up some of this
24 uncertainty?

25 MR. MARKS: Yes. And if I may, I would

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1 like to enlist the help of the DVD Copy Control
2 Association which also testified and submitted
3 comments.

4 MS. HINZE: Can I just make one final
5 reply before we go onto another topic, which I'm sure
6 we will do.

7 MS. PETERS: Sure.

8 MS. HINZE: In response to Mr. Marks' last
9 comment, I just wanted to make clear that the source
10 for my statements --

11 MS. PETERS: Can you --

12 MS. HINZE: Sorry. In response to Mr.
13 Marks' most recent statement about the position that
14 copyright owners have taken in the Remeirdes case and
15 in the 321 Studios case about playback of a DVD on a
16 non-DVD CCA licensed player.

17 The statement that I am making about
18 playback comes from, as I said, the 2nd Circuit Appeal
19 briefs in the Remeirdes case. The particular cite for
20 the statement I am relying on is in our comments.
21 It's in note 43 of page 62 of the appellant's reply
22 brief.

23 The statement is related to playback.
24 Now, perhaps what Mr. Marks is saying is that would in
25 practice look like decryption because in order to play

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1 the content of a machine, you would need to decrypt.

2 In either case, just to make it clear for
3 the record, the stated position as I understand it,
4 and I have not heard anything different from that
5 based on what I've just said this morning, is that
6 playback of a DVD on a non-DVD CCA authorized software
7 or hardware DVD player violates Section 1201.

8 MS. PETERS: I had a question about this
9 side of the isle which had to do with tethered DVDs or
10 space shifting, those kind of things, which appear at
11 points to violate licenses. I just wanted a comment
12 on how you view the various licenses that come
13 attached with a lot of the material in digital form.

14 MS. GROSS: I can address that. What
15 these licenses do is they have the -- they control who
16 can manufacture DVD players, the kinds of features
17 that people can make -- people can use, the kind of
18 experience that people can have.

19 These licenses are the mechanism that
20 control this and then the CSS is what bypasses or
21 prevents people from getting through those licenses.
22 I think it is really important to talk about -- when
23 you were talking about overriding license terms,
24 consumers never see a license.

25 Consumers are not licensees. Consumers do

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1 not -- are not parties to any contract. Their rights
2 haven't been restricted legally in any way. The
3 manufacturer of the DVD player and the technology
4 company may have license agreements between them but
5 that's between them.

6 The consumer is not obligated to follow
7 the agreements in their contracts. They are not a
8 party to those agreements. I'm a little confused when
9 you're saying overriding licenses. People who aren't
10 a party to contracts aren't -- they are not overriding
11 the contract. They are simply not a party. They are
12 engaging in activity outside of the scope of the
13 license.

14 MS. PETERS: Okay, but now you purchased
15 a DVD and it's tethered to a machine and you want to
16 basically untether it. When you buy a CD and it's
17 clear that it's tethered to a machine, you as the
18 consumer know that.

19 MS. GROSS: I'm a little confused. What
20 do you mean you would know a CD is tethered but a DVD
21 is not?

22 MS. PETERS: Frequently when you purchase
23 something -- like I'll take it away from the DVD.
24 I'll take the e-book -- you know that it's limited to
25 a particular machine.

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1 MS. GROSS: Well, when you say you know it
2 is limited, do you mean you have signed an agreement
3 that says it is limited or do the copyright holders
4 wish for it to be limited?

5 MS. PETERS: No.

6 MS. GROSS: I think that is an important
7 distinction.

8 MS. PETERS: My understanding with the e-
9 book reader is that you know it has to be played on a
10 particular device.

11 MS. GROSS: Why would you know that if you
12 haven't signed any contract? If you have always
13 received books and read them however you please, what
14 would legally require you to only watch or view
15 something on a particular device?

16 MS. PETERS: Because you are told that
17 this plays on this machine or other ones or when you
18 put it in your machine this is the machine it will
19 play on. You're raising it as a labeling question.
20 You are basically saying that there is nothing that
21 you purchase in the digital arena that you ever are
22 told or know is limited in any way.

23 MS. GROSS: Why would I know something is
24 limited unless I have agreed for it to be limited? I
25 mean, my point is that the copyright holders may wish

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1 for something to be limited. They may wish that I may
2 only view something on a particular device but that
3 doesn't mean I know I may not do otherwise.

4 MS. PETERS: Okay.

5 Do you want to say anything about that?

6 MR. MARKS: I just sort of think as a
7 matter of frankly practicality going to your CD
8 example, you know, when CDs were first being
9 introduced and consumers bought CDs, I mean, they knew
10 they couldn't be playable on turntables. If you
11 wanted to buy a CD and enjoy an CD you had to buy a
12 new playback device. I mean, similarly those people
13 who were early adopters of Beta, Sony Betamax players,
14 knew that as VHS came onto the market that the VHS
15 tapes were not compatible with the Betamax players
16 even though they were both analog video cassette
17 recording and playback devices.

18 I think that is just sort of a natural and
19 a given that when a particular format is delivered to
20 the market, particularly a physical format but,
21 frankly, an electronic format too as in your e-book
22 example, that it isn't necessarily playable on every
23 playback device or playback methodology that a
24 consumer may have available or may have in their
25 homes.

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1 MS. PETERS: Ms. Gross, we were talking
2 about sense here. When you buy a particular thing,
3 isn't it common sense that it's not going to play on
4 every single thing?

5 MS. GROSS: There's a big distinction
6 between knowledge and a legal requirement. It's true
7 that I could buy a record and it's not going to pay on
8 my cassette tape, but I could make a copy of it and
9 play it on my cassette tape. So, it's not some legal
10 requirement that I can't put that music on another
11 form media. It's just the way the technology has
12 worked in the past. It's industry custom. It's not
13 a legal requirement.

14 MS. PETERS: If, in fact, your thing that
15 you brought on the record is also available on tape,
16 what gives you the right to convert it from a disk to
17 a tape?

18 MS. GROSS: Well, I think the 9th Circuit
19 Court of Appeals in the Diamond Rio case made very
20 clear that space shifting your music from a CD or from
21 any type of technology to another is well within the
22 personal use fair use rights of individuals.

23 MS. PETERS: That case dealt with digital
24 and the fact that there's an exchange for no liability
25 for consumers because the manufacturers actually pay

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1 for the equipment and the tapes. So, it's a no
2 liability issue in Chapter 10.

3 I wasn't really talking about digital per
4 se in this case.

5 MS. GARLICK: I would also just like to
6 point out that we are actually talking about access to
7 content in particular formats --

8 MS. PETERS: Right.

9 MS. GARLICK: -- not necessarily the
10 availability of the content as we mentioned in our --
11 in our sort of written testimony that we gave early.
12 It is also a different type of content by virtue of
13 the different type of format.

14 So, in that respect, we would submit that
15 it's not directly comparable to say oh, I can have it
16 on a cassette tape or I can have it in a digital
17 format.

18 MS. PETERS: I'm not sure I get that
19 distinction, but okay.

20 I'm going to pass it at this point and go
21 to you, David.

22 MR. CARSON: Okay. The first question
23 really relates probably to everything we're going to
24 talk about this entire day, but let's -- let's get it
25 out in the open now.

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1 Mr. Metalitz, I think you, too, Mr. Marks,
2 but I especially recall you, Mr. Metalitz, talking
3 about how successful the DVD format has been, how many
4 people have DVD players, how many DVDs are on the
5 marketplace. We refer -- you refer to the digital
6 cornucopia and so on and that's all well and good, but
7 I'm wondering if that doesn't create a problem as well
8 and the problem is this.

9 Three years ago you'll recall, one of the
10 things we said when we were talking about DVDs was
11 well, to the extent that some people have come forward
12 with problems presented by DVDs and some of the
13 restrictions you have with DVDs.

14 The fact that all this stuff is available
15 on VHS certainly makes those problems not such
16 problems and that's one of the reasons why we don't
17 really feel we need to worry about it. Certainly not
18 the only reason, but one of the reasons.

19 Can we say today particularly looking
20 forward to the next years starting this October 28th
21 that that's still going to be the case? It's my
22 impression that that's not going to be the case, that
23 we're no longer going to be able to say it doesn't
24 matter because this stuff is also available in other
25 formats. Because it may well not be and doesn't that

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1 make us have to look a little harder at some of the
2 other issues that are being raised because of that.

3 MR. METALITZ: Well, I think you raise a
4 good question and first specifically with regard to
5 the demise of VHS, I think it, like so many other
6 demises, it has been somewhat exaggerated. It's still
7 a \$10 billion business this year and -- or in 2002 and
8 it's not going to disappear in -- by 2006.

9 But, I don't think that's really -- as you
10 pointed out, that's not the only reason why you
11 reached the conclusion that you did in 2000. It may
12 not have been the most significant reason, but I think
13 the best example I can give is the demonstration that
14 Mr. Attaway gave for you earlier this month in
15 Washington in which he demonstrated that -- he used a
16 digital camcorder viewing the screen on which a DVD
17 was playing to make a excerpt from a DVD film and have
18 a digital copy that could then be used for all the
19 fair use purposes and so forth that -- that were at
20 issue there and that are at issue at some of these --
21 in some of these requests for exemption.

22 So, the fact that something -- let's
23 assume that -- that "Spiderman" was not available in
24 VHS. That fact alone certainly did not make it any
25 less available for -- for noninfringing uses. Because

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1 as he demonstrated, you could get a copy that
2 probably, in fact, is a higher quality copy than what
3 you would get by copying the VHS tape and you can use
4 that for fair use purposes assuming the copy is within
5 the scope of the fair use privilege and for forth.

6 It's just as available for that purpose
7 even if it were not in VHS and as we demonstrate in
8 our -- in our testimony, there -- and particularly
9 when you get into public domain materials, there are
10 a lot of titles out there that are available in DVD
11 that were never released in VHS. So, to say that --
12 if the focus of this proceeding is on availability of
13 copyrighted material for substantial noninfringing
14 use, I think the conclusion is that also without
15 regard to the availability of the VHS the growth of
16 the DVD has increased that availability.

17 VHS obviously still remains important and
18 it probably will remain important at least in some
19 segments of the market for quite some time to come.

20 MR. MARKS: I agree with everything Steve
21 has just said and I just wanted to add a couple of
22 other points which is if you look at noninfringing use
23 in terms of access and access just to viewing the
24 content, because I agree with everything Steve has
25 just said about fair use copying or taking clips that

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1 now with digital camcorders and analog camcorders
2 being widely available and being available at lower
3 prices, query whether it costs more to buy a camcorder
4 to camcorder off a DVD than to buy a second VHS. Just
5 sort of do the editing that you would need to do to
6 take clips from a VHS. It's probably fairly
7 equivalent now.

8 But, in terms of the -- just viewability,
9 it seems to me that with the decrease, the dramatic
10 decrease in price in play-back equipment both in DVD
11 drives and in players, the barrier to viewability and
12 to use of DVD even if you had always used VHS has
13 really gone down. So, that as the market evolves and
14 if the market eventually does evolve to where movie
15 titles are made available only DVD and not on VHS,
16 there really isn't this barrier to access problem. I
17 believe the CD/LP model is very relevant here.

18 You know, for awhile CDs actually took off
19 rather slowly and for awhile, both formats were in the
20 market and now, I think it's pretty difficult to find
21 LP records of -- you know, certainly to the degree
22 that titles are available in CD. Frankly, I believe
23 that the market will eventually move that way. I
24 don't think it's going to happen in the next three
25 years, but I anticipate that, you know, perhaps over

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1 the next ten or 15 years that may well be the case.
2 But, I think by that time with the -- with the prices
3 and the wide availability of the equipment, access
4 just is not an issue.

5 MR. CARSON: Anyone else want to address
6 that? All right.

7 One of the people on that side of the
8 table, but I don't recall who, in their testimony
9 mentioned that well, it's three years later and we
10 still don't have a Linux-based DVD player. Now, we
11 certainly had some conversations about that three
12 years ago and we certainly had some statements that
13 it's just around the horizon. Is it? I mean where
14 are -- where are we with that? Why don't -- do we
15 have a Linux player out there and if not, why not?

16 MR. MARKS: I'll take that one. There --
17 when last time around we talked about and both -- both
18 at the hearing and then in my follow-up letter to the
19 copyright office that we were aware of two licensees--
20 CSS licensees who were producing Linux compatible
21 players. One was Sigma Designs and the other one was
22 Intervideo.

23 I tried to do a little bit of research on
24 this and as far as I know, Sigma Designs is no longer
25 producing their hardware solution. Intervideo is

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1 still producing their LIN DVD software solution, but
2 they make that software solution available only for
3 integration by hardware manufacturers like computer
4 manufacturers or set top manufacturers. It's
5 available on an OEM basis rather than as a off-the-
6 shelf software solution to individual users.

7 In going on to -- to the web, I found --
8 and it was an excellent public announcement but in a
9 I guess a message discussion group from an IBM
10 engineer, this was in April of 2001, announcing that
11 IBM had on its IBM Thinkpad T22 for its Linux model
12 that they had included the LIN DVD software in its
13 model so that now this Linux IBM Thinkpad was able to
14 play DVDs back, you know -- in compliance with -- with
15 CSS.

16 So, it's there, but it does not appear to
17 be there as an off-the-shelf solution that you can
18 just buy in a -- you know, at Circuit City as a stand
19 alone consumer software solution.

20 MR. CARSON: So, if I already have a
21 computer. I'm running the Linux operating system. As
22 a practical matter, there's not really anyway I can
23 watch a typical commercially produced DVD on my
24 computer. Is that correct?

25 MR. MARKS: As a practical matter, that

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1 probably is correct if all you have is your Linux
2 system just as if you were -- had your laptop computer
3 and all it could run was Windows whatever version,
4 Windows 98, that could not support a windows DVD
5 solution. Actually, Intervideo is one of the leading
6 producers of the Windows compatible DVD player
7 software and if your computer was limited such that it
8 could not take the new Windows operating system that
9 was necessary in order to play WIN DVD, yes, you'd --
10 you'd have to upgrade your computer as well.

11 MR. CARSON: And I gather the only other
12 option I'd have would be to somehow circumvent CSS so
13 that I could watch it on my computer. Is that -- is
14 that accurate?

15 MR. MARKS: The other option would be you
16 could buy a DVD player at, you know, less than 100
17 bucks or your could load -- you know, decide to load
18 a different operating system and -- and even use a --
19 if your computer or laptop didn't have a DV drive
20 built into it, buy an external DVD ROM drive.

21 MR. METALITZ: Or use both operating
22 systems. I mean you could have both operating systems
23 on one --

24 MR. MARKS: Oh, of course, you can have --

25 MR. METALITZ: -- machine and if --

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1 MR. MARKS: -- Linux and Windows. Sure.

2 MR. METALITZ: -- and if -- you can --

3 MR. CARSON: Let's assume that I'm
4 stubborn and I'm devoted to Linux and I'm going to
5 watch it on my computer because that's the way I am.

6 MR. MARKS: Right.

7 MR. CARSON: And so, I -- what I do is I
8 -- one way or another I circumvent CSS and watch it on
9 my computer now. Did I just engage in an infringing
10 use?

11 MR. MARKS: I think you have engaged in a
12 violation of 1201 --

13 MR. CARSON: Well, that wasn't the
14 question. Have I engaged in an infringing use of a
15 copyrighted work?

16 MR. MARKS: Have you engaged in a -- when
17 you have bought the copyright work and you're viewing
18 it just --

19 MR. CARSON: On my computer running Linux?

20 MR. MARKS: -- on your computer and
21 assuming you're not making a copy when you have
22 circumvented and have loaded the computer -- and have
23 loaded the disk onto your computer, assuming that
24 you've not made a copy on the hard drive and I'm not
25 talking about a buffering copy, I mean --

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1 MR. CARSON: Right.

2 MR. MARKS: -- a copy that's subject to
3 being further reproduced, I would say as far as a
4 copyright violation, you probably have not violated
5 the copyright law. But, Steve?

6 MR. METALITZ: No, I would agree with
7 that. You violated 1201(a)(1), but you may not have
8 violated the copyright. All those are independent
9 causes of action.

10 MR. CARSON: And ordinarily, there would
11 be no reason for me to make a copy of the motion
12 picture itself if all I want to do is watch it on my
13 Linux-based PC. Right?

14 MR. MARKS: I think that's correct.

15 MR. CARSON: Okay.

16 MR. MARKS: I mean the problem we've had
17 with that and well, this may not be exactly relevant,
18 but in reading the transcript from the folks who were
19 testifying from 321. It appears that often when CSS
20 encryption is stripped away and even when, for
21 example, a backup copy is made, that copy is made in
22 the clear and that's what's of great concern to
23 content owners because you then have a digital clear
24 copy that can be subject to further unauthorized
25 reproduction and distribution.

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1 That frankly is really what the fear is
2 for content owners. It's not that an individual
3 circumventing in the privacy of their own home to
4 merely watch the movie on their Linux player is a
5 threat. It's that when that content is circumvented
6 and in digital format in the clear, the fact that it's
7 so easily subject to further unauthorized copying and
8 distribution, is -- is the threat that -- that
9 concerns us.

10 MR. CARSON: Sure. I understand that.
11 But, at least in terms of what 1201 says and what the
12 past we have here brings --

13 MR. MARKS: Right.

14 MR. CARSON: -- help me out here. Because
15 it sounds like what we just walked through is the
16 situation where one can fairly say that the
17 prohibition on circumventing an access control has
18 adversely affected me and my ability to make a
19 noninfringing use of the copyrighted work. Isn't that
20 true?

21 MR. MARKS: I guess I would say frankly
22 it's mere inconvenience because you have all of these
23 readily available non-burdensome alternative like
24 loading the Windows operating system on your -- on
25 your PC or using a player that's, you know, non-

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1 expensive.

2 So, I would really characterize it as a
3 mere inconvenience rather than a substantial adverse
4 harm.

5 MR. CARSON: So, it's an adverse impact
6 but a trivially adverse impact.

7 MR. MARKS: Perhaps. Right.

8 MR. CARSON: Okay. Okay. Okay.

9 MS. GARLICK: Excuse me.

10 MR. CARSON: Oh, yes, I'm sorry. By all
11 means. Yes.

12 MS. GARLICK: I'd just like to make two
13 comments. The first is that this continued
14 presumption of a connection between accessing on an
15 unauthorized player and then further unauthorized
16 copying, that seemed to me a very considerable
17 presumption and sort of describing most of the
18 consumers as pirates which I think we would
19 challenged.

20 And the second is also the description of
21 this as a mere inconvenience. If you've invested in
22 a particular format such as Linux or some other kind
23 of format, it's not a mere inconvenience to not be
24 able to have played DVDs that you've purchased.

25 MR. CARSON: Well, you can get a DVD

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1 player for 59 bucks or less now. So, how much of an
2 inconvenience is it?

3 MS. GROSS: Well, if you could write a
4 software player for free, that's a lot of money to a
5 teenager.

6 MS. GARLICK: And also, I mean how many
7 devices do you have to purchase these days just so
8 that you can have the rights that, you know, you
9 otherwise would have? I mean the shopping list is
10 growing at the moment.

11 MR. MARKS: One response here that I think
12 sometimes gets a little bit overlooked when we're
13 talking about the Linux or the open source software
14 operating system issues is that DVD is the first
15 audiovisual format, you know, physical media
16 audiovisual format that's playable in the computer
17 environment in the first place. I mean VHS wasn't
18 playable. Super 8 movies weren't playable. Betamax
19 tapes weren't playable. It is the first, you know,
20 physical media on which motion pictures are delivered
21 that is actually playable in the PC environment.

22 My feeling is that, you know, that should
23 be welcomed by PC users and the fact that it may not
24 be playable on every single operating system does not
25 mean that the content industry should somehow be

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1 penalized by, allowing the circumvention of what is
2 viewed as a critical access control measure because
3 they've actually made the work available for the PC
4 platform but not for every single operating system.

5 MR. CARSON: I'm glad you mentioned that.
6 Because that reminded me of an analogy come up with
7 that I wanted to ask you about.

8 You talked about beta versus VHS, LPs
9 versus CDs and let me just try out a distinction on
10 you because it's one that I find myself tempted to
11 make. When we were talking about those old issue VHS,
12 beta, and so on, you're talking about incompatible
13 formats, different formats.

14 It wasn't that the CD was designed not to
15 be played on a turntable. Just that it was a new
16 technology and there was a new kind of device to play.
17 Nobody was going out of their way to make something
18 which might have been played on a turntable unplayable
19 on a turntable and yet, isn't that what we have here.
20 In other words, you've got a DVD. You've got a DVD
21 drive on a computer but with running limits.

22 MR. MARKS: Right. Right.

23 MR. CARSON: The only reason you can't
24 play it on a Linux is not incompatible format, but
25 it's because there are licensing requirements which

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1 say if you've going to have DVD drive that is -- that
2 has a technology license, it can't play that. There's
3 no technological reason why it shouldn't be able to
4 play it. A decision has been made to disable it from
5 playing it.

6 Now, isn't there a distinction there?

7 MR. MARKS: I'm glad you're asking the
8 question because, in fact, your premise of if, in
9 fact, the CSS playback capability was unavailable or
10 blocked from being made available to the Linux
11 operating system, then I think there may be -- there
12 -- I don't want to necessarily concede it, but there
13 may be some -- some greater weight to the argument.

14 The fact is that that CSS license is
15 available to folks who want to produce software
16 players for the Linux operating system. The fact that
17 there is a software player available for the Linux
18 operating system, the fact that it is CSS licensed,
19 that it is included regularly on things like IBM
20 Thinkpads that are running the Linux operating system
21 shows that it is possible. There is no blockage here.

22 The fact that the market may not be robust
23 enough for manufacturers to say there's enough
24 economic incentive here for me to go and take a CSS
25 license to produce a software player for Linux -- for

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1 the Linux operating system, that may be a market
2 problem, but it's not a licensing requirement problem.
3 The CSS license is open for anybody running an
4 operating system provided that they conform to the
5 requirements of the CSS license.

6 And the fact that this LIN DVD player is
7 out there in the market and has been out there for
8 quite some time shows that it's perfectly possible to
9 make a DVD software player that is -- that both
10 complies with the requirements of the CSS license and
11 is compatible and can be used on the Linux operating
12 system.

13 MR. METALITZ: Can I just add to that?

14 I think if you back -- taken it in a
15 slightly broader context, I think you'll see the
16 distinction between things that are designed not to
17 run on particular formats and things that just happen
18 not to run on particular formats isn't quite so sharp.

19 Because if you look historically,
20 copyright owners have in many cases made the decision
21 that they were going to release something. They could
22 have released an LP for example in 1980 or '85. You
23 could decide to release an LP -- recording as an LP
24 and as a CD. It was technologically possible to do
25 it, but there were copyright owners who made the

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1 decision not to do it.

2 They might have made the decision because
3 they really wanted to reach the market of CD
4 enthusiasts and they didn't want to reach the market
5 of LP enthusiasts particularly or they thought in the
6 long term it wasn't going in that direction or they
7 could have made the opposite calculation.

8 Many people in the 1980s objected to the
9 kind of sound they were getting from CDs and they
10 thought LPs were better and richer for certain types
11 of music and some labels made the decision we're only
12 going to release this audio file recording on LP. CDs
13 were available. We could make the decision. But,
14 we're deciding no. We don't want this to be played on
15 this platform.

16 This was a market decision and over time
17 the market evolves and some of these decisions become
18 less viable as a marketplace alternative and we're
19 seeing -- I think yesterday you had testimony about
20 how in the audio field we can look forward to a
21 certain amount of contention along different formats
22 in the years ahead.

23 So, you know, copyright owners may be well
24 faced with this type of decision in the near future,
25 too. But, that has always been a marketplace

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1 decision. The law has never dictated what that
2 decision would be. The law has never told copyright
3 owners you must release on all formats, you must
4 release on specified formats.

5 MS. GROSS: Could I make a comment to that
6 point?

7 I think that there's some obfuscation
8 going on here with respect to requiring copyright
9 owners to make something available in all formats that
10 distinction between -- with someone who simply owns
11 something and wants to try and access it in another
12 way. Making that a crime to take it upon themselves
13 to make this system work with what they've got.

14 That's a difference between requiring them
15 to make it -- make everything available and somebody
16 simply taking it upon themselves to make what -- to
17 make their property inter-operable with their system
18 and that seems to be a big point of confusion and
19 obfuscation throughout this entire proceedings.

20 If I could go back to this idea of well,
21 you could just download a Windows operating system
22 onto your Linux box. For a growing number of computer
23 programmers, Linux is sort of a political issue.
24 There's a very -- there's a growing concern about the
25 Microsoft monopoly, the lack of security in the

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1 systems and for many people, it's more than a
2 political issue. It's almost a religion. Really a
3 growing number of people.

4 So, if you're telling them to switch your
5 operating system, you're telling them to switch their
6 religion and I think you have to take a -- take a step
7 back and think about that.

8 MR. CARSON: Well, that's not quite what
9 they're saying. I think they're saying, you know,
10 have a dual booting capability. Maybe the only time
11 you ever run Windows is when you want to watch movie.
12 They're not saying you have to switch.

13 MS. GROSS: Well, but they're saying so
14 just use this religion for these circumstances.

15 MR. CARSON: Well, we believe in the
16 establishment class here. So, don't worry about --

17 MR. MARKS: Or - support your religion by
18 buying an updated Thinkpad that has the Linux DVD
19 player in it, you know. Then you're buying from IBM.
20 I'm sure the --

21 MR. CARSON: Anyone else on that topic
22 before we move on? All right.

23 MR. MARKS: Could I -- could I make just
24 one more comment while we're on this -- the -- the
25 licensing of hardware and playback systems and the

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1 rest because I had thought there was a comment made
2 this morning and if I had misunderstood it or misheard
3 it, my apologies.

4 But, that the -- that I thought I heard
5 that content owners derive some sort of financial gain
6 from the licensing of the different platforms for CSS
7 or the different hardware solutions for CSS and I just
8 wanted to make sure that if I correctly heard that
9 comment to just say that that is not the case. The
10 content owners do not gain any financial revenues or
11 any other sort of revenues from the licensing of CSS.
12 The licensing of CSS is conducted by the DVD copy
13 control association which itself is a nonprofit
14 corporation.

15 So, I just wanted to make sure I cleared
16 -- cleared that up.

17 MR. CARSON: Okay. Thanks.

18 Ms. Hinze, you made a reference to -- I
19 think it was Ms. Hinze, yes, to the first sale
20 doctrine, but you didn't really elaborate on it and I
21 was just wondering if it -- I don't think you
22 elaborated on it anyway because I wasn't quite sure
23 what the reference was all about. So, I just want to
24 give you an opportunity to explain what you were
25 talking about.

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1 If you want me to pay attention to it,
2 here's your opportunity.

3 MS. HINZE: Well, I think it sort of got
4 taken over by the discussion about how our exemption
5 would actually work in practice. That's why I haven't
6 -- not worry about it. But --

7 MR. CARSON: You've got to --

8 MS. HINZE: Sorry.

9 MR. CARSON: We're having some access
10 problems here.

11 MS. GARLICK: We can find someone to
12 circumvent those for you.

13 MS. HINZE: My point was that there's
14 nothing in the legislative history of the DMCA that
15 suggests that what Congress was intending to do at the
16 time that they enacted the DMCA in 1998 was rewrite
17 the copyright balance.

18 The particular exemption that EFF has
19 sought relates to essentially what is a private
20 performance issue. It's not one of the copyright
21 rights. Fast forwarding through material or pressing
22 a button to fast forward on DVD players through
23 material is an issue about private performance. It's
24 not one of the six exclusive rights granted to
25 copyright owners in Section 106 of the Copyright

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1 Statute.

2 And my point about the first sale doctrine
3 was that we recognize already in the copyright law a
4 balance. We carefully balance the rights that are
5 given to copyright owners with the rights that are
6 available to the general public to make use of works.
7 One of the rights we recognize in existing copyright
8 law is a limitation on the exclusive right of
9 distribution and that takes the form of the first sale
10 doctrine in the United States as recognized in Section
11 109.

12 MR. CARSON: But, you're not finding a
13 connection between the first sale doctrine and fast
14 forwarding pass commercials I assume. That's why I
15 was -- that's why I just wasn't following.

16 MS. HINZE: I think the context of my
17 statement this morning was that the rights that are
18 given to copyright owners are circumscribed. We
19 recognize limits on those and the particular activity
20 in question that we had sought an exemption for on the
21 EFF side of the table is an exemption that would
22 govern rights in -- activities that are not exclusive
23 rights. I think my --

24 MR. CARSON: Let me give you just an
25 example of how the rights of copyright owners are

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1 limited. It wasn't an example that was tied to --

2 MS. HINZE: In our December comments, we
3 have pointed out that the first sale doctrine does put
4 a limit on what copyright owners can do after the sale
5 of their works. But, my point this morning is merely
6 that -- this by way of illustration of the
7 circumscribed nature of the rights of the copyright
8 owners and the fact that the particular activity in
9 question for which an exemption is sought is outside
10 of that exclusive list of rights.

11 MR. CARSON: Okay. Now, some questions
12 for this side of the table on the question of fast
13 forwarding pass commercials.

14 First of advertisements, first of all is
15 it still the case that some DVDs released by some
16 studios still do have the ability to fast forward pass
17 advertisements disabled or is that a -- is that a
18 thing of the past?

19 MR. METALITZ: I'm not aware of any that
20 are doing it. I think the evidence that I gave
21 earlier in the statement -- in the reply comments was
22 that the studio that is involved in many of the titles
23 that are listed there, not all, has stated that 99
24 percent of its releases do not have that feature at
25 this point in response to marketplace pressures.

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1 I can't sit here and tell you that no --
2 that no motion picture studio has ever released or is
3 not now releasing a single title that disables that
4 feature. I just don't know.

5 MR. CARSON: The statement you just made
6 allows the possibility that 1 percent of current
7 releases still have it. Okay.

8 Since I think you probably represent all
9 the major studios, if you could come back to us with
10 some more specific information on current and
11 anticipated future practices that may or may not be
12 relevant, but it would be useful to know.

13 Mr. Marks.

14 MR. MARKS: I just wanted to speak because
15 I can speak only for my own company, but I went back
16 and checked with my company and as far as Warner Home
17 Video is concerned which is the video division of AOL
18 Time Warner that releases DVDs, I was informed that
19 they have never disabled the fast forwarding
20 functionality and have no intention to do it.

21 MR. CARSON: I think Mr. Turnbull
22 testified to that in Washington as well.

23 Now, maybe I'm asking the wrong people,
24 but I'll ask it anyway. Why shouldn't consumers be
25 permitted to fast forward pass those ads at the

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1 beginning of the DVD? Anyone want to testify to that?

2 MR. METALITZ: It may be that they are.
3 Because as I understand, the claim for exemption here,
4 the feature or the capability, let's put it that way
5 that disables the fast forward button in certain
6 circumstances is not an access control technology.

7 MR. CARSON: Okay. But, that's not my --
8 my question isn't whether or not it's an -- it's a
9 more -- it's a much more general question which is
10 assuming that at least with some releases consumers
11 aren't able to do it for whatever reason, why
12 shouldn't they be able to do it?

13 MR. METALITZ: Well, one reason that they
14 might not be able -- that maybe they shouldn't be able
15 to do it is if it's against the law and I'm trying to
16 say that from what I hear here it is not against the
17 law. At least, it's not against Section 1201(a)(1)
18 for them to do that if, in fact, the technology is as
19 it was represented here.

20 MR. CARSON: Okay. Let's talk policy.
21 And assume it is against the law. I don't know
22 whether it is or it isn't yet.

23 MR. METALITZ: Assume it isn't the law.

24 MR. CARSON: If we're trying to figure out
25 whether there is a noninfringing use here that people

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1 are being deterred in their ability to engage in,
2 well, I guess the first question is is it a
3 noninfringing use to skip pass the commercials on a
4 DVD or is that somehow an act of infringement?

5 MR. METALITZ: I don't know that it's an
6 act of infringement, but I think the issue that's
7 raised here is what would have to be done in order for
8 them to skip pass.

9 MR. CARSON: Sure. We'll get to that.

10 MR. METALITZ: And that may involve a lot
11 of other things besides this UOP --

12 MR. CARSON: Sure. We'll get to that, but
13 the first thing I'm trying to understand is if we're
14 being asked to permit people to do something that you
15 don't want them to do and if the purpose of our being
16 asked to do that is the argument that people should be
17 able to skip pass these advertisements, what I'm
18 trying to hear is if the people who are saying don't
19 do that -- do you have any arguments as to why people
20 shouldn't be able to skip pass those advertisements or
21 are you just going to abandon the field on that one?

22 MR. METALITZ: I don't have any arguments
23 as to why they shouldn't be able to do it, but I would
24 note that in other contexts this may be the subject of
25 litigation in public context where -- particularly

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1 where skipping through parts of what's on the DVD may
2 result in the creation of a derivative work. It is --
3 that is -- is potentially infringing.

4 MR. CARSON: Leaving that issue aside, I
5 don't see the -- I don't -- I don't consider this as
6 an infringing activity.

7 MR. METALITZ: Okay.

8 MS. HINZE: May I just --

9 MR. CARSON: Please.

10 MS. HINZE: This is a different. I believe
11 Mr. Metalitz is referring to the Clean flicks -- I
12 believe Mr. Metalitz' last comment is a reference to
13 the Clean Flick case that is currently before the
14 courts.

15 As I mentioned, our exemption doesn't
16 require that it be something done to the DVD itself.
17 That -- may be one way to do it, but actually as the
18 discussion this morning has proceeded what we have
19 been discussing is a modification of the DVD player.
20 Just to clarify for the record that the Clean Flicks
21 situation is a different situation to the one in issue
22 in the conversation we had this morning.

23 MR. CARSON: Right. Now -- yes.

24 MR. METALITZ: Just to enter into this
25 policy debate that you sort of opened up with respect

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1 to advertising. I think we have to think of the
2 different windows of exploitation here and I want to
3 be very careful here because this now is purely as a
4 policy matter rather than a copyright matter or a DMCA
5 access control matter.

6 I think there are some concerns from the
7 content industry that if ad skipping in the context,
8 for example, of commercially supported television
9 becomes so frequent that, in fact, the revenue model
10 for commercially supported television where it's
11 available free to the public may not be sustainable
12 and as a policy matter, do we want free over the air
13 broadcast television to go away. I think you could
14 say no, as a policy matter, we do not and, therefore,
15 we want to have certain controls on the ability to
16 completely skip ads.

17 I think, and this is my own personal
18 opinion, in the context of a DVD where there is a
19 price paid for the piece of media, I do not see that
20 same policy argument having as much weight and,
21 therefore, I do not consider it either as a copyright
22 matter or a noninfringing use to be able to fast
23 forward the ads or frankly, I don't see a great policy
24 justification to prevent the fast forwarding of ads on
25 a DVD itself.

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1 MR. METALITZ: I would just add on the
2 policy side of this, I have no disagreement at all on
3 the legal side.

4 Mr. Marks is describing the current
5 business model for distributing DVDs. Someone may
6 have a business model that's different. They may even
7 want to give away their DVDs to have an advertiser
8 supported medium and we've seen this happen along the
9 line in broadcast everywhere else. So, in that sort
10 of sense, it could have a policy implication.

11 MR. MARKS: I agree with him. I agree
12 with that.

13 MR. METALITZ: As to -- as to current
14 models, I don't think it does.

15 MR. CARSON: Nobody's arguing we're paying
16 less for our DVDs because of watching commercials.

17 MR. METALITZ: That's right.

18 MR. CARSON: Okay.

19 MS. GROSS: I just wanted to address the
20 point that we heard earlier that it's a mere
21 inconvenience to have to watch 30 seconds worth of
22 commercials. I think that really doesn't address the
23 main criticism which is that parents are very
24 concerned about the amount of advertising and the type
25 of advertising that their children are exposed to and

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1 parents want some kind of control here and these
2 restrictions prevent them from being able to fast
3 forward these -- through these commercials.

4 So, to say oh, it's just a mere
5 inconvenience because you have to sit there for 30
6 seconds, that's not the point. The point is the
7 information that goes into these children's minds and
8 the impact it has on the children as time goes on.

9 MR. METALITZ: I would agree that's a
10 legitimate issue. I just don't see that that's a
11 legitimate issue for this proceeding.

12 That whole question of advertising in our
13 society raises a lot of questions and you could get
14 into product placement and every -- a lot of other
15 issues that are legitimate subjects for policy, but in
16 terms of a substantial impact on the availability of
17 this material for noninfringing use, I don't see that
18 the 30 seconds that we're talking here is a
19 substantial impact. That's the only reason I bring it
20 up in this proceeding.

21 MR. CARSON: And -- and while we were
22 going through the testimony earlier talking about the
23 skipping and it is a mere inconvenience or not, I just
24 went through all the comments we got from the members
25 of the public up here just to try to refresh my

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1 recollection as to what they were saying and I've got
2 to say most of them use the words inconvenient,
3 annoying.

4 It didn't really sound like a substantial
5 impact to virtually any of these folks. I think two
6 people talked about not wanting their children to
7 watch commercials and I wish we could bring them in
8 here because I'd like to know where their kids watch
9 TV because we're not going to solve the advertising
10 problem in this -- in this proceeding I can assure
11 you.

12 MS. HINZE: If I could just respond to the
13 30 second skip. I actually wanted to point out some
14 concrete information that the Tarzan disk that was the
15 subject of our comments The Tarzan disk has in -- had
16 in fact four minutes of unskippable material and every
17 single time a parent put that disk -- that Disney disk
18 into the DVD drive, the parents plus the children
19 would have to sit through four minutes of commercials.
20 So, just to inject some reality back into the
21 conversation here, it's not really a matter of 30-
22 second skips. I guess that's the point I would make.

23 The more important point that here I think
24 is that what we're talking about is a noninfringing
25 use. There's issues about burdens of proof and

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1 substantial adverse harm, but the second aspect of the
2 inquiry this morning is a focus on whether the conduct
3 that -- for which we are requesting an exemption is,
4 in fact, an infringing use of the --

5 MR. CARSON: Nobody here is arguing that
6 it is an infringing use.

7 MS. HINZE: Right.

8 MR. CARSON: It sounds like most of the
9 arguments are over whether there's a substantial
10 adverse impact --

11 MS. HINZE: Right.

12 MR. CARSON: -- on the one hand or a mere
13 inconvenience on the other. I know the folks on your
14 side of the table have problems with the notion that
15 it has to be a substantial adverse impact. Let's
16 assume for the moment that that's the standard you're
17 stuck with.

18 MS. HINZE: Or a distinct measurable and
19 verifiable --

20 MR. CARSON: Yes. Yes. Okay. Right.
21 Now, if that's the standard --

22 MS. HINZE: Right.

23 MR. CARSON: Just one last chance before
24 I pass the baton onto someone else. Assume that's the
25 standard and tell us why you've met it this time

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1 around on this particular issue.

2 MS. HINZE: There are 66 consumers who
3 have filed comments with the Copyright Office in this
4 proceeding. They've given direct first-hand
5 experience of their inability to be able to fast
6 forward through things. They may have used the words
7 mere convenience, but their point is they have been
8 upset enough about this incursion into their private
9 living room to contact the Copyright Office and file
10 comments --

11 MR. CARSON: My God, if that were -- ban
12 everything. We get people upset about all sorts of
13 things. All right.

14 MS. PETERS: All right. Ms. Douglass.

15 MS. DOUGLASS: One question. Mr. Krepick
16 certainly won't feel left out. You don't mind.
17 Right?

18 I note in your comments and discussions
19 about fair use and it's always kind of refreshing to
20 hear that fair use from content owners and those
21 allied therewith and the -- you talk about perceived
22 tensions with circumvention provisions. Earlier in --
23 last week sometime, one of our witnesses said that
24 computer science experts really couldn't tell perhaps
25 the to experts couldn't figure out how to actually

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1 implement fair use.

2 So, I guess to all of you how is fair use
3 going to play out in an access controlled world? Are
4 you going to have to decide what's fair use in the
5 first place and then be your brother's keeper, your
6 user's keeper and decide, you know, are they -- what
7 would they want to do. What kind of access do they
8 want? What is the market telling us? Are you going
9 to have to decide for users what fair use is going to
10 be in the 1201 world?

11 MR. KREPICK: Well, I think that, you
12 know, the technologies that we deal with with regard
13 to rights management in the new world, I guess one of
14 my points was is it seems like a lot of the discussion
15 is still centered around ten years ago, you know, when
16 there was VHS cassettes and there were different
17 formats and I think that, you know, the fact is that
18 we are in a new digital age and we do have
19 technologies which have been used to varying extents
20 so far by both the software publishers as well as the
21 music industry and some -- and the video industry has
22 gotten into it with their movie link and, you know,
23 being able to distribute content digitally over the
24 Internet.

