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ANTI-CIRCUMVENTION RULEMAKING HEARING

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FRIDAY,

MAY 9, 2003

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The hearing was held at 9:30 a.m. in the hearing room of the Postal Rate Commission, 1333 H Street, NW, Washington, DC, 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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P-R-O-C-E-E-D-I-N-G-S

9:31 a.m.

MS. PETERS: Good morning. I'm Marybeth Peters, the Register of Copyrights. And I would like to welcome everyone to the last day of hearings in Washington in this Section 1201 anti-circumvention rulemaking.

The purpose of this rulemaking proceeding is to determine whether there are particular classes of works as to which users are or likely to be adversely effected in their ability to make noninfringing uses if they are prohibited from circumventing technological measures that control access.

Today we have two sessions. The first will address the proposed exemption by static control components and the second will cover an exemption relating to broadcast news monitoring.

The comments, the reply comments and the hearing testimonies will form the basis of the evidence of this rulemaking which, in consultation with the Assistant Secretary for Communications and Information of the Department of Commerce will result in my recommendation to the Librarian of Congress. The Librarian must make a recommendation

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1 before October 28, 2003 on whether or not exemptions
2 to the prohibition should be instituted during 2003
3 to 2006.

4 The entire record of this, as well as
5 the last 1201 rulemaking are on our website. We will
6 be posting the transcripts of all the current
7 hearings approximately one week after each hearing.

8 The transcripts will be posted on the
9 website as originally transcribed, but everybody who
10 testifies has an opportunity to correct any errors.

11 Let me introduce the Copyright Office
12 panel at this point. To my immediate left is David
13 Carson, the general counsel of the Copyright Office.
14 To my immediate right is Rob Kasunic, senior
15 attorney and advisor in the Office of the General
16 Counsel. To his right is Charlotte Douglass,
17 principal legal advisor in the Office of the General
18 Counsel. And to the far left is Steve Tepp, policy
19 planning advisor in the Office of Policy and
20 International Affairs.

21 The format of the hearing is divided
22 into 3 parts. The first, the witnesses present
23 their testimony, and obviously this is your chance
24 to make your case in person, explain the facts and
25 make the legal and policy arguments to support your

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1 claim that whether there should or should not be a
2 particular exemption.

3 Then we will follow with questions from
4 the members of the panels. Hopefully, the questions
5 will be somewhat tough. And I want you to know that
6 we have made no decisions at this point and so you
7 should not read anything into our questions. We're
8 trying to elicit the facts through the questions.

9 Finally, if we have time and if it
10 hasn't worked the way it has in some panels, the
11 last part is where you can ask questions of each
12 other.

13 So, hopefully, we will have a very full
14 hearing this morning.

15 The order of the witnesses, we always
16 basically start with the proponent. So we're going
17 to start with Seth Greenstein. Then we're going to
18 go to former Register Ralph Oman. And we will
19 conclude with Professor Jane Ginsburg.

20 So, let me turn it over to you, Seth.

21 MR. GREENSTEIN: Good morning.

22 MS. PETERS: Thank you.

23 MR. GREENSTEIN: And thank you very much
24 for inviting Static Controls to testify before the
25 panel this morning.

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1 If I came before you this morning with a
2 new technological protection measure for ball point
3 ink pens where the refill cartridge and the pen
4 barrel each include software programs that prevent
5 the ink from flowing unless I used a ball point pen
6 cartridge that's made by my company, and claimed
7 that my competitor's sale of replacement pen
8 cartridges violated Section 1201(a) of the DMCA, you
9 would think my DMCA claim utterly absurd. That's
10 what this morning's is about; a misapplication of
11 the DMCA to protect replacement ink cartridges.
12 That's the claim upon which Lexmark sued Static
13 Control and, unfortunately, has convinced the court
14 to preliminary enjoined Static Control's further
15 sale of technology that would allow competition for
16 the sale of replacement computer/printer toner ink
17 cartridges.

18 Static Control seeks exemptions from
19 1201(a) (1) to help address a substantial adverse
20 economic and societal impact of this application of
21 the DMCA. We propose exemptions in three classes.
22 The first is the specific class of software at issue
23 in the suit filed against Static Control by Lexmark,
24 namely for computer programs embedded in computer
25 printers and toner cartridges and that control the

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1 interoperation and functions of the printer and
2 toner cartridge.

3 Static Control has also proposed two
4 alternative phrasings of an exemption covering more
5 generic classes of technological measures. Class II
6 would exempt computer programs embedded in a machine
7 or product and which cannot be copied during the
8 ordinary operation or use of the machine or product.

9 Class III would exempt computer programs
10 embedded in a machine or product that controlled the
11 operation of one or more machines or products
12 connected thereto, but that do not otherwise control
13 the performance, display or reproduction of
14 copyrighted works that have an independent economic
15 significance.

16 Now, before explaining how the Section
17 1201(a) (1) prohibition has had a substantial adverse
18 impact on the ability to make infringing uses of
19 copyrighted works, most specifically the printer
20 software and why therefore the requested exemption
21 should be granted, I would like to provide the
22 Office with some additional perspective on the
23 business of Static Control, the nature of the
24 technology protection measure here at issue and the
25 impact that the application of Section 1201(a) has

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1 had upon Static Control, the remanufacturing
2 industry and the public.

3 Incorporated in 1987, Static Control
4 Components is a family owned and operated
5 manufacturer and supplier of a diverse array of
6 products. Its product line began with electrostatic
7 bags that shield electronics parts like personal
8 computer cards from damage caused by static
9 electricity. That's from whence the name Static
10 Control was derived.

11 Since 1989 Static Control supplies ink,
12 toner, cartridges and replacement parts and toner
13 for various brands of inkjet and toner cartridges
14 for computer printers. Static Control currently
15 employs approximately 1,000 people at its
16 headquarters in Sanford, North Carolina. Has annual
17 revenues of approximately \$300,000.

18 Now, Static Control does not
19 remanufacture and resell toner cartridges directly
20 to the public. Static Control is a middle man.
21 They provide toner and replacement parts to
22 remanufacture, who then take these products and use
23 them in remanufacturing toner cartridges that are
24 sold primarily to business, institutional and
25 governmental users.

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1 According to the International Imaging
2 Technology Council approximately 34,000 workers are
3 employed by the remanufacturing industries generally
4 in the United States. As an aside, remanufacturing
5 toner cartridges is good for consumers and good for
6 the environment. Remanufactured cartridges that
7 perform as well or better than new cartridges can be
8 sold for substantially less than new cartridges. And
9 some evidence of this is supplied in the reply
10 comments of the Electronic Frontier Foundation.

11 The average remanufacture reworks
12 approximately 340 cartridges per month. That saves
13 264 gallons of oil and 845 pounds of solid waste
14 from landfills each month.

15 On annual basis the average
16 remanufacture's output of cartridges stacked end to
17 end would tower over the Empire State Building. For
18 these economic and environmental reasons, United
19 States Governmental regulations require the
20 acquisition by federal agencies wherever possible of
21 remanufactured toner cartridges.

22 Lexmark has attempted in recent years to
23 improve its market share by offering printers at an
24 initially low entry cost while earning greater
25 profits over the lifecycle of the printer by

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1 controlling the market for its toner cartridges. By
2 changing physical attributes of its products,
3 Lexmark was able for a time to maintain a short lead
4 over its remanufacture competitors.

5 In approximately 1998 and 1999 Lexmark
6 began employing computer chips onto its toner
7 cartridges in an effort to delay and stifle
8 remanufacturing of cartridges by competitors. The
9 first generation of these killer chips indicated
10 when the original cartridge had been used up, so as
11 to prevent refilling and reuse by third party
12 remanufactures.

13 When these chips were readily designed
14 by companies such as Static Control, Lexmark adopted
15 a new lock-out technology, and racketed up its
16 technological cat-and-mouse game a level of
17 magnitude higher.

18 In 2001 Lexmark introduced a new
19 generation of these killer chips that operated
20 somewhat differently. When the printer is powered on
21 or when the cover to the printer is closed, the
22 printer software and software located on this toner
23 cartridge chip would perform a cryptographic routine
24 known as a "hash." Essentially, the hash takes a
25 certain secret number that's located in the printer

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1 and on the toner cartridge chip and repeated
2 performs a series of mathematical operations on it
3 so that the printer and the toner cartridge chip
4 each at the end produce a number. If the numbers
5 produced by this hash or identical, then the printer
6 assumes that the toner cartridge is an authentic
7 Lexmark toner cartridge and the printer will work.
8 If the number differ, the printer software will
9 display on the LED screen on the printer an error
10 message "unsupported print cartridge and the printer
11 will refuse to print." This is the technological
12 measure that is at issue in this proceeding.

13 This authentication routine uses an
14 extremely strong and robust algorithm considered to
15 be virtually unbreakable, known as the Secure Hash
16 Algorithm or SHA1, for short. It's a U.S. Government
17 standard that it's a cryptographic algorithm that is
18 freely available in the public domain for anyone to
19 use. That's the nature of the technological
20 measure.

21 The next question for purposes of
22 1201(a) is whether it protects access to a work that
23 is protected under Title 17. It does not.

24 Lexmark contends that the measure
25 protects copyrighted works, to wit: Software that

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1 controls certain printer functions and software in
2 the toner cartridge that purports to measure toner
3 level. These contentions do not withstand security.

4 Indeed, it's clear that the purpose of
5 the technological measure is, in the words of
6 Lexmark's own sworn declarations that are submitted
7 in support of its motion for preliminary injunction,
8 "To prevent unauthorized toner cartridges from being
9 used with Lexmark's T520/522 and T620/622 laser
10 printers."

11 The true and only purpose of the
12 technological measure is to protect Lexmark against
13 competition from toner cartridge remanufacturers who
14 refill, refurbish and resell cartridges at lower
15 prices than Lexmark, and thus erode Lexmark's profit
16 margins and its market share.

17 If this is the purpose of the
18 technological measure, it is evident when
19 considering the following facts.

20 At the February 7th hearing on Lexmark's
21 motion for preliminary injunction, Lexmark's expert
22 technical witness testified there is no need to have
23 a toner loading program on the toner cartridge at
24 all. The toner cartridge could be designed so that
25 the memory locations where the toning loading

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1 program now resides are all zeros, such as if
2 there's no program there at all. Alternatively, a
3 bit could be set on the chip so that the toner
4 loading program, if present, is not used. In either
5 case, the printer functions perfectly well as long
6 as this SHA1 authentication protocol, the
7 technological protection measure, still ascertains
8 that the toner cartridge is an authorized Lexmark
9 cartridges and if not, the printer doesn't work.

10 If there's no need to have a toner
11 loading program on the toner cartridge chip or for
12 the toner loading program to be used, and yet the
13 technological measure still prevents the printer
14 from working, obviously the toner loading program is
15 not the object of protection; it's the market for
16 remanufactured cartridges.

17 Second, the fact is that anyone can
18 access the printer engine program or the toner
19 loading program. These programs are not encrypted.
20 Using standard inexpensive software analysis tools
21 anyone can read the toner loading program from the
22 chip, anyone can decompile and read the printer
23 engine program. There are no copy protection
24 supplied to either program. Indeed, if you want to
25 get access to the printer engine program, all you

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1 have to do is visit Lexmark's website where you can
2 download it for free.

3 Third, there's no separate market for
4 the copyrighted works allegedly protected by this
5 SHA1 algorithm. The toner loading programs are not
6 sold separately. There is no software license that
7 accompanies the sale of the Lexmark toner cartridge.
8 The printer engine program is available for
9 download, as I said, free of charge from Lexmark's
10 website. The only market at issue is the after-
11 market for toner cartridges themselves.

12 Fourth, what happens if the toner
13 loading program is used is quite instructive as
14 well. The toner cartridge chip contains 4 bytes of
15 data that we can refer to as toner bucket bytes.
16 These buckets are initially set on the cartridges
17 chip to a value of ten. Unlike most of the data on
18 the toner cartridge chip which can only be read but
19 cannot be altered, these bucket bytes are
20 intentionally designed to be changed.

21 As the toner loading program indicates
22 the toner in the cartridge is being depleted, the
23 printer decrementally changes the value of these
24 bucket bytes from 10 down to zero. The purpose of
25 these buckets is essentially to provide the

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1 cartridge with a permanent record of cartridge use.
2 If the cartridge is refilled by anyone other than
3 Lexmark, the printer will compare the amount of
4 toner in the cartridge to the value of these
5 buckets. And if the values are not comparable, for
6 example, if there's much more toner in the
7 cartridges than is indicated on these bucket bytes,
8 the printer assumes that the cartridge has been
9 refilled without Lexmark's authorization and the
10 printer displays the error message "unsupported
11 print cartridge," and shuts down and does not print.
12 This demonstrates once again the purpose of the
13 toner loading program within this overall system is
14 to indicate when these bucket bytes are to be
15 changed. It's not to protect the program itself.
16 It's to protect Lexmark's market for
17 noncopyrightable toner and toner cartridges.

18 Fifth, notably, Lexmark states in its
19 reply comments that the technological protection
20 measure only prevents reuse of its lower price
21 Prebate cartridges, but does not prevent the
22 refilling of its higher priced non- cartridges.

23 Well, if the purpose were to protect the
24 copyrighted works, then it would protect them on all
25 cartridges, but in fact it does not. It only

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1 protects a particular business model for the toner
2 cartridges and not the copyrighted works.

3 Even viewed in a light most favorable to
4 Lexmark, at most the protection against
5 interoperation of a computer program on the chip
6 with a computer program on the printer is but a
7 means to the real end. And the end is protecting the
8 market for noncopyrightable goods. In Static
9 Control's view this is not a proper claim under
10 Section 1201(a). The purpose of the technological
11 measure is not to protect the copyrighted work, but
12 rather Lexmark seeks only to preserve its market for
13 noncopyrightable consumable goods.

14 Undeniably, this case is different from
15 every other case brought under Section 1201(a). In
16 every other case, the courts have found Section
17 1201(a) to be violated where the technology was
18 applied to protect a copyrighted work. For example,
19 copyrighted sound records in Real Networks v.
20 Streambox case. Copyrighted motion pictures in the
21 Universal Studios v. Reimerdes case. Electronic
22 books in the ElcomSoft case. Copyrighted video
23 games distributed on CD-ROMs in the Game Masters
24 case.

25 Static Control submits that the proper

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1 outcome would be that Static Control should be
2 denied this exemption on the grounds that there is
3 no violation of Section 1201(a). Notwithstanding,
4 as Static Control noted in its comments, Static
5 Control could not be sanguined that a court would
6 agree with us. And, unfortunately, that has proved
7 to be the case. Therefore, Static Control filed with
8 the Copyright Office a request for exemption under
9 Section 1201(a). The exemption is justified because
10 of the substantial adverse impact that the
11 application of Section 1201(a) in this case has had,
12 and will continue to have, upon noninfringing uses
13 of copyrighted works. And what are those
14 noninfringing uses?

15 Most fundamentally, the noninfringing
16 use is the purchaser's ability to continue to use
17 programs on the cartridges themselves. Absent the
18 technological protection measure, the continued use
19 of the cartridge even after refilling, would not
20 infringe copyright.

21 The second noninfringing use is the
22 ability to repair. Now, Lexmark notes that the
23 technology protection measure, as I mentioned
24 before, does not prevent continued refilling and use
25 of the non-Prebate cartridges, however as I noted,

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1 when you use the cartridge the value of the buckets
2 on the toner cartridge chip permanently changes. And
3 on non-Prebate chips, this causes the printer's
4 toner level displays to malfunction and it will
5 continually display that even a full cartridge is in
6 the toner low condition. Absent the right to
7 circumvent, this malfunction could not be corrected.

8 Third, inasmuch as Lexmark concedes that
9 the toner loading program on the chip is not
10 necessary to be there, Static Control will focus
11 specifically on how the technological protection
12 measure prevents noninfringing use of the printer
13 engine program.

14 The noninfringing uses of greatest
15 concern to Static Control relate to the ability of
16 third party vendors such as Static Control to create
17 compatible and interoperatable programs that reside
18 on the toner cartridge that provide for enhanced
19 printer functions.

20 The Static Control Smartek chip enjoined
21 by the court was a more powerful chip than the
22 Lexmark chip. It included original computer programs
23 that were written by Static Control that provided
24 for functions that were not found on the Lexmark
25 toner cartridge chip. Static Control is developing

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1 now new generations of toner cartridge chips. And
2 these new chips will contain original computer
3 programs that perform additional functions also not
4 found on the Lexmark toner cartridge chip.

5 Now, I note that Lexmark has contended
6 before the court in LExington, Kentucky that even
7 these new chips that would infringe no Lexmark
8 copyrights still would be in violation of Section
9 1201(a) and would not be exempt under Section
10 1201(f). Indeed, Lexmark has contended that Static
11 Control would be unable in any circumstance to
12 satisfy the Section 1201(f) exemption or otherwise
13 to avoid the prohibitions of Section 1201(a).

14 Those are the noninfringing uses. The
15 adverse effects are as follows.

16 First, as noted, users would be unable
17 to acquire competing software programs that reside
18 on a toner cartridge chip and provide different and
19 better functionality to users of Lexmark cartridges.
20 This restrains the availability of copyrighted works
21 and it harms the interests of users who would wish
22 to acquire that functionality.

23 Second, competitors who create these
24 additional software programs to provide supplemental
25 controls for Lexmark printers are noninfringing

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1 users of the Lexmark printer engine program, but
2 their ability to create and market these works is
3 hampered by the operation of the technological
4 protection measure.

5 I would note in this regard that over
6 the 4 year lifecycle of these chips, Static Control
7 estimated that the impact of the injunction on its
8 business alone and the impact of the operation of
9 Section 1201 or the application of Section 1201(a)
10 to its business, is more than \$15 million worth of
11 business. That does not take into account the impact
12 on Static Control's competitors or on Static
13 Control's customers.

14 Third, purchasers of toner cartridges
15 for Lexmark printers are compelled by the
16 technological protection measure to purchase new
17 Lexmark cartridges from Lexmark at some point in the
18 product's lifecycle. Absent the technological
19 protection measure, consumers would be free to
20 purchase remanufactured cartridges even at the time
21 of purchasing the printer. There is no need other
22 than the technological protection measure to
23 purchase a Lexmark cartridge at anytime. A consumer
24 could always opt for the cheaper remanufactured
25 cartridge.

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1 According to the figures set forth in
2 the reply comments of the Electronic Frontier
3 Foundation, which comports incidentally with
4 information that Static Control has on the
5 marketplace, Lexmark Prebate cartridges cost
6 approximately 40 percent more than remanufactured
7 cartridges. Non-Prebate cartridges cost
8 approximately 80 percent more than remanufactured
9 cartridges. Thus, the technological protection
10 measure also adversely affects consumer welfare by
11 increasing the cost of printing.

12 Now, why is this particular economic
13 impact important and relevant in the context of this
14 proceeding? Well, the Copyright Office and the
15 Librarian should understand the impact of this
16 technological protection measure increases the cost
17 of printing and disseminating printed material by as
18 much as 80 percent. Consider how many times daily
19 people use computer printers, and for what purpose?
20 Computer printers facilitate the creation and
21 distribution of writings, including works of
22 authorship. Printers are used to disseminate and
23 preserve electronically disseminated material in
24 physical form. Printers are used by educational
25 institutions, libraries, businesses, governments,

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1 individuals whether it is a memorandum, a short
2 story, a poem, a photograph, an email, a business
3 plan, a Power Point presentation or articles from
4 electronic databases such as Lexis or from Internet
5 websites where the printing occurs with permission.
6 The vast majority of printed output from computer
7 printers is printing of copyrighted material.
8 Increasing the cost of printing, therefore,
9 increases the cost of creating, using and
10 disseminating printed copyrighted works.

11 Now thus far the discussion has focused
12 primarily upon the first class of work. But Static
13 Control requested exemption for two remaining
14 classes, broader classes, for two reasons.

15 First, Static Control is painfully aware
16 that an exemption that's too narrowly drawn may
17 inadvertently create a loophole or leave some wiggle
18 room for Lexmark or others to devise equally novel,
19 creative and unanticipated strategies to prevent
20 competition from e-manufacturers. A more broadly
21 defined class of works would help to remedy this
22 concern.

23 Second, when word of the Lexmark lawsuit
24 is spread, Static Control was contacted by
25 representatives of other industries that rely on the

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1 right to remanufacture after market parts. And these
2 other industries were equally concerned at the idea
3 that if Lexmark were successful here, Section 1201
4 might next be wheeled against them. Given the
5 ubiquity of computer software, it takes little
6 creativity to imagine scenarios in other industries
7 in which original parts manufacturers have attempted
8 to shutout after-market competitors.

9 For example, modern automobiles rely on
10 small software routines embedded in chips throughout
11 the vehicle. What would be the impact if Section
12 1201 could be used in the precise way it's being
13 used here to require that batteries, headlights,
14 turn signals, air filters, spark plugs, disc breaks,
15 oxygen sensors, water pumps, mufflers, tires, even
16 gasoline be purchased only from specific vendors who
17 are authorized to circumvent a technological
18 protection measure being applied by the original
19 equipment manufacturer of these parks?

20 As here, the real object of such
21 protection measures is market share in
22 noncopyrightable goods, but the means being employed
23 is an overly broad application of the DMCA to small
24 embedded software programs that have no value other
25 than controlling machine functions. For that

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1 reason, two automobile remanufacturing associations
2 filed amicus briefs with the District Court in the
3 Kentucky litigation brought by Lexmark, and they
4 expressed their concerns as to how their industry
5 could be effected by an expansive reading of Section
6 1201.

7 If an exemption is not granted, then
8 Section 1201(a) claims could be lodged in any number
9 of circumstances that seems strange and
10 unforeseeable to you today. Couldn't copy machines
11 be rigged to work only where they read the watermark
12 on certain brands of blank paper? Couldn't vacuum
13 cleaners be constructed to work only in the presence
14 of software embedded in the tag on vacuum cleaner
15 bags? Couldn't ball point pens be made to work only
16 with a chip embedded on a genuine refill?