25 And these rights management technologies

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1 actually have a lot of flexibility in them. I mean
2 you can, you know, allow people to use it for a
3 certain period of time. You can allow people to make
4 a certain number of copies.

5 But I think it gets to the point of Mr.
6 Carson which is, you know, why are we in the situation
7 where we take, you know, we tend to take away certain
8 -- it seems we take away certain rights that the
9 consumers have and I think it's because, you know, on
10 the other side of the equation, it's so dangerous to
11 let this material out in pure digital form,
12 unencrypted form that you've got to have some control
13 mechanisms there.

14 And out feeling in these control
15 mechanisms will evolve over time. That, you know,
16 what is out there today may not answer all of the
17 "fair rights", you know, kinds of situations that
18 people may want, but it's not clear that the content
19 owners want to give somebody the absolute right to
20 make copies anywhere, to use it on any platforms, et
21 cetera, et cetera as we talked about this morning.

22 Our position is that these technologies
23 are very flexible. But, the technologies themselves
24 need to be protected because if they're not and if,
25 you know, hackers have the ability to break any of

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1 these things anytime they want indiscriminately, then,
2 you know, that's kind of the end game in terms of the
3 content owners being able to distribute this stuff.
4 So, you know, that's where we are.

5 And I'll describe an example which
6 probably nobody in the room may know, but it's all
7 over the press today and that is we had sold Intuit,
8 basically a DRM solution for TurboTax. Both ourselves
9 and Intuit were taken to task throughout the media for
10 implementing a DRM system which locked the TurboTax
11 software to a particular PC and did not allow people
12 supposedly to move it from one PC to another. Now, I
13 can tell you that our technology does allow you to
14 move it from PC to another.

15 It turned out that probably both Intuit
16 and ourselves weren't as smart as we should have been
17 in anticipating a lot of situations particularly at
18 Christmas time when people bought new computers. They
19 bought new hard drives. They wanted to move their
20 TurboTax application from one to the other and they
21 wanted to do it easily.

22 I can tell you that it can be done. I
23 don't think either of our companies did it in the
24 right way. So, it was a very painful learning
25 experience and Intuit announced yesterday that they're

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1 actually not going to use DRM on TurboTax in the
2 packaged retail media software next year. However,
3 they will be using it on the Internet downloads, the
4 electronic distribution and on other of their
5 products.

6 So, again, it's a painful learning
7 experience for all of us because this is all new
8 territory. We are trying as best we can to give
9 consumers the kind of access rights that they want,
10 the flexibility that they want and I -- and I think
11 it's just premature, you know, to point fingers at the
12 technology and say all you're trying to do is totally
13 control distribution. You're going overboard. You
14 know, you're always accusing the consumer sort of in
15 advance of trying to make copies.

16 Well, the fact is maybe there's 66
17 consumers who wrote to the Copyright Office and
18 complained about fast forwarding, but in the Intuit
19 case there were 20,000 consumers that tried to gain
20 access to their software for free because they got a
21 hold of a registration number and they tried to hit
22 the website to get free software. So, 66 versus
23 20,000 gives you some idea of the number of consumers
24 that given stuff is free, you know, they will go after
25 it and given stuff is free, that's end game for all

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1 the content owners.

2 So, that's why we're so passionate about
3 saying, you know, don't blame the technology. The
4 technology has a lot of robustness. It's got a lot of
5 flexibility. This is a new era. It's a new age and
6 we have to think a little bit differently than we did
7 back in 1984 when the Bahamax case was around and you
8 said, you know, we're just dealing with a particular
9 physical format.

10 MS. DOUGLASS: Mr. Metalitz wants to say
11 something and then Ms. Gross.

12 MR. METALITZ: Just I have very little to
13 add to what was just said. Just that technology isn't
14 going to dictate what's fair use. Fair use is
15 determined by the courts on a case-by-case basis and
16 the frustration the technologists feel that was
17 expressed in the testimony you referred to is
18 precisely that. It's very difficult to design
19 something that will give you fair use in every
20 situation and not allow uses that are not fair use.

21 That's not really the whole question here.
22 I think this example demonstrates how market forces
23 have a huge impact on what people do and can do and
24 can't do with copyrighted material without regard to
25 whether it's fair use and the example I would give

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1 besides what was just referred to is if you look at
2 the evolution, it's been a very rapid evolution in the
3 -- in the rules or the capabilities of the music
4 downloading services over the last six months or a
5 year that they've been taken off. The legitimate
6 music downloading services and what people -- what
7 capabilities people can get through their services
8 compared to what it was six months ago in terms of
9 saving material to the hard drive, in terms of saving
10 it to other devices, in terms of disseminating it.

11 How, you know, in the absence of an
12 agreement, a lot of those uses would not be fair uses,
13 but the market is impelling the content owners and the
14 distributors to serve the market needs by allowing
15 this -- including this within the scope of their
16 license. So, I think this is the evolution we're
17 going to see and, of course, the courts will decide
18 whether a particular unpermitted use is a fair use.

19 MS. DOUGLASS: So, the evolution that we
20 see is actually a shift between the user being able to
21 make the first crack at what fair use would be to the
22 copyright owner making the first crack of what fair
23 use is going to be in terms of use.

24 MR. METALITZ: Yes, and then the market
25 ultimately determining where that balance is going to

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1 lie.

2 MS. PETERS: Or consumer expectation being
3 met by the market as opposed to fair use.

4 MS. DOUGLASS: Okay.

5 MS. GROSS: It seems like the presumption
6 underlying much of this discussion is that the
7 customers are infringers and the copyright holders
8 will be these benevolent dictators who will permit us
9 fair uses in certain circumstances that they feel is
10 appropriate, but let's remember fair use is lawful,
11 but unauthorized use.

12 So, if we're talking about replacing fair
13 use with a system that only permits authorized use,
14 we're eliminating fair use completely. This is a
15 distinction between liberty and license and it's
16 important to the consumers.

17 MS. DOUGLASS: Yes, Mr. Marks.

18 MR. MARKS: Yes, I just wanted to add just
19 a couple of things to what had been said because I
20 think sometimes the fair use issues and the access
21 issues get confused.

22 I mean as I understand fair use, there is
23 a presumption with fair use that access to the work in
24 the first place has been authorized. There's always
25 the typical, you know, example that's given know, fair

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1 use to quote an excerpt from a book "does not give you
2 the right to break into the bookstore and steal the
3 book."

4 The notion is that there is an authorized
5 access to the work in the first place and then fair
6 use allows you to do just as Ms. Gross said certain
7 unauthorized acts of reproduction, public performance
8 quoting, and things of that nature. And so, it seems
9 to me that the advent of access control technologies
10 in the marketplace end up facilitating a greater
11 availability of works to people in different formats
12 or in different methodologies whether it be on a
13 physical media or on a pay-per-view or on a limited
14 download or a permanent download or a broadcast.

15 In each of those different medias and
16 channels, there may be an opportunity for fair use and
17 so, when we speak of authorized access, I don't think
18 that should necessarily translate into that means the
19 content owners are trying to prevent any unauthorized
20 uses or prevent any fair uses. Let me give some
21 specific examples.

22 A DVD, that's controlled by access
23 technology. Can that DVD be played in the classroom
24 for educational purposes? You bet. Are the content
25 owners going to object to that being played for? They

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1 will not and, in fact, there's an exemption for that
2 under Section 110.

3 The example that Fritz Attaway was trying
4 to describe, you know, in his testimony in Washington,
5 he was saying assume a child is doing a book report on
6 "Spiderman" or a report to their classroom and they
7 copy an excerpt on a camcorder of a small portion of
8 the movie, Fritz said it and I would agree with him,
9 that's probably a fair use and we are not seeking to
10 prevent that. So, I do think it's important to try
11 and keep this distinction in mind between access and
12 fair use.

13 MS. HINZE: I wonder if I can make a
14 comment here. I appreciate this doesn't actually go
15 to EFF's exemption, but I'm a little disturbed by what
16 I'm hearing because I feel it is perhaps not a
17 completely accurate reflection of the fair use case
18 law in this country.

19 And I just feel it might be appropriate to
20 note here that in the Campbell case the court made it
21 very clear that a fair use does not involve a prior
22 authorization and to the extent that Mr. Marks'
23 comments appear to be suggesting the opposite of that,
24 I just wanted to note the court was quite specific in
25 pointing out that periodical fair uses were a clear

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1 category of fair uses where the court recognized that
2 it was not necessary to obtain the prior authorization
3 of a copyright owner in order to make fair use.

4 And while as I said this doesn't directly
5 go to the exemption that we're seeking in this
6 proceeding, I would want the record to reflect what
7 the reality is of the case law in this country
8 regarding fair use and regarding this argument that
9 fair use somehow requires lawful access to be
10 negotiated before a person can make a fair use of a
11 work. I don't believe that that is an accurate
12 statement of the law.

13 MS. PETERS: You going to --

14 MR. MARKS: Yes. Yes, I just wanted to
15 say to Ms. -- is it Hinze? Hinze?

16 MS. HINZE: Hinze.

17 MR. MARKS: I'm sorry.

18 MS. HINZE: Hinze.

19 MR. MARKS: Yes, I agree with her
20 statement and absolutely, you know, in the Acuff Rose
21 case the court had said the fact that, you know, the
22 2 Live Crew had sought a license to parody the Pretty
23 Woman song and had been denied the license as
24 irrelevant to whether or not the use they made was a
25 fair use. I absolutely agree with that.

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1 And what I was trying to say is fair use
2 doesn't mean that you have the ability without
3 authorization to get access to a physical copy of the
4 work.

5 MS. PETERS: Right.

6 MR. MARKS: In that case, they were
7 parodying the song themselves.

8 MS. PETERS: Right.

9 MR. MARKS: There was no access to the
10 physical copy of the work that needed to be authorized
11 in the first place. So, I absolutely agree in terms
12 of parody, in terms of commentary, criticism. You
13 can, for example, quote, you know, lines from a film
14 without having to have necessarily seen the film
15 itself. Someone could have told it to you. So, yes,
16 there are certain types of fair uses that don't
17 involve access to the physical copy of the work at
18 all.

19 MS. PETERS: Right. Thank you. Thank
20 you. Steve.

21 MR. TEPP: All right. Thank you. Mr.
22 Marks, you may have already answered this in response
23 to one of Mr. Carson's questions, but I want to get
24 back to it for just a moment regarding the fast
25 forwarding inhibition, un-skippable, whatever you want

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1 to call it. Why is it, and maybe Mr. Metalitz is the
2 right person to ask as well because you've said AOL
3 Time Warner is to do this, why do studios do it? It
4 sounds like it's just a matter of generating
5 advertising revenue. You can guarantee an advertiser
6 that they're going to get eyeballs. Is that what it's
7 all about?

8 MR. METALITZ: That may be. I think
9 that's a reasonable speculation, but I don't have any
10 first-hand knowledge of that.

11 MR. MARKS: And I unfortunately don't
12 either because we don't as studios tend to talk to
13 each other about what our marketing practices are.
14 So.

15 MR. TEPP: Okay.

16 MR. MARKS: I'm sorry. But --

17 MR. TEPP: Then we can ask a follow-up
18 question to give me a chance to follow up on that,
19 but--

20 MR. METALITZ: I would just say as our
21 testimony indicates that one studio at least that had
22 that policy on some of its releases encountered a lot
23 of consumer resistance and either doesn't do it
24 anymore or does it much less than they were doing in
25 the past. So, I just want put that on the record.

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1 MR. TEPP: And as Mr. Carson suggested,
2 we're certainly going to follow up on that as well
3 because that's an important question. But, I want to
4 juxtapose that benefit with the concerns that have
5 been raised and most articulately I think recently by
6 Mr. Krepick about the dangers of having in the clear
7 copies of audiovisual works on DVDs and I'm assuming
8 in reaching this question, I'm assuming that it is
9 necessary to circumvent CSS in order to deal with the
10 UOP issue that prevents fast forwarding.

11 We're going to -- more on that as well.
12 The impression I got from Mr. Turnbull in the
13 Washington hearing speaking for the DVCCA was that
14 pretty much all the functionality issues coating, fast
15 forwarding, etcetera were encrypted within the CSS
16 umbrella and that the only way to deal with them was
17 to first decrypt under CSS. I'm not saying that's a
18 fact. That was my impression. We'll get information
19 from you later.

20 Let's assume for this question that's the
21 fact. If we have an exemption going forward that
22 allows circumvention for the purpose of turning off
23 the UOP or turning it on whichever is the right phrase
24 so that the consumer's can fast forward, it sounds to
25 me like then studios are going to have to weigh the

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1 benefit of the advertising revenue with the danger
2 that people are now going to be able to circumvent the
3 CSS and having their copies.

4 If that's the case, given what has been
5 described, it sounds like the obvious choice will be
6 we're not going to block fast forwarding anymore and
7 so, there won't be the down side and the consumers
8 will get what they want.

9 If -- if that's a reasonable scenario,
10 doesn't that mitigate in favor of an exception and I'm
11 interested in your comment on it.

12 MR. METALITZ: Well, that's an interesting
13 argument. I think it does -- if you assume that it's
14 the role in this proceeding for the office to inject
15 itself into these market decisions and take decision
16 away from the marketplace and by granting exemptions
17 only for the purpose of influencing behavior in the
18 marketplace.

19 I think this kind of underscores why the
20 solution is so disproportionate to the harm that -- or
21 the substantial adverse impact and this is I think
22 what raises the concern because, again, if you tell
23 people it's okay to clip your fingernails and they
24 start -- they come in with chain saws the next day,
25 you have to be concerned about this and if the only

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1 way to clip your fingernails is to use a chain saw,
2 then you have to worry about all the other -- all the
3 other mayhem that may -- that may follow from that.

4 I don't think I have anything to add to
5 that.

6 MS. HINZE: Might I respond
7 to --

8 MR. TEPP: Of course.

9 MS. HINZE: -- that.

10 MR. TEPP: In a loud voice please.

11 MS. HINZE: In a loud voice. As I
12 think I've said a couple of times this morning there
13 are perhaps several ways in which this exemption the
14 Copyright Office and the Library of Congress might
15 consider granting this exemption. There are several
16 ways in which this exemption might work only one of
17 which involves "putting content into the clear" which
18 as I understand the comments that have been made this
19 morning means making -- somehow physically changing a
20 DVD, the physical disk.

21 The vast majority of what we've talked
22 about this morning is modifying a DVD player. That
23 doesn't involve any modification of any content on a
24 disk and the scope of exemption that -- the Copyright
25 Office and the Library of Congress could consider in

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1 order to affect a remedy if you like for consumers in
2 this situation is a limited exemption circumventing
3 CSS on a player in order to modify, i.e., disable the
4 UOP blocking response on the DVD player or I guess the
5 converse of that, allowing consumers to build their
6 own player which doesn't respond to UOP blocking.
7 It's not the case that there would be this vast
8 majority of in the clear works.

9 I just wanted to make it clear that I
10 actually don't think that's what's required as a
11 matter of technology.

12 Secondly, it's already a capability that
13 exists. To the extent that there's a concern that I'm
14 hearing about CSS decryption being the source of
15 copyright infringement. I think it would be fair to
16 say and -- that that concern already exists and it's
17 quite separate from the ability of consumers to -- to
18 make a noninfringing use of material they've lawfully
19 acquired which is the subject of the exemption here.

20 To the concern that there is an ability to
21 circumvent CSS and for instance post information "in
22 the free and clear" to use the words of the other side
23 of this room, that's already going on and it's
24 inappropriate to bring that to this discussion about
25 the exemption. Because as I understand what the

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1 Copyright Office's role to be in this process and what
2 the Library of Congress can do under 1201(a)(1)(D) is
3 only grant an exemption that will cover noninfringing
4 uses.

5 It's not the case that the rest of the
6 Copyright Law regime goes away. The full set of
7 rights and remedies that are available under Chapter
8 5 to copyright owners will continue to exist and to
9 the extent that the harm is already happening, it's
10 not going to be impacted by granting this very limited
11 exemption that will only apply as I said to a
12 modification of a DVD player.

13 MR. TEPP: Sure.

14 MR. METALITZ: Could I just add two
15 sentences to my answer? I think the other problem
16 with that which -- that suggestion is that in all the
17 discussions that we've had over the last three years
18 about what constitutes a particular class of works and
19 how you would define it, it sounds as though this
20 would be and I'm oversimplifying here that you could
21 circumvent CSS in order to go in and disable UOP or
22 enable. I don't know which is the right verb there
23 and then get out and make -- don't do anything else.

24 So, it's extremely dependent on the
25 behavior of the user rather than -- and I think it's

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1 as the Copyright Office concluded in 2000, that's very
2 hard to fit in the concept of the particular class of
3 works which Congress asked you to identify.

4 But, again I proceed on -- we're
5 proceeding on some assumptions here about what would
6 be required and the alternative assumption is that
7 what is involved -- since what is involved here is not
8 an access control technology, it may not be within the
9 scope of this proceeding at all.

10 MS. HINZE: Could I just respond one more
11 time?

12 MR. TEPP: Of course.

13 MS. HINZE: Just to be clear, my comments
14 just now were an explanation of the way in which an
15 exemption might work. I am aware that in the 2000
16 proceeding, the Copyright Office and the Librarian
17 issued a very clear statement about what is required
18 for a class of works.

19 In the comments submitted by EFF and in my
20 oral testimony this morning, I listed a class of
21 works. I identified a class of works which is based
22 on a Section 102 class and the class of works which we
23 have listed clearly fits within the class definition
24 as identified by the Librarian in its 2000 rule
25 making.

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1 The way in which an exemption might work
2 in practice is the point of my conversation this
3 morning and as to the question about whether
4 circumventing CSS which is, I understand, what would
5 be required in order to turn off UOP blocking in a
6 player. As to whether or not that is, in fact,
7 circumventing CSS is a violation of an access control
8 measure. I think that issue is clear. I think that
9 the issue for which the Copyright Office has sought
10 further information is a question about whether it's
11 necessary to violate CSS in order to turn off UOP
12 blocking on a player.

13 MR. TEPP: Okay. Yes.

14 MR. MARKS: Can I just add one thing? I
15 think that that's right. There is that question for
16 further factual information as to whether it's
17 necessary to circumvent CSS in order to turn off the
18 UOP function that controls fast forwarding and we will
19 certainly try and investigate that to get an answer.

20 But, I thought I heard a statement that
21 circumvention for CSS was already occurring in order
22 to make fair uses or was necessary to make fair uses
23 and if I heard that correctly, I just wanted to
24 dispute that statement. Because I think part of what
25 we're trying to say and part of what this inquiry is

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1 directed towards is whether the prohibition of
2 circumventing an access control technology is
3 adversely affecting the ability of users to make
4 noninfringing uses and I think what some of the
5 testimony Fritz gave and some of the testimony that
6 we're trying to give today is to say, in fact,
7 protecting the integrity of the access control
8 technology and not permitting a circumvention still
9 enables these fair uses to be made.

10 You don't need to circumvent the access
11 control technology in order to make a clip of the
12 movie to use in a documentary. You don't need to
13 circumvent it in order to play it for a classroom.
14 You don't need to circumvent it in order to have
15 comment and criticism.

16 So, I want to be very clear that I do not
17 accept the premise that circumvention of CSS is
18 already happening as a causal necessity in order to
19 make fair uses.

20 MS. HINZE: I'd just like to make clear
21 for the record in case there was some confusion about
22 what I said earlier.

23 I did not actually refer to fair use.
24 What I pointed out was in response to a comment about
25 a concern that I was hearing in relation to our

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1 exemption that somehow there was some causal nexus
2 between our exemption and copyright infringement and
3 that was the context in which I made my previous
4 statement.

5 MR. TEPP: Okay. Let me try and move on
6 a little bit. We spent some time earlier talking
7 about whether the UOP itself was an access control.
8 There was agreement that alone it's not. There is
9 uncertainty or disagreement possibly about whether or
10 not it's necessary to circumvent CSS in order to
11 change the UOP.

12 Again, assuming that it is, just for the
13 sake of argument, is it the position of the content
14 owners that because the UOP is not the access control
15 we can't consider that -- can't consider any adverse
16 affects on noninfringing uses by the UOP because it's
17 not the direct affect of the access control. In other
18 words, can we consider indirect adverse affects?

19 MR. METALITZ: Well, actually, I think the
20 statutory charge is to consider the impact of
21 prohibition. Section 1201(a)(1) circumventing access
22 controls and what's the impact of that on
23 noninfringing uses?

24 If what is preventing people from skipping
25 advertising is not an access control measure, then

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1 1201(a)(1) doesn't apply and, therefore, there could
2 be no impact. If on the other hand the theory is that
3 somehow CSS is preventing this indirectly, then I
4 think you have to look at the -- you have to look at
5 these other questions about how substantial is the
6 impact on noninfringing use and what would be the
7 affect of the allowing the exemption. It says --

8 MR. TEPP: It doesn't get us in the
9 ballpark though.

10 MR. METALITZ: Yes, it gets you into the
11 proceeding.

12 MR. TEPP: Right.

13 MR. METALITZ: And then you have to do
14 the--

15 MR. TEPP: Okay.

16 MR. MARKS: I would agree with that --

17 MR. TEPP: Okay.

18 MR. MARKS: -- analysis.

19 MR. TEPP: Great. Let me come back to
20 this side again and ask about since we do appear to be
21 talking about a noninfringing use, everyone seems to
22 agree with that and we may depending on the -- the
23 technology be talking about an indirect result of the
24 inability to circumvent an access control. We have to
25 look at the different factors here and one of the

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1 factors that we've been asked by the content side to
2 focus on is the fourth, the affect on circumvention on
3 the market for value of the copyrighted works and
4 particularly the potential piracy.

5 On this side, we've heard an objection to
6 that saying no, no, consumers are not criminals and
7 just because you've got some works in the clear
8 doesn't mean you're going to have piracy.

9 I generally agree that people are law
10 abiding, but we have to consider things like -- well,
11 let me ask you this. In light of what we've seen on
12 pier to pier networks, for example, Napster, where
13 people infringed copyrights because it was there and
14 because they could. What is your response to that as
15 a model for concern on this side as to how in the
16 clear copies could very well become a source of
17 massive infringement?

18 MS. HINZE: Well, first I think maybe
19 there is some confusion. As I've said, I don't know,
20 there seems to be a focus here on copies in the "free
21 and clear" and as I understand what you're saying
22 there, you're talking about somehow making the content
23 in the free and clear and what I have been discussing
24 this morning is a modification of a DVD player.

25 MR. TEPP: Well, you've been discussing

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1 both and it's not at all -- it's not a clear answer as
2 to whether or not we can issue an exemption --

3 MS. HINZE: Right.

4 MR. TEPP: -- that would mandate one
5 versus the other.

6 MS. HINZE: I -- I -- yes.

7 MR. TEPP: And if we can't then don't --

8 MS. HINZE: Right.

9 MR. TEPP: -- we have to consider the
10 potential harm of in the clear copies.

11 MS. HINZE: I guess my response was to
12 point out that it's not necessarily going to involve
13 in the -- "free and clear" copies. But I do take the
14 point that you're raising here that to the extent that
15 the Copyright Office is able to shape an exemption
16 that may not be within the scope of what is
17 permissible. That may not be within the scope of what
18 is permissible.

19 What I would say in response to the
20 concern about digital piracy is this. We've heard a
21 lot this morning that CSS and the legal sanctions of
22 1201 as applied to the protection of CSS is the reason
23 why we had a rich digital world, why we have more DVDs
24 available.

25 What I'd say is the history of CSS over

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1 the last four years does not actually show that the
2 availability of CSS and the legal norms that support
3 it have actually been the great legal protection that
4 the copyright owners presumably had sought.

5 What I mean is this. Since 1998 when DVDs
6 were first released, the content has been produced and
7 released on CSS protected DVDs. Within several months
8 of CSS protected DVDs going into the marketplace, CSS
9 was circumvented by a groups of hobbyists, most
10 famously a teenager.

11 For a number of years, the MPAA has made
12 the point, the Motion Picture Association of America
13 has made the point that a number of releases which are
14 DVD releases are available in an unencrypted form, on
15 P2P networks and this is notwithstanding the fact that
16 they have had CSS protection for the last four years.

17 What I would say is if as seems to be the
18 argument that I'm hearing that the necessity for legal
19 protection of CSS is the fact that this -- is what
20 would be required in order for content owners to
21 continue to feel comfortable about releasing work on
22 DVD format into the marketplace, CSS has been
23 spectacularly unsuccessful in protecting content.
24 That's happened irrespective of whether or not an
25 exemption is granted in this particular proceeding.

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1 You would expect if copyright owners were as concerned
2 as they are arguing here about the protection that
3 they require in order to make their works available,
4 that they would have abandoned the CSS format, the CSS
5 -protected DVD format as their medium of release.
6 But, in fact, there's a greater move to release things
7 purely on DVD or primarily on DVD in terms of new
8 releases.

9 So, I don't think it's a complete
10 statement of the motivations of the studios to say
11 that the need for CSS and the need for legal
12 protection for CSS is the full picture here.

13 I guess that's one comment I would like to
14 make probably of a more general nature.

15 The second comment I'd like to make is as
16 I said, that the exemption here is a limited
17 exemption. It will apply to a limited number of
18 people, yes. I don't think that means that it will
19 not be a worthwhile exemption, but it will by
20 necessity apply to a group of people who can make the
21 modification of the DVD player or do whatever is
22 necessary to make content available that doesn't have
23 the advertisements in it.

24 It's a limited exemption by its nature and
25 the availability for piracy, if that's the words that

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1 the other side of the room would like to use, is a
2 capacity that already exists and -- granting an
3 exemption to a limited number of consumers to allow
4 them to make a noninfringing use of the work they've
5 already lawfully acquired, paid money for, doesn't
6 seem to me to be encouraging piracy. There seems to
7 be a disconnect between those two arguments.

8 We're talking about a class of people who
9 by definition have lawfully acquired content and are
10 not in the same category as people who are downloading
11 a movie for free from the Internet.

12 MS. GARLICK: If I could just back up
13 those comments and just briefly point out in -- we
14 always seem to get back to this threat of
15 Napsterization. That at issue in Napster really was
16 a commercial enterprise that was facilitating mass
17 infringements and as we addressed in our testimony
18 earlier, the nature of -- as Gwen just highlighted,
19 the nature of any exemption is going to be quite
20 personal and limited and not commercial and so, in
21 that respect, we would say that that favor weighs in
22 -- that factor weighs in favor of the exemptions
23 proposed.

24 And also given the widespread availability
25 among many of the DCSS, we've already heard testimony

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1 about how fabulous the DVD industry currently is and
2 so, that fact would suggest that the availability of
3 a certain mentioned technology has not actually
4 impaired on the business model of the industry.

5 MR. TEPP: I can see this side wants to
6 respond again.

7 MR. MARKS: I would like to respond to
8 this issue about the hack and not the -- the
9 availability of the hack has not, you know, stymied
10 the birth of the DVD market and, therefore, I think a
11 conclusion that is implied is that circumvention
12 shouldn't be a problem and should be permissible
13 because the existence of the hack of CSS, DCSS has not
14 impeded the growth of the DVD market and what I --
15 where I think there's a major disconnect there is that
16 we agree CSS was hacked. Any content protection
17 technology, access control technology or copy control
18 technology runs the risk of being hacked and almost
19 surely any of them will be. That's the raison d'etre
20 of the DMCA in the first place because technological
21 measures in and of themselves are not bulletproof.

22 What you need to achieve the correct
23 balance is the technological measure and the legal
24 mechanism and legal protections that go with it.

25 CSS was hacked. The program DCSS was

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1 posted on the Internet. Did the content owners sit by
2 and say oh well, no problem? Of course not. We
3 brought a lawsuit against to establish under the DMCA
4 that DCSS was an illegal circumvention device.

5 Why is that important? We think it's
6 important because people -- we think the ordinary
7 consumers will think twice about downloading and
8 obtaining a product or device that has been found to
9 be illegal by the court -- to engage in activity using
10 that device that is found to be illegal by the court.
11 That's very, very important in establishing these
12 legal norms and principles in terms of whether the
13 circumvention device and activity is permissible or
14 not.

15 So, we believe that, in fact, the fact
16 that DCSS has been found by a court to be an illegal
17 device actually dissuades many ordinary consumers and
18 citizens from obtaining or using it. That's first
19 off.

20 Second of all, it's important to note that
21 DCSS has not had an impact on the DVD player market.
22 DCSS can't be downloaded into DVD players and,
23 therefore, that has no influence at all in how DVD --
24 licensed CSS DVD players function. They still decrypt
25 properly and they still protect the works the way

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1 they're suppose to do in accordance with the license.

2 Similarly, even though the DCSS hack can
3 be downloaded to affect the use in the computer
4 environment, all the computer ROMs that come onto the
5 market, the DVD computer ROMs that are licensed by the
6 DVD Copy Control Association to do CSS decryption
7 continue to function in the way they are supposed to
8 do under the license. It's only when a hack has been
9 downloaded that the encryption is defeated.

10 So, in fact, the existence of CSS
11 technology, the existence of the legal protections of
12 the CSS technology, have, in fact, continued to offer
13 a strong degree of protection to the copyrighted works
14 on DVDs themselves. One of the best demonstrations of
15 that is if it were completely useless, then the
16 studios would not continue to encrypt their works with
17 CSS and, in fact, all the studios have, in fact,
18 continued to encrypt their movies on DVDs using CSS.

19 And finally, I just wanted to respond to
20 the point about well, if, you know -- if it wasn't a
21 problem with this hack or if the -- I'm sorry, if the
22 hack was really so problematic and the defeat of the
23 technology was so problematic, wouldn't the studios
24 have stopped distributing their movies on DVD or
25 frankly perhaps a more likely scenario, wouldn't we

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1 have changed the encryption method. Well, you know,
2 believe it or not the studios actually have a concern
3 for their customers out there and we would recognize
4 that if we were to start encrypting our DVDs disks
5 with a new encryption system and abandon CSS, those
6 disks would not be playable on the 40 million DVD
7 players that have been sold into consumer households.
8 We think that would not be a particularly consumer
9 friendly proposition and rather than telling consumers
10 go out now and throw away the DVD player that you
11 bought a year ago, a month ago, a week ago and go buy
12 something else, we think it's a much more user
13 friendly and consumer friendly proposition to say, you
14 know, that this circumvention is illegal, the
15 circumvention device is illegal, and it should be kept
16 away from the market as much as possible.

17 MS. PETERS: Thank you. Even though there
18 are additional questions, I think that it is necessary
19 and proper that we take a short break. People here
20 are all, you know, stuck here. So, we need to take a
21 refreshment or whatever break.

22 Why don't we resume at five of 11:00.
23 Take ten minutes and then we'll finish this panel and
24 start the next.

25 (Whereupon, at 11:43 a.m. off the record

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1 until 11:56 a.m.)

2 MS. PETERS: We're going to resume and
3 Steve has some additional questions, at least one
4 additional questions, but we're going to go to Rob and
5 then back to Steve. So, Rob.

6 MR. KASUNIC: So, I -- one question for
7 Mr. Krepick who I understand has to leave soon. So --

8 MS. PETERS: Well, he has a phone call.

9 MR. KASUNIC: Okay.

10 MR. KREPICK: At 12:30.

11 MR. KASUNIC: In some of your responses
12 you mentioned don't blame technology and about the
13 painful learning experience with the Intuit situation
14 and my question whether -- you also said that one hack
15 has -- can have multiple affects and I wonder isn't
16 that something that is a result of the design of the
17 technology?

18 Is it necessary for instance, the way this
19 may work with CSS in the code, the UOP code, that if
20 it's nested within CSS, then that creates the problem
21 that we may be facing. Isn't there other ways to
22 design this technology so that we have basically
23 distinctions between copy protection measures that
24 control use and copy protection measures that control
25 access to the work so that you could circumvent one

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1 without circumventing the other?

2 MR. KREPICK: Well, like there -- I
3 suppose there are a lot of design parameters that you
4 could use. Are you talking specifically about the UOP
5 and the CSS or just sort of in general the way we --

6 MR. KASUNIC: Well, I guess in both. You
7 said don't blame the technology. Well, why not?

8 MR. KREPICK: Well, I think in terms of
9 the technology, first of all, I think everybody
10 recognizes that it's a very difficult challenge to
11 even come up with technology that can protect digital
12 content. I think everybody realizes that no matter
13 what you come up with that any kind of encryption
14 scheme can be hacked whether it's a simple, you know,
15 two bit kind of solution. In fact, the simpler the
16 solution, obviously the easier it is to hack and I
17 would contend that the simpler the solution the more
18 protection that you need under the copyright law if
19 you believe that it's important to have these kind of
20 technologies to help protect content in this digital
21 world.

22 And I think the whole point is that, you
23 know, every little kind of nick of the blade from the
24 standpoint of gaining access to content no matter how
25 limited the exemption might be, every little nick

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1 potentially can put out widespread damage because all
2 it takes is one copy in the clear to be able to
3 proliferate that on a pier to pier network and so, you
4 know, I think we are in an era where the consequences
5 of having, you know, these access control mechanisms
6 or these copy protection mechanisms, the consequence
7 of having exemptions given, having them broken is huge
8 compared to what it might have been ten years ago and
9 that's just because you're getting content in the
10 clear.

11 What I was trying to say before about
12 don't blame the technology, we are trying to come up
13 with as flexible solutions as possible which will
14 allow, you know, we don't like to use the term fair
15 use because we're technology guys. We're not lawyers.
16 I don't know all the subtleties of fair use.

17 But, I do know that consumers, you know,
18 believe that they have certain entitlements. They
19 look for certain features and so, we try to come up
20 with satisfying as many features as possible and
21 again, space shifting, time shifting, whatever without
22 even getting into a definition of whether it's fair
23 use or not.

24 So, in the process of coming up with that,
25 you have to design a system that is relatively

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1 flexible. Usually when you design a system that's
2 relatively flexible, it means there's probably a lot
3 of holes that can get into it for people who
4 -- if they have nefarious, you know, means or intent
5 that they're going to be able to basically break
6 whatever system you come up with. So, at the end of
7 the day, every one of these systems can be broken and
8 that's where the danger is and that's where I think we
9 need not only -- so, I keep arguing for stronger
10 copyright laws because I think it's the only way that
11 you're going to really ultimately, you know, kind of
12 save the content owners.

13 Because at some point -- just look at the
14 music industry. I mean you can compare. Fortunately,
15 video is higher band width. You know, it's much more
16 difficult to kind of transport video. The music
17 industry is getting killed today because it's low band
18 width. It's easy to transfer files. You know, their
19 revenues have declined while fortunately the DVD
20 revenues have increased dramatically and part of the
21 reason is the size of these files, but part of the
22 reason I believe is also the technology that's been
23 used.

24 I'm not sure if that answered --

25 MR. KASUNIC: Well, partly but not fully.

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1 I guess there are certain -- I understand that there's
2 problems out there and we understand that there's a
3 need for protection for copyright owners to put works
4 out digitally, but we also have congressional
5 distinctions for some things that copyright owners can
6 do under the DMCA and some things that are suppose to
7 be left in a separate category under the -- this way
8 there are no prohibitions on the active circumvention
9 under 1202 or 1201(b). There's no prohibition on the
10 conduct there.

11 That would be the situation that I think
12 Ms. Gross was talking about where it's not up to
13 technology companies to decide what is or what isn't
14 a fair use, but for consumers to have the ability to
15 make their own fair use determination and if they're
16 right, they're noninfringing. If they're wrong,
17 they're infringing and that's the way the
18 congressional distinction was made.

19 So, why not have the technology follow
20 Congress' distinction and the access controls in one
21 place and not have them envelop the copy protection
22 measures in a way that really prevents this act from
23 operating the way it was suppose it?

24 MR. KREPICK: I guess I can't speak to
25 kind of the way it was suppose to operate. I think we

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1 believe that we're trying to provide all of the tools
2 possible to the content owners to allow them in
3 essence to control the content, but at the same time
4 to provide some flexibility to the consumers for so-
5 called enablement of features.

6 You know, it is a matter of security. I
7 mean if you can intertwine some of these features,
8 certainly that makes it more difficult to be able to
9 hack them. So, there's a reason why, you know, when
10 some of these features get put together they get
11 imbedded and intertwined because that does make it
12 more difficult to hack them.

13 MR. KASUNIC: Maybe I could put this to
14 Mr. Metalitz and Mr. Marks.

15 In terms of that issue, is it -- certainly
16 the more they're intertwined the more difficult it is.
17 In fact, it's not just difficult but it's impossible
18 because they're prohibited under 1201(a), but there's
19 nothing that would prevent for copy controls from
20 making them as sophisticated as possible. So, it's
21 extremely difficult for any consumer to ever be able
22 to circumvent it, but it's another question to put a
23 wrapper around it of an access control so that you can
24 never circumvent it without also circumventing the
25 access control which is something that we're faced

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1 with here of having to determine whether there should
2 be an exemption in order to be able to accomplish
3 that.

4 MR. METALITZ: I'm not sure what you're
5 asking. Is the question whether there should be some
6 obligation to design the technology in a way that
7 conforms more clearly to the different statutory
8 categories and that if that obligation is not met,
9 then that's a factor weighing in favor of allowing
10 circumvention?

11 MR. KASUNIC: That sounds fair.

12 MR. METALITZ: I think Congress addressed
13 this to a limited extent in this discussion in the
14 legislative history about the importance of not having
15 a congressional definition of which particular type of
16 technology was used. In other words, there were
17 proposals that went before Congress that said well,
18 this only applies to -- the only access control we're
19 going to protect is encryption and Congress rejected
20 that approach and said no, anything that -- and took
21 a functional approach and said anything that does
22 control access to a work is subject to 1201(a).
23 Anything that controls or that inhibits the exercise
24 of an exclusive right of the copyright owner comes
25 under 1201(b) and Congress was not going to get in the

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1 business of dictating which technological approach
2 should be applied.

3 MR. KASUNIC: But isn't it common sense
4 that if they made that distinction, they were making
5 a distinction that you should be able to do one but
6 not the other. So if you put one inside the other and
7 you can't do the other, the copy control measures, the
8 act doesn't make sense any more.

9 MR. METALITZ: Are you talking about
10 particularly in the context of CSS or just in --

11 MR. KASUNIC: Maybe. I don't know. We're
12 still trying to figure out how CSS works in order to
13 determine that. If the UOP code or, as we'll get to
14 later, region coding are you can not circumvent them
15 without circumventing CSS, then yes, CSS would apply.
16 But it applies to probably hundreds of other ways
17 things could be done or are being done and that we're,
18 I'm sure, going to be faced with more and more.

19 MR. METALITZ: I'm not sure I understand
20 either of those examples because we know UOP standing
21 alone is not an access control and we know it's not a
22 copy control. We know that region coding -- the
23 Copyright Office found that region coding is an access
24 control. Now, there is a question of how closely it's
25 integrated with CSS and, therefore, what would be the

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1 impact of allowing circumvention of region coding?
2 Would it have an impact on CSS? And I assume the same
3 question could arise about UOP, even though that's not
4 an access control. But that's a separate question
5 from this issue of access control versus copy control.

6 MR. KASUNIC: Then let's turn it into a
7 hypothetical where we have a copy control,
8 unquestionable copy control within an access control.
9 Is that legitimate? Should it be legitimate? Should
10 we able to exempt if we can not accomplish
11 circumvention of that copy control?

12 MR. METALITZ: No, because again, Congress
13 provided certain circumstances in which it was
14 permissible to circumvent access controls, even some
15 circumstances in which it's permissible to make
16 available tools for circumventing access controls. In
17 the hypothetical situation you're talking about, when
18 that occurs, once you arrive at that point, you're
19 able to circumvent the copy control. I don't see how
20 it renders the statute a nullity or makes it not make
21 sense because neither 1201(a) nor 1201(b) is an
22 absolute. 1201(b) has no conduct, no circumvention,
23 prohibition -- well, what's wrong with the active
24 circumvention, as you pointed out, the 1201(a) has it
25 with exceptions and when the exceptions apply, then

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1 you get to the -- in your hypothetical situation, when
2 the exceptions apply, then you get to 1201(b) and you
3 can do your copy control circumvention. So again, I'm
4 treating this as a hypothetical because I think in the
5 instances we're talking about here, UOP and region
6 coding, there's no question there's no copy control
7 really involved in -- but we'll be coming back to
8 that.

9 MR. MARKS: This came up four years ago
10 and was the subject of an exchange between Mr. Carson
11 and myself, and I was trying to explain how CSS worked
12 and I frankly don't think at that time and even as I
13 reviewed my transcript last night from the hearing I
14 was necessarily that successful and hopefully was more
15 successful in subsequent speeches and presentations.
16 But it's not hypothetical with the CSS system. There
17 is a real example here, and so I want to address it
18 head on, which is that under the CSS system, under the
19 CSS licensed, there is a requirement for a
20 manufacturer for a CSS licensed DVD player or CSS
21 license DVD ROM drive that goes into a computer, that
22 when the CSS encrypted content is decrypted and it is
23 sent out an analog output, that if the trigger bits
24 from for Macrovision have been placed into the DVD
25 disk, the CSS encrypted disk, that the player must

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1 turn on the Macrovision and, if you will, Macrovize
2 the signal as it goes out the analog output.

3 Macrovision, in my view, is clearly a copy
4 control technology. It is not an access control
5 technology, in my view. If asked the question, and I
6 will just save you the time of asking me the question,
7 is it a violation of 1201(a) if somebody circumvents
8 the Macrovision itself on the analog output to get an
9 analog signal in the clear free of Macrovision, my
10 answer would be it is not a violation of 1201(a). I
11 hope that helps.

12 MR. KASUNIC: The only other question I
13 have for right now is in terms of CSS, one thing that
14 came to mind in Mr. Carson's queries was is CSS a
15 computer program?

16 MR. MARKS: You stumped us.

17 MR. KASUNIC: All right. Okay. Let's
18 assume it's -- it looks to me like when I look at the
19 definition that it may very well fit that definition.
20 If that's true, then why might not for the Linux
21 situation 1201(f) not be applicable in terms of making
22 one computer program interoperable with another
23 computer program creating a created computer program
24 that would allow interoperability with --

25 MR. METALITZ: That came up in the DCSS

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1 case and the court held that it was not because you're
2 not trying to get a computer program to interoperate
3 with another computer program. You were trying to get
4 an audiovisual program to interoperate. At least
5 that's my recollection of Judge Kaplan's decision. So
6 for DCSS, that's been addressed in the courts. I
7 don't know whether Judge Kaplan considers CSS a
8 computer program or not. I'd have to go back and
9 look.

10 MR. KASUNIC: Yes, I'm not sure. I think
11 that's the part that they didn't consider. They were
12 considering the audiovisual work interoperability, and
13 this has come up in our static control LEXMARK issues,
14 and it's an interesting question to ponder. That's
15 all.

16 MS. PETERS: Okay. Thank you.

17 MR. TEPP: I think this should be the last
18 question and we can all take a break.

19 MS. PETERS: No. We're just going to
20 switch panels.

21 MR. TEPP: Sorry. Anyway, to the IP
22 Justice folks, earlier Mr. Metalitz said that we
23 should not assume that platform shifting is not
24 infringing. If it's infringing, then I think we all
25 recognize that you're not in the ball park with an

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1 exemption that we can recommend to the librarian, so
2 I wanted to give you all a chance to respond to that
3 statement and make the case, if you believe it is,
4 that it's non-fringing.

5 MS. GROSS: Sure. Well, reverse
6 engineering for purposes of interoperability has been
7 an exception, fair use exception under copyright for
8 a while. The Diamond Rio case made clear that format
9 shifting, space shifting as the court called it, was
10 exactly the type of fair use, personal, non-commercial
11 use that fair use is supposed to protect. Providing
12 people to have the ability to watch their property,
13 their CDs or DVDs, on the equipment that they own is
14 a non-infringing use. They've paid for the right to
15 view that movie. They never signed any agreement or
16 any restrictions that said they can't do it in this
17 way or the other way.

18 So absent any copyright law principle or
19 other legal principle that would prohibit them from
20 doing those activities, it seems to me it's very clear
21 that it's their property and they're not otherwise
22 infringing the law. They've absolutely got the right
23 to space shift, format shift, time shift, as courts
24 have traditionally held.

25 MR. TEPP: The Register -- you cited

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1 Diamond Rio earlier and the Register pointed out that
2 case was under the Federal Home Recording Act.

3 MS. PETERS: It's under the Diamond Rio
4 case but with regard to sound recordings, there is no
5 liability when you're using a sound recording player.
6 But when you're using a computer, it's outside of
7 Chapter 10.

8 MS. GROSS: I think we can look at the
9 Betamax case where somebody had to time shift their
10 movie to watch it at a later time. It's the same
11 concept as format shift, space shift, particularly in
12 today's world where there are so many different kinds
13 of technologies that are being created. People have
14 the need, more need now than ever to be able to
15 achieve interoperability between the systems and they
16 will need to be able to space shift, to format shift,
17 in order to do that. It's not an infringing use. If
18 you, in fact, make a copy for that fair use space
19 shifting format shifting purpose, the courts have been
20 clear in saying that's lawful.

21 MR. TEPP: Okay. So you're suggesting
22 that the Sony decision should be extended to format
23 shifting as well as --

24 MS. GROSS: That's what the 9th Circuit
25 Court of Appeals tell us.

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1 MR. TEPP: Okay. Is there a response to
2 that?

3 MR. METALITZ: Well, the principle of
4 copyright law that Ms. Gross is searching for is the
5 exclusive right to reproduction, which would apply in
6 many of these cases. I'm not saying necessarily in
7 every case but many instances of format shifting and
8 platform shifting involve making a complete copy of
9 the work and so you have to look at whether any
10 exception applied, any non-liability exclusion such as
11 in the AHRA applied in limited circumstances. We've
12 cited the MP3 case in our submission. Basically,
13 these are non-transformative uses if they're exact
14 copies and often they would not be within fair use.

15 So I'm not suggesting that in every case
16 an infringement is involved. I don't think we can
17 indulge in the presumption that space shifting, format
18 shifting, platform shifting are inherent in non-
19 infringing uses.

20 MS. GARLICK: If I could just make one
21 comment in relation to the MP3.com case. That was,
22 again, we're talking about a commercial enterprise
23 that was providing a space shifting service to a
24 multitude of people and that's not what we're talking
25 about here. We're talking about individual instances

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1 of a legitimate purchaser of a DVD who may want to
2 view that DVD on a variety of different devices that
3 they own, and that's in no way comparable to the
4 MP3.com case.

5 MR. METALITZ: It's quite comparable.
6 It's not exactly the same but, in that case, MP3.com's
7 argument was that the patron, their customer, had
8 bought a copy of the CD already and they were just
9 providing a locker service for them so they can space
10 shift and get at it from different places. So it's
11 not--

12 MS. GROSS: But the court said had they
13 done that themselves, they would have been within
14 their rights. It was because of this commercial
15 service that's the third party doing it that reached
16 around the legality.

17 MS. GARLICK: Yes.

18 MR. METALITZ: I think the court concluded
19 that that's a fair use.

20 MS. GARLICK: No one has concluded but no
21 one has excluded it either and, in that instance, it
22 was the commerciality of the service which precluded
23 a fair use finding.

24 MR. TEPP: So it looks like we've got to
25 do some more analysis. Thank you.

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1 MS. PETERS: Anyone else?

2 Okay. I want to thank this panel very
3 much. It will give us a lot to chew on, and I call
4 the next panel. What we're planning to do is just get
5 the testimony from the next panel, then break for
6 lunch and then come back and do the questions
7 afterwards. So thank you very much, Mr. Krepick.

8 The second panel is going to be looking at
9 ancillary and sole source material and public domain
10 material, and those who are testifying is, once again,
11 EFF with Gwen Hinze and Ren Bucholz. They've been
12 joined with Ernest Miller for the Information Society
13 Project at the Yale Law School. They will be followed
14 by Kathy Garmezy of the Directors Guild of America and
15 then Mr. Marks from AOL Time Warner. Finally, Mr.
16 Metalitz who is representing a large number of content
17 providers. So let's start with EFF. You're getting
18 your workout today. Just remember to keep your voice
19 up.

20 MS. HINZE: Thank you again for the
21 opportunity to testify at today's hearings. EFF has
22 sought a narrow exemption for audiovisual works and
23 movies that are in the public domain in the United
24 States and that are released solely on DVD format
25 where access to the content is prevented by content

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1 scramble system and possibly other technological
2 protection measures.

3 First, I'd like to address the
4 applicability of Section 1201 to these works. EFF
5 believes that Section 1201(a)(1) does not apply to
6 public domain works because they are not titles
7 protected under Title XVII. However, there is legal
8 uncertainty about this, particularly as to the
9 application of Section 1201 to compilation DVDs
10 containing public domain works bundled with
11 copyrighted works.

12 Therefore, to the extent that the
13 Copyright Register and the Librarian of Congress
14 consider public domain works released on CSS-protected
15 DVDs to be within Section 1201's scope, we have
16 requested an exemption for this class of works. The
17 creation of a healthy and rich public domain for the
18 benefit of all society is one of the core principles
19 underlying copyright law, as recognized by the Supreme
20 Court in Twentieth Century Music Corporation v. Aiken
21 and numerous other cases. The public domain is an
22 important source of ideas, information and cultural
23 exchange.

24 With the transition to DVDs and away from
25 VHS tapes as the predominant medium for releasing and

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1 viewing movies in the United States, public domain
2 movies are now beginning to be released only on DVD
3 format. As public domain works, the material is not
4 subject to copyright law and consumers' use is, by
5 definition, non-infringing. However, consumers' use
6 of these works is inhibited where the public domain
7 material is released on a DVD with CSS protection. An
8 exemption is therefore required to allow consumers to
9 exercise the full range of rights in this class of
10 public domain material and preserve the
11 constitutionally mandated copyright balance.

12 Opponents of this exemption have made
13 three main arguments. First, they have argued that
14 EFF is mistaken in arguing that public domain works
15 released on DVDs subject to CSS protection will become
16 less available to the public. The joint commenters
17 argued that the copyright owners will have no
18 incentive to re-release public domain material on DVD
19 in the absence of a legal regime that prohibits
20 circumvention of technological measures governing
21 access to these works.

22 In support of their argument, they quote
23 from a section of the Register and Librarian's 2000
24 final rule discussing the availability of copyrighted
25 content for alternative minority operating systems

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1 such as Linux. This argument is irrelevant to the
2 question of whether copyright owners should be
3 entitled to use technological measures and the legal
4 norms of Section 1201 to preclude access to public
5 domain works. An important, indeed fundamental,
6 distinction exists between the case in issue and the
7 quoted comments on playability on alternative play
8 back systems. Copyright owners do not have copyright
9 rights in public domain works. The joint comments'
10 claim to user a facilitation proceeds on the mistaken
11 reliance on copyrights that DVD publishers do not
12 control.

13 If studios choose to release or re-release
14 a public domain motion picture on a DVD, they may do
15 so in order to obtain revenue from the sale of the
16 physical DVD, but they do not thereby obtain copyright
17 in the public domain motion picture. To argue that a
18 major studio requires technological protection
19 measures backed by legal norms to give them an
20 incentive to release works in which they do not hold
21 a copyright is either factually false or else amounts
22 to an inappropriate attempt to assert private rights
23 over a public asset. It's factually false since
24 motion picture studios are and will continue to re-
25 release these works in order to obtain revenue, as

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1 they have done on VHS for many years, even though it's
2 a public domain work and they don't hold a copyright
3 in it. Studios will continue to release public domain
4 works, as I said, as they have done for many years on
5 VHS format and, in the same way, book publishers have
6 successfully continued to publish the works of
7 Shakespeare, even though they don't hold the copyright
8 in those works.

9 Granting an exemption to commit
10 circumvention by consumers who have already purchased
11 a public domain DVD has no impact at all on a
12 copyright owner's profit from the DVD and does not
13 impact any copyright they own. The existence of legal
14 sanctions for circumventing technological measures,
15 controlling access to works that they don't own
16 copyright in, can not have any bearing on a studio's
17 decision to re-release a public domain movie on DVD.

18 The situation is no different where
19 copyright owners have a thin copyright. For instance,
20 where they choose to release a compilation DVD with a
21 public domain work bundled with works in which they do
22 hold a copyright. In either case, the copyright owner
23 would obtain, at best, a thin copyright in the non-
24 public domain elements but does not thereby obtain
25 copyright in an uncopyrightable public domain work.

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1 As recognized by numerous cases including
2 the Supreme Court's decisions in Harper and Row v.
3 Nation Enterprises, Feist Publications v. Rural
4 Telephone Service and the 9th Circuit's decision in
5 Sega v. Accolade, the public continues to retain the
6 right to access the uncopyrightable parts of that
7 compilation. An exemption is required to allow
8 consumers to exercise their right of access and to
9 prevent copyright owners from using technological
10 protection measures as a boot strap to extend their
11 thin copyrights over public domain works.

12 Second, our opponents claim that this
13 exemption confuses access and copy controls. This
14 claim was based on two misunderstandings. First,
15 about the merged nature of CSS as both an access and
16 copy control, as recognized by Judge Kaplan in the
17 Corley case, and as recognized by the Register and the
18 Librarian of Congress in the 2000 final rule.

19 Second, a misunderstanding about the
20 applicability of Section 1201 to public domain works.
21 Even if Section 1201 applies to a DVD compilation
22 which includes public domain and copyrighted parts,
23 the requested exemption will permit circumvention only
24 for the purpose of accessing and copying public domain
25 works within the compilation. Since public domain

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1 works are not copyrighted or subject to copyright law,
2 there is no prohibition in copyright law on copying a
3 public domain work once access has been granted
4 through a permitted circumvention of the CSS measure
5 which controls access to that work.

6 Third, our opponents have argued that we
7 have not met the burden of proof on proponents of
8 establishing a substantial adverse impact on
9 consumers. I'd like to make two comments in response
10 to this claim. First, as I noted in a previous panel,
11 if interpreted as the joint commenters have suggested,
12 the standard of proof would raise serious questions
13 about the equity of this rulemaking process. It is
14 simply not feasible for consumers to provide an
15 authoritative listing of every public domain motion
16 picture available only on DVD.

17 As a result of considerable effort by EFF
18 and a team of researchers including reviewing and
19 cross-checking several sources, several databases and
20 including a review of records held by the Library of
21 Congress, EFF was able to identify and provide
22 evidence of nine public domain motion pictures that
23 are currently available as solo works only on DVD and
24 not on VHS format. The joint commenters have not
25 disputed that claim. They have instead argued that

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1 this is an insignificant number of titles and that
2 there are alternative sources available for these
3 movies in existing VHS compilations, so an exemption
4 shouldn't be granted.

5 The fact that nine titles have been
6 released as individual works solely on DVD is evidence
7 of current actual harm to the public interest.
8 Whether or not some of them may exist in a compilation
9 in an unprotected format does not detract from the
10 fact that, while the evidence before the Copyright
11 Register in the 2001 rulemaking was that there was no
12 evidence of works being released solely on DVD format,
13 that is not the case before the current proceeding.
14 Public domain works are now being re-released solely
15 on CSS protected DVDs. Since these works are in the
16 public domain, the public is harmed by the fact that
17 consumers are currently precluded from accessing or
18 using them by virtue of technological means. That
19 harm occurs irrespective of whether there's an
20 alternative unprotected source. Public domain works
21 are unique. They're not fungible. Precluding the
22 public's access to one version of one of them harms
23 the public interest and upsets the careful copyright
24 balance. And this is true, even if the work might
25 exist in another format.

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1 In the next three years, this trend is
2 only likely to increase as DVDs overtake VHS as the
3 most common format for home viewing and as the
4 existing stock of VHS tape deteriorates. My colleague
5 Ren is displaying a graph showing the comparative
6 sales of DVDs versus VHS tapes over the last three
7 years. DVD sales overtook VHS tape sales in 2002.
8 The pie chart that Ren is currently showing is DVD
9 rentals versus VHS rentals for the last three years,
10 and DVD rentals overtook VHS rentals in March of this
11 year.

12 As DVD players continue to penetrate the
13 market and DVDs replace VHS tapes over the next three
14 years, public domain movies will increasingly be
15 released or re-released only on CSS protected DVD
16 format. This is already occurring. Ren is currently
17 showing a slide which quotes a Warner Home Video
18 executive announcing this year that Warner decided in
19 January to phase out releases on VHS because, and I
20 quote, "For us, VHS is dead."

21 Finally, I wish to emphasize that the
22 exemption we have requested is narrow and does not
23 permit widespread copyright violation. If a consumer
24 went beyond the scope of the exemption and sought to
25 reproduce or otherwise infringe the copyrighted part

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1 of the DVD compilation, the copyright owner could
2 bring an action for infringement and would continue to
3 have the full range of copyright infringement remedies
4 currently available under Chapter 5 of Title XVII.
5 Thank you.

6 MS. PETERS: Thank you. Mr. Miller.

7 MR. MILLER: Thank you for giving me the
8 opportunity to discuss this exemption. The exemption
9 we've asked for is the ancillary audiovisual works
10 distributed on DVDs using the content scrambling
11 system of access control. I'm going to extend our
12 initial comments and respond to the reply comments in
13 three main arguments.

14 One is to emphasize the distinction
15 between access and copy controls and why this, in the
16 case of CSS, supports an exemption. Secondly, to
17 focus on the limited scope of this rulemaking process
18 and why the reply comments by those opposing this
19 exemption are non-responsive to the scope of this
20 rulemaking and lie outside and should be disregarded.
21 And finally, to look at the balance of harms, the
22 harms to the copyright industry providing this
23 exemption which are negligible and the severe harms
24 that implicate core First Amendment values to
25 consumers without this exemption.

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1 First on the question of access versus
2 copy control. This is a critical distinction and the
3 copyright industry has done very much to try to muddy
4 the waters of this, not only in the reply comments but
5 also in the testimony you've heard here today.
6 They've had some success in confusing the courts in
7 the 2nd Circuit, and I've discussed this in depth in
8 our initial comments. There was no direct rebuttal
9 from any of the reply comments. Furthermore, I gave
10 another option to the Copyright and Librarian of
11 Congress that they could determine that CSS is not an
12 access control device but merely a copy control device
13 and does not, therefore, have to be decided because
14 any use would not be a violation of 1201(b) and would
15 not be a violation of 1201(a) since it's not a 1201(a)
16 device. Again, there was no rebuttal to this in the
17 reply comments and this was an argument that was not
18 brought up in the 2nd Circuit and one that the
19 Librarian of Congress could clearly rely upon to make
20 a separate determination.

21 What is this distinction between 1201(a)
22 and 1201(b)? 1201(a) applies to access control
23 devices and you are not permitted to traffic in these
24 devices, circumvention devices, nor are you permitted
25 to use it for whatever purpose with slight exceptions

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1 for schools and libraries in particular circumstances.
2 1201(b) is merely copy control devices in which you're
3 not allowed to traffic but you are allowed to use for
4 non-infringing purposes. If you use it for infringing
5 purposes, you are guilty of copyright infringement
6 which is a separate violation of the 17 USC.

7 What this means is that the intent of
8 Congress is that there is a clear distinction between
9 these two types of devices. They mean to prohibit
10 illicit access and trafficking in circumvention
11 devices but not to inhibit fair use. In fact, they
12 clearly state that the DMCA is not to change the
13 balance of fair use at all. Let me give you an
14 example of what Congress was thinking about. The
15 analogy that's often used by the copyright industry is
16 that of breaking into a book store. An access control
17 device keeps you from breaking into a book store and
18 then stealing the book.

19 This is not what is happening in the case
20 of CSS. It's more analogous to the fact that you go
21 into the book store, buy a book, the book has shrink
22 wrap on it. You take it home, rip off the shrink
23 wrap. Now, to some extent, the shrink wrap is acting
24 like an access control device. Obviously, you can't
25 access the book without tearing off the shrink wrap.

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1 But it's not getting towards the intent of Congress,
2 which is to permit the illicit access in the first
3 place. When you legitimately purchase a DVD, you have
4 gained legitimate access in giving good credit and
5 faith to the copyright owner.

6 Another example would be a database.
7 Congress did not want people to begin to decrypt
8 databases and access them online without paying for
9 them, and that is precisely what they are attempting
10 to do. If you interpret the DMCA in this way, that
11 CSS is not an access control device, the fact that
12 it's an encryption measure is a necessary but not
13 determinant element of a 1201(a) device, and CSS does
14 not meet that standard. But even if it doesn't, even
15 if it is an access control device, the government
16 recognized and put forward this idea that they would
17 see a separation between the two. The government
18 recognized, the Congress recognized, that there may
19 sometimes be a combination, that access control and
20 copy control devices may sometimes be merged but they
21 thought, according to legislative history, that this
22 would be a rare case. If you hold that CSS is in fact
23 a copy control and access control device, then you are
24 now making what Congress thinks the rare case to be,
25 the pair -- case since CSS on DVDs is probably the

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1 most widespread consumer digital protection device.

2 This is the decision that the court made
3 in the 2nd Circuit that was made by the judge. It is
4 both a 1201(b) device and a 1201(a) device, which was
5 what was upheld by the 2nd Circuit. What this means
6 is that if I try to make a non-infringing copy from a
7 DVD directly copying the bits on the disk, I am making
8 a violation. Maybe I'm doing a five second clip for
9 criticism or commentary. That would not be
10 infringement. It is a violation. Not only is it a
11 violation, but it could possibly have criminal
12 sanctions and heavy civil fines. This was not the
13 intention of Congress. Congress did not intend people
14 who are using non-infringing uses to be sent to jail
15 or to suffer large civil liability.

16 The muddying of the water goes further
17 than just the courts but to this very testimony and to
18 the reply comments that they provided. The copyright
19 industry wants it both ways. They want to say that
20 CSS is a copy protection device here and that we're
21 not harming the copy protection. You don't need an
22 exemption. But they're calling it an access control
23 device in courts. In fact, in the reply comments from
24 the joint reply comments, they admit that when the
25 Blogcritics are discussing some of these ancillary

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1 works on the DVDs, they have access to a works. Well,
2 they don't have access as far as the courts are
3 concerned. The court said this doesn't count as
4 access because if they had lawful access, then there
5 wouldn't be any need for circumvention.

6 They also claim that the activities that
7 we're asking for in this exemption fall under Section
8 1201(b) of the Act. I concur. However, they also
9 fall under 1201(a). That follows that if CSS is a
10 1201(a) device, then use of it is not only a 1201(b)
11 violation but also a 1201(a) violation. They're
12 trying to muddy the waters and have it both ways.

13 Now, to the extent that the joint reply
14 comments recognize that there is a right of access,
15 the Blogcritics already have access and they seem to
16 imply that it's legitimate access, then there's also
17 no harm to them in giving an exemption, which is going
18 to be my second point which is going toward the
19 limited scope of the exemption that we're asking for.

20 This rulemaking has a very limited scope.
21 The reply comments are extremely vigilant with regard
22 to requests for exemption arguments that lie outside
23 the scope of this rulemaking. Were I to make such an
24 argument, they would jump on it in a heart beat and
25 say, outside the scope, can't consider it. But they

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1 are not so vigilant with regard to their own
2 arguments. I have discussed this in detail in our
3 initial comments and these were not directly rebutted
4 in any of the replay comments.

5 In the limited scope of this rulemaking,
6 the Library of Congress is not to consider adverse
7 impacts to consumers that flow from sources outside
8 the prohibition in 1201(a)(1). These are not to be
9 considered. Similarly, it seems to me and logical and
10 within a wide reading of the statute that adverse
11 impacts on copyright industry that flow from factors
12 outside the explicit exemption are also not to be
13 considered. So when the DVD CCA in their reply
14 comments tells us that the creation and possession of
15 copy control devices or circumvention devices harm the
16 copyright industry, this is not to be considered.

17 First of all, creation and possession of
18 circumventing devices is not illegal at all under
19 1201(a) or (b). Secondly, any harm that flows from
20 that lies outside the exemption because the exemption
21 says nothing about creation or possession because that
22 lies entirely outside the scope of 1201.

23 Trafficking. If I were to ask for an
24 exemption for trafficking, there'd be no question you
25 can't provide it. Why then is the copyright industry

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1 permitted to claim all these harms that come from
2 trafficking these devices? If you give an exemption
3 that says I can use the device, that doesn't give me
4 the right to then traffick in the device and give it
5 to all my buddies and all my friends who then do
6 illicit things with it. So to the extent that any of
7 the harms that they're claiming come from trafficking,
8 then they should be disregarded.

9 Infringement. Once having given an
10 exemption, the Library of Congress can only give an
11 exemption for non-infringing uses. If you give me an
12 exemption so I can make a non-infringing use of
13 ancillary works on DVDs and I take a five second clip
14 and I put it in my review of the movie, that's
15 perfectly legitimate. That would normally be
16 considered a fair use. However, if I then take the
17 making of documentary and make multiple copies of it
18 and then begin selling them at the local swap meet,
19 that would be a non-legitimate use and would not fall
20 under the exemption. Not only would I be liable for
21 copyright infringement, I would still be liable for a
22 1201(a)(1) violation since I was given no exemption to
23 infringe. So I'd be hit by the DMCA and by copyright.

24 Finally, the Library of Congress is not in
25 the business of handing out anti-circumvention

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1 devices. If you give the exemption, you will have no
2 effect on how many of these devices are available. If
3 people have the devices already or are able to create
4 the devices or get access to these circumvention
5 devices, an exemption from the library is not going to
6 turn them into pirates. If they're already pirates,
7 if they're already infringers, then an exemption from
8 the Library of Congress, whether you give one or not,
9 is not going to have any impact to it. If they intend
10 to do illegal things, they don't need an exemption.
11 This exemption is only for those who would otherwise
12 have lawful uses but are deterred by the fact that
13 they have civil and criminal liability. So any harms
14 that flow outside of this very limited scope should be
15 disregarded.

16 Finally, let's look at the balance of
17 harms since there's going to be a balancing test.
18 There are negligible harms to the copyright industry.
19 First, as argued above, most harms lie outside the
20 scope of this rulemaking. Second, this exemption is
21 a particularly limited scope. We're not allowed to
22 make non-infringing uses. We already have a fair use.
23 Now, to the extent that any of our uses are going to
24 be non-infringing, they're going to be non-infringing
25 for two reasons. A) they're not a violation of

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1 copyright at all. They're not infringing whatever or
2 B) they're going to fall under an exemption which is
3 most likely going to be fair use. Fair use has a
4 balancing test, a four part test, that the courts are
5 supposed to balance. The last part of the test and
6 considered the most important by the Supreme Court is
7 the commercial impact on the copyright industry.

8 So to the extent that a use is considered
9 a fair use, then by definition that commercial impact
10 on the copyright industry is going to be minimal or
11 outweighed by the other factors such as transformative
12 use, such as the amount copied, etcetera, etcetera.
13 So the Library of Congress doesn't even have to take
14 the commercial impact on the copyright industry at all
15 since the fair use already takes the commercial impact
16 into balance already.

17 Finally, there's no challenge to CSS. The
18 Library of Congress isn't getting rid of CSS. We're
19 not asking you to get rid of CSS. CSS will still be
20 out there, still going to be on DVD players. It's
21 only going to be used for particular small uses for
22 ancillary works.

23 Now for the harms to the proponents of
24 this exemption. First of all, there's no denial by
25 anybody in any of the reply comments that many

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1 important works that are absolutely critical to
2 commentary and criticism such as outtakes,
3 commentaries, behind the scenes, alternative endings,
4 are available. They're available on most wide
5 releases. They're becoming increasingly available.
6 In fact, this is a perverse argument in response.
7 They say because these works are becoming increasingly
8 available and more commercially important, that is a
9 reason to deny the exemption. This is perverse to the
10 extent that there's this more important step that we
11 need to comment, we need the criticism. That's more
12 reason that we need the exemption, not to deny the
13 exemption. Were we to follow this logic, it would
14 mean that they would be encouraged to put out more and
15 more simply to prevent people from commenting on it.

16 Secondly, they make an argument about
17 marketing and that the fact that the CSS exists, it
18 means increased availability of these ancillary works.
19 This is not a good argument for two reasons. First,
20 there are other reasons that they make these works
21 available. It makes DVDs more attractive. It means
22 they want to sell more DVDs. We're not taking that
23 away from them. We're only making fair uses. We're
24 not taking away their ability to sell these outtakes,
25 to sell these commentaries and stuff like that. Were

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1 I to start selling the commentaries, I would be guilty
2 of infringement and could be punished.

3 Secondly, Congress was not concerned with
4 the diminution to the market as a whole. Congress was
5 concerned with the diminution of use to individual
6 users of a particular category. So even if we're
7 increasing the amount of ancillary works of the market
8 as a whole, the fact that it's being restricted to
9 particular individual users is what Congress was
10 concerned with, not the market as a whole.

11 Now, when it comes to the fair users we're
12 talking about, there's absolutely no denying that
13 commentary and criticism come under the fair use
14 banner. Not only are they paradigmatic examples of
15 fair use, they are core First Amendment values.
16 Commentary and criticism are what the First Amendment
17 are all about. Without the ability to do this, this
18 is a severe harm. Furthermore, we have to realize
19 that without an exemption, criminal sanction exists
20 for this and, from a First Amendment point of view,
21 when you have criminal sanction, there's a distinct
22 chilling effect that must be weighed in consideration
23 of whether or not this exemption is to be given.

24 Now, they're going to mention that they
25 don't prevent explicit copying. You can still copy

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1 and quote to a certain extent. However, exact
2 quotation is absolutely critical. What they are
3 promoting is that there's a right to paraphrase, not
4 a right to quote, to take something that's murky and
5 not there. It would be as if I'm talking to
6 Shakespeare and I want to quote Shakespeare but I have
7 to say, to exist or not to exist, that is the query.
8 It's a paraphrase but it just doesn't quite get the
9 same punch as "To be or not to be." And so exact
10 quotation is absolutely critical to commentary and
11 criticism.

12 To say that you can get other ways and you
13 can go through an analog digital conversion and
14 convert it back to analog and digital again, that's
15 going to be degradation. That's not going to be exact
16 quotation.

17 Furthermore, they say that there's no
18 explicit right to have it to the most general ability
19 to get the most exact copy and stuff like that. Well,
20 there may be no explicit right within the First
21 Amendment. That's under dispute because fair use is
22 key to the First Amendment. Copyright law would not
23 be constitutional without a fair use exemption. Now,
24 the extent of that fair use exemption is up in the air
25 and no court has decided that. But to a certain

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1 extent, fair use is necessary for copyright law to be
2 constitutional.

3 Finally, they say that there's a di
4 minimis barrier. If you want to make copies, well,
5 are you free to do it, even though there's
6 Macrovision? You can still use videotapes and these
7 digital recorders and record the TV screen and stuff
8 like that. First of all, that's not as easy as it
9 looks or as it sounds. If you've ever tried to
10 videotape your television set, you see those little
11 bars. You have progressive scan and duel scan and
12 interlaced video and stuff like that which creates
13 artefacts. That is an digital to analog, analog to
14 digital conversion which creates additional artefacts
15 in videos on the screen and at some point it's pretty
16 darn expensive. Well, for the people in this room or
17 the people at the other table, maybe buying a \$400 or
18 \$300 video camera is pretty darn cheap but for a lot
19 of the people who are posting on Blogcritics, that's
20 very expensive and you run into a grocery shopping
21 list of things that you have to buy in order to do
22 this.

23 Again, Congress is looking at the impact
24 to individuals of a particular use, not to the mass.
25 Maybe to the mass market, most people can do it, but

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1 there are particular individuals and our initial
2 comments point out these individuals, this is a very
3 large barrier to them. And so this is not merely di
4 minimis.

5 And finally, the copyright industry can't
6 have it both ways. They're claiming these massive
7 harms if you give this exemption. But then they say,
8 well, it's easy to copy it. If it's easy to copy it,
9 then pirates will certainly have the ability to do so.
10 It will certainly be on P to P networks without the
11 exemption, whether you give the exemption or not. But
12 it is a barrier to those law-abiding citizens who
13 don't want to violate the law, who are afraid of the
14 civil liability and the criminal liability. They
15 can't have it both ways. Either it's easy to copy and
16 quote, in which case there's no harm, or it's not. I
17 say that it's not that easy to quote, it is easy
18 enough for the potential pirates to do so, and the
19 critical First Amendment values inculcated here and
20 implicated are absolutely critical which is why we
21 suggest that the Library of Congress provide this
22 exemption in the next three years. Thank you.

23 MS. PETERS: Thank you.

24 Ms. Garmezy.

25 MS. GARMEZY: Madam Register and

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1 panelists, my name is Kathy Garmezy and I'm the
2 Director of Government Affairs for the Directors Guild
3 of America or DGA, as we're known. I thank you for
4 inviting us to appear before you today to discuss
5 DGA's position regarding potential exemptions to
6 access control technologies. Having listened this
7 morning, I should say I'm neither an engineer nor a
8 lawyer, but I hope that the perspective of the
9 creators of these works will prove helpful and
10 important in your deliberations.

11 In short, DGA is opposed to any easing of
12 the prohibition on circumvention of access controls
13 with respect to what are called ancillary materials
14 included in DVDs. The Directors Guild represents over
15 12,600 directors and members of what are called the
16 Directoral Team who work in feature film, television,
17 commercials, documentaries and news. The DGA protects
18 and advances their economic and creative rights
19 working for their artistic freedom and fair
20 compensation for their work.

21 Film and television are indigenous
22 American art forms which filmmakers have raised to
23 their highest quality of creativity and popularity.
24 Our goal is to ensure that this craft continues
25 unabated for the benefit of the millions of film and

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1 television viewers world-wide and that our members
2 continue to earn their living giving their talents to
3 a craft they love.

4 Because consumers no have instant access
5 to the content our members create, the debate over
6 this access has often obscured the voice of the
7 creator. In fact, the discussion usually focuses on
8 the rights of those who possess the technology, the
9 transaction between who owns the product and those who
10 download it, or the cost to the consumer and the
11 consumer's right. This assumes that the creators are
12 not stakeholders in these decisions or that the value
13 to the creator disappears as soon as their work is
14 created. In both instances, nothing could be further
15 from the truth. There are very real economic and
16 creative consequences for our members.

17 It is against this reality that I come
18 before you today. -- measures on DVDs should not be
19 eased or eliminated with respect to ancillary
20 materials. DGA is in a unique position to speak to
21 the importance of these works on DVDs, works which now
22 comprise a highly regarded and increasingly sought
23 making of sequences, discussions and visual
24 explanations. That is because this material in most
25 instances is the work of our members. If access

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1 control measures are circumvented, this material, the
2 product of our members' works, will be able to be
3 freely traded over the Internet. Since access is the
4 focus of these hearings, it is our position that this
5 type of material is more readily available to
6 consumers because of technological protection
7 measures, not in spite of them. That is true, both of
8 the exponential growth of DVD availability and the so-
9 called ancillary material which is created by our
10 members.

11 Film makers as the individuals whose
12 creative vision is the film itself has a great stake
13 in how that film is shown in DVD or other re-use
14 formats. First and foremost, they want the film to be
15 shown as they originally intended it to be seen by
16 audiences in the theater and, secondarily, on well-
17 produced DVDs and videos but not at present over the
18 Internet. Second, since ancillary works are now being
19 incorporated into most DVDs, film makers are rightly
20 concerned that those materials also remain protected.

21 These ancillary works are not simply
22 materials casually tossed out. Whether an interview
23 or a making of film, the director is actively involved
24 in the creation of the DV text and the visual elements
25 that surround the film itself. The director's voice

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1 and that of the other collaborators on the film, the
2 other creative talent, is not a mere recitation of how
3 the film was made. It is a communication between the
4 director and the audience. It provides the director's
5 perspective, historical and personal, on what the film
6 maker does with his or her craft. In other words, how
7 they create. It is in effect an oral history,
8 historically enriching and preserved for future
9 generations and, therefore, deserving of protection
10 and encouragement.

11 In fact, as DVDs of older films are also
12 released with these ancillary materials, directors go
13 back and painstakingly review their production
14 materials and the process that went into making the
15 film so that they can document their vision in a way
16 that was not accessible to the public at the time they
17 originally created their work. This is a very unique
18 and exciting process for our members and for audiences
19 and one that should not be taken lightly. What
20 they're creating is not free material nor do these
21 ancillary materials just exist in thin air. Directors
22 carefully create and produce them. They do so because
23 they want the audience to have the benefit of their
24 knowledge and their insights as film makers. They do
25 not do so so that Internet critics or others can take

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1 this material, potentially alter it and post it on
2 their website or use it in any way an individual deems
3 appropriate, even if that was not the use or the image
4 or the context the director intended.

5 The very historical value of these
6 ancillary materials to the public and the care that
7 goes into making them is all the more reason that they
8 deserve the full copy protection afforded by
9 technology. Without the security of knowing that both
10 the ancillary audiovisual materials and the movie
11 itself formatted in digital form will not be available
12 for broad, illegal piracy, the desire of members to
13 make such works, just like the interests of producers
14 in distributing them, would be severely diminished.
15 Our members are all too aware that when their work is
16 not protected, it is easily altered and exploited so
17 that it no longer resembles what they created while it
18 still carries their name on it.

19 The ultimate loser in this equation is not
20 only our members who bring their talent and hard work
21 into putting their creative vision on the screen, it
22 is the public who have shown a very clear appetite for
23 this material on DVD. Their popularity and that of
24 re-released of DVDs is demonstrated by the fact, as
25 others have said here today, that more material and

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1 more film titles are available each year. Who would
2 have believed that the existence of access control
3 measures, copyright protections has fostered the
4 popularity of DVDs and the accompanying wealth of
5 information about film making.

6 In fact, those calling for an exemption,
7 the Internet film reviewers known as broad critics,
8 have amply demonstrated themselves that they can get
9 access to and use this material with the existing
10 technological protection measures in place. It used
11 to be that critics could often only see certain films
12 at film festivals or even then they were only able to
13 talk about a film or write about the filmmaker's
14 perspective. Today, not only the films but the
15 director's voice, the voice of the original creator,
16 and the images they choose to share are widely
17 available to and incorporated into the work of film
18 critics. The burden of proof rests on these Internet
19 critics to demonstrate how their ability to engage in
20 common criticism is hindered just because they can not
21 copy and post these ancillary materials on their
22 websites. We maintain that they have more access to
23 information they need than ever before.

24 Circumvention not only adversely affects
25 the value of the copyright creative work to the

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1 producer of the copyright holder, equally important is
2 the fact that this diminished economic value also
3 flows through to the creators. Directors' economic
4 rights are dependent on the premise that the work will
5 be protected from copyright infringement or
6 unauthorized alteration of their work.

7 In short, our members' compensation and
8 pension benefits depend on residual revenues from the
9 work they create. Residuals are fees paid to them for
10 the re-use of their motion pictures or television
11 production. Our industry residual system, which is
12 over 40 years old, is designed to provide appropriate
13 compensation to our members whose contributions to
14 these works are so fundamental that without them they
15 can not be produced. In 2002, the DGA collected and
16 distributed in excess of \$200 million of these
17 residual to its members. This money represents bread
18 and butter income and that is a reality in our
19 industry made all the more necessary because the
20 creative talent industry operate on the concept of
21 free lance employment. This residual income from the
22 rebroadcast of high end film and television
23 productions is critical to our members because it
24 ensures that their economic interests are protected
25 when they are remunerated for the re-use of a work

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1 they created. These payments for the work they
2 completed support their families and go into their
3 pension plans, as I have said. Unfettered access to
4 our members' copyrighted works -- and this includes
5 the ancillary works -- takes this income directly out
6 of our members' pockets.

7 In concluding, the reasoning the Register
8 relied on in 2000 to recommend the rejection of their
9 proposed exemption for these ancillary audiovisual
10 materials is still valid today. Many of these works
11 would never have been created but for the prospect
12 that they would be distributed on a DVD protected by
13 CSS. This increased volume and the sophistication of
14 these ancillary materials just since the 2000
15 rulemaking is a direct result of the rapid growth of
16 the DVD market and the belief of our members that
17 including these materials along with their feature
18 film enhances the viewing experience of the public and
19 their understanding of the art of filmmaking.

20 We hope our members will be able to
21 continue to provide their vision and insights
22 unfettered by a fear that they will not be protected,
23 and again I thank you for the opportunity to appear
24 before you.

25 MS. PETERS: Thank you.

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1 Mr. Marks.

2 MR. MARKS: Thank you. I have no prepared
3 opening remarks for this particular panel and so I
4 wanted to, just if I may, take an opportunity to just
5 very briefly respond to some of the remarks made by
6 Mr. Miller.

7 To the content industry, we share the view
8 that comments and criticism are core First Amendment
9 values. We seek neither to diminish nor to prevent
10 comment, criticism and the free exchange of ideas.
11 They're core First Amendment values and studios and
12 media companies I think seek to promote those values
13 by putting out works and encouraging exchange of ideas
14 and commentary about them. But what this inquiry is
15 going to and what the crux of this inquiry is about is
16 whether there's a need to grant exemptions to the
17 prohibition of circumventing access controls because
18 there's an adverse impact on non-infringing uses.

19 So when we look at the fair use, when we
20 look at fair use in terms of comment, in terms of
21 criticism, in terms of educational use, in terms of
22 quoting, is our access control technology is
23 preventing those fair uses and, in particular, in this
24 case, is CSS technology preventing those fair uses?
25 I would argue the answer to that is no. If you make,

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1 as Fritz Attaway demonstrated in the Washington
2 hearings, a reproduction of a DVD by camcording it, I
3 believe that is enough to satisfy a fair use concern.