17 And if you're sitting here now thinking
18 to ourselves how preposterous this all seems,
19 transport yourselves back 5 years to where we all
20 were in the midst of heated and contentious debates
21 about Section 1201(a). Congress did not consider
22 this scenario in 1997 and 1998. Just imagine the
23 reaction that Representative Coble or Senator Hatch
24 would have had to the scenario that's before us.
25 The use of Section 1201(a) to protect toner

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1 cartridges or garage door openers. I dare say they
2 would have dismissed the possibility that a lawsuit
3 under such a theory could ever be brought as being
4 farfetched and ridiculous. But I submit that they
5 always would have said that's not what the DMCA is
6 intended to protect.

7 Section 1201(a) grew from the white
8 paper report of the National Information
9 Infrastructure Task Force on Intellectual Property
10 and the WIPO treaties. Section 1201(a)
11 fundamentally was intended to protect the
12 marketplace for copyrighted works in digital formats
13 in the coming electronic marketplace for copyrighted
14 works. It was not intended to protect markets for
15 consumable noncopyrightable machine parts.

16 Now, briefly I would like to address the
17 suggestions of two other reply commenters,
18 specifically June Besek and Lee Hollar, for revised
19 class definitions.

20 First, Static Control greatly
21 appreciates support of these commenters who are both
22 very well known in their respective fields. Static
23 Control believes that Ms. Besek's comments were
24 right on when she wrote, "Allowing equipment
25 manufacturers to leverage the protection provided to

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1 copyrighted works by 1201, to preserve monopolies in
2 replacement parts or maintenance and repair services
3 upsets this delicate balance," that is the balance
4 between rights of copyright owners and the
5 privileges of users, "and undermines the DMCA."

6 Static Control could accept the
7 formulations recommended by either of these
8 commenters, but we would suggest that Ms. Besek's
9 proposed formulation be amended somewhat so as to
10 more clearly cover situations such as here where the
11 technological measure applies to the operation of
12 more than one program. So this could be addressed by
13 changing her last phrase to state: "But that do not
14 control access to or use of any copyrighted work
15 other than the embedded computer programs
16 themselves." Essentially turning the singular into
17 a plural.

18 MS. PETERS: A plural.

19 MR. GREENSTEIN: Congress established
20 this proceeding as a safety valve to be used when
21 circumstances demonstrate an overly broad
22 application of Section 1201(a) that creates palpable
23 harm to noninfringing uses of copyrighted works. As
24 I noted before, in truth this case presents no valid
25 claim under Section 1201(a). But in light of the

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1 finding of the district court and the substantial
2 adverse impact that the ruling has had on Static
3 Control, the remanufacturing industry and the
4 public, Static Control urges the Copyright Office
5 and the Librarian to grant the requested exemptions.

6 Thank you.

7 MS. PETERS: Thank you, Mr. Greenstein.

8 Mr. Oman?

9 MR. OMAN: Thank you for the
10 opportunity--

11 MS. PETERS: There's a switch.

12 MR. OMAN: Thank you for the opportunity
13 to testify, and for the privilege of being part of
14 such a distinguished panel.

15 I hope hearing me testify will bring
16 back some memories of my days as Register of
17 Copyrights, and that at least some of those memories
18 are pleasant.

19 At the trial in Lexington, Kentucky that
20 Mr. Greenstein made reference to, I was surprised to
21 learn that the SCC urged the Judge to draw a
22 favorable conclusion as to the merits of the SCC
23 case based on the fact that the Copyright Office had
24 granted its request for a hearing on the DMCA
25 exemption, even though the timeliness for the filing

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1 of a request had expired. And I hope that we can
2 assume this morning that your great kindness and in
3 allowing SCC's late filing does not indicate in
4 anyway a predisposition as to a finding in its
5 favor.

6 MS. PETERS: You are so assured.

7 MR. OMAN: Thank you.

8 In any case, I am pleased to appear
9 today to testify on the proposed exemption.

10 SCC has asked the Librarian to create
11 the exemption to Section 1201(a)(1)(A) that would
12 allow it to circumvent the technological protection
13 measure that prevents SCC from accessing the
14 copyrighted computer programs that Lexmark
15 International uses on some of its toner cartridges
16 and laser printers. Lexmark respectfully submits
17 that there is no need for the proposed exemption.

18 Let me start with some of the basics.
19 Mr. Greenstein has already given his fact pattern. I
20 will add my two cents to it as a means of
21 clarification and illumination.

22 Lexmark is, in fact, a leading
23 manufacturer and supplier of laser printers and
24 toner cartridges. Lexmark has developed a computer
25 program that controls the operation of T-series

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1 laser printers and two computer programs that, among
2 other things, approximate the level of toner in the
3 cartridges that are used in those printers. All of
4 those programs have been registered with the
5 Copyright Office.

6 Lexmark has developed a technological
7 protection measure or an authentication sequence
8 that prevents others from gaining unauthorized
9 access to these computer programs in certain
10 circumstances. This technical measure is embedded in
11 Lexmark's T-series printers and toner cartridges.

12 Basically the technical measure performs
13 a "secret handshake" whenever a certain type of
14 toner cartridge is inserted into a Lexmark printer
15 or whenever the printer is turned on. If the secret
16 handshake is successful, the printer will access and
17 run the printer engine program and the toner loading
18 program. But if the secret handshake is not
19 successful, the printer will issue an error message
20 and will not access or run those programs.

21 Why does Lexmark use this technical
22 measure? It does so to protect the computer program
23 that is stored on its laser printers and the
24 computer programs that are stored on Lexmark's toner
25 cartridges.

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1 Lexmark sells two types of toner
2 cartridges, as Mr. Greenstein has observed, namely
3 Prebate and non-Prebate cartridges. Lexmark offers
4 its Prebate cartridges at a discount. In return for
5 this discount -- a sort of front-end rebate, or
6 Prebate cartridges, the consumer agrees to return
7 the empty Prebate cartridge only to Lexmark so that
8 Lexmark can recycle the cartridge through its own
9 remanufacturing programs.

10 Now, to facilitate the return, Lexmark
11 provides a preaddressed, prepaid shipping carton for
12 the consumer to use.

13 The microchip on Lexmark's Prebate
14 cartridges contains the technical measure that
15 prevents the consumer from reusing that cartridge
16 after it runs out of toner. If the consumer refills
17 the cartridge instead of returning it to Lexmark for
18 remanufacturing, the secret handshake will prevent
19 the consumer from accessing the printer engine
20 program and the toner loading program when the
21 cartridge is inserted in the Lexmark printer or when
22 the printer is turned on. So Lexmark's technical
23 measure ensures that consumers will return their
24 discounted Prebate cartridges to Lexmark for
25 remanufacturing.

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1 Lexmark's non-Prebate cartridges are
2 different in several important respects. First of
3 all, when the consumer buys a non-Prebate cartridge,
4 he does not receive the up -- front discount on the
5 price of the cartridge.

6 Second, the microchip does not prevent
7 the consumer from refilling and reusing that
8 cartridge in a Lexmark printer.

9 And third, when a non-Prebate cartridge
10 runs out of toner, the consumer is not required to
11 return that cartridge to Lexmark for
12 remanufacturing. So consumers can refill and reuse a
13 non-Prebate cartridge over and over again, or a
14 third party remanufacture can refill and resell
15 those cartridge over and over again.

16 Consumers can also buy a remanufactured
17 cartridge from Lexmark, and they can buy a
18 remanufactured cartridge from a company that sells
19 refilled non-Prebate Lexmark cartridge.
20 Remanufactured non-Prebate cartridges are compatible
21 with Lexmark's laser printers. They permit the
22 authorized access to the printer engine program and
23 the toner loading programs.

24 Now, please let me summarize the
25 consumer options in these cases.

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1 Consumers can buy a new Prebate
2 cartridge from Lexmark. They can buy a new non-
3 Prebate cartridge from Lexmark. They can buy a
4 remanufactured cartridge from Lexmark. Or they can
5 buy a remanufactured non-Prebate cartridge from any
6 other cartridge remanufacturer. Lexmark's technical
7 measure only prevents consumers from using one type
8 of toner cartridge; third party remanufactured
9 Prebate cartridges. So Lexmark's anti-circumvention
10 measure does not prevent consumers from gaining
11 access to copyrighted works across the board.

12 Now, let's look at the SCC operation, if
13 I might. SCC, as Mr. Greenstein mentioned,
14 manufactures and sells components to the toner
15 cartridge remanufacturing industry, such as
16 microchips for use in connection with refilled toner
17 cartridges.

18 Recently SCC began selling a new type of
19 single use microchip called Smarttek. Each of these
20 microchips contains an exact reproduction of
21 Lexmark's toner loading program. SCC admits that it
22 slavishly copied Lexmark's toner loading programs in
23 the exact format and order. SCC also admits that it
24 designed these microchips to circumvent the
25 technical measure that controls access to Lexmark's

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1 computer programs.

2 When a toner cartridge containing a
3 Smartek chip is inserted into a Lexmark printer, the
4 chip mimics Lexmark's secret handshake. This fools
5 the printer into accessing the printer engine
6 program that is stored on the printer and the
7 infringing copy of Lexmark's toning loading program
8 that SCC has pirated and incorporated into the
9 Smartek chip.

10 Why did SCC circumvent Lexmark's secret
11 handshake? So that their customers, the after-
12 market remanufacturers, could refill, recycle and
13 resell Lexmark's one-time use cartridges, namely the
14 cartridges that are sold through the Prebate
15 program. This gives the remanufacturing industry a
16 competitive advantage, because Prebate cartridges
17 are less expensive than non-Prebate cartridges. By
18 refilling Lexmark's Prebate cartridges the
19 remanufacturing industry can sell their
20 remanufactured cartridges at a lower price than if
21 they used components from Lexmark's non-Prebate
22 cartridges. In doing so, they rob Lexmark of the
23 use of Prebate cartridges for its own
24 remanufacturing program and injure Lexmark for
25 having given the customer an up-front rebate.

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1 So it should come as no surprise that
2 the Smartek chip has been extremely profitable for
3 SCC. And it should come as no surprise that SCC's
4 proposed exemptions are not really designed to
5 address a substantial effect on the noninfringing
6 use of copyrighted works: They are simply designed
7 to preserve SCC's enormous profit margins.

8 And there's an odd twist to this story.
9 The panel should also be aware that SCC's Smartek
10 chip itself contains a technological protection
11 measure that prevents consumers from reusing that
12 chip in a subsequent effort to refill the cartridge
13 without authorization. In other words, if the
14 consumer refills his or her cartridge without buying
15 a new microchip from SCC, SCC's technological
16 protection measure will prevent the consumer from
17 any further reuse or refilling of that cartridge.
18 And I would think that SCC could have developed a
19 multiuse chip similar to the one that Lexmark uses
20 on its non-Prebate cartridges, but such a multiuse
21 chip would not guarantee repeat business for SCC.

22 Now I'd like to address the specific
23 DMCA issues that have been raised.

24 First, SCC's request for a special
25 exemption is, in my view, premature. As was

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1 mentioned, Lexmark sued SCC for violating Sections
2 106 and 1201 of the Copyright Act and sought a
3 preliminary injunction to prevent SCC from
4 trafficking in its Smartek chips. In that case, SCC
5 made the same arguments that it has made in this
6 rulemaking proceeding. After an all day hearing on
7 the motion for a preliminary injunction, the U.S.
8 District Court for the Eastern District of Kentucky
9 considered and, in fact, rejected arguments that SCC
10 made along the lines of the arguments it made this
11 morning.