4
5 Mr. Miller seems to believe that fair use
6 guarantees the right to engage in mechanical copying
7 for a non-infringing purpose that is of identical
8 quality to the original. That may be Mr. Miller's
9 interpretation of what the fair use doctrine requires.
10 It is at direct odds with what the courts have held,
11 and I would like to quote from the 2nd Circuit in
12 Remeirdes where it said quote, "We know of no
13 authority for the proposition that fair use as
14 protected by the Copyright Act much less the
15 Constitution guarantees copying by the optimum method
16 or the identical format of the original."

17 Mr. Miller may disagree with that
18 interpretation of fair use but that is the law as
19 interpreted by the courts and, therefore, I do not
20 believe that the existence of the access control
21 technology of CSS does cause adverse impact on the
22 various fair uses that Mr. Miller describes which we
23 as the content industry agree are vitally important
24 and should be maintained. Thank you.

25 MS. PETERS: Mr. Metalitz.

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1 MR. METALITZ: Thank you. I think my
2 colleagues have covered most of this issue. In the
3 interest of time, I'll just very briefly raise a
4 couple of points.

5 With regard to the ancillary works, I
6 think Ms. Garmezzy had demonstrated a lot better than
7 I can why these should have the same protection as the
8 principal feature on the DVD. Back in 2000, you gave
9 this issue honorable mention. You said perhaps the
10 best case for actual harm in this context was with
11 respect to the ancillary works, but you ultimately
12 concluded that it appears that the availability of
13 access control measures has resulted in greater
14 availability of these materials. This is footnote 13
15 of the 2000 final rule.

16 All I can say is I think that's an
17 understatement. I think what the testimony here today
18 shows is not only has it resulted in greater
19 availability of these materials, some of these
20 materials wouldn't even ever have been created without
21 the availability of the DVD format and the DVD format
22 would certainly not have achieved the prominence it
23 has without the CSS features. So here we're talking
24 not just about greater availability but actually
25 greater production which I think is what Congress was

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1 trying to encourage certainly in the Copyright Act and
2 I would say as well in the DMCA.

3 So availability of these works in the pre-
4 DVD era was zero. Now these works are available to
5 tens of millions of people. I think by any
6 calculation the conclusion that you reached in 2000
7 remains viable.

8 Mr. Marks has pointed out what the 2nd
9 Circuit said about CSS. The 2nd Circuit also reached
10 some conclusions that CSS was an access control.
11 Congress reached some conclusions about 1201(a)(1)
12 that there could be liability, even the absence of
13 infringement. I think Mr. Miller argues quite
14 eloquently on the other side of all these propositions
15 but we're acting within a context of now that the
16 Congress has enacted and decisions that the courts
17 have made, I think that's really the context within
18 which this proceeding should be operating.

19 Of course, Mr. Attaway's demonstration has
20 already been referred to here as evidence. I'm still
21 a little uncertain as to what era our joint reply
22 comments made when they asserted that the broad
23 critics seem to have access to all of these movies.
24 They're watching them and describing them in great
25 detail in the postings that were included in Mr.

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1 Miller's submission, so it seems to me they have
2 access. We're prepared to assume that it's legitimate
3 access. But if they believe that they need an
4 exception to the access control provisions in order to
5 actually excerpt the material and post it on the site,
6 I think the record here demonstrates that that is not
7 necessary in order to promote values of comment and
8 criticism.

9 Turning very briefly to the public domain.
10 Here again, I think it's a situation where the record
11 clearly shows that over the past three years public
12 domain films have become more accessible to more
13 people with more titles in more ways with more
14 commentary, with more material that will help put them
15 in context and increase people's enjoyment of them
16 than ever before. So it's a little hard to see. I
17 mean we would say, I suppose, the glass is half full.
18 Not every public domain film is available and there
19 are real issues about preservation and so forth that
20 need to be tackled, but it's hard to see that the
21 glass is leaking and draining, which is the viewpoint
22 that EFF has brought to the table here. I think, by
23 contrast, there's been an explosion of this material
24 that's available.

25 And the issue of availability on VHS which

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1 was a factor obviously in your footnote 13 and also in
2 the PD area, I think we've already addressed that,
3 that we don't think that's the determinative factor.
4 Many of these titles were never available on VHS and
5 so it's hard to see why, because copyright owners have
6 made the decision and others besides the major studios
7 obviously, have made the decision to put public domain
8 material out in DVD format, the result of that should
9 be that protection against circumvention is limited.
10 It seems as though that's kind of providing a perverse
11 incentive to making this material available.

12 And, of course, this material, by
13 definition, if it's in the public domain, in many
14 cases, the source material is available, as you all
15 know, within the Library of Congress and if people
16 want to put it out without compilations of public
17 domain material that don't have any CSS protection on
18 them, they're free to do so and the library actively
19 encourages that and makes prints available and so
20 forth and I'm sure for some of these titles there are
21 multiple versions out. I can't give examples but if
22 you look analogously at the print market, we know that
23 there are 100 different versions of Leaves of Grass
24 and many of these other public domain materials are
25 out in multiple versions.

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1 I'll just conclude. I don't want to
2 conclude on a picayune note here, but the question of
3 these famous nine titles that the crack research team
4 at EFF discovered that were not available in VHS and
5 we pointed out in our counter-filing that in fact five
6 of them were. We found that. We didn't have a crack
7 team working on it. We had one person go on the
8 Internet for about 45 minutes one Saturday afternoon
9 and we located these. These are mostly Laurel and
10 Hardy titles. Along Came Annie. Actually, it's Along
11 Came Auntie. We gave the correct title of this work.
12 And many of these other Laurel and Hardy pictures.
13 There was also a very well known documentary by Pier
14 Lorenz, The River. That's out in VHS.

15 So what the EFF filing says is at the date
16 of submitting these comments, the commenting parties
17 were able to identify nine public domain works that
18 are now available only on DVD format and not in VHS
19 format. We agree that there's not a burden on them to
20 identify a republic domain title that is affected by
21 their exemption, but we think that when they list
22 titles and claim they're not available in one format,
23 they should be accurate about it and that's the only
24 reason that we tried to correct that in our reply
25 comments. As I said, I don't think that the

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1 availability on VHS is determinative here. What I
2 think should be determinative in this case is that
3 with the advent of DVD, including the CSS functions,
4 the result has been that public domain film material
5 is more available to more people than ever before.

6 I think we're in agreement here that
7 1201(a)(1) would not prohibit the circumvention of
8 access controls when the only thing lying behind the
9 access control is public domain material. That is
10 often not the case and, for that reason, we think an
11 exemption in this area is unnecessary and, in fact,
12 would be harmful. Thank you.

13 MS. PETERS: Okay. Thank you very much.

14 You will all have one hour, and so will
15 we, to think about the questions when we come back.
16 So see you in one hour.

17 (Off the record at 1:10 p.m. to reconvene
18 at 2:10 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 2:10 p.m.

3 MS. PETERS: Now to the final session of
4 our, I guess, seven days of hearings.

5 MR. TEPP: But we're still on the second
6 panel.

7 MS. PETERS: That's right. But it's the
8 afternoon session. I hope you all had a nice lunch
9 and are ready to answer some questions. We're going
10 to start the questioning with David.

11 MR. CARSON: I'm hoping we can clear the
12 air on at least one issue. Is there anyone in front
13 of us who would take the position that when a public
14 domain audiovisual work is put on a DVD by itself and
15 is protected by CSS that the circumvention of CSS in
16 order to do whatever one is doing with it to view that
17 public domain work would be a violation of Section
18 1201(a)(1), to circumvent CSS to access a public
19 domain work when the only thing that's on that medium
20 is the public domain work?

21 MR. MARKS: No.

22 MR. CARSON: No, you don't think it is.

23 MR. MARKS: I do not think that if it's
24 purely a public domain work which is on the DVD
25 encrypted with CSS, I believe the statute by its terms

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1 refers only to effectively controls access to a work
2 protected under this title meaning a work protected by
3 Title XVII.

4 MR. CARSON: Mr. Metalitz, I know you were
5 going to the text. Do you agree with that analysis?

6 MR. METALITZ: I would agree.

7 MR. CARSON: Okay. So I hope that
8 satisfies you folks. That was your position in the
9 first place.

10 MS. HINZE: Yes.

11 MR. CARSON: So whether we say it or not,
12 at least you've got these folks saying it. You may
13 have a chance with us. Who knows?

14 MS. HINZE: That doesn't relieve the
15 question of the compilation.

16 MR. CARSON: Well, that's my next question.
17 That's my next question. Thank you for anticipating
18 it. So how many public domain works are you folks
19 aware of that have been released in combination with
20 other copyrighted material on the same medium and
21 protected by an access control such as CSS?

22 MS. HINZE: I think we looked at the flip
23 side of the coin, so our research was looking at how
24 many works were available on DVD, public domain works
25 were available, stand-alone works, on DVD.

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1 MR. CARSON: Right. By their
2 interpretation, you don't have a problem with that.
3 The one you think there's a real problem with is the
4 compilation one, so it would be helpful to know how
5 much of a problem that is and I'm not sure I saw
6 anything in the record thus far that tells us what's
7 out there in that forum, which is the forum where you
8 really need our help, if in fact you do need our help.

9 MS. HINZE: Right. Perhaps I can give
10 this by way of a point of quantification. Our
11 comments include the figure of 70 works. The best
12 information we were able to obtain in December was
13 that there were 70 public domain works that have been
14 released on DVD. Now, again I would like to point out
15 that as a consumer organization what we had to rely on
16 were not industry sources there but the Internet Movie
17 Database Pro Service, which is the largest movie
18 Internet database on the Internet and it listed 70
19 public domain works released on DVD. I'm not aware
20 whether they are in combination or not but that
21 certainly sets sort of the upper limit and, just for
22 the sake of clarification of the record, what I think
23 is on the record -- my clear understanding is this.
24 What we have identified is nine works, public domain
25 works, that are released as pure public domain works

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1 on DVD. Mr. Metalitz has clarified that five of those
2 are available on VHS compilations and that four of
3 those are pure public domain works only available on
4 DVD and no other format.

5 MR. CARSON: Okay. Is there any witness
6 in front of us at all who is aware of a single public
7 domain work in audiovisual form that is on the same
8 medium as a copyrighted work?

9 MS. HINZE: I can answer that question.
10 I couldn't answer the question as to the total number.

11 MR. CARSON: Okay. Good.

12 MS. HINZE: I think both of the comments
13 that were submitted by consumers in support of this
14 exemption dealt with that. One deals with the Lumiere
15 Brothers. They were the French pioneers of movies and
16 the Great Works of Film Title I, Volume I includes a
17 public domain with their work in combination with
18 works which, as I understand it, are still subject to
19 copyright. There is also the example of a Charlie
20 Chaplin movie which, as I understand it, is a public
21 domain work that is in a compilation with a series of
22 Charlie Chaplin movies, some of which there is a claim
23 to copyright over.

24 So I can answer that point and I don't
25 think it would be hard for me to supplement the record

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1 if it would be helpful to the Copyright Office after
2 this proceeding but I don't have an upper limit on
3 that number for today's inquiry.

4 MR. CARSON: I don't know whether it would
5 be helpful to the office. It might be helpful to you
6 to do that.

7 Mr. Metalitz, you looked at one point like
8 you wanted to say something else.

9 MR. METALITZ: I just wanted to make sure
10 that the record is correct. I don't want to beat a
11 dead horse over these nine titles, but I don't even
12 know whether these titles are in the public domain.
13 I was assuming that they were. We found that they
14 were available on VHS. I don't know about the other
15 four titles because we didn't find them so I don't
16 know what their status is.

17 MR. CARSON: Okay.

18 MS. PETERS: All we know is that there are
19 VHS copies.

20 MR. METALITZ: There are VHS versions of
21 five of them.

22 MS. PETERS: Right, but not the other
23 four.

24 MR. CARSON: Mr. Miller, Mr. Marks
25 actually beat me to the punch on one question I wanted

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1 to ask, but at least in setting down the predicate
2 for, but having done so, you recall the passes from
3 the Corley decision and the 2nd Circuit that he
4 recited.

5 MR. MILLER: Yes.

6 MR. CARSON: I gather you would take issue
7 with the 2nd Circuit's analysis there.

8 MR. MILLER: Well, I'd like to address
9 that issue. First of all, I would take issue with the
10 2nd Circuit's analysis, but that's not the question
11 before this panel. The First Amendment does not,
12 according to the 2nd Circuit, demand mechanical
13 copying. Now, I -- as a First Amendment guarantee now
14 -- I disagree with that, but that's not before the
15 panel.

16 However, this does not mean that the First
17 Amendment is silent on the issue. A First Amendment
18 issue does exist. Whether it rises to the question of
19 unconstitutionality or not is a separate issue.
20 Unconstitutionality is a very high burden to meet, but
21 that doesn't mean that there isn't a First Amendment
22 issue at stake. The First Amendment may not guarantee
23 a mechanical copying according to the 2nd Circuit but
24 it does not foreclose the fact that mechanical copying
25 may in fact be fair use. And I would argue that in

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1 fact it is a fair use. AND the question before this
2 panel is whether or not direct copying, mechanical
3 copying, is a fair use. And in the context of
4 commentary, review, criticism and parody, the answer
5 is most generally yes.

6 Furthermore, we're not asking this panel
7 for a constitutional determination. We're asking this
8 panel to waive a harm of not permitting direct
9 quotation in the balancing between the harm to the
10 copyright industry and in the balance to the harm to
11 the people who want to do direct question. And our
12 argument, which has not been sufficiently responded
13 to, I believe, is that direct quotation is critical.
14 "To be or not to be" (cough). How much are we going
15 to permit these multiple analog copies that create
16 things? Sometimes you want to look at how a lighting
17 director lighted a scene and some of these variations
18 would be very subtle and they could easily be lost in
19 some of these various aspects and so mechanical
20 copying is absolutely critical to certain types of
21 commentary and criticism and it does identify First
22 Amendment rights. It may not rise to the level of
23 constitutionality but that does not mean that this
24 panel must not balance that harm.

25 MR. CARSON: So there are First Amendment

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1 rights that aren't constitutional? I'm not following
2 that.

3 MR. MILLER: There are First Amendment
4 issues, First Amendment values and First Amendment
5 concerns that do not rise to the level of
6 unconstitutionality. Now it may be permissible, for
7 example, for the government, say, to, for example, say
8 that you can't say certain words on television before
9 10 p.m. That does not mean that there's no First
10 Amendment interest in saying those words. It just
11 means that in the balance between the First Amendment
12 issue of saying particular words before 10 p.m. on
13 television and the balance of protecting children or
14 something, those First Amendment issues are
15 outweighed.

16 So the First Amendment issues of
17 mechanical copying may not rise to the level of
18 constitutionality, but that is a very high burden. It
19 does rise to the point of balancing the harms to the
20 copyright industry which is negligible with the harms
21 to those who want to comment and criticize on
22 ancillary works. So there's a First Amendment issue
23 there. It may not achieve constitutionality by itself
24 but it's still an interest that must be weighed.

25 MR. CARSON: You're talking largely in

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1 terms of the First Amendment. Is that what your
2 analysis is based on, the First Amendment as
3 distinguished from fair use or -- I'm a little
4 confused on what you're basing your argument on, I
5 guess. Just if you could clarify that.

6 MR. MILLER: Well, the First Amendment
7 argument is in response to the 2nd Circuit where they
8 say it doesn't rise to the level of First Amendment.

9 MR. CARSON: They also say it's not fair
10 use.

11 MR. MILLER: Mechanical copying is not
12 fair use but I would argue that -- actually, I don't
13 believe that they make that ruling. They say
14 mechanical copying is not guaranteed by fair use.
15 They don't say that mechanical copying may not be fair
16 use. So, for example, I make a pure mechanical copy
17 and it's a five second clip and it's for purposes of
18 commentary and criticism. I think most courts would
19 rule that that is a fair use. Now, whether that
20 violates 1201(a) or not is a different story, but
21 they would say that this mechanical copy was a fair
22 use. If I mechanically copy Shakespeare, assuming
23 Shakespeare wasn't copyrighted, and I wrote "To be or
24 not to be period," that's a mechanical copy of
25 Shakespeare because it's an exact absolute perfect

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1 copy of it. That would be a fair use.

2 MR. CARSON: So I gather you would say one
3 could reconcile the 2nd Circuit's analysis in Corley
4 with the position you're taking today.

5 MR. MILLER: Absolutely.

6 MS. PETERS: Can I just ask a question
7 because it's related. I don't understand your direct
8 quotation comment with regard to a DVD. Are you
9 basically saying that using a camcorder or any other
10 means is not a direct quotation, that you have to
11 somehow copy it --

12 MR. MILLER: Absolutely, and I think the
13 comments of the other side would say. In some senses
14 and for some purposes, it may be the equivalent of a
15 direct quotation. But remember, when you're doing a
16 camcorder copy of a DVD, you have the DVD which is
17 purely digital which is then converted to an analog
18 conversion. This is going to create some degradation
19 of the signal to some certain extent. This analog
20 signal is then transmitted to the camcorder which may
21 be digital or analog. In the case of an analog
22 camcorder, it's going to be converted from analog to
23 analog and analog to analog transmissions are going to
24 create various effects and be degraded. I mean
25 that's the argument that the copyright industries make

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1 all the time. And then may be converted back to
2 digital so that Blogcritics can then post it on the
3 web. So we have multiple conversions that then create
4 multiple discontinuities and may create different
5 things.

6 If you're looking at certain subtle
7 aspects of it, then you may miss them, whether it's
8 lighting or the sound is not going to be quite right
9 because the television has bad sound and then you're
10 going to the microphone of the camcorder and everybody
11 knows microphones on the camcorder are really not very
12 good. This is assuming everything works perfectly and
13 that, despite any demonstration, is not going to be --
14 you know, like I said, have you ever videotaped a
15 party and there's a television in the background. What
16 do you see? You see these bands because you're
17 dealing with different sorts of inter-laced video
18 versus progressive scan video and you have to synch
19 them just right. Otherwise, you're going to have all
20 sorts of defects that will really degrade the signal.

21 So in such cases where there's all these
22 defects degrading the signal, that's not a direct
23 quotation. Like I said, that's like "To be or not
24 (cough).

25 MS. PETERS: But doesn't it relate to what

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1 the use is? I mean for many purposes, comment and
2 criticism, it's enough to basically say a comment
3 about the lighting.

4 MR. MILLER: For many purposes, that would
5 be true, but not for all purposes and for many
6 purposes it would be perfectly great to paraphrase
7 Shakespeare and discuss the plot in Romeo and Juliet.
8 I can give you the plot of Romeo and Juliet right now.
9 I can't give you Shakespeare. For some purposes, just
10 giving you the plot of Romeo and Juliet and
11 commentating on that would be fine. But if I really
12 want to get to the language of Shakespeare, I must
13 quote Shakespeare directly. The people on Blogcritics
14 are videophiles. They love movies. They're very much
15 into the detail of movies. And these people really
16 want to get to the very heart of it. In fact, that's
17 why ancillary works are absolutely key because they
18 are showing the subtle distinctions. This isn't just
19 hey, the -- are really cool, let's go see it, dude.
20 This is, you know, look at the decisions that
21 Warchowsky brothers made in the digital option and how
22 the cameras moved and the lighting options that they
23 did here, so they really have a strong need for
24 mechanical reproduction and direct quotation in order
25 to meet their needs.

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1 For some people, sure, but we have strong
2 evidence that these videophiles demand for the
3 purposes of commentary and criticism. I mean
4 otherwise what we're saying is well, you know, hey,
5 good enough, murky, sound quality is bad, good enough.
6 I think in the balance that's a harm.

7 MR. CARSON: Mr. Metalitz, you had your
8 copy of Section 1201 open. I wonder if you could do
9 it again. Go to the bottom of page 179 in the edition
10 that we all seem to have. Just as an introduction to
11 what I'm about to try to engage you in, I take it that
12 a good deal of what you folks are saying in response
13 to what people like Mr. Miller are saying is not so
14 much that the individual act of circumvention by the
15 individual Blogcritic who wants to get that perfect
16 copy so they can show the lighting just as it was,
17 that individual act isn't necessarily the problem.
18 The problem is that what could happen subsequently
19 with respect to the copy, that the copy is suddenly
20 then free and clear and all sorts of other things
21 might happen to it. You're not so much complaining
22 about that one individual act if it just stopped at
23 the use he's talking about. Am I right or am I not
24 right, first of all?

25 MR. METALITZ: I think that's basically

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1 correct. I mean I think Mr. Miller spent a while
2 demonstrating that a lot of the uses that would be
3 enabled by circumvention would be non-infringing uses,
4 and we're prepared to stipulate that there would be a
5 lot of non-infringing uses. But Congress made the
6 decision, which we very much support, that
7 infringement liability by itself was not enough to
8 deal with the problem and the risks and the
9 uncertainties that are faced in the digital
10 millennium. You don't have to prove infringement in
11 order to show liability under a 1201(a)(1). That, I
12 think, is based on the assumption that many of the
13 things that would happen after a circumvention would
14 be non-infringing but not all.

15 MR. CARSON: Okay. Well, let's turn to
16 1201(a)(1)(d) and what that says in pertinent part is
17 "The Librarian shall publish any class of copyrighted
18 works for which the Librarian has determined, pursuant
19 to this rulemaking, that non-infringing uses by
20 persons who are users of a copyrighted work are or are
21 likely to be adversely affected and the prohibition
22 contained in subparagraph H shall not apply to such
23 uses with respect to such class of works for the
24 ensuing three year period."

25 My question is let's assume we find a

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1 particular class of work will be exempted. That
2 happened three years ago, likely to happen somewhere
3 with respect to something this time. What's the
4 effect of that? As I see it, there are three
5 possibilities you may come up with other but I'd sort
6 of like to get your analysis of it.

7 One analysis would be once a class of
8 works is exempted, anyone is free to circumvent with
9 respect to that class of works. That's one
10 possibility. Another one is once that class is
11 circumvented, anyone who is engaging in a non-
12 infringing use may circumvent but only someone who's
13 engaging in a non-infringing use. Perhaps the most
14 restrictive one that I can imagine would be that once
15 that class is exempted, anyone who is engaging in a
16 non-infringing use that we have identified in this
17 rulemaking as a non-infringing use would be able to do
18 so but nobody else. That's sort of the universe of
19 reasonable or semi-reasonable possibilities I can see.
20 I don't know.

21 I guess I'd like to know if you've got an
22 analysis of what in fact the correct analysis is. Who
23 in fact is able to take advantage of this exemption
24 once a class is exempted?

25 MR. METALITZ: This is a question we've

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1 given some thought to and obviously this provision is
2 not a model of legislative clarity.

3 MR. CARSON: Unlike the rest of 1201.

4 MR. METALITZ: Unlike the rest. Right.
5 But I think that the likeliest outcomes would be
6 either #1 or #2 in your list. The key phrase, as I
7 read it, is "Shall not apply to such users with
8 respect to such class of works." "Such class of
9 works" is the class you've defined, so we know what
10 that is. Such users. Persons who are users of a
11 copyrighted work, if you look at three lines up. I
12 think reading #2, as you said, which is that this only
13 applies to people who circumvent and then make non-
14 infringing uses assumes -- it's almost interpolating
15 such users and such uses. It's almost interpolating
16 the concept of such uses because the statute refers to
17 non-infringing uses by persons who are users of the
18 copyrighted work. A person is a user for all
19 purposes. He or she may be making non-infringing uses
20 and, if the statute said, such users for such uses
21 with respect to such class of works, then it would be
22 clear that I think #2 -- I hadn't thought about #3
23 because I don't think you really have to
24 comprehensively identify all of the potential non-
25 infringing uses, but if it said that, I think that it

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1 would be clear that #2 is the right interpretation.

2 We don't know because there haven't been
3 any (a) (1) cases, at least that I'm aware of. I think
4 the likeliest outcome would be that the courts -- it's
5 likely that the courts would find #2 as to be the
6 correct reading and I think the way it would work is
7 this. If the plaintiff claimed a violation of
8 1201(a) (1), the defendant would come in and say, look,
9 I was using one of the works in the class identified
10 by the Librarian of Congress and, therefore, I'm such
11 user, I'm a user to whom this exemption applies.

12 I think then it would probably be
13 incumbent on the copyright owner to say, but wait a
14 minute. You're not making a non-infringing use.
15 You're making an infringing use and, therefore, that
16 the exception really doesn't apply to you.

17 Now, in that case, there might also be--
18 obviously the claim of the copyrighter would be that
19 there would be infringement liability also. I think
20 if you had a case where it was just a claim under
21 1201(a) (1), that would be based on a non-infringement.
22 In other words, in the case where there isn't an
23 exempted class.

24 MR. CARSON: Let's assume for a moment
25 that interpretation #2 is the correct interpretation

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1 and nobody disagrees. Let's just indulge in that
2 fantasy for a moment. If that's the case, what's the
3 big deal? We've identified at least some non-
4 infringing uses that are being deterred by CSS. If we
5 come up with an exempted class and maybe these will be
6 corporate ones, maybe not, all that it's really doing
7 is permitting people who are engaging in non-
8 infringing uses anyway to circumvent. So aren't all
9 these risks, all these dangers you're worried about,
10 really not present if that's how you have to interpret
11 Section 1201(a) (1) (b)?

12 MR. METALITZ: First of all, I don't think
13 that is the way you have to interpret it. I think
14 that's one --

15 MR. CARSON: That's my premise.

16 MR. METALITZ: Let's assume for a moment
17 that interpretation is right. Then you have to try to
18 reconcile this with Congress's decision not to
19 collapse the concepts of circumvention and
20 infringement or act of circumvention and active
21 infringement. Congress obviously -- it's hard to
22 imagine an act of circumvention that couldn't possibly
23 result in a non-infringing use. If your analysis were
24 correct that what's the big deal, that could be said
25 as to just about any claimed exemption. What's the

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1 big deal? If people only use them for non-infringing
2 purposes, there's no liability there and if people use
3 it for infringing purposes, you have infringement
4 liability.

5 That was not Congress's approach.
6 Congress said after the two year period and subject to
7 the tri-annual review that we're engaged in now and
8 subject to other exceptions that are in the statute,
9 the act of circumvention itself should by itself be a
10 track viability and the reason I think was to
11 encourage the development and the deployment of
12 technological projection measures with the ultimate
13 goal of increasing availability, maximizing public
14 access to these works.

15 So I think to reconcile this to the
16 structure of the statute, you can't go in with the
17 supposition that as long as the scope of the exception
18 exemption is only limited to non-infringing uses,
19 there's really nothing to worry about. Now, that's a
20 legalistic answer. Let me give the practical answer
21 as well which is we all know that there's a bleed
22 through effect here and there's a very important
23 signalling effect that is involved here and giving
24 permission to engage in acts of circumvention is going
25 to have repercussions in the real world.

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1 I think there was some testimony about
2 this earlier and perhaps there will be later this
3 afternoon in the example of video games where the
4 regional coding function is in some instances, at
5 least, very tightly integrated with the other access
6 control functions and, in that case, you have evidence
7 before and I'm sure you'll discuss it in more detail
8 that as a practical matter, if people are going to be
9 circumventing regional coding, they're almost
10 inevitably going to be using a tool that also
11 circumvents the generalized access control and,
12 therefore, the scope of what's actually going to
13 happen in the real world is going to go far beyond
14 what may be within the narrow legalistic confines of
15 the exemption that you've recognized.

16 I hope that answers your question. I
17 think from a legal structural point of view, it can't
18 be enough to say don't worry about it because if you
19 have an infringing use, you'll be able to overcome
20 this exemption by some type of rebuttal or some type
21 of counter-evidence in the case. I think as a
22 practical matter it's very important that the
23 exemptions be drawn as narrowly as possible so that
24 they will, to the greatest extent possible, carry out
25 the congressional purpose which is to deal with a

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1 situation where you determine and liability determines
2 there's been a substantial adverse impact on non-
3 infringing.

4 MR. CARSON: Mr. Miller, I think you had
5 something to say in response.

6 MR. MILLER: Yes. I can imagine several
7 scenarios where you would have a violation of
8 1201(a)(1) and yet have a non-infringing use. Now,
9 those would not be relevant to the claimed exemption
10 that we're asking for today with regard to CSS for a
11 variety of reasons. The example I would give, for
12 example, would be a database. You have access to a
13 database. You need to use a password. If I create
14 some sort of tool that generates passwords and then
15 gets me access to the database, I may get access then
16 to the database and then make a non-infringing use of
17 that database, but I've gained access where normally
18 I 'd have to pay, that I'd have to pay money to walk
19 through that door. But I haven't paid money because
20 I cut a hole. And that's what Congress is trying to
21 get. So even though I only used the database for a
22 non-infringing use, I think you could still find
23 liability there. We're not asking for an exemption
24 for that purpose.

25 I can also give another example. For

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1 example, many video games come with certain levels
2 that are public domain on a DVD or a CD and then you
3 have to get a password to unlock the other levels. If
4 I unlock those other levels for fair use purposes, I
5 want to review the game, for example, which would be
6 a fair use, you could still say that that's a non-
7 infringing use but that it's a non-fringing use,
8 therefore, no violation of copyright but you've
9 violated the access control. You got access to the
10 game without forking over the cash. And this is what
11 I believe Congress actually had the intention of
12 doing. This is a proper reading of the DMCA and that,
13 therefore, and is not applicable to the exemption that
14 we're asking for with regard to CSS.

15 On a second point, as far as the practical
16 answer, well, this is the first time we've heard this
17 argument. It wasn't in reply comments to my initial
18 arguments where I made this argument clear. There's
19 no evidence of this, I think. It's sociological, and
20 I'm not sure that it falls within the scope of this
21 rulemaking that we have to decide, well, are people
22 thieves or not? And I think my argument is to the
23 fact that these tools are already available in the
24 case of CSS. If people want to be thieves, they can
25 be thieves. The Library of Congress isn't suddenly

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1 going to flip a switch and say, well, you have an
2 exemption for particular special uses and turn a bunch
3 of people into pirates. I think that's ludicrous.

4 MS. PETERS: Steve.

5 MR. MARKS: I just wanted to make just one
6 sort of very -- maybe it's prosaic -- response to one
7 of the remarks Mr. Miller was making in terms of the
8 example of you have a particular film where the
9 lighting direction was very, very subtle and perhaps
10 unique, something very worthy of commentary and, in
11 that case, it may well be that you can only see that
12 the best and with the greatest crispness in a theater
13 on a 35 mm print of the film.

14 I think the logical conclusion of what Mr.
15 Miller is arguing is that, therefore, a user who wants
16 to make that sort of fair use to show that clip of the
17 wonderful lighting should be guaranteed access to the
18 35 mm film print, go into the studio vault, be
19 guaranteed access to it to take that clip because it's
20 the medium that shows the lighting direction the best.
21 I think just sort of as a practical common sense
22 notion, we would say no, that's not the case. Fair
23 use just doesn't work that way.

24 MR. MILLER: Well, my response to that is
25 my argument doesn't lead to that at all. Given that

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1 I have a DVD, why shouldn't I be able to make the best
2 use of that DVD? That doesn't mean that you guys have
3 to give me a DVD if no DVD exists. It doesn't mean
4 that you have to give me a 35 mm print. It doesn't
5 mean that I have to be given anything but, given that
6 a DVD exists and it's out there, why can't I use it to
7 the best ability that I can if such subtle
8 destinations are suited to my needs and, in many
9 cases, they will be if I'm a videophile.

10 MR. MARKS: And my answer to that is we do
11 not give you the DVD unconditionally. That's what
12 access control is about. Access control is about
13 you're granted access to the work under certain
14 conditions like playing it on an authorized DVD player
15 that is authorized to decrypt the work. I think you
16 are making the assumption that when a consumer buys a
17 DVD, they automatically, because they've made the
18 purchase, have access to the work under any conditions
19 they so choose as long as the use that they're making
20 is non-infringing and I don't think that's frankly a
21 correct premise.

22 MR. MILLER: Well, my argument is that, A)
23 I would argue that that is a correct premise and I put
24 a lot of work in and nearly 100 footnotes into making
25 this determination and a proper understanding of the

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1 DMCA and trying to analyze it within that harm text.
2 However, I think beyond that, with regard to fair use,
3 we hear a lot about licensing and terms and everything
4 like that and my understanding of copyright law is
5 that we have copyright law in the absence of terms and
6 licenses. Now, when I buy the DVD, I've never seen a
7 license, I've never seen explicit terms, I've never
8 signed anything and if the copyright industry would
9 provide me with these explicit terms that I agree to
10 when I buy a DVD, I'd be more than happy to read them
11 and make a determination.

12 But in the absence of specific contractual
13 terms, then copyright law holds and copyright law
14 holds that there's no reason I can't play it on a
15 different machine. There's no reason that I can't
16 make use of it as long as it's non-infringing.
17 Copyright law says as long as it's not violating 106
18 or some of the other smaller statutes in there, fine.
19 And so the absence of a license --

20 MS. PETERS: Sort of like your class for
21 exemption. No?

22 MR. MILLER: Say it again.

23 MR. TEPP: Okay. Go ahead.

24 MR. METALITZ: I was just going to say
25 that argument was presented to Congress and that

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1 argument may summarize the state of the law prior to
2 October 28, 1998. Now we have an act of Congress that
3 says that if you meet the criteria, if there's
4 circumvention of the access control measure, there may
5 be liability. So I think that's another element.

6 MR. TEPP: As long as we're talking to Mr.
7 Miller, let me continue with you. I have a couple of
8 questions. Mr. Miller, in your submitted comment, you
9 acknowledge that Macrovision can be circumvented
10 consistent with Section 1201 in order to capture a
11 copy of the analog output of DVD use and that that
12 could get you a copy of the ancillary works, similar
13 to the camcorder exempt we've talked about. Granted
14 that involves a copy of somewhat less quality than the
15 digital copy right off the DVD if you circumvent CSS.

16 On the other hand, there are concerns that
17 have been raised by the content industry about copies
18 that are free and in the clear and piracy. I think by
19 any standard Congress took those to heart when they
20 enacted 1201 so we would certainly be in a tough
21 position to ignore those concerns. The statute says
22 we have to consider things that are going to harm the
23 market. So then we're in the balancing test. So what
24 I need to ask you is can you identify for us -- and
25 perhaps I want to say quantify even though we know

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1 that's a difficult thing to do -- how much benefit
2 there is to the Blogcritics that you spend most of
3 your time in your submitted testimony talking about to
4 have a perfect copy off the DVD by circumventing
5 versus a copy that's been captured through
6 circumventing Macrovision or via the camcorder route?

7 MR. MILLER: Well, it is very hard to
8 exactly quantify it. I won't be able to give you
9 specific numbers personally, but I will be able to
10 give you some examples to have an idea of it. Many of
11 these Blogcritics are college students, are people
12 with very low resources. So to say for them to go
13 ahead and go get a camcorder is a rather large
14 expenditure for these individuals and it may not seem
15 a lot to the people in this room but \$400 for a
16 minimal quality camcorder is going to be very
17 expensive, so even if they were to do that.

18 Secondly, and thanks to the wonderful
19 efforts of Macrovision, it's not nearly so easy to get
20 around Macrovision as many people think. To get the
21 devices, the video correction devices that strip out
22 the Macrovision and improve, you often have to go
23 through quasi-underground sources, deal with ads in
24 the back of magazines. You're not sure who you're
25 dealing with. You may in fact be dealing with regular

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1 pirates. So I find it odd that the copyright industry
2 is saying, well, you can do it by going around
3 Macrovision so go deal with those people in the back
4 of those magazines.

5 MR. TEPP: You said that.

6 MR. MILLER: But to the extent -- no, no.
7 Obviously I --

8 MR. TEPP: You said that in your
9 testimony. Right?

10 MR. MILLER: Based on -- obviously yes.
11 If Macrovision is a copy protection device only, under
12 1201(b) it is legal to around it.

13 MR. TEPP: Okay.

14 MR. MILLER: It is not, however, legal to
15 traffic in it and I'm not sure that, as a policy
16 matter, we want to encourage people to get these anti-
17 Macrovision devices or encourage them to deal with
18 these sort of things because it's illegal to
19 necessarily traffic in them.

20 MR. TEPP: Let me interrupt you for just
21 a second because where you're going raises an
22 interesting juxtaposition. You're arguing that it's
23 expensive and possibly against public policy to have
24 people circumvent Macrovision but your solution is to
25 have them circumvent CSS.

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1 MR. MILLER: Yes.

2 MR. TEPP: Which arguably is also not
3 something that we want to have unless we absolutely
4 need it and which normally isn't readily available
5 without going through something very nefarious but
6 there's some sort of means that aren't in the front of
7 the magazine.

8 MR. MILLER: Well, the distinction between
9 CSS and circumventing Macrovision is that CSS or DCSS
10 or the circumvention are computer programs whereas
11 circumventing Macrovision requires actual physical
12 hardware which means you have to have some sort of
13 physical contact with somebody which is going to
14 implicate a variety of different issues that you don't
15 get with just downloading from a site in the
16 Netherlands or in Holland. It's not so easy to buy a
17 Macrovision circumvention from Holland or the
18 Netherlands, but I can download from the Holland and
19 Netherlands sites, and I see that as an improvement,
20 particularly since CSS is not illegal in Holland or
21 Finland and so we're dealing with an entirely separate
22 set of issues.

23 Now, it is a subtle distinction but I
24 think a very critical one. I think the Internet is
25 very different than real space in this sense so I

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1 think that it's much preferable to have people
2 downloading CSS if necessary or creating it
3 themselves. CSS is well known, well understood. You
4 can talk to many cryptographic experts who will tell
5 you exactly how it works. I think that's very
6 superior because that's the other way to get around it
7 is learn cryptography, learn programming, and it's
8 wonderful for our industry.

9 MR. TEPP: Well, that doesn't sound like
10 a cheap way for a college student to get to a movie.

11 MR. MILLER: Well, it's cheap in terms of
12 price, costly in terms of time, and college students
13 usually have more time than they have money.

14 MR. TEPP: But to learn to be a
15 cryptographer sounds like a substantial undertaking.

16 MR. MILLER: Forty bit keys aren't that
17 hard to understand.

18 MR. METALITZ: May I have ask one
19 question?

20 MR. TEPP: Well, no, but if you want to
21 respond, go ahead.

22 MR. METALITZ: I do want to make it clear
23 on the record that the copyright industry is not
24 encouraging people to circumvent Macrovision which is,
25 I think, what I heard from the other side of the room,

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1 and it's just kind of odd that as long as you download
2 your hack over the Internet rather than buy it from
3 somebody in a trench coat in a dark alley, it's okay.
4 I mean it's cleaner because it's over the Internet.
5 I don't buy into that thinking and I don't think
6 that's relevant to this proceeding.

7 MR. TEPP: Certainly, while DCSS may be
8 illegal in other countries, it's pretty clearly not
9 here.

10 MR. MILLER: It's not legal to traffic in
11 it --

12 MR. TEPP: Let me just get the question
13 out. I think you have raised some interesting points
14 about the relative difficulties of using DCSS versus
15 whatever is necessary to circumvent Macrovision.
16 Okay. But what I want to get back to, I sort of
17 diverted you on this and I don't want to spend all the
18 time on it, what I want to ask you is to focus on the
19 relative benefits of having a circumvented digital
20 copy for the Blogcritics that you've discussed as
21 opposed to a copy attained through a camcorder or
22 through circumventing Macrovision so that we can
23 compare in this balancing test that we're instructed
24 to do the relative benefits of the exception you're
25 proposing as compared to the harms that have been--

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1 MR. MILLER: Well, again I'll return to
2 the fact that to use anything other than your own
3 hardware, to use a free software program that you
4 download off the Internet or obtain other ways is much
5 cheaper than having to buy and set up all this
6 additional hardware. But secondly, I think again,
7 we're dealing with videophiles. People who are very
8 interested in the quality of the video, who are very
9 attuned to subtle degradations in it, and that this is
10 very important to them. I will use an analogy to
11 music.

12 Many people will not listen to MP3 files
13 which are compressed using a loss in compressions
14 scheme which means they lose some of the high notes
15 and there's a little bit of tinniness and stuff like
16 that, and they refuse to listen to MP3 files. Most
17 people find it perfectly acceptable. They think
18 they're really convenient and stuff, but for them, it
19 just doesn't do it for them. They have to have the
20 higher fidelity. How do you quantify that? For many
21 people, it's worth a lot of money. It's worth a lot
22 of their time and effort and a lot of loss of
23 convenience. MP3s, I can put them in my pocket, take
24 them anywhere. But if I really want the high
25 fidelity, they're not as transportable and they lose

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1 these measures and that's a cost to them. And the
2 same thing goes with videophiles. The fact that they
3 have to use these loss E analog, digital analog
4 conversion schemes and stuff is simply not acceptable
5 to them. It's a very high cost to them. And I think
6 for purposes of criticism and commentary, this is
7 important. These people who have attuned themselves
8 to the video, to lose their commentary because they
9 can't get this high quality and provide and share it
10 with us is a loss to all of us.

11 MR. TEPP: So you want us to focus ont the
12 relative harm to the connoisseur rather than the
13 average --

14 MR. MILLER: I think there's harm to all.
15 The harm is obviously higher, I think, with the
16 connoisseur but it's a variable graph.

17 MR. TEPP: Thank you. I just have one or
18 two questions for Ms. Hinze on the public domain
19 issue. I think we've settled with the questions Mr.
20 Carson asked that the pure public domain work can be
21 circumvented, the CSS on that can be circumvented
22 because it's not a work protected under this title.
23 So now we move into some of the areas of gray about
24 some sort of mix of the same DVD. I'll pick a movie
25 that shows a scene at the Louvre, as one of the

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1 commenters suggested, which necessarily have public
2 domain works in the background. Is that the sort that
3 you're suggesting? You're going to see the Mona Lisa
4 there and I'm pretty sure that's PD. So there's a PD
5 work on a DVD. Does that mean, even though the rest
6 of the movie is two years old, you can go ahead and
7 circumvent under the exemption you're asking us to
8 grant?

9 MS. HINZE: I just want to get clear that
10 I am understanding your question. Is your question
11 directed to a public domain element within a movie
12 that otherwise is copyrighted?

13 MR. TEPP: Yes.

14 MS. HINZE: Is it the visualization of a
15 public domain element? Well, no. The class of
16 exemption that we're seeking is for public domain
17 motion pictures. We have asked for an exemption for
18 a Section 102 class of motion pictures that are in the
19 public domain.

20 MR. TEPP: Okay.

21 MS. HINZE: Our intention in asking for
22 that exemption was to seek an exemption for the public
23 domain motion picture so in a situation where a
24 compilation DVD includes a motion picture that is
25 copyrighted and or that there's a claimed copyright

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1 over and a motion picture that is clearly in the
2 public domain, our exemption would give consumers the
3 right to access the public domain motion picture.

4 MR. TEPP: I appreciate that distinction.
5 Thank you.

6 MS. HINZE: Could our argument go further?
7 Is that what you're asking or perhaps I'm not
8 understanding your question.

9 MR. TEPP: I'm not sure that others
10 haven't suggested a broader exemption and I guess what
11 I'm trying to find out from you is do you think
12 there's an argument there or did you craft your
13 exemption more narrowly than others?

14 MS. HINZE: Our exemption was crafted to
15 deal with a motion picture that's in the public
16 domain, not an element.

17 MR. TEPP: Did you do that because you
18 felt that the larger exemption couldn't be sustained
19 under the terms of the rulemaking or wasn't necessary?

20 MS. HINZE: I think we actually wanted to
21 present to the Copyright Office narrow exemptions that
22 fit within the classifications and the determinations
23 that the Copyright Register and the Librarian of
24 Congress made in its 2000 rulemaking. We were
25 conscious in crafting our exemptions to think about

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1 the nature of the class that we would need to present
2 and I think -- I haven't actually given -- I guess the
3 answer to your question is the way we crafted our
4 exemptions was specifically to address a class that
5 would fit within the definition of "class" as we
6 understood the Librarian of Congress and the Register
7 to have defined that term in the 2000 rulemaking.
8 That was the reason why we crafted our class the way
9 we crafted it.

10 MR. TEPP: Okay. Thank you.

11 I'm trying to further pursue this line of
12 exactly what it is the class you're proposing would or
13 wouldn't reach. How would you address the following
14 hypothetical? There was a documentary produced about
15 the Wright Brothers first flight and in that there's
16 a 20 second clip of footage of the actual first flight
17 of the Wright Brothers. I don't even know if that
18 exists, but let's assume it does. That footage is
19 clearly public domain so you've got public domain
20 audiovisual work on a DVD. If we issued the exemption
21 verbatim to what you've requested, can CSS be
22 circumvented for that documentary?

23 MS. HINZE: I actually don't think that
24 that's within the scope of what EFF has requested, so
25 anything I say I guess is in the category of

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1 speculation. But if you'd like me to speculate on the
2 hypothetical, I guess I would like to get clear for my
3 understanding. As I previously said, is that our
4 exemption was crafted to deal with a unit of a motion
5 picture and a motion picture in the public domain.
6 Perhaps I'm not understanding your question correctly.

7 MR. TEPP: As I read your submitted
8 testimony, Class 4 audiovisual works that are in the
9 public domain in the United States that are released
10 solely on DVDs, access to which is prevented by
11 technological protection measures.

12 MS. HINZE: Right.

13 MR. TEPP: Now, this 20 second clip of the
14 Wright Brothers first flight. Let's assume there's no
15 other way to get it but on this DVD. That is --

16 MS. HINZE: Right. Okay. I understand
17 where your question is going. Perhaps it would have
18 been more helpful if we had said motion pictures per
19 se. I can authoritatively say to you our exemption
20 was targeted at motion pictures as a unit, not at
21 footage within a wider work.

22 MR. TEPP: Then let's change the
23 hypothetical and instead of a documentary on the
24 Wright Brothers, it's a documentary on the Laurel and
25 Hardy and we have a clip from one of the PD Laurel and

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1 Hardy films.

2 MS. PETERS: You still have a clip.

3 MS. HINZE: Sorry?

4 MR. TEPP: That's exactly the question.
5 What I'm trying to find out is how much public domain
6 material must there be on the DVD in order to arrive
7 at the threshold where you want the exemption to kick
8 in? Any audiovisual work, any motion picture of any
9 length or does that have to be the predominant nature
10 of it? You used the term compilation. Are you
11 suggesting that they're independent works?

12 MS. HINZE: Our exemption was targeted at
13 capturing a unit of a motion picture which is in the
14 public domain and by that, I mean something like a
15 Charlie Chaplin movie, a work, a motion picture work.

16 MS. PETERS: You're not talking about
17 parts of a work?

18 MS. HINZE: No.

19 MS. PETERS: Right.

20 MR. CARSON: You know these guys. They'll
21 take two frames out of it and say hah, you can't use
22 it.

23 MR. MARKS: I hadn't thought about that
24 but thank you.

25 MS. HINZE: I actually think it's a very

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1 important thing to be clear about and we were careful
2 in drafting our exemption to make our exemption
3 request as narrow and as practicable as possible. I
4 think the key issue here is the fact that public
5 domain works are being issued in combination with
6 copyrighted works. That is the key issue here and
7 what we have heard this morning before we broke for
8 lunch was an argument about increasing availability of
9 works by virtue of works being released on DVD and my
10 concern there is that it is a matter of choice for a
11 motion picture company to release a DVD that includes
12 both a copyrighted work and a public domain work.
13 That is something they can choose to do or choose not
14 to do and, to the extent that there's an ability for
15 them to choose to make public domain works available,
16 or -- to release public domain works and bundle them
17 together with copyrighted works and put them all with
18 inside a CSS wrapper so that it now becomes an issue
19 where someone has to potentially violate Section 1201
20 to access what was otherwise available as a public
21 domain work -- in other words, reasonably available
22 as a public domain work -- I think there's a real
23 chilling effect on consumers there and our exemption
24 is trying to get that particular situation exempted.

25 MR. TEPP: Okay. Let me ask one last

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1 thing and I'll stop. I'm not sure -- and maybe I've
2 just missed it. I'm not sure I've heard or seen
3 evidence of this bundling. We had some discussion of
4 the nine or maybe four or five or whatever it is that
5 were strictly PD, subject to CSS. Do you have
6 specific evidence of entire PD motion pictures being
7 bundled with new copyrightable material, of any
8 material that's still in copyright?

9 MS. HINZE: As I stated in response to Mr.
10 Carson's question, I believe that the two consumer
11 commenters actually, the works that they referred to,
12 the Lumiere Brothers and the Great Works of Film are
13 in this category and, as I said, I believe that there
14 is, based on our searches as of December in our
15 comments, that there are 70 public domain works
16 available on DVD. I would welcome the opportunity to
17 supplement the record by providing exact concrete
18 examples. I believe there are two examples in the
19 record already in this proceeding by virtue of the
20 consumer comments and, with the permission of the
21 Copyright Office, I'd be very happy to supplement the
22 record because I believe that is the situation and
23 that is predominantly the situation.

24 MR. TEPP: Well, we'd certainly like to
25 get those facts if they're out there. Thanks.

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1 MS. GARMEZY: I just wanted to say in the
2 case of public domain works, even though the film
3 would be in the public domain, that does not mean that
4 the original creators or the actors in it or their
5 heirs don't have an interest in what happens to the
6 film or how it is utilized or how, particularly for
7 the actors, their image might be used, whether it's in
8 public domain or not.

9 MR. TEPP: Okay. I assume you're not --
10 well, maybe this comes from -- that I thought we had
11 unanimity on from the question Mr. Carson asked. Are
12 you suggesting that a purely public domain work alone
13 on a DVD protected by CSS should not be circumventable
14 for the 1201(a)(1)?

15 MS. GARMEZY: No, I'm not but I'm just
16 saying that in the case of these compilations, we
17 shouldn't make the assumption that there's not a
18 reasonable protection of these works in the
19 compilation.

20 MS. HINZE: Could we clarify that? I'm
21 not quite certain --

22 MR. TEPP: Let Mr. Metalitz go.

23 MR. METALITZ: It's not directly on that
24 point.

25 MR. TEPP: Okay.

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1 MR. CARSON: You want a clarification of
2 what she said?

3 MS. HINZE: Is there a kind of copyright
4 in public domain works? I'm not clear.

5 MR. TEPP: I thought I heard no but I
6 don't want to put words in anybody's mouth.

7 MS. GARMEZY: No. I said --

8 MR. METALITZ: I was just going to say
9 that in terms of the supplementation of the record,
10 which I agree would be very helpful, we do have to
11 distinguish the fact that a public domain title is on
12 DVD doesn't necessarily mean that it is protected by
13 CSS. I think we heard that this morning that these
14 are two separate standards and so just to say this
15 title is on DVD, we also have to know whether it was
16 protected by CSS to know whether it even came within
17 the scope of what we're talking about here. Whether
18 that's standing alone, although I think we're in
19 agreement that the statute doesn't reach it if it's
20 bundled with other titles. There obviously may be--
21 that circumstance may exist.

22 MR. CARSON: When you give us that
23 information, will you give Mr. Metalitz a copy and
24 you'll certainly have an opportunity to advise us
25 which of those titles you come up with are not

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1 protected by CSS.

2 MR. METALITZ: I can try but I think the
3 fact of the matter is that most of these public domain
4 titles -- I mean if you look at most of the major
5 motion picture studios, they are not primarily in the
6 business of distributing public domain titles. So
7 this was likely to be small distributors and so forth.
8 We can certainly try.

9 MR. CARSON: Good idea. I mean we've got
10 to get the evidence in front of us. There are burdens
11 of proof here. Sometimes the best we can do is he'll
12 give us the information, you got a chance to respond.
13 We'll do our best.

14 MR. TEPP: Thank you.

15 MS. PETERS: Could I just follow up with
16 your questions. Mr. Metalitz this morning talked
17 about the fact that if in fact the motion picture is
18 in the public domain, then it is possible that maybe
19 you can get access to it through the Library of
20 Congress or maybe the UCLA film archive. But I
21 thought I rememberer saying that's not good enough.
22 If in fact the work is in the public domain and if in
23 fact it is available in public archives, doesn't that
24 respond to your fair use concerns?

25 MS. HINZE: My argument isn't an argument

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1 about fair use. My argument is an argument about the
2 nature of copyright protection.

3 MS. PETERS: If in fact you can get a copy
4 of the work, then where's the problem?

5 MS. HINZE: The problem is that the work
6 is in the public domain. The copyright owner is the
7 public. In that particular category of works, there
8 is no claim to copyright, as I understand it. My
9 concern would be that by releasing something that is
10 in the public domain with a CSS protection on a DVD
11 that there is an assertion of private rights over
12 something that is a public work and that, I guess,
13 the--

14 MS. PETERS: So you're saying that they
15 can never combine a copyrighted work with a public
16 domain work in a package?

17 MS. HINZE: They can never deny the public
18 the right. In my analysis, they can never deny the
19 public the right to access it. They shouldn't be
20 entitled to use CSS and the legal sanctions of Section
21 1201 to deny the public the right to access the public
22 domain elements of that compilation. That would be my
23 position.

24 MS. PETERS: To access. That means to be
25 able to play it?

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1 MS. HINZE: I would actually go further.
2 They're public domain works, since they're not subject
3 to copyright, the public is entitled to use the non-
4 copyrighted material in all manner of ways. As I
5 said, by definition, these works are not subject to
6 copyright law and the intent of Congress when it
7 struck the carefully constructed copyright balance was
8 that consumers would have the ability to use, not just
9 access, works that are in the public domain.

10 MS. PETERS: So an example that you raised
11 this morning. It's a public domain work and now
12 ancillary material has been added to it. People
13 commenting on how it was made or the sets, whatever.
14 That's clearly copyrighted footage. It now is
15 combined with the public domain. How does that play
16 out in your proposed exemption?

17 MS. HINZE: Are there two separate pieces?
18 That's where I'm --

19 MS. PETERS: Well, obviously there's the
20 ancillary material that kind of talks about the film,
21 whatever. Doesn't matter what it is. But it's
22 related to the film but it's new. But with this
23 package, with this DVD, there is also the quote,
24 "public domain motion picture." How does your
25 proposed exemption work in that case?

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1 MS. HINZE: To what does it apply?

2 MS. PETERS: Yes.

3 MS. HINZE: It applies to public domain
4 works.

5 MS. PETERS: But you want to be able to
6 circumvent all of it because it's all as a package.

7 MS. HINZE: The only reason that we are
8 seeking an exemption to circumvent all of it is
9 because a copyright owner has chosen to release it
10 combined with a copyrighted work. If it were released
11 as a solo form, I think we all agree, as far as I can
12 see this afternoon, that there's really no need --

13 MS. PETERS: So you're basically saying
14 you don't put out any ancillary material.

15 MS. HINZE: Don't choose to make your
16 business model dependent upon using a technological
17 protection measure to protect something that's
18 actually something you don't own a copyright in. That
19 might be the other way to phrase it.

20 MR. MARKS: I just wanted to respond a
21 little bit to this with just some practical thoughts
22 perhaps about the access to the public of copies of
23 the work because I think part of the business
24 incentive to take a public domain work and remaster
25 it, restore it, to put it out on DVD, and add perhaps

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1 historical information or get the directors back with
2 that work to talk about the work is not simply some
3 nefarious scheme to say, aha, we're going to snatch
4 this away from the public domain but rather to say
5 we're going to make an investment to make this work
6 available to the public and we'd like to get an
7 economic return on that investment.

8 And I think there is, when you look at the
9 overall balancing of availability of works to the
10 public, I think its' important to balance the issue of
11 if you're going to allow circumvention of works that
12 represent compilations of protected works and public
13 domain works, will the end result be greater access to
14 the public of these public domain works, more
15 restoration of these public domain works, or less?
16 And I just think that's one factor that needs to go
17 into the equation.

18 And another issue I wanted to raise is if
19 you take public domain literary works that are
20 available in print, and I understand, at least in
21 England and I don't know if this happens in the U.S.,
22 but some publishers who specialize in publishing
23 public domain works do so on paper that has a certain
24 sort of water mark on it so that if you go to just
25 mechanically photocopy the public domain work, the

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1 water mark appears and obliterates part of the text
2 and so the copy that you've made is really not very
3 usable.

4 As far as I know, no one has challenged
5 that that's somehow an illegal activity to engage in
6 because you're trying to frustrate the making of a
7 mechanical copy of a copy of the work. I think some
8 of those same arguments could apply in this case. I
9 think when we speak about public domain works, there
10 does need to be some sort of distinction made between
11 the work itself, which I believe the Register was
12 getting to saying hey, the work itself could be
13 available in an archive, could be available at the
14 Library of Congress, available for people to make
15 whatever fair use they want, versus saying that every
16 single copy of the public domain work must be made
17 readily available for any sort of use that a user
18 wants to make. I think that is sort of blurring the
19 distinction between the work falling into the public
20 domain itself versus whether you can take any steps to
21 actually protect the investment that you've made in
22 distributing and bringing copies of the work out to
23 the public.

24 And finally I'd like to say, at least in
25 my mind and this is only my opinion, I think the

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1 genius and the value of the public domain, of the fact
2 that works fall into the public domain has much more
3 to do with the public performance of those works,
4 giving theatrical performances of things, musical
5 performances of things, using them as the basis for
6 derivative works and new versions, and that that is
7 really the key input in social value there rather than
8 just slavish consumptive mechanical reproductions for
9 consumption. That's my own personal opinion.

10 MS. HINZE: Can I respond?

11 MS. PETERS: Yes. I want to ask a
12 question first. When you make a work available on
13 DVDs, even with CSS, everybody, as long as you have a
14 compliant player, which is everything except maybe
15 some stand-alone Linux systems, you do have in fact
16 access to it. The reason I went to the archive
17 example was because I was thinking you wanted to
18 somehow use footage or something that was there. But
19 it sounds the way that you're doing it is your
20 argument is based on a principle that the fact that
21 it's in the public domain means it should have no
22 restrictions on it whatsoever and it's not really a
23 practical -- you're not after a practical effect that
24 I can't make fair use of it.

25 MS. HINZE: I'm not arguing for fair use.

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1 Fair use only applies to copyrighted works.

2 MS. PETERS: Right, so it's all straight.
3 In principle, a work is in the public domain and,
4 therefore, it should not have any controls on it
5 whatsoever, whether it's an access control or
6 copyright.

7 MS. HINZE: I'd actually rephrase it from
8 the consumer point of view as going the other way.
9 Consumers should continue to have the right to access
10 it.

11 MS. PETERS: But if they are, if in fact
12 you go and buy a DVD, you can play it.

13 MS. HINZE: Perhaps I'll finish my
14 thought.

15 MS. PETERS: I don't know where the access
16 issue is.

17 MS. HINZE: Consumers Should have the
18 ability to access and to use. That will mean in the
19 case of public domain works that are not subject to
20 copyright, the ability to copy it. That's certainly
21 not true of any of the other three, of the four
22 exemptions EFF requested in this proceeding. But in
23 relation to public domain works which are not subject
24 to copyright law, yes, that would mean both to access
25 and to copy. So just to be really clear about that,

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1 that is the position for this category of works. And
2 as I said--

3 MS. PETERS: So every copy that gets put
4 out has to have the ability to use that copy in any
5 way.

6 MS. HINZE: As I understand it, we have
7 complete agreement that if a public domain work were
8 to be released on a DVD subject to CSS protection and
9 nothing else was on that disk, there would be
10 agreement that there would be no violation of 1201.

11 MS. PETERS: But if it's the other way.
12 Now it has copyrighted material with it that's
13 entitled to be protected and maybe it's to be
14 beneficial to the public, it also includes a public
15 domain work and now to flip it the other way is they
16 can't protect their copyrighted work if they make the
17 choice to bring the public domain work into that DVD
18 for the benefit of the public.

19 MS. HINZE: I understand the socially
20 beneficial argument. I have heard that several times
21 this afternoon. My concern with that is that it may
22 actually hide an assertion of private rights over a
23 public asset. I'm not a specialist in English law so
24 I don't know what the situation is there.

25 MS. PETERS: I'm just getting it straight.

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1 I'm just trying to understand the two sides. You're
2 not going to agree with each other, and we're going to
3 struggle.

4 MR. CARSON: That leads to my question,
5 probably directed to this side although you folks
6 could conceivably know the answer. Is CSS an all or
7 nothing proposition? In other words, if you want to
8 put CSS on that DVD to protect the ancillary material,
9 does it necessarily also have to protect the public
10 domain material sitting right next to it or can you
11 make a choice, CSS would apply to only this part of
12 the disk which has the copyrighted material and the
13 rest public domain material is free and clear and is
14 not protected by CSS?

15 MR. MARKS: For my part, the answer is I
16 don't know. I just don't know.

17 MR. CARSON: You could probably find out.

18 MR. MARKS: But I will try and find out.

19 MR. CARSON: Anyone else know the answer?

20 MS. HINZE: It's a good question.

21 MR. MARKS: I just don't know.

22 MR. CARSON: Next is not so much a
23 question as a comment. You mentioned the two reply
24 comments you have from members of the public about the
25 compilations.

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1 MS. HINZE: Yes.

2 MR. CARSON: I don't 'think they do it for
3 you. I don't think the record shows anything right
4 now. Fitz Swanson says that the Lumiere Brothers
5 Victorian era film From the Earth to the Moon is on
6 Great Works of Film Volume 1 but from all we can tell
7 from this comment, every single work on Great Works of
8 Film Volume I which could be the first decade of
9 motion pictures is public domain. We just have no
10 information whatsoever to tell us that.

11 The other comment is pretty much the same
12 situation. It's the Charlie Chaplin Marathon. You
13 tell us some copyrighted works are on that. The
14 comment doesn't, so the record is absolutely barren at
15 this point of a shred of evidence that there are
16 compilations contained in both public domain works and
17 copyrighted works. If you want to persuade us, you
18 haven't begun to meet your burden. You'll get the
19 chance.

20 MS. HINZE: I appreciate the clarification
21 and, as I said, we will be happy to supplement the
22 record in this regard.

23 MR. CARSON: Okay.

24 MS. PETERS: Anything else?

25 MR. CARSON: Nothing. Okay, Bob.

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1 MR. KASUNIC: I want to follow up on what
2 David was just asking. I understand we're going to
3 get some follow up on whether you can separate the CSS
4 for the public domain and not have it on the public
5 domain work and have it on the copyrightable work.
6 But just to sort of phrase it in a different way, this
7 seems to be somewhat in line with, at least the way I
8 see it, the harm that you're posing is that this is
9 again another form of nesting where you have the
10 overall protection covering both and it's just being
11 used as a means to broaden the scope of protection.

12 I want to also get clarification here,
13 too. It's not your position, is it, that you think
14 that technology can not be used to protect the public
15 domain work so if, for instance, CSS was put on the
16 new material on a DVD but some other form of copy
17 protection or some kind of technology alone that would
18 not fall under 1201(a)(1) was put over the other work
19 or that was not prohibited by the law, technology
20 alone could be used on public domain works --

21 MS. HINZE: I think -- sorry.

22 MR. KASUNIC: Go ahead.

23 MS. HINZE: I think it would depend on the
24 particular technology that was used. There would be
25 no 1201 violation for instance, in the situation

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1 you've given. Sorry... It would depend on the
2 technology which was used, the particular technology
3 in question. In the example you've just given, there
4 would be no violation as I understand what you've said
5 just for this pure copy protection. There would be no
6 violation of 1201(a) in order for a consumer to make
7 use of that work. There might be some issues then
8 outside of 1201 about whether or not there's some sort
9 of burdening of the public interest in prohibiting
10 access to a public work but, as I understand your
11 question, I don't think there would be a 1201(a) issue
12 there. So it would be outside the scope of this
13 proceeding, any concerns that that might raise.

14 To give you a more thorough answer, I
15 think I would need to know a little bit more about the
16 particular technology at issue and what the impact
17 would be. I think that would be my sort of road map
18 to how to analyze that.

19 MR. KASUNIC: Let me move back -- please.

20 MR. METALITZ: I think it's important to
21 remember that 1201(a) doesn't contain any prohibitions
22 on using technological controls. We're talking about
23 under what circumstances are you liable for
24 circumventing it. Now, 1201(k) may in some
25 circumstances where you can put copy controls in a

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1 particular analog situation, and I would not even try
2 to explain what those situations are at this point
3 without looking at 1201(k) which I haven't in a long
4 time. But I just wanted to put on the record that in
5 some cases 1201(k) will affect when you can put copy
6 protections on and when you can't.

7 MR. KASUNIC: Moving back just again for
8 clarification on the 1201(a)(1)(d) question about the
9 effect of that in terms of infringing users. I just
10 want to understand in terms of David's option two
11 which would be that only non-infringing users can take
12 advantage of that. Am I right that the result of that
13 would be -- well, first of all, there would be
14 copyright infringement if someone was using it for an
15 infringing purpose but then also that this would be a
16 violation of 1201(a)(1) as well. Is that right?

17 MR. METALITZ: Yes. If that analysis is
18 correct, if that's how the courts read it. Yes.

19 MR. KASUNIC: Is everyone in agreement on
20 that? Okay.

21 Now, Mr. Metalitz, you stated that you're
22 not aware of any 1201(a)(1) cases and I'm quite
23 confident that if you're not aware of any, no such
24 cases exist. Clearly, even though there have been no
25 cases of that, there's undoubtedly been acts of

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1 circumvention. I'm trying to get at what the reality
2 is of 1201(a)(1) and for this I came across a section
3 of an article that was part of the WIPO conference
4 that Mr. Marks and Mr. Turnbull wrote some time ago.
5 If I can just quote a little section. It says, "For
6 several reasons, a conduct only approach is
7 insufficient. Circumvention conduct is generally not
8 public. Individuals usually undertake it in the
9 privacy of their homes or work places. While the
10 results of such activity such as a software utility
11 program that hacks a copy protection measure may be
12 made public, the conduct leading up to that cracking
13 of the protection system is usually private. It is
14 neither feasible nor desirable to undertake systematic
15 monitoring of private conduct to deter circumvention
16 activity. In any event, most people will not
17 undertake the time and effort to crack the copy
18 protection measure on their own."

19 So in light of that, isn't it somewhat
20 obvious from the fact that there hasn't been any
21 enforcement of 1201 in the courts and that the
22 trafficking provisions are really the key to
23 protection for copyright owners? Let me just finish
24 the last part and I'll give you all the time you want.
25 This sort of struck me in terms of Mr. Miller's point,

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1 too. Doesn't an exemption that we find or recommend
2 in this rulemaking really only provide a means for
3 honest people to be honest with the caveat that only
4 such honest users that also have the technological
5 ability to actually accomplish this will be able to
6 utilize it? That's the end of my line of questioning.

7 MR. MARKS: Let me take part of that and
8 maybe other members of the panel will take part of it,
9 since you were quoting from an article that I wrote
10 and I frankly believe that I wrote the passage you
11 quoted from. I can't blame it on Bruce.

12 I think the statements that were written
13 from which you quoted were aimed at pointing out the
14 importance of having the prohibition, the
15 circumvention prohibition go to devices and why having
16 just a conduct-based only prohibition would not be
17 adequate for the reasons that I cited. That doesn't
18 necessarily lead one to the inexorable conclusion that
19 conduct, prohibitions on circumvention conduct, are
20 useless or are not of any normative validity in and of
21 themselves. I'd like to draw a real life parallel to
22 that because even though there may not have been any
23 1201(a)(1) litigations brought to date, that doesn't
24 mean there may not be in the future and what I'd like
25 to do is draw an analogy straight from the copyright

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1 law and what's going on frankly with the music
2 industry for a long time with the file swapping and
3 the copyright infringement that's been going on on
4 peer to peer activities. The music industry took the
5 course of we would prefer to get at the purveyors of
6 the file sharing software that's allowing this
7 copyright infringement to take place and put our
8 reliance on contributory infringement cases and
9 vicarious infringement cases and that had been the
10 approach actually for several years. Because that
11 approach may not be yielding exactly as useful results
12 as the music industry may have wished for, the music
13 industry has now begun to actually sue individual
14 uploaders or downloaders for the direct infringement
15 that they are engaging in.

16 I believe the same thing could happen some
17 day with respect to circumvention devices where if in
18 fact there is lots of circumvention activity taking
19 place due to the fact that we are unsuccessful in
20 controlling the trafficking in circumvention devices,
21 we may well feel ourselves forced to bring legal
22 actions against individuals who do engage in such
23 circumvention conduct.

24 MR. MILLER: I would just like to say that
25 this is a very scary proposition and only increases

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1 the need for this exemption. What he's proposing is
2 that the movie industry is going to begin prosecute
3 people under 1201(a) without necessarily having an
4 infringement violation necessarily attached to it,
5 that they will begin enforcing 1201(a) whether it's
6 for fair use purposes or not which only increases the
7 need for an exemption and, if the most likely
8 interpretation of 1201(d) is part two of Mr. Carson's
9 analysis, then this means that people who are making
10 non-infringing uses will be -- he's making an argument
11 that people making non-infringing uses -- if I'm
12 making a five second clip violating CSS in order to
13 review in kind, I will be prosecuted for that under
14 the DMCA, and this is precisely what Congress did not
15 intend. So his argument is, to me, a parade of
16 horribles. I could not have made it more clear.

17 MR. KASUNIC: Mr. Metalitz.

18 MR. METALITZ: I think I would say Mr.
19 Marks hit the nail on the head again, as he often
20 does, that this is a tool that may be needed. I
21 would just add really two additional points. First,
22 I think the quote you read -- and I agree with what he
23 said in Geneva four years ago which is that often this
24 would take place in private in the home, etcetera,
25 etcetera. It's easy to conceive situations where it

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1 would not. One example I would give is end user
2 piracy of business software applications which can be
3 carried out through the use of 1201(a)(1) in a
4 business setting and while I think there might be an
5 argument to be made that if the system's operator of
6 a company were to strip off access controls so that
7 people could have access to unlicensed copies and so
8 forth, arguably there might be an (a)(2) violation but
9 I think it's clearly an (a)(1) violation and,
10 therefore, it's possible that legal tool would be used
11 in that setting which is not private in the home but
12 in fact somewhat more a public sphere.

13 The last point I would make is that the
14 motivation, one of the motivations for enactment of
15 the DMCA was to bring the U.S. into compliance with
16 the WIPO Internet treaties and those treaties, it
17 seems to me, require that there be remedies against
18 people who circumvent access controls. So obviously
19 that doesn't dictate the scope of those remedies or
20 whether there will be exceptions and so on and so
21 forth, but I think if Congress, because of Congress's
22 goal to implement these treaties, I think it was
23 inevitable that there would be some prohibition of the
24 act of circumvention also.

25 MS. HINZE: Could I just make one comment

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1 in response to that? I just would like to be clear
2 for the purposes of the record that there's nothing in
3 the Article 11 Copyright Treaty and the Article 18
4 WIPO Performances and Phonograms Treaty obligations
5 that required the particular scope of implementation
6 that was done by Congress in Section 1201. So just
7 for the record, I would like to make it clear that the
8 wording of those provisions doesn't actually specify
9 a particular form of prohibition. It doesn't actually
10 specify that there needs to be both an act and a tools
11 prohibition in order to satisfy that obligation.

12 MR. KASUNIC: I just have one other
13 question in response to a comment that Mr. Miller
14 made. I just want some clarification. You said that
15 Section 1201 is not concerned with the market as a
16 whole but is only concerned with individual use. I
17 wonder how you can say that in light of, in
18 particular, I think, Section 1201(a)(1)(c)(iv) that
19 one of the factors that we have to consider is the
20 effect of circumvention of technological measures on
21 the market for a value of the copyright works.

22 MR. MILLER: Actually, my responses to the
23 argument made in the reply comments with regards to
24 the fact of the benefit to consumers, not to the
25 commercial value of the works. I deal with that

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1 argument in a separate way. The argument made in the
2 reply comments to my initial comment was that the
3 effect, not on the market but on the availability of
4 copyrighted works. What they claim is that they have,
5 because of the existence of these devices, that we
6 therefore have more available. I dispute this in a
7 number of ways.

8 One of the ways I dispute this is by
9 reference to the House report, #105-551, where it says
10 that the purpose of 1201 is the mechanism that allow
11 the enforceability of the prohibition against the act
12 of circumvention to be selectively waived for limited
13 time periods if necessary to prevent a diminution in
14 the availability to individual users of a particular
15 category of copyrighted materials. They're saying
16 well, the availability of having this copyrighted work
17 will create all kinds of stuff but what your focus is
18 on is whether individual users are being harmed by
19 this and you can selectively waive it for particular
20 classes of works for particular users, a particular
21 class of users, and not to focus on the market as a
22 whole but to focus on whether or not individuals are
23 being harmed, and my argument is that individuals are
24 being harmed here. That's not referring to the
25 commercial market. I have other arguments that I'm

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1 basically saying that their commercial market is not
2 being harmed at all by this exemption. By giving me
3 the ability to do a five second commentary or critical
4 clip of their movie does not create a recognizable or
5 cognizable commercial harm. I may say that DVD stinks
6 and the ancillary works are terrible and don't buy it,
7 but that is not a cognizable harm within the scope of
8 this rulemaking to their commercial interests.

9 MR. KASUNIC: Do you have any comments?

10 MR. MARKS: I just can't resist responding
11 to the last comment which is that none of what's at
12 issue today or any of the arguments that we are making
13 today have any bearing or any relation to the notion
14 that we are trying to stop somebody from saying a
15 particular DVD title stinks, don't buy a particular
16 DVD title by AOL Time Warner or any other speech
17 element. Just when remarks like that are made, I
18 can't not respond to them.

19 MR. MILLER: May I just respond to that.
20 If my understanding is correct, the speakers from the
21 Director's Guild of America was making the argument
22 that directors don't want this exemption because
23 Internet critics specifically might alter it or use it
24 in ways that the individual deems appropriate but the
25 directors do not. So I'm being responsive to that.

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1 Thank you.

2 MR. METALITZ: If I could just respond to
3 the first part of his answer about individual users.
4 I'd have to go back and look at the committee report,
5 but I think Congress was saying there that we need to
6 look at what is the impact on the availability of
7 these works for non-infringing uses by individuals.
8 They're not necessarily talking about non-infringing
9 use by other entities. But that doesn't mean that if
10 one individual is harmed or suffers an adverse impact
11 that that's enough to constitute or to justify an
12 exemption. I'm not sure if that's what Mr. Miller was
13 arguing or not, but I think the fact that they use the
14 term individual users doesn't necessarily mean all you
15 have to do is find one person who feels that they're
16 hurt and the exemption should be granted.

17 MR. KASUNIC: I don't think that's what
18 you were arguing.

19 MR. MILLER: No.

20 MS. DOUGLAS: The cause that Mr. Miller
21 was saying in his comment was that what you need to
22 focus on is -- and I suppose you say it in the first
23 place -- I guess I'll just ask it this way. Would
24 motion picture producers be less willing to make
25 material available on DVDs if they knew that the

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1 prohibition on the use of circumvention tools would
2 not be in force on the use as opposed to what happens
3 after you let the cat out of the bag? Does that make
4 any sense?

5 MR. METALITZ: I'm sorry. Could you
6 repeat the question?

7 MS. DOUGLAS: Would motion picture
8 producers be less willing to make material available
9 on DVDs if they knew that the prohibition on the use
10 of circumvention tools would not be in force?

11 MR. METALITZ: I think the answer to that
12 question is yes, that they would be less likely to
13 make material available on DVD if 1201(a)(1) were not
14 applicable. Yes, I think the Librarian has found that
15 to be the case in general. That doesn't mean it
16 applies in every single instance and that there can be
17 no exemptions, but I think as a general rule, the
18 answer to your question would be yes, it would reduce
19 the incentive to make these works available.

20 MS. DOUGLAS: Okay. Yes, Mr. Miller.

21 MR. MILLER: I'd just like to say the
22 question why would it reduce these incentives? The
23 DGA has argued that among the reasons that it would is
24 because directors don't like having people alter their
25 work or criticize it or parody it, and that is not a

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1 cognizable harm within the scope of this rulemaking
2 body. The other possible harm that I can imagine
3 which the DGA has offered is that it harms the
4 commercial interests, that they will not get the money
5 from this, and it's hard for me to see how permitting
6 non-infringing uses under the interpretation of
7 1201(d) that we've offered would result in any
8 cognizable commercial harm to their interests. It's
9 not enough for them to say that they will be harmed.
10 They should state how and precisely where within the
11 scope of this rulemaking that harm applies, and they
12 have not made that case.

13 MR. METALITZ: I think I have to rise to
14 the defense of the DGA here. My problem here goes to
15 the whole thrust of this argument of ancillary works
16 because I can't avoid the suspicion that the reason
17 we're hearing so much about ancillary works is because
18 the Copyright Office said in footnote 13 that maybe
19 that's the thing that came closest to arguing for an
20 exemption. Virtually everything that Mr. Miller said
21 in his filing and in his testimony today could be
22 applicable as well to the principal work, principal
23 motion picture that's on the DVD.

24 One difference here is that in these
25 ancillary works there tends to be more of an

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1 opportunity for the director to speak with his or her
2 own voice and to present something. By the way,
3 there's also more work for directors to direct making
4 of documentaries which many of these have and have a
5 separate director from the director of the principal
6 film. So there's obviously an economic interest here
7 in the creation of these works and these ancillary
8 works wouldn't even exist were it not for this format
9 in many cases. So I just don't see where the economic
10 interest as well as the other interests of the DGA are
11 not very deeply implicated here.

12 So ancillary works are a target of
13 opportunity here, I think is what I'm hearing. Most
14 of the arguments again that have been made would apply
15 just as much to the principal motion picture. The
16 problem is you rather forcefully closed the door on
17 that in the year 2000 and you left the door open a
18 crack in 2003 and that's why we're hearing so much
19 about these works and there's such great interest in
20 the directors.

21 MS. DOUGLAS: Yes, ma'am.

22 MS. GARMEZY: Could I just clarify for the
23 record. I did not say that directors felt that the
24 reason they have these great concerns about the
25 Blogcritics is because they don't like to be

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1 criticized. Clearly, directors are very used to being
2 criticized in print, on TV, in reviews, etcetera. I
3 never said that was the reason for any objection.

4 MS. DOUGLAS: Might even enhance the
5 interest in the movie itself. But that's certainly
6 beside the point here.

7 We've heard a number of times that going
8 back to ancillary works, not talking about anybody's
9 motives, that these ancillary works are an additional
10 bonus and that we really ought not be considering
11 ancillary works because consumers haven't even
12 suffered a diminution of material. In other words,
13 this is just gravy. So we're supposed to look back to
14 2000 and see what material was available to the public
15 and then see whether or not that material has been
16 diminished. What's wrong with that analysis? What's
17 wrong with saying well, this is just additional
18 material that we wouldn't have had in the first place?

19 MR. MILLER: Well, it's not clear to me
20 necessarily that the way you construe the statute is
21 always to look back to the year 2000. I think there
22 are several different ways to interpret the statute
23 and I think it makes it clear that the Congress did
24 not intend to set the bar at the year 2000 and any
25 works that appear, new media forms, new forms of work

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1 that could be put on DVDs or anything are suddenly
2 just going to be exempt because they never existed
3 before and, of course, the claim will always be well,
4 they never would have existed without DRM. Certainly
5 Congress did not intend that.

6 So I think what we have to do is look at
7 the present and look at what the standard of the
8 present is. Right now the standard is that these
9 works are going to be readily available. DVDs are
10 hardly issued without them. That in fact, there's
11 marketing for them, that people buy DVDs precisely
12 because its ancillary works are available. It's not
13 simply because of DRM. These ancillary works are on
14 there, not because of DRM necessarily but because the
15 directors want it on there. They want to explain
16 more, they want to talk to their audience.

17 So we simply shouldn't just take it at
18 face value that well, these works would not exist
19 without DRM. There's plenty of reason and plenty of
20 evidence to show that they would exist whether or not
21 DRM was available or not.

22 Furthermore, again, I think that what
23 Congress is intending in this statute for statutory
24 interpretation is to look at where bar is at present
25 when you make the ruling, not necessarily what it was.

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1 I mean otherwise, a hundred years from now, we'll be
2 asking can we get an exemption for this wonderful new
3 media form of brain imaging? Well, brain imaging
4 never existed back in the year 2000. Therefore, it
5 never would have existed at the year end. Therefore,
6 it shouldn't be considered. So I think we need to set
7 the bar at the present and the present is that this is
8 pretty standard and it's important.

9 Just quickly to address the issue of why
10 we chose ancillary works is because of their
11 importance to commentary and criticism. In the
12 Library of Congress ruling, they said well, they meet
13 the burden closer on ancillary works because they're
14 not available on VHS as opposed to other stuff. But
15 that's not the argument I'm making. I'm making an
16 argument about how important they are to commentary
17 and criticism and how that really is key to
18 understanding and working with the movies.

19 MS. DOUGLAS: Yes, Mr. Marks.

20 MR. MARKS: I just wanted to respond to
21 the last comment of Mr. Miller. One of the reasons
22 why ancillary works are made available on DVD, one of
23 the reasons, is because with that digital format and
24 the ability to compress and place more information on
25 that format, there is room to place both a movie and

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1 the makings of these commentaries, these additional
2 ancillary works whereas with VHS analog tape it is
3 often a struggle just to fit the movie onto a single
4 cassette. So it's very accurate, I think, to say that
5 the DVD format itself lends to the inclusion of these
6 ancillary works and that these ancillary works are
7 sort of a natural thing for movie studios to do to
8 make the DVD more attractive and to make it something
9 that consumers want to purchase because it's got these
10 added bonus materials. I agree with that completely.