12 For example, the District Court
13 concluded that Lexmark's computer programs are, in
14 fact, eligible for protection under Section 1201 and
15 that Lexmark's technical measure does not harm the
16 environment, does not harm consumers, and does not
17 harm the remanufacturing industry.

18 The District Court also concluded that
19 SCC should be prevented from distributing any device
20 that circumvents Lexmark's technological protection
21 measure, and it issued a preliminary injunction that
22 remains in effect today.

23 SCC has appealed the Court's decision to
24 the Sixth Circuit and has asked the Court to
25 consider its appeal on an expedited basis. Lexmark

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1 has not opposed that request.

2 If the Sixth Circuit grants SCC's
3 request for an expedited treatment, the Court could
4 hold oral arguments sometime this fall and issue its
5 decision sometime next year.

6 I also should add, and as you no doubt
7 know, SCC has filed an antitrust lawsuit against
8 Lexmark in the U.S. District Court for the Middle
9 District of North Carolina, and in that case SCC has
10 made the same arguments that are at issue in this
11 proceeding, namely that Lexmark's technical measures
12 violates the antitrust laws and constitute copyright
13 misuse. We shall see.

14 At your last rulemaking proceeding, the
15 Copyright Office made it clear that when a
16 circumvention claim is being challenged in federal
17 court, the Librarian should proceed with caution
18 before he creates a brand new exemption that expands
19 the scope of the statutory exemptions that may apply
20 in the case at hand. And I refer, of course, to the
21 final rule in which the office determined that there
22 was no need to create a reverse engineering
23 exemption for DVDs because the Southern District of
24 New York specifically addressed that issue in the
25 Reimerdes case and because that issue was still on

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1 appeal.

2 In this case, SCC has argued that the
3 Smartek chip should be protected under Section
4 1201(f), the reverse engineering provision, and that
5 SCC should be allowed to circumvent Lexmark's
6 technical measure because it violates the antitrust
7 laws and constitutes copyright misuse. The District
8 Court of the Eastern District of Kentucky considered
9 these arguments and, again, rejected them.

10 In the unlikely event that the Sixth
11 Circuit reverses that decision on appeal, then the
12 Librarian would have no need to create a special
13 exemption for SCC under 1201(a)(1)(C). Therefore,
14 Lexmark submits that SCC's request for a special
15 exemption is not ripe for consideration at this
16 time.

17 The second point I would like to make is
18 that SCC has failed to satisfy its burden of proof.
19 Even if the Copyright Office decides to consider
20 SCC's request at this time, despite the pending
21 litigation, Lexmark respectfully submits that there
22 is no need to create a special exemption for SCC or
23 any other member of the toner cartridge
24 remanufacturing industry.

25 In its initial notice of inquiry, the

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1 Office provided a thorough explanation of the legal
2 standards that apply in this rulemaking proceeding.
3 The Office explained that the prohibition set forth
4 in Section 1201(a)(1)(A) is extremely broad. It
5 presumptively applies to any technical measure that
6 effectively controls access to any and all classes
7 of works.

8 The Office explained that the Librarian
9 of Congress may create a limited exemption to the
10 prohibition on circumvention only in exceptional
11 cases and only if the Librarian determines that the
12 prohibition has a substantial adverse effect on
13 noninfringing uses of a particular class of work.
14 So the proponent of a proposed exemption, in this
15 case SCC, must do three things: It must identify a
16 particular class of work; it must identify specific
17 activities that are adversely affected by the
18 prohibition on circumvention and; third, it must
19 establish that these activities are in fact
20 noninfringing uses under current law.

21 And the proponent also has the burden on
22 all of these issues. SCC must identify the
23 noninfringing uses of the copyright-protected class
24 of works that are adversely affected by the
25 prohibition on circumvention and must establish that

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1 these activities are in fact noninfringing uses
2 under current law.

3 And one more point. SCC must provide
4 concrete examples, not speculation, concrete
5 examples of how the prohibition on circumvention has
6 adversely effected these noninfringing activities.
7 The notice of inquiry is very clear on this point,
8 quoting, it says "Actually instances of verifiable
9 problems occurring in the marketplace are necessary
10 to satisfy the burden with respect to actual harm."

11 Simply put, SCC has failed to identify
12 any noninfringing uses that are adversely affected
13 by Lexmark's technical measure. In the same way,
14 SCC has not provided any evidence that Lexmark's
15 technical measure has had any effect on the public's
16 ability to use any class of copyrighted works, let
17 alone a substantial adverse effect on the public's
18 ability to engage in specific noninfringing uses.
19 As I see it, the evidence in the record only
20 demonstrates that SCC bypassed Lexmark's technical
21 measure in order to make slavish infringing copies
22 of Lexmark's computer programs, and that's not a
23 noninfringing use.

24 Let me also comment on Lexmark's
25 technical measure as it is specifically protected

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1 under Section 1201(a)(1)(A). SCC has argued that
2 the DMCA was not intended to protect a computer
3 program that controls the operation of a laser
4 printer or toner loading cartridge. SCC claims that
5 the DMCA was only intended to protect copyrighted
6 works that are reproduced and redistributed in the
7 online environment.

8 SCC has also argued that the DMCA was
9 not intended to protect Lexmark's embedded computer
10 programs because these programs do not have any
11 economic value separate and apart from Lexmark's
12 printers and Lexmark's toner cartridges. SCC made
13 these same arguments in the case in the U.S.
14 District Court in the Eastern District of Kentucky
15 and, as we all know, the District Court considered
16 and rejected them. The District Court considered,
17 and I quote, "The DMCA is not limited to the
18 protection of 'copies of works such as books, CDs
19 and motion pictures that have an independent market
20 value.'" Indeed, the Court noted that the few
21 cases decided under the DMCA provide that Section
22 1201(a) applies to the very type of computer software
23 that Lexmark seeks to protect and the very type of
24 access protection regime Lexmark has employed to
25 protect it. I think the Judge had the Game Masters

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1 case in mind in that quote.

2 One particular fact has a bearing on
3 this proceeding, and one that I would like to
4 mention as I'm drawing to an end here. Lexmark's
5 computer programs are available in an unprotected
6 format. And I think that is a plus from the point of
7 view of the limits of this rulemaking inquiry.

8 During the last rulemaking the Copyright
9 Office explained that the Librarian should not
10 create a special exemption for works that are
11 available in a format that does not contain any
12 technological protection measures "even if that is
13 not the preferred or optimal format for use." As I
14 said earlier, Lexmark uses a technical measure on
15 its Prebate cartridges that prevents consumers from
16 accessing Lexmarks printer engine program and toner
17 loading programs if the consumer attempts to use
18 Prebate cartridges after they run out of toner. By
19 contrast, the microchip on Lexmark's nonprobate
20 cartridges does not prevent the consumer from
21 gaining authorized access to the printer engine
22 program and the toner loading programs so consumers
23 can, in fact, refill and reuse the same cartridge
24 over and over again.

25 Obviously, remanufacturers would prefer

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1 to use the toner cartridges that Lexmark sells
2 through its Prebate programs because they're less
3 expensive than the non-Prebate cartridges and they
4 would generate even greater profits. But as a
5 practical matter, remanufacturers don't need to
6 circumvent Lexmark's technical measure in order to
7 make cartridges that are compatible with Lexmark's
8 laser printers. Instead, they can remanufacture and
9 resell new cartridges that Lexmark sells through its
10 non-Prebate program.

11 So even if SCC could prove that
12 Lexmark's technical measure adversely effects the
13 public's ability to make noninfringing uses of
14 Lexmark's computer programs, which I doubt, the fact
15 that Lexmark makes those programs available without
16 restriction to consumers and remanufacturers on non-
17 Prebate cartridges should alleviate those effects
18 and eliminate the need for this special exemption.

19 Actually, despite all of the huffing and
20 puffing that we've heard, Lexmark's Prebate program
21 really is a pro-competitive model. During the last
22 rulemaking, the Copyright Office explained that the
23 Librarian should not create a special exemption for
24 technical measures that create a "use facilitating
25 model" that is likely to benefit the public. The

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1 public seems to like the Prebate system. Lexmark's
2 technical measure benefits the public by making
3 Lexmark's toner cartridges and the computer programs
4 that they contain available at a lower cost than if
5 the secret handshake were not in place.

6 Since Lexmark sells its Prebate
7 cartridges at a lower price than the non-Prebate
8 cartridges, Lexmark's technical measure encourages
9 the consumer to return the Prebate cartridges to
10 Lexmark, giving Lexmark a constant supply of
11 cartridges for its remanufacturing program. This
12 system lowers Lexmark's manufacturing costs, which
13 in turn lowers the cost of both the cartridges and,
14 presumably, the operating costs of the printers
15 themselves, and the public benefits.

16 Even more important, the secret
17 handshake prevents remanufacturers from buying used
18 Prebate cartridges, refilling them with toner and
19 then selling the unauthorized cartridges in direct
20 and unfair competition with Lexmark's cartridges.
21 If Lexmark were unable to prevent this type of
22 cartridge cannibalism, it would be unable to sell
23 its Prebate cartridges at a discounted price. So
24 Lexmark's technical measure benefits the public by
25 creating a use-facilitating model that allows the

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1 public to obtain toner cartridges and computer
2 programs that are embedded in them at a price lower
3 than the price that they would pay if this measure
4 were not in place.

5 The logical follow-up question is:
6 Would the public benefit if Lexmark were forced to
7 abandon the Prebate program because of SCC's
8 infringing activities? I think the answer to that
9 question is no.

10 In conclusion, let me just say that I
11 would hope that the Copyright Office would reject
12 SCC's request for a special exemption from the anti-
13 circumvention prohibitions of the DMCA. And I would
14 be pleased to answer any questions at the
15 appropriate time, either now or in writing.

16 Thank you very much, Madam Chairman.

17 MS. PETERS: Thank you, Mr. Oman.

18 Professor Ginsburg?

19 PROFESSOR GINSBURG: Thank you very much
20 for allowing me to appear before you.

21 First of all, I am not here for any
22 party. And I'm also not here to discuss the merits
23 of the Lexmark case. I'm here to explore the
24 implications of the resort to 1201(a) in that case,
25 but not the decision itself. And I'll say at the

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1 outset that the remarks that follow are all based on
2 the premise that the Copyright Act was not intended
3 to be used and should not be used to secure the
4 after-market for replacement parts and other
5 noncopyrightable goods.

6 Given that premise, does it therefore
7 follow that a special class of circumventable works
8 is necessary? I note, by the way, that even were
9 such a class necessary, it would not be sufficient
10 because the listing of a class does not entitle the
11 circumventer then to distribute a device. And I
12 think that the problem that we're exploring is
13 essentially one of circulation of devices. So, even
14 if necessary, not sufficient.

15 As to whether or not such a class if
16 necessary, I am actually quite uncertain and tend to
17 think that it is not necessary. But just in case,
18 at the end of these remarks I will propose a class
19 which is essentially a refinement of the class that
20 was proposed by my colleague at the Kernochan
21 Center, June Besek.

22 Okay. So why am I uncertain that a class
23 is necessary at all? For two reasons.

24 First of all, I don't think that 1201(a)
25 was meant to reach this sort of problem. And second,

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1 I believe that 1201(f) permits the activities that
2 are necessary to make, use and distribute a
3 noncopyrightable replacement part. If either of
4 those propositions are correct, then it is not
5 necessary to create or list a special class.

6 First, with respect to 1201(a). I do
7 not believe that it covers the circumvention of a
8 technological measure that controls access to a work
9 not protected under this title. And if we're talking
10 about ball point pen cartridges, printer cartridges,
11 garage doors and so forth, we're talking about works
12 not protected under this title.

13 As has already been stated here and in
14 many of the filings, there's nothing in the
15 legislative history that would suggest that such a
16 result was intended. The legislative history points
17 to Congress' desire to protect copyrighted works
18 against circumvention.

19 And moreover, looking at the structure
20 of the statute, if one looks at the factors that
21 this Office is now considering in Section
22 1201(a)(1)(C), the predominately are seeking to
23 access whether access controls improperly lock
24 copyrighted works away from archival, educational,
25 critical or research uses. Although there is indeed

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1 a catch-all factor 5, I think the overall thrust of
2 these factors are addressing the impact on
3 copyrighted works of the protection of access
4 controls.

5 That said, there is a literal reading of
6 1201(a) which would reach noncopyrightable
7 replacement parts to the extent that those parts are
8 controlled by computer programs. So the argument
9 would be that the technological measure effectively
10 controls access to a computer program that makes the
11 replacement part work. And that would be the hook
12 for prohibiting circumvention. I think that is a
13 somewhat wooden reading of the statute and don't
14 think it's a necessary reading of the statute, but
15 acknowledge that is a possible reading of the
16 statute.

17 Given that, I then move on to the next
18 question, which is whether even if on a rather
19 literal reading 1201(a) would prohibit the
20 circumvention of access controls protecting access
21 to a computer program that controls a
22 noncopyrightable good, would Section 1201(f)
23 nonetheless permit the making, using and
24 distributing of noncopyrightable replacement parts?
25 And in analyzing Section 1201(f), I think it's

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1 helpful to place it in the context that gave rise to
2 it. That is, I think the general understanding that
3 in passing Section 1201(f) Congress was seeking to
4 preserve the result in Sega v. Accolades.

5 Now, that was a case in which Accolade,
6 an independent producer of video games sought to
7 make games that would be capable with the Sega
8 console and reverse engineered the operating system
9 of the Sega console in order to figure out how to
10 make their independently generated video game play
11 on that piece of hardware. And that was held to be
12 fair use by the Ninth Circuit. And I think it's
13 generally recognized to be fair use.

14 The problem is that in what I'll call
15 "son of Sega," one could imagine that Sega would
16 interpose a technological measure controlling access
17 to the operating system in the console so that even
18 if you have an independently produced video game, it
19 will no longer run on the console because it can't
20 get to the operating system with which it has to
21 communicate in order to run on the console. And
22 that would clearly frustrate what is generally
23 recognized to be a fair and desirable use.

24 And so I think that the way 1201(f)
25 works, it would avoid that result through the

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1 following means: 1201(f) allows circumvention of
2 the access control in order to create the program,
3 the interoperatable program in the first place. But
4 if that's all it did, you would have the impasse
5 problem. Now you've created the program but you
6 can't use the program because, in effect, to use the
7 program you have to engage in recurring acts of
8 circumvention every time that you want to have the
9 video game run on the console. And I understand the
10 language in 1201(f)(2) in the second part of (f)(2)
11 or for the purpose of enabling interoperatability of
12 an independently created program with other programs
13 to mean circumvention in order to be able to use the
14 program that you have lawfully created pursuant to
15 the terms of (f)(1) and fair use precepts generally.

16 So under (a)(1) you could make the
17 independent video game. Under (f)(2) you can use
18 the independent video game. And I believe under
19 (f)(3) you can distribute to the public the
20 independently generated video game that contains a
21 component that circumvents the access control on the
22 operating system of the console, so long as that's
23 all it does. (f)(3) does endeavor to make sure that
24 the tail doesn't wag a larger dog. But assuming
25 that the access circumvention device is

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1 appropriately designed, 1201(f) would allow you to
2 make the program, use the program and distribute the
3 program.

4 Now, let's apply that analysis to
5 replacement parts. Let's take a car door. And since
6 I don't drive, I don't know if this is still the
7 case, but I do remember a time when a computer
8 generated voice would speak to you and tell you "A
9 door is ajar," meaning not that it's a container,
10 but that it not properly closed. Now that was a
11 computer program that would recognize if the door
12 had not been properly closed or locked and would
13 tell you. Okay. There is a computer program in the
14 door, and there is a computer program somewhere else
15 in the car that talked to each other to let you know
16 if the door is opened or closed.

17 Now I'm the Ford Motor Company. And I
18 would like to make sure that the next time
19 somebody's door is damaged in a accident, that the
20 customer must buy a Ford door or a Ford approved
21 replacement door and some other replacement door.
22 And I can do this, perhaps, if I say I've two
23 computer programs here. The door program can't talk
24 to the car program if I interpose an access control.

25 So now let's say I'm Crash Parts, Inc. I

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1 want to make a compatible door. But I can't do it
2 because there is the access control. That's where
3 1201(f) comes in. 1201(f) says, first of all, I can
4 circumvent the access control to figure out how to
5 make a compatible door is ajar program with the car
6 computer somewhere else in the car. Then (f)(2)
7 says I can use my door because it doesn't do me any
8 good to make the door if I can't actually use the
9 door, and similarly (f)(3) says that I can sell a
10 door that will work on a Ford car, even though it's
11 not a Ford approved door.

12 Now, if I'm correct in that analysis,
13 then the question would be is there anything that
14 1201(f) doesn't cover that it should cover in order
15 to deal with the replacement part problem? And
16 there I'm not sure that we have a record that will
17 let us answer that question. Where there could be a
18 gap is in the definition in (f)(4) of what
19 inoperatability means which states the ability of
20 computer programs, plural, to exchange information
21 and of such programs mutually to use the information
22 which has been exchanged. So the premise is that you
23 have in the host machine a program and in the
24 replacement part a program and they're going to talk
25 to each other. And if that's how it's set up, then

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1 I think my analysis of 1201(f) would cover that
2 replacement part.

3 But what if there is a computer program
4 that talks to something that is not a computer
5 program? I don't know what this would look like. I
6 am simply posting that possibility.

7 If that is the case, then perhaps
8 1201(f) doesn't cover the entire problem. And in
9 that case, perhaps some carefully designed class
10 would be desirable. But I put in all these perhaps
11 because as far as I can tell, we don't have the
12 evidence that would tell us whether or not there is
13 a gap.

14 My other concerns are, given the lack of
15 evidence it's rather difficult to define what that
16 class should look like. And I'm also quite concerned
17 that I wouldn't want the definition of a class to
18 prompt a negative inference that 1201(f) doesn't
19 excuse the creation, use and distribution of the
20 replacement part or that, by the same token, that
21 1201(a) reaches this conduct in the first place.
22 Because the obvious argument would be if you didn't
23 need a class, why did you list one? If you listed
24 one, that must mean that 1201(a) reaches this and
25 1201(f) doesn't forgive it. So I would be very

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1 nervous about potential negative inferences that
2 could be drawn wee such a class to be articulated,
3 plus the limited utility of such a class given that
4 it only reaches the active circumvention, not the
5 distribution of the device.

6 That said, and in conclusion, the
7 attempt -- and I acknowledge that it is a continuing
8 attempt to define an appropriate class -- would be
9 as follows, and I did distribute some observations
10 with this language.

11 Computer programs that control access to
12 a physical machine or device in order to restrict
13 use of substitute or replacement parts for that
14 machine or device, where the substitute or
15 replacement parts do not embody a work protected
16 under this title other than a computer program that
17 controls the use of those parts.

18 The problem was figuring out how to
19 draft language that would address the replacement
20 parts issue more broadly than just toners and
21 cartridge, but not so broadly as to create a giant
22 exception for replacement copyrightable works.

23 Thank you.

24 MS. PETERS: Okay. Thank you.

25 Mr. Greenstein, the panel noticed that

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1 you were shaking your head during some of the
2 testimony of Mr. Oman, and I wanted to offer you an
3 opportunity to make any statements in rebuttal at
4 this moment, if you wish.

5 MR. GREENSTEIN: Thank you. I apologize
6 if I distracted the panel in anyway.

7 MS. PETERS: No, you didn't distract us.

8 MR. GREENSTEIN: I think there were a
9 few points that I would like to address. One is
10 really, I think, not particularly relevant to this
11 proceeding but nevertheless it has a kind of an
12 atmospheric effect, if you will. And that is this
13 issue of whether Static Control was slavishly
14 copying or pirated software.

15 And certainly Lexmark in its comments,
16 you know, kind of tried tar Static Control with a
17 rather broad rush as a wilful infringer, but Static
18 Control is really nothing of the sort. Static
19 Control devoted months of effort to analyze the 128
20 bytes of hexadecimal code that's found on the
21 Lexmark toner chip. It's not a lot of code, but
22 hexadecimal code is just numbers. It doesn't have
23 any significance to the viewer unless you have some
24 contextual information that explains what that is.

25 Indeed, Lexmark's trial expert conceded

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1 on the stand that hexadecimal code without such
2 contextual information is just a meaningless string
3 of numbers.

4 So until the complaint was filed, Static
5 Control did not know that there was a toner loading
6 program or any copyrighted work on the chip.

7 Indeed, we had no way of knowing that that small
8 number of bytes, 34 or 55 bytes, constituted a toner
9 loading program. As we noted in our papers, that
10 number of bytes is in fact less information than is
11 necessary to write the name and the title of the
12 Librarian of Congress.

13 There is no copyright notice that
14 appears on the chip, and even the shrinkwrap license
15 that accompanies the Prebate cartridge does not
16 refer to copyright. It refers only to patents with
17 respect to any intellectual property whatsoever.

18 And it was well known from prior models
19 of printers that the toner loading program, the
20 toner measuring program, if you will, was found in
21 the printer engine software and not on the chip
22 itself.

23 So in our reverse engineering efforts,
24 what Static Control did is we followed the path of
25 the data on the chip to try to determine what it was

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1 and how it operated. And what we found was that
2 these few bytes of data that Lexmark has said
3 constitutes its toner loading program were fed into
4 the same super charged SHA1 encryption algorithm,
5 the hash algorithm, that was used to perform the
6 technological protection measure authentication. And
7 we found that if any bit of those bytes was changed,
8 then the printer displayed the error message and
9 wouldn't work.

10 And so with no evidence to the contrary
11 and having done about as much as Static Control
12 could without contextual information, we determined
13 in our view that what those 34 or 55 bytes were was
14 a lock-out code. Essentially a code that also had
15 to match and be fed into the SHA1 algorithm and be
16 exactly as it was or else the printer wouldn't
17 function along with the cartridge.