11 Where I disagree with Mr. Miller is the
12 premise that it's not DRM that's the cause or that has
13 any causal nexus to the ancillary works because where
14 I think he misses the point is that but for -- and I
15 really mean but for -- the availability of CSS to be
16 applied to protect motion picture content on DVDs,
17 none of the motion picture studios would have released
18 their movies on DVD in the first place. I know that
19 from firsthand personal knowledge from having
20 negotiated for two years over the CSS license
21 agreement and even with CSS, several motion picture
22 studios were very reluctant to release the motion
23 picture content onto DVD because of the fear of piracy
24 of releasing their films on a digital format. So I
25 can say with absolute personal knowledge that but for

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1 the existence of DRM and CSS, you would not have
2 motion pictures released on the DVD format.

3 MR. MILLER: My only quick response to
4 that is that that was back in 1995 and I don't think
5 we have to judge the but fors by the standards of
6 1995. Otherwise, we'll be trapped in a time warp
7 where our laws becoming increasingly in variance with
8 the forward moving of cultured society.

9 MS. DOUGLAS: Thank you.

10 MS. PETERS: You have one last question.
11 Right?

12 MR. TEPP: Yes. Thank you.

13 Very quick for anyone who wants to answer.
14 Is there an independent market for what we're calling
15 ancillary works?

16 MR. MARKS: Yes.

17 MR. CARSON: That's it?

18 MR. TEPP: That may be enough. Does
19 anyone disagree or want to add to it?

20 MR. METALITZ: An independent market for
21 ancillary works.

22 MR. TEPP: For the offset in the market
23 values, I mean they are a part of the value package.

24 MR. METALITZ: Independent market value?

25 MS. PETERS: Do you mean separate and

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1 apart from the --

2 MR. TEPP: Separate and apart from --

3 MR. MARKS: Yes.

4 MS. PETERS: From UOB itself.

5 MR. MARKS: Yes. I can think of a
6 specific example in some of those on some of the films
7 that we've released. I'm thinking back of Robin Hood,
8 Prince of Thieves, perhaps not our most notable work
9 but there was a very popular music video by Bryan
10 Adams which we included in with the film and I think
11 clearly that that music video, for example, in and of
12 itself, has market value and could be sold
13 independently. So I would say yes.

14 MR. TEPP: And what would the effect on
15 that market value or market be of the proposed
16 exemption?

17 MR. MILLER: I would say it would have
18 zero effect on the market value of these works because
19 again, I believe in the interpretation of 1201(b)
20 which holds that only non-infringing uses and non-
21 fringing uses, as I said before, are going to have no
22 commercial harm or that commercial harm is outweighed
23 by other interests in the fair use analysis of the
24 four part test.

25 MR. TEPP: Anyone disagree?

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1 MR. METALITZ: Yes. I would disagree
2 because I think if you establish something as having
3 independent market value, you're basically saying it's
4 got the same kind of value as Robin Hood, Prince of
5 Thieves. It may not be the same dollar amount but it
6 has the same type of value and I think for all the
7 reasons that Mr. Marks has already gone through, CSS
8 and the ability to prevent circumvention of CSS is
9 critical to making those works available.

10 MS. PETERS: We're going to take a 10
11 minute break in which people can use any facilities
12 that they need and then the final panel.

13 (Whereupon, off the record for a 10 minute
14 recess at 3:46 p.m.)

15 MS. PETERS: The last panel of the last
16 day of hearings 2003 rulemaking proceeding is a
17 historic event and we'll celebrate. This one is
18 region coding. All of the witnesses have been
19 previously introduced so I'm not going to go there.
20 Can I turn to this side of the table and who wants to
21 go first?

22 MS. HINZE: I can.

23 MS. PETERS: Okay. EFF. Speak up, Gwen.

24 MS. HINZE: Thank you. Thank you for the
25 supportive environment. EFF is requesting an

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1 exemption for a limited class of DVDs, foreign
2 audiovisual works and movies that are released on non-
3 Region One DVD format and are not otherwise available
4 on DVD in the United States. Region coding controls
5 on DVDs currently preclude American consumers from
6 playing foreign movies they have lawfully acquired and
7 lawfully imported into the United States on their U.S.
8 DVD players.

9 The exemption we have proposed would
10 permit consumers to play these movies. Playback of a
11 DVD is a non-infringing use of these audiovisual works
12 since private performance is not one of the exclusive
13 rights granted to copyright owners by Section 106 of
14 the Copyright statute. As Mr. Attaway of the Motion
15 Picture Association of America stated in his testimony
16 before this rulemaking on May 2, the purpose of the
17 region coding system is to allow copyright owners to
18 control marketing of their works. The region coding
19 system does not and was not designed to protect any of
20 the rights granted to copyright owners by Section 106.

21 In considering whether to grant this
22 exemption, we are asking the Copyright Register and
23 the Librarian of Congress to decide whether
24 preservation of an existing business model should
25 outweigh consumers' ability to make a non-infringing

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1 use of their lawfully acquired and lawfully imported
2 DVD movies.

3 The parties opposing this exemption have
4 made four main arguments. First, the Joint Commenters
5 have argued that EFF has not met its burden of proof
6 in establishing harm amounting to a substantial
7 adverse impact on non-infringing uses. They deride
8 the figures provided in EFF's comments for the number
9 of movies from Australia, Japan and India that are not
10 released in the U.S. on Region 1 DVD format in the
11 United States as being "somewhat suggestive of the
12 number of titles in this class and the U.S. demand for
13 them, but they are presented in a way that tends to
14 exaggerate both these qualities."

15 However, the Joint Commenters have
16 criticized only the figures provided for Indian movies
17 and have not disputed the figures provided for Region
18 4 Australian movies or Region 2 Animé works. In terms
19 of actual harm, I note that 124 consumers have filed
20 comments in support of this exemption describing their
21 inability to play numerous lawfully acquired DVD
22 movies that are not available in a Region 1 format.
23 These comments constitute detailed firsthand evidence
24 of non-infringing uses that American consumers are
25 currently prohibited from making due to region coding

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1 access controls.

2 The Joint Commenters also argue that in
3 order to meet the substantial adverse impact standard
4 of proof for this exemption, EFF is required to show
5 the numbers of foreign movies released on DVDs that
6 will not play on Region 1 DVD players. This would
7 require a showing for every foreign country of the
8 number of foreign movies that are never released in
9 the United States, and a showing that they are
10 released solely on DVDs that are not coded either
11 "one" or "all" or "zero." If this were the standard
12 of proof that an exemption proponent had to meet, it
13 would negate Congress' intent in establishing this
14 rulemaking process, namely as the Commerce Committee
15 report stated, To provide a fail-safe mechanism to
16 protect consumers' non-infringing uses.

17 It would also raise serious questions
18 about the procedural fairness of this process. The
19 only parties who could physically gather that data are
20 the parties opposing this exemption. These parties
21 have chosen not to disclose this data, even though by
22 doing so they could presumably refute our claims if
23 the scope of people affected is as minimal as they
24 suggest.

25 EFF submits that the data on the record in

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1 this proceeding, in EFF's comments and in the over 124
2 comments filed by consumers, is sufficient to prove a
3 present substantial adverse impact on users' ability
4 to make non-infringing uses of their lawfully acquired
5 works.

6 Our opponents also argue that this
7 exemption should not be granted because American
8 consumers can acquire a VHS version of the relevant
9 foreign movie. As DVDs continue to overtake VHS as
10 the preferred movie distribution medium, this is not
11 a feasible alternative to address the likely harm to
12 consumers in the next three years.

13 Previously we have provided some
14 information, a printout of the slides that we showed
15 in our previous panel that we would otherwise show but
16 will not due to time constraints this afternoon, which
17 addresses the volume of sales of DVDs versus VHS. As
18 I noted in the previous panel, DVD sales overtook VHS
19 sales in early 2002 and DVD rentals overtook VHS
20 rentals in March 2003. The availability of VHS sources
21 of these works is likely to decrease in the next three
22 years for two reasons.

23 First, as in the United States, foreign
24 movies are increasingly being released only or
25 predominantly on DVD and retailers are ceasing to

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1 carry or reducing their stock of VHS tapes in response
2 to consumer demand. For instance, our submission
3 cites the 2002 decision of Japanese Animé company
4 Bandai Entertainment to release only on DVD. And as
5 previously quoted in the slide from this morning,
6 Marylou Bono, Vice President of Home Video Marketing
7 for Warner Strategic Marketing in the United States
8 stated that Warner decided in January of this year to
9 phase out VHS releases because, as she put it, "VHS is
10 dead."

11 I'd also point out on the slide that we
12 showed this morning that Circuit City ceased carrying
13 VHS tapes in June 2002 and in September 2001
14 Blockbuster reduced their stock of VHS tapes by 25
15 percent.

16 The second reason is as VHS tapes degrade,
17 the existing stock of older works on VHS tapes will
18 diminish. Unless an exemption is granted to allow
19 American consumers to view their lawfully acquired
20 DVDs, they will increasingly be walled off from the
21 benefits of cultural exchange offered by foreign
22 movies.

23 The Joint Commenters' second major
24 argument against this exemption is that consumers are
25 not actually denied access to their lawfully obtained

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1 DVDs because they can purchase alternative DVD
2 players. There are two options available to consumers
3 here. First, consumers can buy a multi-region or all
4 region player. Apart from the fact that these are not
5 easy to find since neither amazon.com nor any of the
6 five major U.S. consumer electronic stores sell these
7 any more, the Joint Commenters have taken the position
8 in several lawsuits that playing a DVD on one of these
9 players violates Section 1201(a) because it goes
10 beyond the scope of the authority granted by a
11 copyright owner.

12 In the appellate brief in the Universal v.
13 Remeirdes case cited in our submission and most
14 recently in their March 2003 summary judgment papers
15 in the pending 321 Studios litigation, the Motion
16 Picture Association of America and several of the
17 movie studios have argued that the scope of authority
18 given to consumers is limited to playing the DVD on a
19 DVD-CCA licensed DVD player. Since the DVD-CCA's
20 multi-tiered licensing system requires DVD players to
21 respond to a DVD's region coding, multi-region players
22 are not DVD CCA authorized and playing a DVD on them
23 therefore violates Section 1201, according to the
24 Motion Picture Association and its member studios.

25 I should note here that I was sincerely

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1 surprised to see a statement by Mr. Attaway in his May
2 testimony responding to a question from Mr. Carson
3 which appeared to present a completely contrary
4 position to the public position taken by MPAA and its
5 members in the two lawsuits I've just mentioned in
6 relation to their construction of Section
7 1201(a)(3)(B). Assuming for a moment that the
8 copyright owners still believe that the playing of a
9 DVD on a multi-region player violates Section 1201,
10 which is what I understood this morning's discussion
11 to be, that leaves consumers with a second option of
12 purchasing up to three region specific players from
13 the relevant foreign countries, paying associated
14 shipping costs, and purchasing a more expensive multi-
15 standard television or a PAL or SECAM to NTSC
16 converter to overcome any questions about
17 incompatibility of broadcast standards and conversion
18 of electricity standards.

19 I'd like to make two points here. First,
20 this is a significant capital equipment cost to ask a
21 consumer to bear to playback a movie. Second and, more
22 importantly, the consumers' desired use here is a non-
23 infringing use. Playback of a DVD is a private
24 performance. It is not one of the exclusive rights
25 granted to copyright owners under Section 106 of the

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1 Copyright statute. It is also clearly lawful for
2 consumers to import foreign movies on DVD for
3 personal, non-comment use under Section 602 of the
4 Copyright statute. On closer inspection then, the
5 Joint Commenters' arguments distill down to the claim
6 that it is appropriate to impose a significant cost
7 burden on American consumers to enjoy what is a non-
8 infringing use of lawfully acquired media in order to
9 preserve an existing marketing system for these works.

10 The third argument made by our opponents
11 or by some of our opponents against granting this
12 exemption is that the system of geographic region
13 coding is part of the exclusive right of distribution
14 granted to copyright owners under Section 106 and,
15 therefore, granting an exemption would violate this.
16 This is not accurate. Copyright law does not grant
17 copyright owners unfettered control over distribution.
18 The Copyright statute recognizes a number of
19 limitations on copyright owners' distribution right.
20 Two of these limitations, the first sale doctrine
21 which is recognized in Section 109 and the right of
22 personal importation recognized in Section 602 for
23 noncommercial purposes both support the exemption we
24 have sought here. This exemption would only extend to
25 DVDs that consumers are lawfully allowed to import

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1 into the United States under Section 602 of the
2 Copyright statute.

3 The Joint Commenters have argued in
4 relation to one of the examples cited by EFF that
5 allowing consumers to play a lawfully imported DVD
6 movie that was currently in U.S. theatrical release
7 would undermine box office profits. However, this is
8 already permitted by Section 602 of the Copyright law.
9 The same argument could equally be leveled at imported
10 foreign VHS tape movies. Congress has already drawn
11 the balance in favor of permitting exactly this
12 behavior and it should not make a difference whether
13 the consumer is trying to play a foreign movie
14 purchased on DVD or VHS.

15 Nothing in the legislative history of the
16 Digital Millennium Copyright Act indicates that
17 Congress intended to override Section 602 or Section
18 109 or otherwise to extend the rights granted to
19 copyright owners under Section 106 by enacting Section
20 1201.

21 The fourth argument made by opponents of
22 this exemption is a claim to user facilitation and a
23 corresponding warning of reduced availability should
24 an exemption be granted for region coded works. The
25 Joint Commenters state at pages 26 and 27 of their

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1 comments that the use of region coding helps preserve
2 the market opportunity for U.S. distributors to make
3 foreign works available and that foreign titles would
4 become far more widely available to American viewers
5 through U.S. distributors, "so long as the
6 distributors can be assured that region coding access
7 controls are respected in the United States." The
8 same argument was made by testifiers at the May 2
9 hearings in this proceeding.

10 In response I'd like to point out first
11 that we are seeking this exemption precisely because
12 many foreign movies are not and have not been released
13 in the United States despite the existence of region
14 coding on DVDs and CSS for the last three years. U.S.
15 copyright owners can control the scope of this
16 exemption by choosing to release a foreign work in
17 region one. Second, there is no sense in which this
18 exemption would deprive U.S. distributors of an
19 economic benefit. U.S. distributors have not lost any
20 profits because the work was not available in the
21 United States. Copyright owners' foreign distributors
22 have also not been harmed economically because they
23 have received the designated purchase price.

24 Third, the threat that copyright owners
25 will not release content unless there is absolute

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1 legal protection for technological protection measures
2 is not actually borne out by the last three years
3 experience of the content scramble system protection
4 on DVDs. Prior to the introduction of the DVD format,
5 copyright owners argued that they required legal
6 protection for technological protection measures to
7 overcome the threat of illegal copying and to provide
8 incentives to make digital content available. As a
9 result, content released by the major motion pictures
10 on DVD has been protected by CSS since 1998. However,
11 as I mentioned in this morning's hearings, CSS has not
12 been effective at preventing large scale commercial
13 reproduction of DVDs. It was defeated almost
14 immediately by a group of hobbyists and the tools for
15 circumventing CSS are widely available on the Internet
16 and from commercial vendors in the United States.

17 As the MPAA frequently points out, large
18 numbers of unauthorized copies of motion pictures are
19 widely available for download on the Internet. Given
20 the copyright owners' stated concerns about the need
21 for protection against digital piracy you would expect
22 the copyright owners to have abandoned, releasing
23 content, on CSS unprotected DVDs. But exactly the
24 opposite is true. DVD sales overtook VHS sales in
25 early 2002, as I mentioned, and Warner Home Video is

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1 moving to release movies only on DVD.

2 My point here is that motion picture
3 studios have continued to make their copyrighted works
4 available on DVD, notwithstanding the ease of
5 defeating CSS. Granting an exemption for circumvention
6 for a limited class of movies owned by consumers who
7 have paid for these works and have lawfully imported
8 them into the United States will not have any bearing
9 on copyright owners' decisions to make content
10 available.

11 Finally, I'd like to emphasize that this
12 limited exemption does not open the floodgates to
13 widespread copyright infringement. First, the
14 exemption is limited to non-infringing playback of
15 movies and does not immunize infringing behavior. It
16 doesn't include reproduction.

17 Second, as Section 1201(a)(1)(D) makes
18 clear, any exemption granted by the Librarian of
19 Congress cannot be interpreted to authorize infringing
20 behavior. If anyone were to go beyond the scope of
21 the exemption and make an unauthorized reproduction or
22 distribution of the DVD work, copyright owners would
23 continue to have the ability to bring suit for
24 infringement and the full range of remedies currently
25 available to them today under copyright law. And based

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1 on what we have discussed this afternoon, it would be
2 likely they would be in violation of 1201(a) in that
3 situation.

4 Thank you very much.

5 MS. PETERS: Thank you.

6 Any opening testimony?

7 MS. GROSS: Mia will present the testimony.

8 MS. PETERS: Okay.

9 MS. GARLICK: Good afternoon. IP Justice
10 welcomes this opportunity to testify to the Copyright
11 Office about the adverse impacts on the ability of
12 users to enjoy fair access to DVDs.

13 Region code restrictions significantly
14 interfere with non-infringing access to and post sale
15 uses of DVDs. The magnitude of this harm warrants the
16 recommendation by the Copyright Office of the
17 exemption proposed by IP Justice in its submission
18 comments.

19 We wish to make initially four procedural
20 comments, and then we'll make four substantive
21 comments. Although we have touched on these
22 procedural comments earlier today, we feel it is
23 important to remind the Copyright Office of these
24 points in consideration of the region code exemption,
25 because they again impact on the substantive findings

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1 and also they address the reasons given by the
2 Copyright Office for rejecting such an exemption
3 during the first rulemaking.

4 Firstly, IP Justice would like to again
5 remind the Copyright Office that its obligations in
6 this rulemaking are to the users. Moreover, the
7 Office's duty is to ensure access to works by users,
8 not the availability of works by copyright owners.

9 Congress introduced the anti-circumvention
10 measures to encourage copyright owners to make their
11 works available digitally, or in the words of the last
12 rulemaking, "The measures were designed to be use
13 facilitating." The responsibility of the Copyright
14 Office in this rulemaking is not to repeat Congress'
15 logic, but to protect users and ensure access to
16 individual DVDs, not the availability of DVDs
17 generally.

18 Second, the structure of this rulemaking,
19 as interpreted by the Copyright Office, effectively
20 precludes it from achieving its purpose. The
21 Copyright Office insists that exemptions be defined
22 according to class of work, adequate protection of
23 user rights requires that exemptions be drafted with
24 reference to the type of user and circumstances of
25 use. For example, if a person imports a DVD for

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1 personal use, they are not infringing a on a copyright
2 owner's right to control imports, but if the person
3 imports commercial quantities of DVDs they are.

4 Third, the Copyright Office has set an
5 impossibly high evidentiary standard, given it
6 requires evidence of substantial harm or likelihood of
7 harm. However, the adverse effects experienced by
8 users are likely of their very nature to be individual
9 and personal, difficult to measure and quantify. For
10 example, it is extremely difficult to measure all of
11 the Americans who travel each year and purchase DVDs
12 overseas intending to play it when they get home.
13 This difficulty does not detract from the prevalence
14 of such harm, it does mean that the Copyright Office
15 should accept as evidence news reports and principal
16 analyses of likely harm which take account of the
17 interaction of the anti-circumvention measures with
18 the limitations and exceptions for users under
19 traditional copyright principles.

20 Fourth and finally, IP Justice urges the
21 Copyright Office to be mindful in conducting the
22 second rulemaking of two important facts. Firstly,
23 the first rulemaking was conducted when the
24 prohibition on active circumvention had not yet taken
25 effect, and three years later the trend of digital

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1 lockup is more apparent. Thus, the extent of the
2 impact on users must be greater because the anti-
3 circumvention measures are broader than copyright.

4 The second important factor is that the
5 impact of any exemption will necessarily be limited.
6 This is something that the Copyright Office failed to
7 take account of in the first rulemaking, circumvention
8 of access controls are, by their nature, inherently
9 non-commercial and personal, and as we've discussed
10 earlier today, that arises from the fact that in order
11 to be take advantage of an exemptive act of access
12 circumvention, which is a bit of a tongue twister, a
13 person must be highly technically literate.

14 Turning now to our substantive comments,
15 of which we have four. I would firstly like to note
16 that it is extremely important that the Copyright
17 Office act now and grant the exemption before users
18 are misled into thinking that they do not have the
19 right to watch foreign purchased movies on U.S. coded
20 DVD players, and before users effectively lose the
21 right to watch foreign purchased movies.

22 Section 603(a) of the Copyright Act
23 specifically carves importation of movies for
24 personal, non-commercial use out of the copyright
25 owners monopoly. Access controls should not be

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1 allowed to eliminate this consumer right and prevent
2 users from taking advantage of this intentional
3 statutory carve out.

4 Whatever a user doesn't know to use they
5 will lose. Failure to grant an exemption now will set
6 this process of mis-education in train irreversibly
7 and will render Section 603(a) meaningless for DVDs.

8 In its first rulemaking, the Copyright
9 Office incorrectly relied on the fact that by
10 purchasing additional equipment a user could watch an
11 overseas coded DVD. This misses the point. Such an
12 attitude entrenches a de facto extension of the
13 copyright owners right to dictate technology. Only
14 the most determined and informed consumers are likely
15 to do so, and then only if they have the disposable
16 income to buy the necessary equipment. This precludes
17 opportunity for demand for and competition in
18 technology design. This overturns Section 603(a)'s
19 right of personal importation, since it effectively
20 bars such activity. In essence, DVD copyright owners
21 are again dictating the technology preferences over
22 consumers and usurping individual rights in the
23 digital media they purchase.

24 Second, we would note that region coding
25 impedes cultural exchange. At a time when technology

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1 could enable greater cultural exchange through the
2 ability of the American consumers to purchase foreign
3 films through foreign websites, region coding enforces
4 cultural separation. If people are forbidden to
5 bypass these controls we cut ourselves off from the
6 opportunity for worldwide cultural exchange.

7 The technology has the potential to
8 collapse the distance between people, but the business
9 model of DVD copyright owners seeks to erect
10 artificial walls in order to receive extreme maximized
11 profits.

12 The Copyright Office should not assist in
13 this process at the expense of users. The framers
14 originally intended copyright to facilitate cultural
15 exchange, but after centuries of manipulation
16 extending both the scope and breadth of copyright it
17 is now being used to justify perpetuating cultural
18 separation.

19 Third, there is no evidence that the movie
20 industry will suffer harm as a result of a region
21 coding exemption. Just because profits are not
22 maximized in the extreme does not remove the
23 incentives for copyright owners to make content
24 available.

25 In addition to the highly personal and

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1 non-commercial nature of access circumvention
2 mentioned above, it is the fact that this exemption
3 will expand the global market for DVDs, rather than
4 the market simply being domestic it will be
5 international. Each person who takes advantage of the
6 region coding exemptions will be a legitimate
7 purchaser in that global market.

8 Fourth and finally, region coding defeats
9 the first sale doctrine as it applies to DVDs.
10 Without a region coding exemption there is no resale
11 market for foreign purchased DVDs in the U.S.
12 Similarly, there can be no overseas resale market for
13 American DVDs.

14 At exactly the time when the internet
15 opens up the opportunity for people to sell their
16 second-hand DVDs throughout the global village, region
17 coding segments and shrinks the village bazaar. This
18 will further discourage people from purchasing DVDs
19 overseas once they experience these restrictions. It
20 further entrenches the copyright owner's ability to
21 control private enjoyment of all DVDs. It is the
22 user's right to access and freely dispose of DVDs
23 wherever purchased, which the Copyright Office has a
24 duty to safeguard.

25 Thank you.

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1 MS. PETERS: Thank you.

2 On this side, who wants to go first?

3 MR. MARKS: Again, I don't have any formal
4 introductory remarks for this part of the panel. Let
5 me just try and respond by the following.

6 First of all, in the rulemaking conducted
7 in 2000, the Copyright Office and the Librarian did
8 find that there were legitimate reasons for the motion
9 picture companies to employ regional coding on DVD
10 discs, and I would just like to summarize again some
11 of those rationales for the employment of regional
12 coding.

13 One is that the rights to exploit a film
14 on video and DVD are frequently granted to different
15 parties in different territories, and, therefore,
16 regional coding assists in the enforcement of this
17 legitimate licensing of copyrights and of distribution
18 rights. And, this particularly happens quite
19 frequently in the motion picture industry,
20 particularly for independent motion picture producers
21 where rights are often sold, pre-sold, before the
22 first frame of film is ever shot, and those rights are
23 often sold to different third parties for
24 exploitations in different territories. So, regional
25 coding really assists in the proper exploitation of

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1 those distribution rights.

2 A second reason, and one that the
3 Copyright Office and Librarian refer to in the
4 rulemaking, is the fact that there are staggered
5 release windows for the exploitation of a film through
6 the windows of theatrical, home video, DVD, pay for
7 view, pay television, free television, et cetera, and
8 that these windows vary from territory to territory
9 and country to country. So, the regional coding on
10 DVD helps preserve the integrity of those windows so
11 that, for example, if a film has not yet been released
12 in Europe in theaters, but is already on DVD in the
13 United States, that DVDs don't just get simply
14 transshipped to Europe and, therefore, destroy the
15 theatrical window of distribution.

16 A further reason is the fact that as we
17 distribute our movies in various territories overseas
18 we have to comply with certain local censorship or
19 local version requirements, and the regional coding
20 helps us to make sure we are complying with those
21 requirements.

22 And finally, there are variations in
23 television formats, NTSC, and PAL, and SECAM, which
24 exist, and the regional coding helps ensure that the
25 discs that are distributed in the regions with those

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1 formats are playable on television sets.

2 And, I just want to stop there for a
3 moment, because even if you have, for example,
4 acquired a DVD of a French movie in France, and even
5 if hypothetically you can circumvent the regional
6 coding of that movie to play it on your DVD player, if
7 the movie on the DVD has been placed on that French
8 DVD only in PAL or SECAM format, and if your DVD
9 player does not have the ability to transcode the PAL
10 format into NTSC, it will not necessarily play on your
11 television set.

12 CSS has nothing to do with that. CSS has
13 no requirements as to whether a particular regional
14 DVD player can or cannot have the ability to transcode
15 PAL into NTSC and vice versa, but the fact of the
16 matter is, some DVD players do and some DVD players
17 don't. So, just defeating regional coding in and of
18 itself doesn't necessarily guarantee that the disc is
19 going to play on the particular DVD player that you
20 have in your home.

21 On the effect of regional coding in
22 general, that was part of the reason I wanted to
23 emphasize the growth in foreign titles that have
24 occurred in terms of their distribution in the United
25 States. Far from there being a paucity of such

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1 titles, there's been an actual threefold growth in
2 terms of just foreign language feature films, and I
3 believe almost a fivefold growth in terms of anime
4 titles that are released now and distributed in the
5 U.S. market on Region 1.

6 I know Ms. Hinze was speaking about Bande,
7 that Bande was, perhaps, going to stop releasing its
8 anime titles on VHS, but the fact is, Bande, which is
9 included with Pioneer, in this description of the
10 suppliers who supply the U.S. market with anime on
11 DVD, Pioneer, including Bande, is actually the number
12 one supplier of anime titles to the U.S. market on
13 DVD, and currently they are supplying 427 titles. So,
14 I think, in fact, regional coding has is not the end
15 result of depriving U.S. users and consumers of
16 foreign titles, there have been a dramatic increase in
17 those foreign titles distributed in the U.S. market.

18 Finally, for me, one of the big reasons
19 here about why we should not seek to create an
20 exemption to defeat regional coding to allow people
21 who are individually purchasing foreign DVDs abroad
22 and bringing them home to be able to watch them, is
23 because I think there is a less risky and less
24 burdensome alternative which is, not only perhaps the
25 purchase of a DVD player which may cost \$100, and

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1 which legitimately you may have to import or purchase
2 off the internet, but the fact that you can also do it
3 via a DVD ROM drive, and any DVD ROM drive that is
4 purchased the regional coding, even if you buy that
5 DVD ROM drive here in the United States, and it's
6 coded for Region 1, the CSS license allows, and the
7 DVD ROM drive facilitates consumers being able to
8 reset the regional code five times.

9 And, the way it works, and I apologize
10 because it's a little bit complicated, the consumer
11 can set it five times. After the fifth time that
12 they've reset it, they do have an ability to reset it
13 again, but they have to bring the drive to an
14 authorized dealer or an authorized service
15 representative, who can then authorize an additional
16 set of five changes, and then they can bring it back
17 again for a second, for a third, fourth, and fifth set
18 of authorized changes. So, you can change it 25 times
19 in total, but you have to go back for each set of
20 five. You only get the first five when you buy the
21 ROM drive itself.

22 But, the point is, is if you are - some of
23 the commentaries I've read, I believe one of them was,
24 was it David Miller - David Carroll, he kept on
25 referring, for example, to Japanese titles. He

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1 referred to no other titles but Japanese titles. All
2 that would require him to do would be to purchase a
3 \$40 DVD ROM drive, set it to Region 2, which he could
4 do himself, then he's set, he can view all of those
5 Japanese Region 2 coded titles here in the U.S. And,
6 it seems to me that if the users have enough
7 disposable income to be traveling abroad to acquire
8 titles to bring back into the United States, it's not
9 very burdensome to ask them to spend \$50 to buy a ROM
10 drive to enable their viewing of those titles,
11 particularly, now when the players and the ROM drives
12 cost no more than maybe two, three or four DVD titles
13 in and of itself.

14 I wanted to also just touch briefly on the
15 Indian language film issue. This had come up in the
16 prior rulemaking, when I made an inquiry through
17 Warner Home Video, where we made inquiries into the
18 Indian market. The information that we were given was
19 that Indian films are, when they are released on DVD
20 are generally coded all region, multi-region, so that
21 they are playable here in the U.S.

22 Interestingly, in the DVD release report,
23 which is where I've gathered all these facts and
24 figures about the number of foreign language feature
25 films that are released on DVD, none are listed for

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1 the Indian language. Apparently, there are no U.S.
2 distributors who are in the market selling Indian
3 language DVD titles for the U.S. market. So, you have
4 Chinese, French, Spanish, Japanese, Italian, German,
5 Russian, Korean, Hebrew, Portugese, but no Indian
6 foreign language titles.

7 However, I went on to Netflix, which I
8 don't know if the panel is familiar with Netflix, but
9 Netflix is an internet-based rental service for DVDs.
10 It is a legitimate service. Netflix purchases
11 authorized, you know, DVDs, and I don't know, I think
12 they only rent DVDs, I'm not - actually, I'm not
13 positive about whether they deviate, but I believe
14 they only do DVD rentals. A subscriber pays, I
15 believe it's \$20 a month, and they are able to get
16 three DVDs at a time, request titles, get three DVDs
17 at a time. They are mailed to them with a self-
18 addressed stamped mailer to return the discs, and when
19 they return the discs they get their next three
20 titles. And, it's a very, very popular service.
21 Everybody I know who uses it absolutely loves it.

22 I went on to Netflix to see if there were
23 any Indian language titles, film titles available, and
24 there are, in fact, over 380 Indian language film
25 titles available. I cannot say here that they, with

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1 absolute certainty, that they are playable on Region
2 1 DVD players for the U.S., but because Netflix is a
3 service that serves the U.S. market my presumption is
4 that, in fact, they are playable. We plan to - I
5 mean, we'll probably subscribe, order some, try them
6 on a DVD player to just check it out. I actually sent
7 an e-mail to the Netflix folks saying, gee, I'm
8 interested in subscribing and only have a Region 1,
9 you know, DVD player, will these Indian foreign
10 language titles that you are making available, will
11 they play on it, I didn't get a response. But, I
12 think it's important to try and test that out.

13 All that is to say is that I do not see
14 regional coding as a big impediment to this cultural
15 exchange and to the growth of foreign language product
16 and titles being made available in the U.S. market,
17 and I fear that if circumvention of region coding is
18 permitted what it may do is allow both people who are
19 very sophisticated and know how to defeat regional
20 coding to be able to do so with respect to their
21 titles that they buy abroad, but the net effect may be
22 that it discourages distribution of the titles by U.S.
23 distributors here in the market, and the net effect
24 could be actually less access to foreign language
25 works than more.

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1 MS. PETERS: Thank you.

2 Mr. Metalitz.

3 MR. METALITZ: Thank you, and before the
4 hearing draws to a close I just want to take this
5 opportunity to thank the members of the panel for your
6 attention, your consideration of our views, and the
7 questions that you've posed to us, and also to your
8 fortitude as I speak at 4:30 p.m., on the last day of
9 the hearings.

10 Just briefly on the regional coding issue,
11 in the decision or recommendation that you rendered in
12 the year 2000, and that was approved by the Librarian,
13 there were really four main points, and you actually
14 discussed this issue in some detail. First, you
15 concluded that regional coding on DVDs is an access
16 control. Second, you concluded that it encourages the
17 distribution and availability of DVD titles in the
18 United States. Third, you characterized the problem
19 of - or rather, the call to circumvent regional coding
20 as confined to a relatively small number of users. And
21 fourth, you noted that there are options available for
22 those users and you listed VHS resetting the regional
23 coding on the DVD player, and obtaining an out-of-
24 region player or player set, where it could be a ROM
25 drive set, to a region other than Region 1.

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1 I would submit to you that your first two
2 conclusions remain just as true today as they were
3 three years ago, and Mr. Marks has already talked
4 about some of the reasons for regional coding.

5 Your third point, I think the evidence is
6 that this, perhaps, is even a smaller problem than it
7 was three years ago, or rather it affects fewer
8 people, because of for the very reason that Mr. Marks
9 cited, the growth, quite impressive growth, in the
10 number of foreign titles released in the United States
11 on DVD, and particularly strong growth in the area
12 that I think on this record right now is most
13 documented, and that has to do with Japanese anime
14 titles. Some of the submitters have given you a
15 wealth of examples of Japanese anime titles which they
16 wish to circumvent regional coding, but I think we
17 also have evidence now that there's been a dramatic
18 growth in the licensed authorized distribution of
19 anime titles in formats that will play on Region 1
20 players. So, I think that has to be taken into
21 account.

22 And, on your fourth point, as to the
23 options that are available, I think it is definitely
24 a - those options are more available today than they
25 were two and a half or three years ago. VHS is still

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1 available in many cases. I don't gainsay the evidence
2 that VHS is declining, but as I said earlier today I
3 think reports of its demise are greatly exaggerated
4 and in many cases it will be an option.

5 Second, the regional code resetting
6 function that Mr. Marks talked about remains
7 available, and I do want to take issue with the
8 characterization that the joint commenters have ever
9 said that obtaining a multi-region player, a player
10 that's been modified without the authorization, or at
11 least potentially in violation of the obligations of
12 the distributors, to play DVDs from any region, I
13 don't believe we've ever suggested that that's an
14 option because we believe, at least in the United
15 States, that trafficking in that is probably a
16 violation of 1201.

17 In any case, I've gone back and looked at
18 my submission, and I don't believe we have ever said
19 that, so I'm not sure, perhaps, Ms. Hinze was talking
20 about one of the other comments.

21 And finally, the option of purchasing an
22 out-of-region player, a player that's set to Region 2
23 if you are interested in the Japanese titles, or
24 whatever region you are most interested in, I think as
25 Mr. Marks has already pointed out, the cost of that is

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1 much less than it was a few years ago. If you can
2 solve this problem by buying a \$40 or \$50 piece of
3 equipment and then using it indefinitely to play these
4 titles, it's hard to see the substantial adverse
5 impact on your ability to play titles that may
6 themselves cost almost that much for each individual
7 one, or close to it.

8 I think looking at the congressional goals
9 here in the context of regional coding, if the
10 congressional goal is to increase the availability for
11 non-infringing uses of, in this case, foreign titles,
12 anime titles and so forth, on DVD, there are really
13 two models to choose from here. One is the model that
14 the proponents of the exemption argue for, I would
15 call that the drip drip model, you can bring in these
16 titles one at a time under Section 602(a) of the
17 Copyright Act, which we don't have any problem with,
18 run off imports, and then you can take them home and
19 on your Region 1 player you can circumvent the
20 regional coding, this would be the effect of the
21 exemption if it's granted, and then you can watch
22 these titles, anime titles or other foreign titles.

23 And, if you have the connections to either
24 go overseas, or are savvy enough to buy from overseas,
25 and you know how to circumvent this control, then

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1 you'll be able to achieve this objective. That's the
2 drip drip approach.

3 The alternative approach is what I think
4 we are seeing now, which is at least building up the
5 pressure so we get an honest trickle of these titles
6 into the United States, and the way you do that is to
7 attract U.S. distributors, to encourage people to take
8 on, or rather entities to step in and distribute these
9 titles to people that want to watch them on Region 1
10 players, get Region 1 titles and distribute them in
11 the United States.

12 Region coding is very important to
13 achieving the honest trickle solution, because if you
14 are someone contemplating being a distributor for a
15 Japanese title, or Indian title, or another foreign
16 title in the United States, it's certainly more
17 attractive if, in fact, you are only competing against
18 the drip drip, you are only competing against people
19 that are able to circumvent. In other words, your
20 market is there, except for a few isolated cases, a
21 very small niche of people that are maybe
22 circumventing, or illegally bringing these in under
23 602(a).

24 So again, if the goal is to encourage the
25 availability, increase the availability in the United

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1 States, you want to have a system that encourages the
2 creation of authorized distribution relationships,
3 regional coding helps to do that as it preserves the
4 market in the United States. And, allowing
5 circumvention of regional coding would discourage
6 that.

7 If the anime market is as big as many of
8 the submitters say it is, I think it will prove
9 attractive and I think we already see evidence that it
10 is proving attractive to U.S. distributors.

11 Now, I can't say this based on personal
12 knowledge, we are shadow boxing a little bit here, I
13 have to say, because these decisions are not made by
14 members of the Motion Picture Association, or of AFMA
15 for the most part, they are made by the producers of
16 Japanese anime titles or of Indian producers, and so
17 we don't have - this is not a situation necessarily
18 where we have all of this information, and before I
19 attract a question from Mr. Carson as to whether my
20 grade and evidence was better than Steve Marks grade
21 and evidence, which I'll take the 5th Amendment on, I
22 don't know that we have this information, but as I
23 say, we can certainly try to obtain it, but I think
24 the evidence that Mr. Marks has pointed to here, that
25 Dean Marks has pointed to, shows that there's a robust

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1 market for - there are an increased number of
2 distributors of Japanese titles, foreign titles
3 generally, and Netflix is getting them from somewhere
4 and sending them to customers all over the United
5 States, and I have to presume that those Indian titles
6 are playable on Region 1 players.

7 Before I conclude, I want to just say a
8 word about the application on the regional coding
9 issue for video games, especially console games, and
10 I think it's easy to confuse the issues here but they
11 are somewhat distinct. It's easy to confuse them
12 first because some of the reasons for regional coding
13 in the audio visual area, the film area, also apply in
14 the video game area, such as the regional status of
15 licensing and the need for localization and so forth.
16 The video game industry doesn't really have the
17 windows issue, the time-related windows issue, at
18 least not to the extent that the movie industry does,
19 and it doesn't have the PAL, CCAM and NTSC issues, but
20 otherwise the reasons are the same, and, to further
21 confuse matters, an increasing number of consoles can
22 serve both as DVD players for DVDs that have CSS, or
23 that have the regional coding that is compatible with
24 CSS, and for video games that are on DVD that are
25 subject to a different kind of access control and use

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1 a different kind of regional coding. The same machine
2 does both these things. So, it's a little bit
3 confusing.

4 But, I think the analysis would be similar
5 in this case. I would cite one additional factor that
6 militates against - well, two additional factors that
7 militate against recognizing a regional coding
8 circumvention exemption for video games. One is that
9 there's virtually no evidence in the record of the
10 need for it, as contrasted with, as I said, some of
11 the very extensive evidence you have about Japanese
12 anime titles and other things in the film area. And
13 second, in at least some of the console systems the
14 regional coding technology is very tightly integrated
15 with the platform specific access control technology
16 that's used that prevents the playing of pirate games.
17 And again, there is evidence in the record about this,
18 the statement from one commenter that the easiest way
19 to circumvent regional coding in video games would be
20 in a manner that also allows the playing of pirate
21 games. They also have some evidence from Sony
22 Computer Entertainment of America that one of the
23 defendants in their cases said he tried to interest
24 people in a product that would only circumvent
25 regional coding and no one was interested. They

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1 really wanted to play the pirate games. That's where
2 the money was, and that's where the demand was.

3 But, I think the practical result would be
4 that if an exemption were recognized in the console
5 video game area for this, it would very quickly mutate
6 into circumvention, not just of regional coding, but
7 of access control generally. And, I'm not really
8 making a slippery slope argument here, I'm making kind
9 of a quick sand argument. I think if you put your
10 foot down in that area you will sink up to your hips
11 very quickly, because the technology is such that it
12 doesn't make much sense to circumvent regional coding
13 without circumventing the entire shebang. That,
14 again, is another distinction I believe that you
15 should take into account here.