18 Static Control's technical expert, I
19 guess not surprisingly, but said nevertheless in his
20 independent judgment that that was a completely
21 reasonable belief based on the information that was
22 available to Static Control at the time. That
23 without having access to any of the information
24 concerning the chip that Lexmark closely guarded as
25 a trade secret, even within its own company, it

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1 would take billions of attempts to try to unlock the
2 secret and determine what it was otherwise through
3 dumb luck or brute force.

4 So, putting aside the question of
5 whether the toner loading program is properly
6 protectable by copyright, you know, it may expedient
7 in litigation for Lexmark to call Static Control a
8 pirate or say that we've engaged in slavishly
9 copying, but I think it strains credulity to contend
10 that Static Control can be branded a willful
11 infringer for copying something that they had no
12 reasonable ability to know was a copyrighted work
13 and, in fact, where they reasonably believed that
14 the string of numbers instead was simply a
15 noncopyrightable lock-out code.

16 The next handshake that I had from
17 listening to Mr. Oman's remarks was his odd twist
18 that the Static Control chip has a technological
19 protection measure. There is nothing of the sort
20 that Static Control inserts on there. If there is
21 anything, it is the result of these bucket bytes
22 that I referred to earlier, which is something that
23 is required on the Lexmark chip for operation. But,
24 if anything, you know would prevent some aspect of
25 operation of the Static Control chip. In its

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1 initial incarnation it was the bucket bytes that
2 were Lexmark's creation, not Static Controls.

3 And I guess the last point that I want
4 to address now is this idea that somehow or another
5 in our antitrust suit we are raising the same claims
6 that are issue here. Nothing of the sort is true.
7 The antitrust claims are based purely on the
8 business model of Prebate. It has nothing to do
9 with copyright misuse. It has nothing to do with
10 the technological protection measure. It is purely a
11 matter of attacking the business model as
12 anticompetitive and violative of the antitrust laws.

13 MS. PETERS: Okay. Thank you.

14 Do you want to add anything at this
15 point?

16 MR. OMAN: I'm glad it was just shaking
17 of the head rather than audible sighs. Audible
18 sighs are in disfavor.

19 I thought that I was quoting the SCC
20 expert when I said that there was an admission that
21 it was slavishly copied. And I suppose it could
22 have been done inadvertently at the outset, but
23 certainly once they learned that this was a computer
24 program, that it was registered in the Copyright
25 Office, and that it was fully protected by

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1 copyright, they could have unilaterally moved to
2 stop the infringing activity. And as far as I know,
3 did not attempt to do so. And I think that would
4 move them into the category of being a willful
5 infringer.

6 I was remiss, Madam Chairman, at the
7 outset by not introducing my colleagues at the
8 panel. If I may do so now?

9 MS. PETERS: Certainly.

10 MR. OMAN: Mr. Joseph M. Potenza of the
11 law firm of Banner & Witcoff on my left. And on my
12 far left, Mr. Christopher J. Renk, also of the law
13 firm of Banner & Witcoff.

14 And would it be appropriate to ask them
15 to jump in with a comment at this point?

16 MS. PETERS: Why don't we wait until we
17 go to the questions.

18 MR. OMAN: Thank you.

19 MS. PETERS: I think there'll be plenty
20 of time for everybody to have their say.

21 Let me start with a couple of questions.

22 I'm struggling a little bit with the
23 issue of the scope and whether or not the
24 technological protection measure really does
25 effectively control access to a work protected by

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1 copyright law. And my struggle comes from the fact
2 that it's in the record and you mentioned it, that
3 what you're looking at is the computer program. And
4 yet the testimony was that the computer program
5 essentially is an encrypted form, it's available in
6 the non -- what is it called -- Prebate.

7 MR. OMAN: Prebate.

8 MS. PETERS: Prebate. Right. And it's
9 also available on the website. So the computer
10 program itself seems to be not really what's being
11 sought to be protected, per se, or kept from
12 anything other than what's embedded as the
13 authentication which controls the operation of the
14 printer and the toner cartridge. So I guess I was
15 getting at the fact that essentially the program
16 that's in the toner cartridge and two of them were
17 in fact registered, it's a fairly short program and
18 they do essentially the same things. The big
19 difference seems to be just the authentication
20 measure. So it's hard to see how you're protecting
21 a computer program as the computer program.

22 MR. OMAN: The Prebate cartridges do
23 prevent people from accessing --

24 MS. PETERS: Accessing that computer
25 program.

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1 MR. OMAN: Yes.

2 MS. PETERS: But essentially the same
3 computer program is in the clear?

4 MR. OMAN: Well, it's the same way with
5 some CDs are copy coded, some CDs aren't copy coded.
6 There are different marketing strategies that are
7 used and the access controls are used for various
8 kinds of works.

9 MS. PETERS: But the difference is that
10 in the CD area, you're really looking at a
11 copyrighted work and under what conditions that
12 copyrighted work is generally going to be made
13 available. And you've got an embedded program that
14 isn't something that's sought to be marketed.

15 MR. OMAN: Well, if I may say so, I
16 think it is marketed in connection with the printer
17 and in connection with the toner loading program --
18 in connection with the cartridge itself.

19 MS. PETERS: But not as a separate
20 copyrightable work?

21 MR. OMAN: That is correct, but it's not
22 my understanding that that is a criteria, as the
23 Court found in the Eastern District of Kentucky that
24 that's not a requirement of the anti-circumvention
25 measure. It has to be a work protected under this

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1 title. It has to be a copyrighted work.

2 MS. PETERS: Okay. I'll take your answer
3 for what it is.

4 Take it one step further. Could you
5 respond to Mr. Greenstein's parade of horribles of,
6 you know, the ball point pen, Professor Ginsburg the
7 car; all of the items in commerce that could in fact
8 be controlled by a computer program so that the
9 original manufacturer is the only one who can do
10 replacement parts?

11 MR. OMAN: This is, in my view,
12 speculation. And there are provisions that relate
13 to reverse engineering that would apply in those
14 circumstances that probably do not apply in this
15 case. And Congress has it certainly within its
16 powers to authorize certain activities and to
17 prohibit certain activities.

18 I thought it was interesting that Ms.
19 Besek, in her comments raised the amendment to
20 Section 117 that Congress enacted at the same time
21 it adopted the Digital Millennium Copyright Act. The
22 thought being that Congress made the policy judgment
23 that a copyright owner could not enforce rights in a
24 copyrighted program to monopolize access to repair
25 services. That's something that Congress is fully

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1 capable of doing within its judgment. I don't think
2 that's the point of this inquiry today.

3 I think we're not making those policy
4 judgments. We are making judgments on a very narrow
5 reading of a very narrow provision. And if Congress
6 wants to get involved in that type of policy debate,
7 as they frequently do when they bring up the issue
8 of design protection, as they have for the past 100
9 years, that is an issue that is legitimate and
10 should be examined. But it's not one of the issues
11 that we're looking at today.

12 MS. PETERS: So your interpretation
13 would be that because of the amendment to Section
14 117 things that there's a replacement part issue or
15 after- providers and they specifically dealt with it
16 in Section 117, and because they didn't deal with it
17 in 1201 they must have known it was there, so it was
18 okay?

19 MR. OMAN: Based on my ten year's
20 experience on Capitol Hill, I think it's a more
21 compelling argument to say that they were aware of
22 it and decided not to get into it rather than they
23 simply forgot or they didn't anticipate it. I think
24 the argument is strong that it was in their mind,
25 they were looking to maintain the status quo in

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1 various areas. And if they had wanted to foreclose
2 this opportunity to works that were not
3 independently marketable, they could have done so.
4 But all the language in the legislative history
5 suggests they wanted to keep it as broad as possible
6 for those technological measures that serve purposes
7 other than protecting individually copyrightable
8 works, like a DVD or a CD.

9 MS. PETERS: Okay. I understand that's
10 your reading.

11 Let me ask about Professor Ginsburg's
12 analysis. Would you agree with Professor Ginsburg
13 in her analysis of what you can accomplish under
14 1201(f)?

15 MR. OMAN: I would, obviously, like to
16 have the opportunity to examine her comment in some
17 detail before formally expressing my views. But I
18 thought it was a fascinating discussion. It was a
19 fascinating discussion of the broader policies
20 involved in what underlies the intellectual property
21 laws of this country, both patents and copyrights.
22 And if Congress wants to get into this policy
23 debate, they're free to do so, but it's not my
24 understanding that that's what we're involved in
25 today. Issues of competition, issues of environment,

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1 issues of interchangeable parts; that is not the
2 very narrow issue that we're examining today. But I
3 would like to certainly pursue that conversation at
4 some point in the future.

5 MS. PETERS: I would sort of disagree.
6 One of the issues here clearly is whether or not the
7 activity that has been raised in this proceeding is
8 already covered by an existing exemption. So, if in
9 fact, you actually accept Professor Ginsburg's
10 analysis and then we go through this, then at the
11 end of the day we make a decision on whether or not
12 there's anything to do or it's already covered. So I
13 was just interested in your reaction to whether or
14 not this type of circumventing for operatability and
15 then being able to distribute what it takes to make
16 it inoperable in a very narrow way is something that
17 you could accept?

18 MR. OMAN: Well, if I can digress for a
19 moment and discuss the issue of reverse engineering
20 and 1201(f). We're not faced with that
21 circumstance. They did not reverse engineer, they
22 copied. If they had reverse engineered and had come
23 up with a noninfringing program, we would be in a
24 different situation both legally and factually.
25 That wasn't the case. And it would be an issue,

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1 perhaps, we could consider down the road if in fact
2 they do reverse engineer the toner loading program
3 and come up with a noninfringing product, fine,
4 let's look at it at that point. But that's not what
5 we're faced with today.

6 MS. PETERS: But you're really talking
7 about the case that's really going through the
8 courts. I'm actually making it broader than that,
9 which is if someone, like Lexmark does, has a
10 program that has an authentication code, can someone
11 who is in the replacement part business use 1201(f)
12 to reverse engineer the authentication piece and
13 then actually put out in the market a chip that
14 would allow the intraoperatability with the Lexmark
15 printer based on reverse engineering of the
16 authentication code?

17 MR. OMAN: In this case the reverse
18 engineering is not necessary, because they can
19 remanufacture the cartridges that are not encoded.
20 We are talking about a situation where in the
21 example that Professor Ginsburg used, the Ford Motor
22 Company could prevent anyone from using a
23 replacement door. That is not the case here.

24 What we're talking about here is various
25 options. There is an option to go for a replacement

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1 part, a replacement cartridge; many options are
2 available. There's only one option that is
3 foreclosed. And I would say that in terms of
4 copyright policy, in terms of antitrust policy, that
5 that is a reasonable limitation on the rights of the
6 user, on the rights of the remanufacturer.

7 MS. PETERS: Okay. You made that point.

8 I think I'll turn it over at this point
9 to Rob.

10 MR. KASUNIC: Thank you.

11 Well, I'm going to be continuing pretty
12 much in the same line of what the Register was just
13 asking, but maybe trying to get a little deeper into
14 that.

15 In terms of the Register's first
16 question, I think part of this is -- and I did
17 provide you a handout which has the one subsection
18 1201(a)(3)(B) on the bottom of the page. And in
19 particular, I'm looking at what does it mean to gain
20 access to a work? Can it really mean to simply use
21 the work for a purely functional or utilitarian
22 purpose without any regard to access of the
23 expression that comprises the copyrightable elements
24 of that work? Doesn't gaining access to the work
25 require the ability to in some way to perceive or to

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1 reproduce, or communicate the components of that
2 work? And let me put that to anyone.

3 MR. OMAN: Let me just repeat something
4 that I said in my testimony, if I could. Access does
5 mean use. Access does mean the ability to use the
6 work as intended. And in the facts of this case,
7 access is available and no one is denying access by
8 the public for a class of works with this technical
9 measure, which was what we were looking at in this
10 rulemaking.

11 MR. KASUNIC: But looking at that, just
12 to follow up on that, is the user of Static Control
13 cartridge gaining access to the Lexmark printer
14 engine program in any real copyrightable sense when
15 it just uses that cartridge?

16 MR. OMAN: Well, it's being used in the
17 manner in which it was intended. And if it weren't
18 functioning, they would certainly be aware of it.

19 I'm not sure that copyrighted works have
20 to be something that someone is looking at
21 specifically to have gained access to it. Many of
22 the programs that are embedded in the car door that
23 Professor Ginsburg was mentioning, I suspect that
24 the consumer is not aware of them being there, but
25 that is not necessarily a criteria that we would

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1 examine in whether or not Section 1201 would apply.

2 MR. GREENSTEIN: If I can address this?

3 MR. KASUNIC: Yes.

4 MR. GREENSTEIN: I think that, perhaps,
5 you know the question is not necessarily so much as
6 what is the meaning of access, but rather what does
7 it mean access to the work, right?

8 In this case access to the work is not
9 the object of protection. As I said in my testimony,
10 it's the means to the end. The real end is to
11 protect the market for noncopyrightable consumable
12 goods. The access to the work is purely an
13 incident. This could have been done through the use
14 of physical switches. The work itself is not
15 particularly relevant. What is relevant as the
16 object of protection is an economic marketplace.

17 MR. KASUNIC: But even if you consider
18 access to the work, when we're talking about
19 computer programs don't we have to make some kind of
20 distinctions when we're talking about functional
21 elements of that program as opposed to the express
22 of elements? Because that's one of the
23 characteristics that's unique about computer
24 programs, that we do a thorough analysis of
25 functionality versus expression.

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1 MR. GREENSTEIN: Yes. I certainly would
2 agree with you. I think in other cases, as I said,
3 involving Section 1201(a) and the definition of what
4 is access, they have involved access to the
5 expressive elements of the copyrightable works.
6 It's been with reference to motion pictures or sound
7 recordings, or books, or video games where that was
8 really the object of protection, that's what the
9 access control measure was intended to protect. And
10 I agree, that's not the case here.

11 What's being protected here is the
12 function of a printer rather than the particular
13 expressive nature of the programs.

14 MR. KASUNIC: Professor Ginsburg?

15 PROFESSOR GINSBURG: I'm a little
16 troubled because I'm not sure the distinction works.
17 I don't know in a computer program the extent to
18 which you can distinguish functionality from its
19 expression without pre-analyzing every computer
20 program. And so it may be that some computer
21 programs which control access to something that is
22 not a work protected under this title, may still
23 contain sufficient copyrightable expression. And
24 when the computer program runs, it runs.

25 So, it sounds good in the abstract, but

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1 I'm not sure that it actually works to distinguish a
2 work from its functionality without wiping out
3 protection for computer programs generally. So,
4 that's why I've had such difficulty trying to figure
5 out if one needed a class, how would you articulate
6 that class without being overbroad as to computer
7 programs.

8 I think there's some evidence in the
9 legislative history, but it cuts two ways, on the
10 distinction between computer programs and other
11 works In the Senate report -- House report, House
12 Manager's report with respect to Section 1201(f),
13 all three of them distinguish reverse engineering to
14 achieve interoperability of computer programs as
15 opposed to, and here I'll quote "nothing in the
16 subsections can be read to authorize the
17 circumvention of any technological protection
18 measure that controls access to any work other than
19 a computer program."

20 So that does suggest that one could
21 treat computer programs somewhat differently. On the
22 other hand, this is 1201(f), but we're talking about
23 1201(a). So I'm not sure that the distinction in
24 1201(f) necessarily goes back all the way to
25 1201(a). So I'm not sure that a broad based

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1 distinction on computer programs would actually
2 work.

3 If I may, some of the things that were
4 said by both the Register and Mr. Oman prompted some
5 further thoughts.

6 First of all, in Section 117 I don't
7 think it's appropriate to draw a negative inference
8 from Section 117 over to Section 1201. Section 117
9 has nothing to do with circumvention.

10 The question of computer repair services
11 was a separate problem in MAI v. Peak and was not an
12 access control issue. So I think that it's pertinent
13 to show that Congress was aware in general of the
14 after-market issue, but not specifically with
15 respect to 1201. So I don't think it would be
16 appropriate to conclude that having addressed it in
17 Section 117 it therefore follows that you can use
18 1201 to control the after-market.

19 MS. PETERS: Would you take it one step
20 further and say that you can use it to interpret it
21 differently?

22 PROFESSOR GINSBURG: Yes, I think that
23 the use that was made of it by my colleague in her
24 footnotes was actually quite illuminating. But,
25 again, it's at that slightly higher level of

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1 abstraction that you've been straining to obtain.

2 The other observation was prompted by
3 something Ralph Oman said with respect to a computer
4 program which is already readily available so that
5 in fact you don't need to reverse engineer that
6 computer program in order to figure out how to
7 create an interoperable program because that
8 information is already available.

9 If that is true, does that mean that
10 1201(f) no longer applies? So now you could have a
11 kind of clever strategy where -- let's go back to
12 Sega or Ford. You make all the specs available for
13 making interoperable programs, but then you make
14 it impossible for people to use the interoperable
15 programs because of the technological measure that
16 controls access.

17 If 1201(f) presupposes and requires that
18 you cannot otherwise get information about
19 interoperability without circumventing, then this
20 would be very clever. But I don't think 1201
21 requires that result.

22 MS. PETERS: Good.

23 PROFESSOR GINSBURG: The reason I don't
24 think 1201 requires that result is because looking
25 at 1201(f)(2) -- (f)(1) is about circumventing in

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1 order to get the information, right. But that's not
2 our situation. The information is available.

3 (f) (2), the first clause also seems to
4 address the question of enabling the identification
5 and analysis, but after the all important comma, it
6 says "or for the purpose of enabling
7 interoperability of an independently created
8 computer program." So it seems to me that, at least
9 under that reading, even if the interoperability
10 information is available so you don't have to
11 circumvent to find out how to make an
12 interoperable program, if you want to use an
13 interoperable program, then (f) (2) would apply.
14 So you can't short circuit 1201(f) by making the
15 information about interoperability otherwise
16 available.

17 MR. GREENSTEIN: Can I address those two
18 points as well, as long as we're on the subject?

19 With respect to 1201(f), I would note
20 that Lexmark has taken the position in papers filed
21 with the Court in Lexington, Kentucky there is no
22 way, in effect, that Static Control can make an
23 interoperable chip that would satisfy 1201(f).
24 And the reason is that they interpreted in their
25 papers, the language in 1201(f) (3) where it says

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1 that the means permitted under paragraph (2) may be
2 made available to others very narrowly, such that
3 made available would not include commercial
4 manufacture and sale. They contrasted the language
5 "may be made available" in 1201(f)(3) with the
6 language in 1201(a)(2) about trafficking and selling
7 and manufacture saying that Congress intended in
8 1201(a)(2) to have a very broad prohibition and
9 intended (f)(3) to be much narrower and not to
10 include the means of distributing commercially the
11 circumvention means.

12 I think that a reasonable reading of
13 "making available," particularly in the context of
14 its history coming from the WIPO treaties, that
15 "making available" is intended to be quite broad by
16 contrast. But that is an issue that the court is
17 still considering and has not actually rules upon.

18 Lastly, with respect to Section 117, I
19 certainly subscribe to Professor Ginsburg's views
20 and would also note that given the history of that
21 amendment, you will recall that it was never part of
22 the DMCA itself until it was rolled in at the last
23 minute. It was part of a separate bill that was
24 created by Representative Knollenberg to address a
25 very specific particular problem, and was really

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1 rolled in as a matter of administrative convenience
2 in legislating rather than as an integral part of
3 the DMCA considerations.

4 MR. KASUNIC: I just wanted to follow up
5 briefly on one point about 1201(f) and if looking at
6 this not within the context of this fact situation,
7 because we're not here to resolve the litigation
8 going on between these parties. So thinking about
9 this hypothetically just so we can understand what
10 your views are of 1201(f), if this was an ability to
11 reverse engineer the toner cartridge program in
12 order to interoperate with the printer engine
13 program, if I reverse engineer and create an
14 independent program that would interoperate with the
15 printer engineer program, is it your view that under
16 that scenario that 1201(f) would fit my reverse
17 engineering that? And then further, in line with
18 Professor's Ginsburg's view of this, would allow me
19 to use that device and further market that device?
20 Anyone from Lexmark?

21 MR. OMAN: I think I've already had my
22 attempt at answering that question. Could I ask Mr.
23 Potenza to make an effort?

24 MR. KASUNIC: Please.

25 MR. POTENZA: We believe that if all the

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1 limitations, and I think what we have to look at is
2 all the limitations of 1201(f) (1), (2) and (3) and
3 all the subparts: solely, inoperatability,
4 necessary, other applicable laws etc., if all those
5 are met -- then perhaps in a situation like that
6 there might be -- if all those were met.

7 I mean when you look at the District
8 Court's order, and Static later filed a request for
9 clarification and the Judge basically said the
10 injunction will stand unless there is some showing
11 under 1201(f). That's what 1201(f) says. So if all
12 the subparts are met, then perhaps there would be an
13 opportunity. But there's a lot there, and I just
14 don't think you can broadly say distribution, or
15 could you say anything else. I mean, there's just a
16 lot there in that statutory language, and the
17 legislative history has a lot to say about that, as
18 well as in limiting to sharing of computers and
19 programs.

20 MS. PETERS: Okay.

21 MR. GREENSTEIN: I think, if I may, I
22 would articulate two particular concerns. One, of
23 course, has to do with the point that Professor
24 Ginsburg raised previously, which is that in this
25 particular case one can get access to the works that

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1 you need to interoperate with without circumventing
2 the technological protection measure at all because
3 they're not encrypted. They're available in the
4 clear. And so an argument might be made that under
5 (f)(1) the information that you gain is not
6 appropriately covered. That's one possibility.

7 The second possibility that I would be
8 concerned about is this -- I guess the breadth of or
9 to violate applicable law other than this section.
10 That kind of raises a question about shrinkwrap
11 licensing and the validity of a particular license
12 in general, not just in this particular circumstance
13 where replacement parts are sold with licenses
14 attached that are unilaterally imposed that restrict
15 certain copyright rights that otherwise might exist
16 and where there's no opportunity to negotiate. That
17 potentially is a concern where legitimate activities
18 would be precluded that would not necessarily be
19 exempted under 1201(f) but that would have a
20 substantial adverse impact on the noninfringing uses
21 of copyrighted works, which is the standard that you
22 operate under in 1201.

23 MS. PETERS: But your comment with
24 regard to shrinkwrap licenses goes to all shrinkwrap
25 licenses, I mean not just this one.