16 Thank you very much.

17 MS. PETERS: Okay, thank you.

18 Let's start with you, Bob.

19 MR. KASUNIC: Mr. Metalitz, I've got
20 another question for you.

21 You said in, I think, the last session or
22 in your statement, that we said that CSS is an access
23 control in our last recommendation. The way you said
24 that makes we wonder were we wrong? Is that your
25 position as well?

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1 MR. METALITZ: Yes, CSS is an access
2 control.

3 MR. KASUNIC: I guess region coding.

4 MR. METALITZ: Region coding, yes, is an
5 access control.

6 MR. KASUNIC: Okay.

7 So, everyone is in agreement that region
8 coding is an access control. Okay.

9 Regarding, this mostly is in terms of
10 players, and as a result of a follow-up question that
11 we had going back in time again to three years ago, a
12 follow-up question we had about exactly what was
13 involved in the license.

14 And actually, before I go any further, is
15 the licenses available for DVD Copy Control
16 Association and the various licenses that we've been
17 hearing about, or is that all restricted information?

18 MR. MARKS: I believe, but it would be best
19 to check with the DVD Copy Control Association itself,
20 but I believe that the licenses are available from the
21 DVD Copy Control Association on their website. You
22 may have to send them an e-mail, giving them, you
23 know, contact information, before they will send you
24 a copy of the license, but I believe the license
25 itself, both from the - I'm trying to remember if

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1 there is a separate content participant license for
2 DVD, an adopter license, I can't, frankly, remember
3 for CSS, but I believe the licenses themselves are
4 available. The specification as to how the technology
5 works, there's both a procedural specification and a
6 more detailed technical specification, those are not
7 publicly available. You actually have to sign a
8 license agreement, as far as I know, before you get
9 either the procedural specification or the detailed
10 technical specification, but the documents are
11 separate and I believe the license agreement, in and
12 of itself, is available.

13 I suggest if you want a complete accurate
14 answer to that question, that should be directed to
15 the DVD Copy Control Association, because they will
16 know the best.

17 MR. KASUNIC: Okay, Gwen.

18 MS. HINZE: I appreciate you've already
19 heard testimony on a number of these issues on May 2
20 from Mr. Turnbull. My understanding is that the region
21 playback control provisions and the robustness rules
22 are actually not a matter of public record, and that
23 they are actually - there's a claim to trade secret
24 protection for the specifications, which actually
25 would clarify some of these issues.

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1 So, the answer is, no, they are not
2 publicly available.

3 MR. MARKS: Yes, and I agree, and that's
4 probably the case. I was drawing a distinction
5 between the license agreements and the procedural
6 specifications and technical specifications. And so,
7 yes, I believe the license agreements themselves
8 discuss the regional coding requirements, but they
9 certainly don't discuss how they are implemented.

10 MS. HINZE: I believe the relevant
11 information is in the robustness rules, which is not
12 public information, but I'm sure that the record from
13 May 2, and the statements made by Mr. Turnbull, will
14 provide better information about that.

15 MR. KASUNIC: Well, we may have a follow-up
16 question then for Mr. Turnbull on that.

17 Regarding the letter, though, we had asked
18 for some follow-up information after the last hearings
19 in Stanford, and in response you stated that, "The CSS
20 license contains no prohibition on licensed
21 manufacturers of playback devices from selling any
22 device in any country around the world. Thus, for
23 example, an equipment manufacturer that makes DVD
24 players coded for Region 1 is not prevented by the CSS
25 license from selling such Region 1 players in Europe,

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1 which is Region 2."

2 One question that comes up --

3 MR. MARKS: I was just saying, that
4 language sounded familiar.

5 MR. KASUNIC: Oh, good.

6 MR. MARKS: Sorry.

7 MR. KASUNIC: I wasn't making it up.

8 MR. MARKS: Sorry.

9 MR. KASUNIC: Does the CSS license, and I
10 think we've sort of heard this, but does the CSS
11 license permit manufacturers to sell region free or
12 all region players?

13 MR. MARKS: That I can say the CSS license
14 does not permit.

15 MR. KASUNIC: Okay.

16 Then, does that mean that Region free
17 players are - well then, they are unlicensed players
18 to the extent they exist, and I think it's safe to say
19 that they do, and therefore have no authority to
20 circumvent CSS?

21 MR. MARKS: Let me give a little bit more
22 detail on that. First of all, because this can be a
23 confusing area, I wanted to before I answer your
24 question back up a little bit, because --

25 MR. KASUNIC: Just don't make it more

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1 confusing.

2 MR. MARKS: Pardon?

3 MR. KASUNIC: I said just don't make it
4 more confusing.

5 MR. MARKS: I'll try not to. I'll try not
6 to, but I think it's important to draw the
7 distinction, and I frankly wanted to do this even to
8 correct my esteemed colleague, Mr. Metalitz. There
9 are differences in the way you, under the CSS license,
10 regional coding is treated for DVD players, which are
11 the stand alone consumer electronic devices and the
12 DVD ROM drives, which are, basically, configured for
13 computer use. For the DVD players the regional coding
14 is set and it is not permitted to be adjusted by the
15 consumers, it's supposed to set in a robust way, such
16 that the consumer cannot adjust the regional code
17 setting on a DVD player. That contrasted with a DVD
18 CSS licensed, DVD ROM drive, whereas I described there
19 is an ability for the consumer to reset the regional
20 coding setting on that.

21 So, I just wanted to make that point of
22 clarification.

23 On your question, specifically, that does
24 the CSS license permit the manufacturer of DVD
25 players, CSS licensed DVD players that are multi-

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1 region, the answer is no. What is then the source of
2 a lot of these players that actually are in the
3 marketplace, which are multi-region players? As far
4 as I understand it, the majority source is players
5 that leave the manufacturing plant that are, in fact,
6 properly manufactured in compliance with the CSS
7 license agreement, such that they are set for a single
8 region, and then the third party after market, I don'
9 even know what you would call them, but I will call
10 them tamperers for the sake of this hearing, take
11 those, purchase those machines, reconfigure them so
12 that they are multi-region, and then resell them on
13 the market, so that, in fact, for the majority of
14 activity which is occurring, which is causing these
15 devices to be region free instead of properly
16 conforming to the CSS license, that activity is being
17 undertaken by third parties who have no contractual
18 privity with the DVD CCA and, therefore, have no
19 license obligations under the CSS license agreement.

20 MR. METALITZ: And, I stand corrected to
21 the extent that I suggested otherwise. I defer to Mr.
22 Marks.

23 MS. HINZE: And, if I could just add for
24 the sake of clarifying for everybody here my
25 statement, my statement to the effect that the joint

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1 commenters had a position that playback on a multi-
2 region player was unauthorized under Section 1201 goes
3 like this, (1) a multi-region player, for the reasons
4 that Mr. Marks has just identified, is a non-DVD CCA
5 licensed player, and I'm quoting here from the
6 statement from the reply brief of the
7 plaintiff/appellants in the Remeirdes case, which the
8 short quote is, "Authorization by the studios upon
9 . . .," I'll add here, "... upon purchase of a DVD, "has
10 been limited to accessing DVD content by authorized
11 equipment." In other words, playback of a DVD on a
12 non-authorized player is a violation of 1201. That's
13 my understanding.

14 MR. CARSON: What you just read didn't say
15 to me at all that it's a violation of 1201. That's
16 your gloss on what they said, isn't it?

17 MS. HINZE: I'm reciting why I said that my
18 understanding of their position was that playback of
19 a DVD on a non-DVD CCA authorized player was a
20 violation of 1201, I was explaining my statement,
21 based on the two pieces of information.

22 MR. METALITZ: Mr. Carson, if it helps, I
23 wouldn't disagree with that characterization. My
24 concern that I raised was that I thought that Ms.
25 Hinze had said that in this proceeding we had said

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1 that one option that's available to people that want -
2 it's in lieu of circumventing regional coding was to
3 acquire and use a multi-region DVD player.

4 MR. CARSON: Let me make sure I understand
5 what you just said. Are you saying that you agree
6 that it's a violation of 1201(a)(1) to use a multi-
7 region player?

8 MR. METALITZ: Yes.

9 MR. CARSON: Okay. Okay, good, great. Now
10 we understand it.

11 MR. MARKS: If it helps for the record, I
12 agree too.

13 MS. HINZE: I would just like to clarify.

14 MR. CARSON: Please.

15 MS. HINZE: My agreement was agreement that
16 was what - that was the proposition I was making, not
17 that I agree with that legal proposition but that's my
18 understanding.

19 MR. MARKS: No, that's understood, and I
20 thought, I don't know if this is helpful, but I
21 thought it might, you know, and maybe I'm trying to do
22 a preemptive strike against Mr. Carson here and I'm
23 sure it won't work, I'm sure it won't work, but let me
24 just run through, at least in my mind, my analysis as
25 to why I believe that the use of a multi-region player

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1 can constitute a violation of 1201(a)(1), and my
2 analysis goes as follows, is that 1201(a)(1) is a
3 prohibition on circumvention conduct. I believe that
4 circumvention conduct includes conduct that is based
5 on the use of a circumvention device, even if that
6 circumvention device is available in legitimate
7 channels of commerce. I do not believe that the
8 1201(a)(1) prohibition is limited to conduct that you
9 undertake completely confined to your skill set and
10 your hands or knowledge. That, I believe, is too
11 narrow of an interpretation of circumvention conduct.

12 I believe circumvention conduct also
13 includes the use of a circumvention device. So, if
14 one accepts that premise, I'm not saying you
15 necessarily do, but if one accepts that premise, which
16 I do, then the question is, is a multi-region DVD
17 player a circumvention device?

18 In my view, because a multi-region player,
19 for the part or component that deals with regional
20 coding, that part or component is designed, primarily
21 designed, to defeat, avoid, bypass regional coding,
22 and because I think regional coding is an effective
23 access control measure I conclude that the multi-
24 region DVD player is, in fact, a circumvention device,
25 and that is how I arrived at the conclusion that the

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1 use of a multi-region player does, in fact, constitute
2 a technical violation of 1201(a)(1).

3 MR. METALITZ: I would not necessarily
4 follow that reasoning, but I would reach the same
5 result.

6 MR. CARSON: Could you repeat your question
7 on that, Rob? Maybe I'm not recalling clearly, maybe
8 I'm incorrectly recalling what I thought I heard at
9 the hearings in Washington, but I thought one of the
10 arguments that I heard against an exemption that would
11 permit people to circumvent CSS, for example, if they
12 needed to, in order to get to the region coding to do
13 what they needed to do to get around the region
14 coding, with the availability of multi-region players,
15 and you can always do that, so why do you need to
16 circumvent. Am I wrong in that?

17 MR. KASUNIC: I thought that's what we
18 heard Mr. Attaway say.

19 MR. MARKS: Well, I believe, I mean I read
20 the transcript recently, I didn't necessarily hear
21 that exact explanation, but what I did read in the
22 transcript was when the question, I believe you posed
23 the question, Mr. Carson, to Mr. Turnbull, is the use
24 - when an individual uses a multi-region player, are
25 they violating Section 1201(a)(1), and I believe Mr.

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1 Turnbull responded, "No, I believe they are not
2 violating Section 1201(a) (1)."

3 I would say 80 to 90 percent of the time
4 I agree with Mr. Turnbull on things, but I happen to
5 disagree with him in this particular instance.

6 I will say I think it's a difficult
7 argument, and I can see arguments on both sides. I
8 don't think it is as clear-cut a case as, for example,
9 the studio 321 software, which I think clearly is a
10 circumvention device.

11 MR. KASUNIC: Well, since we have a slight
12 difference of opinion there, and, Mr. Metalitz, you
13 said you would agree with the result, but I'd like to
14 hear how you get there.

15 MR. METALITZ: Section 1201(a) (1) is not
16 dependent on the use of a circumvention device.
17 Section 1201(a) (1) covers the act of circumvention.
18 And, even if the thing that you use to circumvent is
19 not a circumvention device under 1201(a) (2) it doesn't
20 matter.

21 So, I'm not troubled on this question
22 about whether a multi-region player is a 1201(a) (2)
23 violation.

24 MR. KASUNIC: Okay. It doesn't matter
25 whether the device is a violation.

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1 MR. METALITZ: That would be my
2 interpretation. If you are just looking at (a)(1).

3 MR. KASUNIC: Correct. Right, right, okay.

4 Well, going back then into - are you
5 finished, Dave?

6 MR. CARSON: No, I was not finished.

7 MR. KASUNIC: No, I know you have more.

8 MR. MARKS: I'm sure you do.

9 MR. KASUNIC: Dean, you said that there's
10 no privity then with the manufacturer, or with the, I
11 guess, tamperer, was that it?

12 MR. MARKS: Yes, a third party modifier.

13 MR. KASUNIC: Okay, no privity, so when
14 they modify that licensed player then they are
15 creating a device and anyone who sells a copy. Okay.

16 Does - now this - this has been a long
17 day, so excuse me if this - does CSS - is this one of
18 the questions we're going to get further information
19 on, does CSS need to be decrypted in order - or maybe
20 this actually goes along with the UOP, it has been a
21 long day, does CSS need to be decrypted in order to
22 get to decrypt the region coding?

23 MR. MARKS: Right. I knew this question
24 was coming, and we are not sure, to tell you the
25 truth. I believe, from talking with some of our

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1 engineers, that, in fact, the regional coding codes
2 are examined prior to decryption of the content on the
3 DVD disc, so that you insert the disc into a DVD
4 player and one of the first things it checks for in
5 the header or information is, what's the regional
6 coding, and if you have a Region 1 player only, and
7 it's some disc that's coded only for Region 2, it
8 goes, okay, well I won't play this, and it doesn't
9 even get to the point of beginning to decrypt the
10 motion picture content on the disc.

11 What I do not know, and this is why, and
12 I'm not an engineer, obviously, but what I don't know,
13 and what we will try and find out is, is the regional
14 coding flags themselves also encrypted with the CSS,
15 and I just don't know the answer to that question, and
16 we will try and find out.

17 What I can say, with a fair degree of
18 certainty, is the way Mr. Turnbull described the
19 implementation of regional coding, and how the
20 regional coding functionality is separate from the CSS
21 encryption functionality, is accurate, and the fact
22 that the license, CSS license, does not dictate
23 exactly the manner in which regional coding must be
24 implemented or - well, must be implemented, it rather
25 only says it must be implemented in a robust fashion,

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1 but DVD player manufacturers, ROM drive manufacturers,
2 have a variety of different methodologies by which
3 they implement regional coding recognition, and that
4 is accurate.

5 MR. KASUNIC: Okay. So, you are going to
6 get us more information.

7 MR. MARKS: I'm hoping DVD CCA will do
8 that, but I will certainly do all I can as well.

9 I have a lot of homework assignments from
10 this hearing.

11 MR. KASUNIC: Does anyone else have any
12 other information on that? Okay, let me just plow
13 through.

14 I think, actually, this might be something
15 that Mr. Tepp is going to get into more, but it's in
16 my list so let me - if you don't need to - well, it's
17 your position that the region coding then as an access
18 control you would need in order to, if you have a
19 device that would not read that that would be
20 bypassing or avoiding an effective technological
21 protection measure that protects access to work.
22 Okay.

23 What is region coding enhancement, and how
24 does that differ from standard region coding?

25 MR. MARKS: Frankly, I've not heard of

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1 region coding enhancement, so I don't know what it is.

2 MR. KASUNIC: It looks like somebody has.

3 MS. HINZE: Region coding enhancement is a
4 further layer of protection that is currently being
5 deployed, mainly on Region 1 titles, and what it does,
6 as I understand it, it's a query-response system that
7 - sorry, it's a query response system that a DVD
8 player will - This will be a very untechnical
9 description because I am not a technologist, clearly,
10 As I understand it, basically, the DVD player, there's
11 exchange of information between a DVD disk for a
12 particular region and a DVD player. And, in simple
13 terms, the DVD disk asks the DVD player what region it
14 is, and sequentially asks the same question, and if
15 the DVD player comes back and multiple flags are
16 turned on in the DVD player allowing it to play the
17 six relevant regions, then a region code enhanced disc
18 will not play.

19 As I say, primarily, as I understand it,
20 it's being used on Region 1 titles at the moment, and
21 again as I understand it based on a statement actually
22 made by several motion picture companies, my
23 understanding is it was introduced primarily to stop
24 Region 1 disks being played in other countries outside
25 of the United States.

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1 MR. KASUNIC: Mostly on these multi-region
2 players?

3 MS. HINZE: Mostly in Europe, as I
4 understand it.

5 MR. KASUNIC: Okay.

6 Why don't I pass it on for now. I think
7 that's all I have right now.

8 MS. HINZE: Perhaps, I could just clarify,
9 what that means in practical terms is, if you have a
10 multi-region or a full region, however you want to
11 describe it, if you have a player that would play
12 multiple regions. A disk which has, as I understand
13 it, a disk which has RCE on it will not play. So,
14 there is no - it's not the case that there is -
15 because as I understand it there are ways to reset a
16 region if you have a player that is able to manually
17 reset to a single region, if even it's been previously
18 clipped, for instance, to be six region. If you can
19 reset it back to one region then the disc will play.
20 But, as I said, as I understand it, it was introduced
21 as a challenge to multi-region players.

22 MR. KASUNIC: So, is what you are saying -
23 I'm sorry, if you have this on the DVD ROM drives, you
24 have the ability to change a limited number of times,
25 and now I didn't realize 25 times the region, will

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1 that - to your understanding is that going to be
2 affected? If you switch that, is the region code
3 enhancement going to be picking up those changes and
4 may be fooled by it?

5 MS. HINZE: I will be honest here and say
6 that I don't think so, but I'm not sure. It would be
7 misleading for me to say that I have the answer to
8 that 100 percent under my control.

9 MR. KASUNIC: Okay.

10 Well, any information you could - further
11 information, some more homework, that you could get
12 about region coding enhancement would be helpful.

13 MR. MARKS: Okay.

14 MS. PETERS: Mr. Tepp.

15 MR. TEPP: Okay, Mr. Marks and Mr.
16 Metalitz, I want to go back and roll up our sleeves a
17 little bit on this question, whether or not region
18 coding is an effective technology or protection
19 measure that controls access to a work, because I'll
20 be very blunt, I'm not sure it is.

21 Let me start by asking this. What happens
22 if I have a DVD disc with a Region 1 flag on it, I put
23 it into a DVD player that does not look for that flag,
24 simply doesn't look for it, will I be able to watch
25 the content on the DVD?

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1 MR. MARKS: Yes.

2 MR. TEPP: Okay, that's what I thought.

3 Given that --

4 MR. MARKS: I mean, but for this region
5 code enhancement stuff that I frankly don't know
6 anything about.

7 MR. TEPP: Okay, I saw that mentioned in
8 one of the comments as well, and that's an interesting
9 next step, and it's an interesting counterpoint to
10 region coding.

11 MR. MARKS: Right.

12 MR. TEPP: We haven't talked about that in
13 the past.

14 Let me focus on traditional region coding,
15 if I can use that term -

16 MR. MARKS: Okay.

17 MR. TEPP: - for the moment.

18 If a DVD player that doesn't look for and
19 recognize a region coding flag will play the work, how
20 can it be said that that flag, in the ordinary course
21 of its operation, requires the application of
22 information for process of treatment in order to gain
23 access to the work? You just told me if I have a
24 device that doesn't supply any information I gain
25 access to the work.

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1 MR. MARKS: Right, right, and the reason
2 why I think it still qualifies is that the key is in
3 the normal course of its operation, because in the
4 normal course of its operation regional coding flags
5 are responded to by devices that are licensed
6 authorized devices. I think if the standard that you
7 need to meet is that, for an access control technology
8 to be effective, is that it has to be effective in
9 unauthorized devices and circumvention devices, then
10 I think you'll never meet the standard.

11 MR. TEPP: If I have a DVD player that
12 doesn't decrypt CSS --

13 MR. MARKS: Correct.

14 MR. TEPP: - doesn't recognize CSS --

15 MR. MARKS: Correct.

16 MR. TEPP: - and I put a CSS encrypted
17 disc in that player, can I watch the content?

18 MR. MARKS: No.

19 MR. TEPP: Okay, so there's an example
20 where there would be an effective technology or
21 protection measure that controls access.

22 MR. MARKS: Correct, but let me give you a
23 counter example. If you had an unlicensed DVD ROM
24 drive, and you loaded a CSS encrypted DVD on that ROM
25 drive, and you applied DCSS to the CSS encrypted DVD,

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1 then you would be able to access the content on the
2 DVD on that unlicensed ROM drive hooked up to a
3 computer operating system.

4 MR. TEPP: Okay, well then, we're almost
5 going to get metaphysical on this I fear, but where
6 does region coding reside? Is it on the disc?

7 MR. MARKS: It is - well --

8 MR. TEPP: Is it on the player?

9 MR. MARKS: - yeah, yeah, good question.
10 The flag for the region coding that says I am a Region
11 1 disc, or I'm a multi-region disc, or I'm a Region 2,
12 3 and 4 disc, that resides on the DVD disc itself.
13 The response to that flag is a response mechanism that
14 is built into the player or the ROM drive. So, the
15 player or the ROM drive, as an obligation of the CSS
16 license, an obligation that's undertaken as part of
17 the authorization to decrypt the CSS encrypted
18 protected disc in the first place, looks for the
19 region code flat that's on the disc and abides by it.

20 MR. TEPP: Okay.

21 So, it's an obligation of the CSS license
22 to recognize and respect the region coding.

23 MR. MARKS: Correct.

24 MR. TEPP: The broadcast flag.

25 MR. MARKS: Correct.

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1 MR. TEPP: Dare I go there.

2 MR. MARKS: Do we have another day?

3 MR. TEPP: But, does Section 1201 require
4 that a DVD player respond to the region coding flag,
5 because you've already said that the third parties who
6 modify players into multi-zone players are not in
7 privity with DVD CCA.

8 MR. MARKS: Right.

9 MR. TEPP: So, there's no contract claim
10 there.

11 MR. MARKS: Right.

12 MR. TEPP: And, you've asserted that they
13 are violating 1201, and I'm trying to figure out how
14 that is if you are hooked for saying that it's a
15 1201(a)(1) violation is that the region coding system
16 is mandated by the contract, the license with DVD CCA.

17 So, if we're talking about a third party
18 that has no contractual or license relationship with
19 DVD CAA, where is the 1201 violation, and then I think
20 that boils down to, is a third party required, that
21 manufactured or modifies DVD players, required under
22 Section 1201 to recognize a region code?

23 MR. MARKS: Right, and I believe that the
24 region code flag and system itself is an effective
25 technological measure, because I believe in the

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1 ordinary course of its operation it does require a
2 process or treatment with the authority of the
3 copyright owner to gain access to the work and,
4 therefore, I think that the manufacturer, the third
5 party modifier, who modifies the compliant DVD player
6 to be non-compliant does actually circumvent the
7 technological measure because it's avoiding bypassing,
8 deactivating, impairing the regional code system. So,
9 that's how I proceed to that conclusion.

10 MR. TEPP: Okay.

11 Let's change the hypothetical just a
12 little bit and say, you've said that your
13 understanding is that most of the DVD players that are
14 multi-region and multi-zone are these modified
15 versions.

16 MR. MARKS: Yes.

17 MR. TEPP: Presumably, it's possible to
18 create from scratch a DVD player that never recognizes
19 region coding.

20 MR. MARKS: Correct.

21 MR. TEPP: And so you are not talking about
22 modifying, you are just creating a player that never
23 is ever in its life going to look for a region code.

24 MR. MARKS: Correct.

25 MR. TEPP: When it sees a DVD with a region

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1 code on it it's going to play that disc. I think
2 you've already told me that.

3 MR. MARKS: Well, there's a catch there,
4 okay, you create a DVD player that never looks for a
5 Region code, is that DVD player licensed by the DVD
6 CCA to be able to decrypt CSS, or is that player not
7 licensed by the DVD CCA to decrypt CSS, and does that
8 player, in fact, decrypt CSS or doesn't it decrypt
9 CSS?

10 MR. TEPP: Okay.

11 MR. MARKS: These facts are very, very
12 relevant to your question.

13 MR. TEPP: Okay, that's a fair
14 clarification.

15 Let's say, for the purposes of this
16 hypothetical, there's no license with the DVD CAA, but
17 they've got CSS decryption on there.

18 MR. MARKS: Okay, then my answer is, if the
19 DVD player decrypts CSS without a license, and doesn't
20 recognize the regional coding that's on the disc, yes,
21 it will play the disc but it is in violation of the
22 license and I think, clearly, you know, in terms of
23 decrypting CSS without authorization, clearly falls
24 into --

25 MR. TEPP: But, there's no license.

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1 MR. MARKS: - there's no license, so I
2 believe it clearly falls into the category of a
3 circumvention device.

4 MR. TEPP: That was the easy one.

5 Now, flip it.

6 MR. MARKS: Okay.

7 MR. TEPP: They have a license and they are
8 breaking it, there's clearly a license violation, I'm
9 stipulating that.

10 MR. MARKS: That's right.

11 MR. TEPP: Is there 1201 violation?

12 MR. MARKS: I believe yes.

13 MR. TEPP: Can you give me the analysis
14 there?

15 MR. MARKS: And again, the analysis is that
16 the regional coding technology, granted that it's on
17 the basis of a flag and a response, I grant you that,
18 I grant you that, it is not the same, to the same
19 degree self protecting that encryption and scrambling
20 is, I grant you that. Okay. But, I do not believe
21 that to qualify as an effective access control measure
22 that it must be completely self protecting the way
23 scrambling and encryption is.

24 I believe, as Mr. Metalitz was testifying,
25 that there was discussion as to whether an access

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1 control technology should be limited to scrambling or
2 encryption, and Congress decided, no, it shouldn't be,
3 and there was discussion about passwords being access
4 control technologies, and, in fact, the statute 1201
5 refers to, you know, the application of information,
6 a process or treatment, with the authority of a
7 copyright owner. And, therefore, I believe this
8 regional code system, which involves a combination of
9 a flag on the disc, plus a response from the player,
10 that in the ordinary course of operation it qualifies
11 as an effective access control measure.

12 MR. TEPP: Okay.

13 Let's take it out of the CSS realm,
14 because that's complicating the analysis, I won't go
15 there. You've just got a regional code, don't have
16 CSS, okay? I've got a DVD player, it doesn't have
17 DCSS on it, you don't need it to play this.

18 MR. MARKS: Okay, right.

19 MR. TEPP: It doesn't recognize the region
20 code. Is it a 1201 violation?

21 MR. MARKS: This is definitely a harder
22 case, I think that's a definitely harder case. If you
23 are saying that you've put content out in the clear.
24 Let me make sure I understand your hypothetical.

25 MR. TEPP: Okay.

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1 MR. MARKS: Just I want to be very clear,
2 Mr. Tepp, you are saying you have content in the clear
3 on a DVD disc. You've chosen not to encrypt it with
4 CSS, is that right?

5 MR. TEPP: No CSS, that's correct.

6 MR. MARKS: No CSS on the DVD disc.

7 MR. TEPP: I won't say in the clear because
8 it's not, I don't know what region coding is.

9 MR. MARKS: Okay, I'm sorry, right, with no
10 CSS encryption, the U.S. content owner has decided to
11 put that piece of content out without CSS encryption,
12 but you have put a regional code flag on the disc, and
13 there is a player out there which can play the
14 content, it doesn't have a CSS license so it can't
15 play CSS encrypted content, but it can play this
16 particular disc because it's not encrypted with CSS in
17 the first place.

18 MR. TEPP: Right.

19 MR. MARKS: And, that particular player
20 does not recognize the regional code flag that's on
21 the disc, I would say, frankly, it's a much harder
22 case to say that that particular player is
23 circumventing.

24 MR. TEPP: Okay, let me take it to the next
25 step then, because I - well, I think we are making

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1 some progress and I'm interested in where we are going
2 next.

3 We have, someone makes a Region 2 player,
4 turns it into a multi-zone player, I buy it. I use it
5 to play a Region 1 disc. Am I violating 1201(a)(1)?

6 MR. MARKS: I think that goes back to the -
7 again, if we're assuming CSS encrypted discs?

8 MR. TEPP: Yes, we are back in CSS.

9 MR. MARKS: If we are back in CSS land, I
10 think it does, because I think the manufacturer of the
11 multi-region player that is a CSS licensee is
12 violating the CSS license, they are violating the
13 obligation to respond to the regional code. I believe
14 in the context of CSS encrypted discs, because in the
15 ordinary course of their operation on players and ROM
16 drives the regional codes are, in fact, responded to
17 because license devices are obligated to respond to
18 them, in that set of circumstances I believe the
19 threshold is met for the regional coding to be an
20 effective access control technology, and, therefore,
21 I believe that this device, which avoids, bypasses,
22 deactivates, defeats that effective access control
23 technology, qualifies as a circumvention device, and
24 then again my analysis that if an individual is using
25 that circumvention device to defeat regional coding

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1 they are engaged in 1201(a) prohibited conduct.

2 By the way, I want to say for the record
3 just that I also agree with Mr. Metalitz that to
4 engage in 1201(a) prohibited conduct you don't
5 necessarily have to use a prohibited device.

6 MR. TEPP: Okay.

7 MR. MARKS: But, I think if you are using
8 a circumvention device to defeat an access control
9 technology, I think it does qualify as circumvention
10 conduct under 1201(a), but I don't believe that's the
11 only methodology to run afoul of 1201(a). So, I think
12 we are in agreement, actually.

13 MR. TEPP: Okay.

14 So, it sounds to me, from all of this,
15 that in isolation region coding is not really an
16 effective technological protection measure that
17 controls access to a work. You've told me that's a
18 tough case to make.

19 MR. MARKS: You mean in isolation of the
20 CSS license?

21 MR. TEPP: In isolation of CSS.

22 MR. MARKS: I think it's a harder case.

23 MR. TEPP: Okay.

24 MR. MARKS: I agree.

25 MR. TEPP: Do you want to give it a try?

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1 Do you want to sustain that, because the next step is
2 for me to ask the folks at EFF and IP Justice if they
3 want to make the case that it's not.

4 MR. MARKS: I think it's borderline. I
5 mean, and I don't mean to totally punt on this, but
6 I'd be curious as to what my colleague, Mr. Metalitz,
7 thinks.

8 MR. METALITZ: I agree with Mr. Marks that
9 this is a tough case, because it turns on the
10 operation of really two provisions in the statute.
11 One is in the ordinary course of its operation, and
12 the other is no mandate provision in 1201(c)(3), which
13 doesn't apply if the product otherwise falls within
14 the prohibitions of (a)(2) or (b)(1). So, if you have
15 the CSS, you know, the, if you will, CSS non-compliant
16 player, then that clearly does otherwise fall within
17 the prohibitions of (a)(2) and (b)(1), and, therefore,
18 you don't have to worry about whether all it's doing
19 is failing to respond to a particular technological
20 measure.

21 When you take that out of the equation,
22 then I don't know what the bottom line answer would
23 be. I do think it's relevant that this whole - and
24 again, I'm not 100 percent sure about the chronology,
25 but the use of regional coding within the context of

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1 CSS I think was something that was clearly known at
2 the time of the enactment of the DMCA, and I think it
3 would be very difficult to make the argument that
4 Congress did not intend that regional coding within
5 the context of CSS would not qualify as a
6 technological measure that effectively controls access
7 to a work.

8 As Judge Newman and Judge Kaplan have
9 pointed out, the fact that it can be circumvented
10 doesn't rob it of its status as an effective
11 technological measure, and as Mr. Marks mentioned and
12 it's extensively documented in the legislative history
13 Congress did not want to dictate what types of
14 technologies would - particular methods would or would
15 not qualify as long as on a functional basis it had
16 the functional result of controlling access to a work.

17 So, I think you could argue that the
18 regional coding, even in the absence of CSS, in the
19 ordinary course of its operation would meet that test,
20 the functional test, but I'm not sure that isolated
21 from CSS, I'm not sure how that would come out.

22 MR. TEPP: Well, okay.

23 This is obviously a key analysis, because
24 if we recommended an exemption that says it's okay to
25 circumvent CSS for the purpose of defeating region

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1 coding, we are taking CSS out of the analysis. And
2 so, that's where I'm going with this, and as I
3 promised I want to turn to the other table and give
4 you all a chance to say what your analysis is of
5 region coding in isolation from CSS, as to whether or
6 not is an effective technological protection measure
7 that controls access to the work, as the statute
8 describes.

9 MS. HINZE: I think in the absence of some
10 clear information about exactly where RPC sits in
11 relation to CSS, I've read through the May 2 testimony
12 as well, and I'm not a technologist. I have my
13 understanding of how RPC works, but I think the
14 relevant question that we haven't actually had
15 answered here is whether RPC is part of the content
16 that is scrambled within CSS. So, in terms of a
17 practical response I think that's the key question.

18 MR. TEPP: Well, let's go to the
19 hypothetical I gave these gentlemen. There is no CSS
20 on a given DVD, just a region coding flag for a given
21 region, and I have a player that plays that doesn't
22 have DCSS on it, but I don't need it to play this
23 particular disc, since there's no CSS on the disc.
24 And, the player does not recognize region coding. Doe
25 either the player, the manufacturer of the player

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1 violate 1201(a)(2) or do I violate 1201(a)(1) by
2 building or using the player?

3 MS. HINZE: Let me say this. First, I'm
4 very happy to engage in hypothetical speculation, but
5 since I'm on record what I'd like to say is, I don't
6 think that for our exemption to be granted I need to
7 have a definitive answer to this.

8 The reason I say that is that I don't
9 think the exemption that we are requesting here
10 requires us to have a clear answer to that. From our
11 point of view, the fact that there is an inability for
12 consumers to play foreign region, non-Region 1 DVDs,
13 that they have lawfully acquired, and lawfully
14 imported into the United States on a Region 1 player
15 without some sort of modification is the reason why we
16 have sought an exemption.

17 So, to the extent that you are asking me
18 to speculate on a hypothetical, I'm not sure that it
19 actually speaks to our exemption. So, from that point
20 of view, before I speculate, and I would be happy to
21 speculate, I guess, after this proceeding is over, on
22 the basis of some more information about exactly how
23 it works in practice.

24 I'm not a technologist, and my
25 understanding is that RPC is inside the CSS envelope.

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1 That was certainly my understanding of how it works.

2 MR. TEPP: That's what Mr. Turnbull said.
3 That's my understanding of what Mr. Turnbull said in
4 Washington.

5 MS. HINZE: Right, that's my understanding
6 as well, in which case in order to change the RPC
7 control on a player it would be necessary to violate
8 CSS, on a disc or a player for that matter, the
9 response mechanism.

10 Now, I'm aware that that's probably not an
11 answer to your question, but --

12 MR. TEPP: That's true.

13 MS. HINZE: - in the absence of clear
14 information I'm not sure what value there is in my
15 speculation. I'd be happy to do it, but, perhaps, on
16 the basis of some more information so that I could
17 actually make a meaningful analysis.

18 I'm not adverse to looking at this in
19 further detail with some further information. As I
20 said, I don't think it's necessary, I don't think this
21 question has to be reached in order to make the
22 consideration for our exemption that we have sought.

23 MR. TEPP: Well, it does seem like the
24 central question, because if region coding, you are
25 asking for an exception to 1201(a)(1), to defeat the

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1 access control of region coding.

2 MS. HINZE: Specifically, the way that I
3 think this would work from the point of view of our
4 exemption, and I'm aware that there's a slight
5 difference in what's being requested here, is that a
6 user may be able to modify their Region 1 player. In
7 the absence of Section 1201(a) that wouldn't - with
8 Section 1201(a)(1), it would potentially be a
9 violation for a user to modify the player. I think
10 that would be the legal liability point of view.

11 So, we would be requesting an exemption
12 that would allow consumers to do that, so that they
13 could play back on their devices.

14 DOCTOR REEVES: But, the line of
15 questioning I'm pursuing goes to the very heart of
16 that, as to whether or not there is liability under
17 1201(a)(1) for defeating a region control. And so,
18 I'm at a loss as to how to address your exemption
19 without tackling this issue as well.

20 MS. HINZE: Well, I'm not sure that I can
21 provide you with more technical information, which I
22 think is what you probably need to have a correct
23 legal analysis.

24 As I said, I would be happy to speculate,
25 but it will only be speculation. In order to answer

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1 this question in a meaningful way, I think better
2 information is required, and to the extent that the
3 entertainment companies and movie studios have made
4 that their position, the response to that is, if that
5 is, indeed, the case then an exemption is required.

6 MR. TEPP: But, you are not willing to
7 state a position one way or the other for yourself.

8 MS. HINZE: It's difficult for me to
9 actually state a conclusive answer when I've never
10 actually seen the spec on exactly how the robustness
11 rules work, and exactly how RPC is implemented.

12 It's not that I'm adverse to speculating,
13 but it's mere speculation, and in order for it to be
14 a meaningful legal analysis I, too, would be
15 interested in seeing some further technical analysis
16 of how this is actually implemented, and I would be
17 very happy to supplement our response based on that
18 information.

19 MR. TEPP: Well, that's likely that you'll
20 get a question on that then.

21 MS. HINZE: Great.

22 MR. TEPP: Was there something else on this
23 point?

24 MR. METALITZ: Yes, the only thing I wanted
25 to say is that my understanding was that, and I mean

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1 in a lot of the comments that we made here were about
2 regional coding in the context of CSS, not in the
3 context of no CSS, which I also understood to be the
4 exemption that she was seeking.

5 MR. TEPP: Okay, well -

6 MS. HINZE: Just to clarify, we have sought
7 an exemption of whatever - ours is whatever it would
8 take in order to get a playback type exemption. So,
9 I don't know the answer to your question. It's a
10 matter of technology, I said that, if it's the case
11 that RPC is a separate technology and a separate
12 access measure, and if there's a violation of
13 1201(a)(1), for circumventing RPC without - CSS or
14 there's no necessity for circumventing CSS, then I
15 think we would still require an exemption from
16 1201(a)(1), in my understanding, in order for
17 consumers to playback lawfully acquired foreign DVDs
18 on a U.S. Region 1 DVD player.

19 MR. TEPP: And, if the region code flags
20 are within CSS, so that they cannot be altered unless
21 you first decrypt CSS, are you asking for an exemption
22 to be able to do that as well?

23 MS. HINZE: To circumvent CSS?

24 MR. TEPP: To circumvent CSS, so that you
25 can then do whatever needs to be done to the region

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1 coding.

2 MS. HINZE: If it's necessary to circumvent
3 CSS in order to modify the Region 1 DVD player to make
4 it play back non-Region 1 DVDs, then yes, by
5 definition that would be part of the scope of our
6 exemption.

7 MR. TEPP: Okay, that's what I thought, but
8 I wanted to confirm it.

9 Thank you.

10 MS. HINZE: Thank you.

11 MS. PETERS: Thank you.

12 David?

13 MR. CARSON: Yes, I'd like to pursue Steve
14 Tepp's line of questioning for one or two more
15 questions. Let's pull our Circular 92, and go to page
16 180. I'd like to focus on the definition of
17 circumventing a technological measure.

18 Now, let's go back to the hypothetical.
19 If I recall, one of Steve's hypotheticals was, I buy
20 a multi-region DVD player, you folks would assert that
21 that multi-region DVD player is a violation of
22 1201(a)(2), I believe, correct?

23 MR. MARKS: Yes.

24 MR. CARSON: Now, I'm trying to understand
25 how my use of that multi-region player is in itself an

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1 act of circumvention as defined in 1201(a)(2)(b). No,
2 I'm sorry, gosh, (a)(3)(a), sorry. This is hard to
3 track, but it's right there on the middle of that
4 page, so to circumvent a technological measure means
5 to descramble a scrambled work.

6 MR. MARKS: Right.

7 MR. CARSON: I don't think I've done that.

8 MR. MARKS: Right.

9 MR. CARSON: To decrypt the decrypted work,
10 have I don't that?

11 MR. MARKS: No.

12 MR. CARSON: Okay, or otherwise to avoid,
13 bypass, remove, deactivate or impair technological
14 measures. Have I done that?

15 MR. MARKS: Ding, ding, ding, ding, ding,
16 ding.

17 MR. CARSON: Okay, how did I do that?

18 MR. MARKS: Because this is the analogy I
19 would draw, Mr. Carson, when you download DCSS, you
20 know, you -

21 MR. CARSON: I didn't.

22 MR. MARKS: No, no, no, I'm using an
23 analogy.

24 MR. ARSON: Oh, I'm sorry.

25 MR. MARKS: If you download DCSS or if you

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1 use a Macrovision stripper, you know, you've bought
2 the thing, or you've obtained the thing, you yourself,
3 necessarily, by your own hands and conduct, aren't
4 stripping off the encryption or stripping off the
5 Macrovision, it's the device that's doing it.

6 MR. CARSON: Yes.

7 MR. MARKS: I say it's the same thing here,
8 you've bought the multi-region player, it's the multi-
9 region player itself which is avoiding that bypass
10 saying the regional code treatment, the disc is
11 treated with a flag, there is supposed to be a
12 response to the flag, in the ordinary course of
13 operation there is a response to the flag. This
14 device has been modified, Jimmy, so there's no
15 response to the flag. Therefore, I think it qualifies
16 as circumvention.

17 You may disagree with that, but that's the
18 argument.

19 MR. CARSON: No, I honestly don't know
20 where I am on it, I'm just trying to parse the
21 language of the statute and figure out whether it
22 works.

23 MR. KASUNIC: The question is, is your
24 problem with the verb here or with the object? Are
25 you wondering whether -

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1 MR. CARSON: Now we're really getting
2 metaphysical.

3 MR. KASUNIC: Are you asking about the
4 situation with the Streambox, the real networks in the
5 Streambox case to a certain extent?

6 MR. MARKS: I knew I should have reread
7 that case last night. I have it with me here, and I
8 think there is something relevant in that decision
9 about it. But, I guess I've got to - I think there
10 was something, frankly, in the Streambox decision
11 about down, if you'll forgive the pun, downstream
12 controls or measures that were somehow linked to the
13 initial encryption. So, I guess at the risk of giving
14 myself another homework assignment, can I come back to
15 you on whether Streambox has any relevance to this
16 issue?

17 MR. CARSON: I don't care, but he does.
18 All right.

19 So, maybe Mr. Tepp hasn't found us a way
20 out of this dilemma, I don't know. Let's assume we
21 are dealing with an access control, and let's assume
22 that what these folks want to be able to do is to
23 circumvent a technological measure that effectively
24 controls access to the work.

25 Now, I think it was you, Mr. Metalitz, who

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1 said that if you exempt this class of works it's going
2 to - it's likely to dissuade the legitimate marketing
3 of foreign films on DVDs in the United States. Is
4 that an accurate characterization?

5 MR. METALITZ: It certainly discourages
6 that.

7 MR. CARSON: Okay.

8 I'm trying to figure out why that's the
9 case if the class by definition is limited to works
10 that are not released in the U.S. I mean, wouldn't,
11 in fact, that be an incentive for people to start
12 distributing them here so that you couldn't qualify
13 for the exemption?

14 MR. METALITZ: Well, I'm actually a step
15 earlier in the analysis. At the time that a company
16 like the ones that are listed in Mr. Marks' list,
17 Pioneer, Bande and these others, are deciding what's
18 the value of obtaining the exclusive distribution
19 rights in the United States, I think it would matter
20 to them whether that would be compromised by the
21 widespread, and, obviously, it would depend on how
22 widespread it was, the existence in the hands of their
23 market of circumvention devices that would enable
24 people to circumvent their regional coding and thereby
25 obtain access to this material. Those people,

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1 therefore, are excluded from the market that's the
2 potential market for that distributor.

3 Although I will agree that anime titles,
4 and I think this is mostly what we are talking about
5 here, may have a growing viewership, this is still a
6 niche market, and if your most devoted fans are
7 already able to get this, because after the Copyright
8 Office announced that it was not a violation of the
9 law to circumvent regional coding there was a sudden
10 upsurge in the availability of multi-region players,
11 or the chips that were needed that you could solder
12 yourself to make these into multi-region players, and
13 that if that became widespread suddenly the most
14 devoted part of your fan base might be gone. And,
15 therefore, it would be less likely that you, the
16 distributor, would want to get into that business.
17 There's less money to be made.

18 Now, there would be some titles where you
19 might do it anyway, because you think you can break
20 through out of that niche market, cross over and
21 really get a mass market. So, you know, you may try
22 that a few times. And, if you are successfully maybe
23 that would - and, you know, the hoopla about the
24 latest anime release is approaching the hoopla around
25 the release of Matrix II Reloaded, then this could

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1 really change the economics of the marketplace.

2 But, as I understand it now, this is a
3 niche market, and if you are going to lose, or there's
4 a threat that you will lose a lot of your most devoted
5 fans, then that distributorship is not going to be
6 worth that much to you, and you are just going to be
7 reluctant to give in to that market.

8 MR. CARSON: Well, aren't the only people
9 who are going to be able to take advantage of this
10 people who actually go abroad and buy them and bring
11 them back in? And, if that's the case, you are not
12 talking about a big part of the fan base, are you?

13 MR. METALITZ: Well, some of those people,
14 the 124 people, wherever it was, that wrote in seemed
15 to do a lot of shopping outside the United States for
16 these titles, and I don't know how many of them
17 already have shopped outside the United States for a
18 multi-region player, but I'm sure that would increase
19 once this exemption were granted.

20 MR. CARSON: Well, if the concern is that
21 there are all these devices that are going to be out
22 there, once people are given our blessing to
23 circumvent to their heart's content, you've still got
24 1201(a) (2) to stop the trafficking in those devices,
25 don't you?

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1 MR. METALITZ: Yes, I think it would still
2 be in violation of 1201(a)(2), but again, I think that
3 the concern is that once the (a)(1), and this is
4 really repeating some of what you heard at the
5 hearings earlier this month in Washington, these are
6 not airtight compartments between (a)(1) and (a)(2).
7 They are legally, but I don't think they are
8 practically.

9 MR. CARSON: Okay.

10 Now, I think it was you, Mr. Marks, who
11 talked about the fact that even if you can circumvent,
12 with respect to some of these foreign DVDs, that may
13 not be the answer because some of them may be only -
14 may only have PAL or CCAM on them --

15 MR. MARKS: Correct.

16 MR. CARSON: - and at least some players
17 here can't read PAL or CCAM.

18 MR. MARKS: Correct.

19 MR. CARSON: The flip side of the coin is,
20 some players here can read PAL and CCAM.

21 MR. MARKS: Yes, absolutely.

22 MR. CARSON: So, if at least if you are
23 lucky enough to have one of those players you are home
24 free, right?

25 MR. MARKS: Yes, or you may, if you don't

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1 have to upgrade to a different player that will do the
2 transcoding.

3 MR. CARSON: Okay.

4 MR. MARKS: Yes, I agree with you.

5 MR. CARSON: Do you have any sense of the
6 proportion of, let's say, European DVDs that have the
7 content only in PAL or CCAM?

8 MR. MARKS: I don't.

9 MR. CARSON: Okay.

10 MR. MARKS: I don't.

11 MR. CARSON: Anyone else? Okay.

12 MS. HINZE: Could I just point out, just by
13 way of clarifying here, a PAL or a SECAM to NTSC
14 converter is not illegal in the United States.

15 MR. CARSON: Is not what?

16 MS. HINZE: Is not illegal, and costs
17 approximately \$20.

18 MR. CARSON: Yes.

19 MS. HINZE: It's not a difficult issue to
20 make that conversion.

21 MR. CARSON: Okay.

22 MS. HINZE: The issue here is whether or
23 not there's a 1201(a) violation.

24 MR. CARSON: Okay.

25 MR. MARKS: I want to just, let me just put

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1 a marker down there. I absolutely agree with Ms.
2 Hinze, I'm sorry, I don't know why I can't get your
3 name pronounced correctly. I really apologize for
4 that. I absolutely agree, there is nothing illegal
5 about converting from, you know, SECCAM and PAL to
6 NTSC, or back and forth, and again, I emphasize
7 there's nothing in the CSS license that prohibits
8 player manufacturers or ROM drive manufacturers from
9 doing those conversions.

10 What I would like to say is that, you
11 know, as she has just mentioned, you can buy a
12 converter on the open market here in the U.S. for \$20,
13 if, in fact, that is your problem. It really goes to
14 the heart of the argument that I was trying to make
15 about regional coding, which is that if you want to
16 play a Region Code 2 disc here in the United States
17 you spend maybe \$30 or \$40 and buy a ROM drive, set it
18 to Region 2, and do the same thing. It's practically
19 the same amount of financial burden.

20 So, to do the one is really not very
21 burdensome, I think to do the other isn't very
22 burdensome either. And, just coming back to sort of
23 from the metaphysical to the practical, that's what I
24 urged the Copyright Office to consider in this
25 analysis, is the balance here, and the balance of

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1 burdens to users, and I believe there is a very non-
2 burdensome way for users to, in fact, be able to play
3 the non-Region 1 discs here in the United States that
4 they acquire abroad. And, I believe that that burden
5 and inconvenience is less than the potential harm to
6 copyright owners by granting the exemption to the
7 regional code system.

8 MR. METALITZ: The other panelists here are
9 actually much more expert on this PAL/CCAM/NTSC issue
10 than I am, but our viewpoint was that that's a fixed
11 cost, no matter whether you circumvent or whether you
12 go out to get a Region 2 whatever DVD ROM drive, if
13 you have that problem you have that problem.

14 I think the reason we addressed this in
15 our comments was because of what's said on page 21 of
16 EFF's comments, which said that it's not feasible for
17 someone to purchase and use a DVD player from one of
18 the foreign regions without also purchasing an
19 expensive multi-standard television or signal
20 converter, due to the incompatibility between the
21 three main video display standards, and they contend
22 that imposing this burden on consumers is a
23 substantial adverse effect.

24 So, I don't know, maybe - I don't know if
25 the price has gone down a lot in the last few months,

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1 but they were characterizing these converters as
2 expensive at the time of the initial filing, and now
3 they are \$20.

4 MR. CARSON: So, Ms. Hinze, do you want to
5 retract that statement?

6 MS. HINZE: Let me explain that statement,
7 one, expensive TV multi-standard, or, signal
8 converter, \$20.

9 MR. CARSON: So, we don't really have a
10 problem there, do we? All right, never mind, that's
11 not terribly important.

12 MS. HINZE: Can I, however, address one of
13 the earlier statements about the ease and convenience
14 of doing this, From the consumer point of view, you
15 just buy a DVD --

16 MR. CARSON: With what?

17 MS. HINZE: From the consumer point of
18 view, just buy a DVD ROM and put it into your
19 computer.

20 MR. CARSON: Right.

21 MS. HINZE: In fact, if you actually want
22 to watch movies from, for instance, Region 2, Region
23 3 and Region 4 where I'm from, you actually have to
24 buy three different DVD ROM drives, you have to
25 install them on your mother board, if that's a

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1 possibility, and then you have to find the ability to
2 make your BIOS, or your operating system, recognize
3 the three different DVD ROM drives all set to
4 different regions, and then you have to have some sort
5 of software that will do a conversion of the PAL to
6 NTSC for a playback to display on your VGA monitor.

7 That, one, involves three sets of drives,
8 and, two, is something that will be difficult
9 technically to do. It's not trivial.

10 MR. CARSON: More difficult than
11 circumventing CSS?

12 MS. HINZE: To modify a Region 1 player, as
13 I understand it, from information that's available on
14 the internet, so this is information that exists that
15 I have heard about, I understand can be as simple as
16 pressing a series of buttons. However, it does
17 violate Section 1201(a)(1) according to the views of
18 my opponents, and, therefore, an exemption would be
19 required.

20 MR. CARSON: Okay.

21 Mr. Marks --

22 MS. GARLICK: May I - I'm sorry, I just
23 wanted to make one comment in relation to the harm
24 that's being claimed. I'm getting some conflicting
25 senses of what's going on here in relation to region

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1 coding.

2 On the one hand, we are told that region
3 coding is necessary to incentivize distribution
4 structures and to enable people to comply with local
5 laws. On the other hand, it seems to be, from the
6 testimony that you read earlier, that it's okay to
7 sell Region 2 players into the U.S. market, and it's
8 okay for people to run around and buy all kinds of
9 equipment in order to be able to circumvent these
10 region codes.

11 So, I'd just like to pose a question for
12 others to consider, is, you know, how valid is this
13 claim of harm, particularly, against the history of
14 people being able to import for personal use
15 previously.

16 MR. CARSON: We'll get there, have
17 patience.

18 Mr. Marks, I'm a little puzzled by the
19 suggestion you made, in your last round of comments,
20 that you can just go out and get the DVD ROM drive.
21 Now, if I'm not mistaken, we've been talking about
22 limits. You've been saying, why do you ever watch it
23 on the a computer, just get a DVD player and watch it
24 on TV, better to watch it on TV anyway. Now you are
25 saying, why should we watch it on a TV, watch it on a

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1 computer, get a DVD ROM drive. I mean, which is it?

2 MR. MARKS: You can do both.

3 MR. CARSON: Well, no, apparently not,
4 because in this particular case you can't watch it on
5 a TV.

6 MR. MARKS: Whoa, whoa, whoa, hang on.

7 MR. CARSON: I'm hanging on just barely.

8 MR. MARKS: You may not put words in my
9 mouth. You can do a lot, but not that.

10 I said, I specifically said in this letter
11 that I submitted on June 23, 2000, that there's no
12 restriction in purchasing and importing a DVD player
13 coded for Region 2. So, if you would prefer to play it
14 on a DVD player and watch it on your television set,
15 assuming - well, in the case of Japan and Region 2
16 stuff they are NTSC, we are NTSC, so you won't have an
17 NTSC/PAL conversion problem there, so let's stick with
18 that and put the NTSC/PAL conversion, because that
19 happens whether there's an exemption, no exemption,
20 regional coding, no regional coding, it's kind of a
21 moot factor because it exists irrespective of regional
22 coding or not. So, let's stick with Region 2 for a
23 second, Japan, U.S., both NTSC format countries.

24 You can buy that DVD player, and, you
25 know, hook it up to your television and play it.

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1 That's a more expensive, and I acknowledge, more
2 expensive proposition that you would have to engage
3 in, because you may find difficulty in finding a
4 Region 2 DVD player here in the U.S., and you may, in
5 fact, have to import it from Japan. And, I
6 acknowledge that.

7 What I was saying in the ROM drive
8 circumstance, it's easier because you can buy any ROM
9 drive here in the United States and change the
10 regional setting yourself.

11 So, the point I was trying to make is
12 that's a less burdensome method of being able to
13 actually view the Region 2 DVD discs here.

14 MR. CARSON: Okay.

15 MR. MARKS: But, I certainly wasn't
16 arguing, and I apologize if I gave the impression,
17 that that was the exclusive method by which you could
18 do it.

19 MR. METALITZ: I would just say also on the
20 DVD ROM example, first of all, I guess it costs a
21 little more if you do the player, but maybe you don't
22 have to, you know, make all the steps that Ms. Hinze
23 talked about for bringing your new DVD ROM drives on
24 line.

25 The second is, as I recall the comments,

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1 and I can't swear that all of them fit in this
2 category, but the vast majority of the comments really
3 seek to view DVDs that are coming from one market,
4 either an Indian market, Japanese market, Australian
5 market. I know some people, we have an increasing
6 number, let's say, of global citizens who actually are
7 interested in watching DVDs that aren't released in
8 the United States, but they come from all over the
9 world, but I think that does shrink considerably the
10 number of people who would need three or four
11 additional DVD ROM drives. I think for most of the
12 people who have spoken up in this proceeding, their
13 problem could be solved if they got one.

14 MR. MARKS: Can I have just one more point
15 also? In terms of that issue of somebody who, you
16 know, has a global cultural interest and has a
17 voracious appetite for foreign titles from all sorts
18 of different regions of the world, it seems to me the
19 best way that that can be satisfied is for those
20 different variety of foreign titles to be made
21 available in the U.S. on discs that are coded either
22 for Region 1 or coded for multi-regions, so that,
23 therefore, you don't have to get into all of this
24 problem of multiple players and multiple ROM drives,
25 or ROM drives where you are resetting the region

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1 coding player. And, it seems to me we need to try and
2 figure out what is the best way to incentivize this.

3 I would maintain that for the last three
4 years the regional coding system has been legally
5 protected, you know, in tact, in terms of there not
6 being an exemption granted, and the result has been a
7 very strong proliferation of foreign language and
8 foreign works available on DVD in the U.S. market.

9 I believe if there was not that
10 proliferation, and if there was a diminution, in fact,
11 of foreign works available in the U.S., on Region 1 or
12 multi-region DVD discs, we might be in a more
13 difficult position here today.

14 But, I think, you know, the evidence is
15 showing that there's actually quite a dramatic
16 increase in the availability of these foreign language
17 titles, and I think that's ultimately the result we
18 all want.

19 MR. METALITZ: I think we also have to
20 assume, based on what we know about, again, going back
21 to the Japanese situation, that for whatever reason
22 the producers of those titles have decided that the
23 way they want to reach the U.S. market is through
24 distributorship in the United States, and the Region
25 1 version, rather than originally producing their

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1 titles either in all region or in Region 1 and 2 at
2 least, so that they could directly export it into the
3 United States.

4 You know, they may change their mind, they
5 may decide that this niche market is never going to be
6 more than a niche market, and there will be enough
7 people out there ordering by mail order from Japan,
8 and so let's enable these discs on Region 1 and 2.

9 But, they haven't made that decision,
10 unlike, for example, the Indian film makers who appear
11 to be releasing an all region, there could be a
12 variety for reasons for this, but I think the most
13 logical one is that they also figure this is the way
14 to reach the U.S. market. And, if we want to
15 encourage distribution, continued increased
16 distribution of these titles in the U.S. market,
17 regional coding is part of that picture.

18 MS. HINZE: Could I address that?

19 MR. CARSON: Sure.

20 MS. HINZE: The precise reason EFF is
21 seeking this exemption is because in the last three
22 years there are a number of works that have not become
23 available in the U.S. market, and the reason we are
24 seeking this exemption is because for whatever reason
25 these works have not become available.

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1 MR. CARSON: Yes, we understand that.

2 MS. HINZE: I just want to make it clear
3 from the point of view, for instance, Region 4 works,
4 there are numerous titles that are not new titles,
5 that have not become available. It's been more than
6 three years since some of these titles have been
7 released, and they are not in existence in Region 1
8 format. They are not in existence in any format in
9 the United States, and the only way that a consumer
10 could actually have access to play those titles here
11 would be to buy a Region 4 version of the disk and,
12 hopefully, find some way to play it. That would
13 presumably require an exemption. That's specifically
14 why we sought the exemption, because these works
15 simply are not available, and to the extent that
16 there's an incentive structure, the incentive
17 structure would be to actually encourage people to
18 distribute these works. We believe our exemption will
19 actually have the effect of encouraging U.S.
20 distributors to make these works available.

21 We would certainly welcome that, if that
22 were the case, but the reason the exemption is being
23 sought is because our experience is that that has not
24 been the case.

25 MR. CARSON: Right.

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1 Now, should someone who goes abroad and
2 buys a DVD from another region - well, let's start
3 over - does someone who goes abroad and buys a DVD
4 from another region, and then brings it here and wants
5 to try to succeed in playing it here, notwithstanding
6 region coding, are they engaging in an infringing use
7 of the work?

8 MR. MARKS: I don't think so.

9 MR. CARSON: Is there any reason why they
10 shouldn't be permitted to view the DVD that they
11 purchased abroad?

12 MR. METALITZ: They are.

13 MR. CARSON: Pardon?

14 MR. METALITZ: They are permitted to do
15 that, as far as the copyright law is concerned, I
16 believe.

17 MR. CARSON: Right, but the region coding
18 is preventing them from doing that, correct?

19 MR. METALITZ: No, the region coding is
20 making them go a different route to do that, rather
21 than circumventing the region code they need to get a
22 - use one of the other methods that we've talked
23 about, resetting their DVD ROM drive or getting a --

24 MR. CARSON: None of which is necessarily
25 a very easy way of doing it, right?

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1 MR. METALITZ: Right.

2 MR. CARSON: So, there are impediments to
3 their engaging in what we all agree are non-infringing
4 uses.

5 MR. METALITZ: The adverse impact in this
6 situation is not zero.

7 MR. CARSON: Right, okay, so let's go
8 through the cost of benefits then, because, obviously,
9 I think your argument is the benefits of this region
10 coding system far outweigh the costs to these people
11 who are facing difficulties in doing it.

12 MR. MARKS: Correct.

13 MR. CARSON: So, I think I was given four
14 justifications by Mr. Marks. First of all, rights are
15 territorial. Does that have any effect when we are
16 talking about an individual who purchased a DVD abroad
17 and wants to look at it here?

18 MR. MARKS: No, it doesn't for the most
19 part. I think we're looking at the - and I'm glad you
20 are asking that, because we are looking at the
21 consequence of if there could be an exemption to
22 regional coding will there be, you know, parallel
23 importation of these discs, and not just the one off
24 that is permitted by Section 602.

25 MR. CARSON: Okay.

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1 Now, of course, the exemption wouldn't in
2 any way extend the parallel importation. That's
3 understood, isn't it?

4 MR. MARKS: I do understand, but I'm just
5 talking about the practical reality spillover versus
6 the scope of necessarily the exemption itself.

7 MR. CARSON: Have we had any problem thus
8 far with parallel importations?

9 MR. MARKS: We had a lot of problems with
10 parallel importation, but they've generally been from
11 the U.S. out, rather than --

12 MR. CARSON: Exactly.

13 MR. MARKS: - into the U.S.

14 MR. CARSON: Well, of course, this
15 exemption, if it existed, would apply only to the U.S.
16 So, I gather there's not really any record of a
17 problem of parallel importation into the U.S., of
18 foreign media.

19 MR. MARKS: So far, no, but, you know, that
20 sort of begs the question as to whether that's because
21 of the regional coding or not.

22 MR. METALITZ: And, I'm not sure that we
23 know enough about that, because again, let me
24 emphasize that the major studios are not generally the
25 - I mean, there are some exceptions, but the major

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1 studios are not generally the authorized distributors
2 of these titles, and it may be that parallel
3 importation is occurring in violation of the exclusive
4 distribution rights of the distributors who tend to be
5 independent.

6 MR. CARSON: So, that leads to a very
7 interesting question. I mean, you are here
8 representing the major studios, why on earth do you
9 care?

10 MR. METALITZ: Well, I'm not just
11 representing the major studios, number one.

12 MR. CARSON: Okay.

13 MR. METALITZ: And, we're representing
14 AFMA, for example, and of course some of the major
15 studios are involved here as well.

16 But, obviously, regional coding, as you
17 know, is a global system.

18 MR. METALITZ: Right, but we are not going
19 to effect it elsewhere, we are only talking about
20 here.

21 MR. CARSON: I agree. This proceeding
22 cannot directly affect it anywhere else. So, for U.S.
23 copyright owners, whether or not this exemption is
24 granted is, I would think, a trivial thing, isn't it?

25 MR. METALITZ: No, I don't think it's a

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1 trivial matter, both because to the extent that
2 there's a growing market for foreign language DVDs and
3 others in this category, it's certainly a market
4 opportunity that they would want to exploit as
5 distributors, and all of these companies are
6 distributors of other people's product, to some
7 extent.

8 And, the second reason, of course, is
9 because they want to maintain the integrity globally
10 of the regional coding system, and they don't want the
11 United States setting the example of permitting
12 circumvention of regional codings.

13 MR. CARSON: Okay.

14 MR. MARKS: And, in fact, on these foreign
15 language feature films, at least according again to
16 this DVD release report, the fourth largest
17 distributor distributing 91 of the 1700 titles was
18 Columbia Tri Star, distributing 91 foreign language
19 releases in the U.S.

20 So, they probably would have an interest.
21 They may be able to better answer some of these
22 questions, whether they have parallel importation
23 problems of the foreign language films or not. I just
24 don't know.

25 MR. CARSON: Okay.

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1 MR. METALITZ: Again, these are niche
2 markets for the most part, so you wouldn't expect a
3 huge flood of parallel imports, but it might be enough
4 to affect that market.

5 MR. CARSON: All right.

6 Well, let's move on to the second
7 justification, the theatrical window. That's,
8 obviously, not an issue here, is it? We are talking
9 about viewing foreign DVDs here, as a general
10 proposition I don't think we're -

11 MR. MARKS: Only to the extent, I would
12 say, if, in fact, there was a U.S. distributor who
13 gained theatrical distribution rights to the foreign
14 film here in the U.S., it certainly could affect it.

15 MR. CARSON: Yes, there is certainly the
16 possibility, do we have information about how often
17 that arises?

18 MR. METALITZ: We have the example in our
19 submission, the Rabbitproof Fence.

20 MR. CARSON: Yes, you've got that one.

21 MR. METALITZ: I agree with you that this
22 is not the typical situation.

23 MR. CARSON: Right, and we certainly heard
24 out of your mouths plenty of times that when you come
25 up with one example that's just one example, it

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1 doesn't mean much. So, so far we've got one example
2 on that side of the equation I gather, that's all we
3 can say.

4 MR. MARKS: One example where the
5 theatrical distribution in this country occurred after
6 the DVD release.

7 MR. METALITZ: In a non-Region 1 setting.

8 MR. MARKS: There could well be other
9 examples, I just don't know of them. It wouldn't
10 surprise me.

11 MR. METALITZ: I mean, it really depends on
12 how much of the U.S. theatrical market is of titles
13 that are first released outside the U.S. That would
14 be the likeliest source of this, such as Rabbitproof
15 Fence, and, obviously, that's not a high proportion,
16 but it's not insignificant either. There are, you
17 know, foreign films that do quite well in the United
18 States.

19 MR. CARSON: Right, but --

20 MR. METALITZ: And, some of those may have
21 been, you know, I'm speculating here, that some of
22 them may have been released on DVD with region coding
23 that didn't allow playing in the United States prior
24 to the time of their theatrical release in the United
25 States.

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1 MR. CARSON: Right, I'll agree, that's the
2 question, and we just don't have a clue what the
3 answer is, I guess.

4 MR. METALITZ: I think the answer is that
5 it's not unheard of, but I would agree with you, it's
6 probably not going to be a major part of the market.

7 MR. CARSON: Okay.

8 Let's move on to the third justification,
9 local censorship, not an issue here, I assume,
10 correct?

11 MR. METALITZ: Well, not censorship, but it
12 could be for ratings.

13 MR. CARSON: For ratings, okay.

14 But again, we are talking about people who
15 acquire these abroad and are bringing them here so
16 they can watch it. Are we really concerned about them
17 being deceived by ratings or having a problem with
18 ratings?

19 MR. METALITZ: I don't know the extent to
20 which there's - you know, it's certainly more in the
21 video game area that this is an issue, but I don't
22 know the extent to which it's an issue in the audio
23 visual.

24 MR. CARSON: Okay.

25 Well, even with the video games, I mean if

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1 I go to Japan and buy a Japanese video game and bring
2 it back here and it's a lot more violent than what
3 people are used to here, I knew what I was buying,
4 didn't I? Are you going to tell me that I shouldn't
5 be able to play it here because it's too violent for
6 me?

7 MR. METALITZ: I'm certainly not telling
8 you that, but I'm sure there are state legislators
9 around the country who would tell you exactly that.

10 MR. CARSON: No doubt.

11 Okay, finally, the fourth and final
12 justification you gave, Mr. Marks, and all I've got on
13 my piece of paper, you are going to have to elaborate
14 for me, is, I just wrote down CCAM and PAL, and I'm
15 not quite sure what that means.

16 MR. MARKS: Oh, yes, well, what I was
17 referring to there is that, you know, some of the
18 justification for doing regional coding in the first
19 place was to try and replicate those divisions in PAL
20 in SECCAM markets, PAL, SECCAM and NTSC markets, that
21 certainly the division in regional coding isn't
22 completely analogous to the division of foreign
23 territories vis-à-vis PAL and SECCAM.

24 But, for example, Region 2, which is
25 generally Western Europe and part of Central Europe,

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1 is generally a PAL territory, although Region 2 also
2 includes Japan, which is an NTSC territory. But, in
3 general, we try to make any territory like Europe,
4 which is generally PAL and CCAM, all subject to one
5 region, to sort of minimize the problem of the
6 NTSC/PAL transcoding problem.

7 MR. CARSON: Okay.

8 I can following what you say as a matter
9 of fact, but I'm not sure I understand how that is a
10 justification for region coding, and why we should be
11 - why we should hesitate before coming up with the
12 exemptions because of this denominator. Why does that
13 matter?

14 MR. MARKS: Well, why it mattered initially
15 is, we wanted to be sure that, you know, when somebody
16 bought - that we could say, okay, these just are
17 destined for Europe and for, you know, Region 2
18 players in Europe, that we will know to put on the
19 PAL/SECCAM version of the movie so that they will be
20 playable on the television sets that are in Europe.

21 If you, you know, exempt, do an exemption
22 for regional coding, people may, in fact, you know,
23 bring in discs that are not NTSC discs, expect, okay,
24 with this exemption I'm going to be able to clearly
25 play this on my DVD player and television set, and, in

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1 fact, they may not be able to do so. So, it can add
2 to confusion.

3 MR. CARSON: Is that a problem you care
4 about?

5 MR. MARKS: I care about it to the extent
6 that I believe if you create an exemption for regional
7 coding, and if, in fact, what ends up becoming the de
8 facto standard is that regional coding is basically
9 defeated and no longer abided by, both here in the
10 U.S. and abroad, that's going to hurt our distribution
11 business. So, yes, I care.

12 MR. CARSON: I'm not sure I see the
13 connection between that and your previous statement
14 that someone might be disappointed --

15 MR. MARKS: No, no, no, because you asked
16 me why do I care about an exemption granted for
17 regional coding.

18 MR. CARSON: No, no, my question was, why
19 do you care that someone who buys something abroad and
20 takes it home, thinking, oh great, I've got an
21 exemption I can play it, and then they are not able to
22 because of the PAL and SECCAM issue.

23 MR. MARKS: Well, what I'm trying to --

24 MR. CARSON: What do you care about that?

25 MR. MARKS: - I care about that because I

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1 think it goes to the issue of how much utility and
2 value are you actually giving to users by granting
3 that exemption.

4 MR. CARSON: Okay, and we certainly had a
5 conversation on that before.

6 MS. HINZE: Could I just quickly add a
7 quick statement of clarification there?

8 MR. CARSON: Sure.

9 MS. HINZE: I have a number of Region 4
10 DVDs that I currently cannot play. Each of them are
11 labeled as to being PAL.

12 MR. CARSON: What?

13 MS. HINZE: PAL, which is the Australian
14 standard.

15 MR. CARSON: Right.

16 MS. HINZE: It's clear to any consumer who
17 buys a foreign region DVD - It's on the label, they
18 know exactly what they are getting. I don't think
19 there's any issue of confusion on the part of
20 consumers.

21 And, as I said before, I'm a little
22 puzzled about Mr. Marks' statement, because as I
23 understand it, a \$20 PAL to NTSC converter is all
24 that's required in order to address that particular
25 concern.

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1 One, I can't see how consumers will be
2 confused because it's clearly labeled on a foreign
3 DVD, and second, it's not illegal to have a PAL to
4 NTSC converter or to use one, and three, it's a matter
5 of a \$20 PAL to NTSC converter.

6 MR. MARKS: And, I guess I would answer,
7 and the discs are clearly labeled that they are
8 playable on Region 4, so there's no consumer
9 confusion, and it's not a burden to get a Region 4
10 player here in the U.S., and then play the disc. I
11 think it's quite equivalent.

12 MR. CARSON: Well, you know, I've heard two
13 different things about that, and I would like
14 clarification on that. On the one hand, at times I've
15 heard you say it's easy to get a player from another
16 region, and other times I've heard you acknowledge
17 that maybe it's not so easy. I mean, which is it?

18 MR. MARKS: Okay, well, let me say, you can
19 import a player and it's certainly easy to get a ROM
20 drive, you know, here in the U.S., and set it to
21 Region 4.

22 MR. CARSON: Okay.

23 MR. MARKS: So, if the issue is viewability
24 of the disc, and the consumer's ability to view the
25 disc, there's an easy alternative that doesn't involve

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1 circumvention.

2 MR. CARSON: Okay.

3 Well, how easy is it to import the player?

4 MR. MARKS: I haven't tried, so I couldn't
5 tell you.

6 MR. CARSON: Okay.

7 I've heard \$40 or \$50 bandied about as the
8 price of a player from another region.

9 MR. MARKS: No, no, no, you've heard
10 bandied about \$40 or \$50 for the price of ROM drives.

11 MR. CARSON: Oh, okay.

12 MR. MARKS: And, I have listings here of
13 many, many different ROM drives that are in that price
14 range.

15 MR. CARSON: Okay.

16 Do you have any information on what the
17 cost would be for an American citizen living here to
18 get - to acquire a DVD player for Region 4 or Region
19 2?

20 MR. MARKS: I don't have that information.

21 MR. CARSON: Does anyone have any
22 information on that? No, all right.

23 Okay, finally, just one question about the
24 video game issue.

25 Mr. Metalitz, you mentioned that one

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1 difference between the region coding issue for video
2 games that may not be there with respect to motion
3 pictures is that in some console systems the region
4 coding is closely integrated with the access control
5 technology that prevents playing of pirate games. So
6 that, if you permit people to circumvent the region
7 coding in the video game area, you may also be
8 permitting them to, basically, commit piracy. Is that
9 more or less an accurate summary of your testimony?

10 MR. METALITZ: Yes, your exemption won't
11 say that if you granted it, it won't say you are
12 allowed, but I think that would be the fact. And, I
13 think the emphasis in the contrast is on May after the
14 interrogation we had from Mr. Tepp, we are not 100
15 percent, at least I'm not 100 percent sure of the
16 degree of integration between CSS and the regional
17 coding, but I know that in at least some of the
18 console systems it is closely integrated.

19 MR. CARSON: Even if that's true, though,
20 isn't that just the result of a choice made by video
21 game manufacturers to integrate the two of them, and
22 aren't you just penalizing the user because of that
23 choice that was made by the providers of this stuff?

24 MR. METALITZ: Well, it is true that they
25 chose this system, and, in fact, they have different

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1 systems. I mean, the major console manufacturers
2 don't all have the same system. So, I hesitate to
3 generalize.

4 But, they are - if you are asking for the
5 reasons why video game companies do this, I think as
6 I said they are similar to, although not identical to,
7 the reasons that movie studios use regional coding,
8 the main ones being licensing restrictions, because
9 their licensing this region for the most part, and
10 localization, which is I think a big issue not only
11 because of the cultural issues as far as the level of
12 violence that's allowed, but language and other
13 factors. That's why they do it, that's why they have
14 regional coding.

15 You are asking why they have a system in
16 which the two are closely integrated?

17 MR. CARSON: Well I'm not even sure I care
18 why, I'm just wondering whether we should care about
19 it, when it's a choice that was made by the people who
20 were saying don't do it to us. Well, it was their
21 choice to do it that way, it was their choice --

22 MR. MARKS: Well, no, but wait one second.
23 You could be putting us in sort of a catch-22, you
24 know. If you don't integrate it closely with an
25 access control methodology, and there's absolutely no

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1 connection to an access control methodology at all,
2 and it's a flag with a response, then you are saying
3 to us, well, it may not be an effective access control
4 method at all. And then, if you do try and hook it
5 into a licensing scheme, like CSS which is an access
6 control methodology, then you are saying, well, wait
7 a second, you are somehow, you know, illegally
8 bootstrapping two access control methodologies
9 together.

10 So, what's our choice?

11 MR. CARSON: We'll have to decide that.

12 MR. MARKS: I'm glad I stumped you. Sorry.

13 MR. METALITZ: Again, Mr. Carson, I think
14 in terms of the real world impact of this, I think the
15 video game companies experience is colored to a great
16 degree by the Section 117, I don't it's too strong a
17 word to say debacle, where a provision that's been
18 enacted by Congress has been widely abused as an
19 excuse for piracy, and the same thing we fear will
20 happen again in this situation.

21 So, I think the video game industry is
22 living with a very high level of piracy right now.
23 It's a huge problem in which their losses are quite
24 extensive, and in many countries they virtually don't
25 have a market because of piracy, and this would simply

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1 exacerbate the problem.

2 MR. CARSON: But, what's the connection
3 between that and region coding?

4 MR. METALITZ: Because allowing the
5 circumvention of region coding, as I said, would I
6 think step you into the quick sand of promoting the
7 circumvention of access controls, generally the
8 playing of pirate games on video game consoles.

9 MR. CARSON: Okay, I get it.

10 MR. TEPP: You know, I just want to react
11 to something that just got said very quickly, because
12 you didn't stump me.

13 MR. MARKS: I was afraid of that. I was
14 really afraid of that. I was hoping you'd be too tired
15 to continue, but, oh, well.

16 MR. TEPP: Oh, no, if you think that was an
17 interrogation, I think what we are trying to figure
18 out is precisely whether what's going on is
19 bootstrapping something not protected by 1201, by
20 merging it with something that is. And, if so,
21 whether we should respond in the affirmative to a
22 request for an exemption to deal with that, to allow
23 non-infringing uses.

24 MR. MARKS: Right, and I think that's a
25 very fair question, and what I was trying to say, and

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1 maybe I didn't articulate it clearly enough, is that
2 if you accept the premise, and you may not, but if you
3 accept the premise that it's legitimate for a
4 copyright owner to employ technical measures in order
5 to enforce - help enforce their distribution rights,
6 including their right to decide how to market their
7 works, where to market their works, when to market
8 their works, if you accept that premise that it's
9 legitimate for copyright owners to do that, then one
10 of the technologies to do that is this regional coding
11 technology, which, as I mentioned before, in and of
12 itself is not self protecting to the degree that
13 scrambling and access control - that scrambling and
14 encryption are, but still constitutes an access
15 control technology.

16 If your goal as a copyright owner is to
17 say, I want to try and ensure that that access control
18 technology truly is effective, so that it qualifies
19 for protection under the DMCA, one way of
20 accomplishing that may be to link it, you know, as we
21 have done in CSS, as an obligation of an encryption
22 scrambling technology, which, perhaps, more clearly
23 qualifies for protection under 1201.

24 And so, that's actually a more, I think,
25 reasonable explanation, perhaps, to the flippant

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1 question I posed to Mr. Carson.

2 MR. TEPP: I'm certainly not trying to pass
3 judgment on what's legitimate for a copyright owner to
4 do in terms of the distribution market. I'm not aware
5 of any violation of the law by attaching region coding
6 in the first place, that's not the question we're
7 faced with. The question we are faced with is, once
8 it is in place is it a 1201 issue, and if so should
9 there be an exception. And, in spite of my so-called
10 interrogation, I still haven't heard, I don't believe,
11 an argument or an analysis of region coding in
12 isolation that it is within the definition of an
13 effective technology or protection measure that
14 effectively controls access to works.

15 MR. METALITZ: I think one of the reasons
16 that you may not have heard that is because it doesn't
17 exist in isolation from CSS. I mean, theoretically
18 it's possible for someone to release the disc that you
19 talked about, that doesn't have CSS, but does have
20 region coding. At least I think that's theoretically
21 possible, but I'm not aware that that ever happens.

22 What at least happens in the vast majority
23 of cases is that it is - they are both there, and I
24 think we've explained our view why in that
25 circumstance I don't think there's much doubt that as

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1 the Copyright Office and the Librarian found three
2 years ago, region coding is an access control
3 technology that's protected by 1201.

4 And then the question, quite properly, is,
5 have proponents met the burden of showing that it
6 would be adverse impact on non-infringing uses, which
7 we concede is not zero, but is it sufficiently
8 significant weighed against the value that you
9 recognized three years ago of region coding to justify
10 an exemption.

11 MS. PETERS: Okay.

12 We could go on forever, it is now --

13 MS. GROSS: I'm sorry, can I just make one
14 comment before we conclude?

15 MS. PETERS: Sure.

16 MS. GROSS: Thank you.

17 I just wanted to raise a point that we had
18 discussed in an earlier panel with respect to Linux
19 users being able to play their DVDs. And, Mr. Marks
20 had a press release talking about the IBM Think Pad,
21 the press release is about two years old. It was my
22 understanding that once that press release went out,
23 announcing this Think Pad Linux DVD player that there
24 was a good deal of controversy, threat of litigation,
25 and it was immediately withdrawn from the market.

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1 So, before you conclude that there is a
2 Linux box available, I think you need to see a little
3 bit more information, because it's my understanding
4 that that particular Think Pad is not available for
5 Linux playing today.

6 MR. CARSON: Who threatened that
7 litigation?

8 MS. GROSS: I'm not sure. This is two years
9 old, this story, so I'm just saying, I think we need
10 to have a little bit more information about the
11 existence of this box.

12 MR. CARSON: Well, you're welcome to pass
13 it on to us.

14 MS. GROSS: I will do that.

15 MS. PETERS: Okay.

16 It's 6:18, we've been at this for more
17 than nine hours. Many of you have been here all day,
18 and contributed. I want to thank all of you, you've
19 given us a lot to think about, and at least for now,
20 except for you, Mr. Marks, who have many things to do
21 for homework --

22 MR. CARSON: And, Ms. Hinze.

23 MS. PETERS: - and Ms. Hinze, but I do
24 thank you for all of your efforts, both to what you've
25 filed with us and as well as your participation here.

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1 So, this hearing is concluded, all the hearings are
2 concluded, and enjoy your evening. Thank you.

3 (Whereupon, the above-entitled matter was
4 concluded at 6:18 p.m.)

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