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1 MR. GREENSTEIN: Well, it does, but I
2 guess there's a question of whether it applies in
3 particular circumstances that otherwise invoke the
4 applicability of 1201. Again, the standard for your
5 consideration refers only to noninfringing uses of
6 works. It does not refer to violations of other
7 applicable laws.

8 MS. PETERS: No, but I was talking--

9 MR. GREENSTEIN: So therefore, there's a
10 circumstance that is potentially presented under a
11 request for an exemption that is not covered by
12 Section 1201(f).

13 MS. PETERS: Okay.

14 MR. GREENSTEIN: That was really the
15 point that I was raising, without regard to its
16 applicability in this case.

17 MS. PETERS: Okay. Thank you.

18 Charlotte?

19 MS. DOUGLASS: I have a question for Mr.
20 Oman first. You say that Lexmark's secret handshake
21 doesn't diminish the ability of the public to engage
22 in the same lawful uses of copyrighted works that
23 they are able to engage in previously. I'm
24 wondering what is that public that you are referring
25 to? Are you referring to remanufacturers as part of

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1 that public, or are you just referring to the public
2 in general, individual users, consumers?

3 MR. OMAN: I was referring to the
4 consumers who use the remanufactured cartridges. And
5 they do have the options to use those cartridges and
6 gain access to the copyrighted works without
7 inhibitions if they use 3 of the 4 possible options
8 available to them.

9 MS. DOUGLASS: But it seems to me that
10 1201 talks about adverse effects on users. And I
11 guess I was trying to figure out whether you
12 included a broader public in speaking about the
13 public in your comment. In other words, would you
14 say that 1201 would be available to encompass use by
15 remanufacturers as part of public?

16 MR. OMAN: As the user, a
17 remanufacturer? I had not thought of it in that
18 context. I was thinking in the broader context in
19 the enumeration that Professor Ginsburg gave us in
20 terms of the underlying purposes of 1201(a)(1)(A),
21 the abilities of library patrons to gain access to
22 copyrighted works for purposes of gaining the
23 ability to make a fair use of those works; that's
24 the type of larger audience that I think we're
25 talking about here. But I would have to think more

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1 clearly about it in terms of whether or not a class
2 of user would be the remanufacturers.

3 MS. DOUGLASS: I wasn't so much speaking
4 about a class of users, as a defined group, I was
5 just thinking about it in terms of any noncopyright
6 owner, any person who might want to use and work.
7 And maybe it will be a little clearer when I ask
8 Seth this question.

9 Mr. Greenstein, you talked a little bit
10 about adverse effects on lawful use. As a matter of
11 fact, it seems like you talked about one adverse
12 effect was it impacted purchaser's ability to use
13 programs. And another one was it impacted the
14 ability to repair certain devices if they broke
15 down. Could you tell me a little bit more narrowly
16 and precisely specifically how you think adverse
17 effect on lawful use is implicated here in the
18 exemption that you seek?

19 MR. GREENSTEIN: Yes. Okay. With
20 respect to noninfringing uses?

21 MS. DOUGLASS: Yes.

22 MR. GREENSTEIN: Okay. Well, first of
23 all, it is not an infringing use of the program to
24 continue to run them, even after the cartridge is
25 empty and refill it. You still have the right to use

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1 those programs as a consumer, and so therefore the
2 purchaser's ability to continue that use is a
3 noninfringing use that is prevented by the
4 technological protection measure.

5 Second, the repair issue that I
6 identified was pretty specific for the non-Prebate
7 cartridges where in the non-Prebate cartridges one
8 of the artifacts of the system that has been created
9 by Lexmark is that after the cartridge is emptied
10 once, one of the meters that shows how much toner is
11 left in the cartridges will always continue to show
12 that it's toner out or toner low when, in fact, the
13 cartridge could be lawfully refilled and continued
14 to be used, even under Lexmark's interpretation.
15 So, that's something that could be addressed. It
16 certainly would be a lawful use to have the system
17 work as it was intended to show the actual toner
18 level on the various meters available, but that's a
19 lawful use that is a noninfringing use that is being
20 inhibited.

21 Going to your prior question to Mr.
22 Oman, Static Control most certainly puts in the
23 category of lawful users, noninfringing users those
24 who manufacture, distribute, develop competing
25 compatible software programs that would control the

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1 operation of the printer. Static Control has
2 created several of those and would like to market
3 them, and we believe that they provide certain
4 degrees of functionality that over and above what is
5 in the Lexmark printers currently. And those are
6 functions that would be valuable to remanufacturers
7 and would be valuable to the end user consumer.
8 Nevertheless, through the operation of Section
9 1201(a) at present we are prevented from making
10 those available to the public. There was, in fact,
11 such programs on the existing Smartek chips, but the
12 operation of 1201 has prevented us from making those
13 available. And those are noninfringing uses both by
14 the remanufacturers or by Static Control as a
15 software developer and by the end users that are
16 being prevented through the operation of 1201(a)(1)
17 in this case.

18 MS. DOUGLASS: Thank you.

19 Do you have anything further to say
20 about that?

21 MR. OMAN: I'm sorry, I don't.

22 MS. DOUGLASS: Okay.

23 MS. PETERS: Finished? Okay.

24 Steve?

25 MR. TEPP: Thank you.

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1 I want to spend some more time on this
2 issue of noninfringing uses, because it's central to
3 both this rulemaking and the question of whether
4 1201(f) may or may not apply. And in order to do
5 that, the first thing I want to try and identify is
6 exactly what copyrightable works are at issue in
7 terms of potential infringement. And so let me start
8 by asking the Lexmark team is it your contention
9 that when SCC does what it does, are they infringing
10 the computer programs on your printers, the computer
11 programs on your printer cartridges or all of them?

12 MR. OMAN: If I could have a
13 clarification, it might be helpful. Because in our
14 view, they have infringed the toner loading
15 cartridge program by slavishly copying it.

16 MR. TEPP: That's the one on the
17 cartridge?

18 MR. OMAN: Yes, that's the one on the
19 cartridge. And by reproducing that and distributing
20 that and selling it to their customers, they are
21 involved in a continuing infringement of the
22 copyright in that program.

23 But in terms of the toner loading
24 program, it is used in conjunction with the printer
25 engine program. And to use those without the

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1 authorization of the copyright owner itself would be
2 an infringement.

3 MR. TEPP: Okay. Which of the exclusive
4 rights on the programs that reside in the chip on
5 your printer is implicated?

6 MR. OMAN: The normal rights of
7 reproduction when you engage the printer and use the
8 printer engineer program, you are using the program
9 as it was intended to be used. But if you do that
10 without authorization, it is an infringement.

11 MR. TEPP: Okay. I'm sorry, maybe I just
12 don't understand the technology well enough. Does
13 the chip that resides on the printer itself merely
14 activate the embedded program, it reproduces it, is
15 that what you're saying? It makes it happen, it's
16 operation?

17 MR. OMAN: During the normal use of a
18 computer program, you are reproducing it in an
19 electronic sense. It performs its function and gives
20 the signals that it gives to the printer, which is a
21 very complex program, it's a very complicated system
22 of running a laser printer. And to use that program,
23 you have to not reproduce it in a sense that you put
24 on download and walk off with it, but that you use
25 portions of it in the operation of the machine, and

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1 that would constitute a violation of the act of
2 reproduction if it in fact it were done without
3 authorization.

4 MR. TEPP: Okay. Now, I saw the shaking
5 of heads ago. So, Mr. Greenstein, please.

6 MR. GREENSTEIN: No. I was also remiss,
7 by the way, early on in not introducing Skip London
8 who is general counsel to Static Control who has a
9 deeper understanding of the technology than I do.

10 First of all, I guess to answer your
11 question, there was no allegation of copyright
12 infringement lodged with respect to the printer
13 engine program. The only allegation was with
14 response to the toner loading program, and I already
15 addressed the slavishly copying allegation. I don't
16 need to address that again.

17 With respect to the printer engine
18 program, our understanding is that it resides in the
19 computer chip, it operates in the chip, it does not
20 get loaded into random access memory. There is no
21 further copy that is made.

22 What is loaded into memory locations on
23 the chip and the ASIC, the application specific
24 integrated circuit, are data rather than the printer
25 engine program itself or any element of it.

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1 MR. TEPP: Okay.

2 MR. GREENSTEIN: So there is no
3 reproduction. And I would agree, as I think your
4 question was implying, that there is no 106(3) right
5 that's being infringed by mere use of the program.

6 MR. TEPP: Well, I'm not going to say
7 I'm implying anything. I'm just asking. But this
8 obviously--

9 MR. GREENSTEIN: As I inferred from your
10 question.

11 MR. TEPP: Fair enough.

12 Then let me continue with your, Mr.
13 Greenstein, because if your analysis is correct, let
14 me ask about remanufacture of the non-Prebate
15 cartridges. Because we've talked about the fact that
16 the information necessary for reverse engineering is
17 available in the clear are a result of the lack of
18 protection on non-Prebate cartridges. And that's for
19 purposes of the 1201(f) analysis. But just as a
20 functional matter can SCC use the non-Prebate
21 cartridges without implicating -- to remanufacture
22 those cartridges without implicating either 1201 or
23 any copyright with the printer engine program and to
24 what extent does that potentially address the
25 concern here?

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1 MR. GREENSTEIN: Certainly we can
2 remanufacture the chip. We can manufacture the
3 chips for the non-Prebate cartridges that have no
4 impact on the printer engine program whatsoever.
5 That is thoroughly independent and not at all
6 implicated, to at least our understanding, by what
7 we would do on our chips. The chips would contain
8 our own developed programs that would interoperate
9 with the printer engine program, but there would be
10 no infringement nexus there.

11 With respect to 1201(f), I think that it
12 depends on how 1201(f) is interpreted by a court.

13 MR. TEPP: Let me stop you for just a
14 second.

15 MR. GREENSTEIN: Yes.

16 MR. TEPP: Because there's no
17 protection, at least I understand there's no
18 protection in terms of technological protection
19 measures on a non-Prebate cartridge, would there
20 even be a 1201(a) issue which would require a
21 1201(f) analysis if you're remanufacturing non-
22 Prebate cartridges?

23 MR. GREENSTEIN: I guess there would be
24 to the extent that if what we are doing is -- well,
25 I would submit to you, first of all, that we don't

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1 think that there's a proper 1201(a) issue with
2 respect to any of what we've been doing. That's
3 first of all. And so the issue really comes down to
4 the same thing, whether Static Control is entitled
5 to put its own chip into the marketplace that has
6 its own developed programs that circumvents the
7 technological protection measure. Because no matter
8 whether it's prebate or non-Prebate, it still
9 performs this handshake. It still performs the
10 authentication.

11 If you have a non-Prebate cartridge that
12 didn't have a chip on it, it would not work because
13 the authentication routine would not be satisfied.
14 The only difference is whether the -- for the non-
15 Prebate cartridges, whether the printer looks at the
16 bucket levels and decides that there's toner in the
17 printer cartridge, there is a bucket level that says
18 it's empty and chooses to disregard the information
19 because it's a non-Prebate cartridge.

20 The same technological protection
21 measure and the authentication routine apply,
22 whether it's prebate or non-Prebate. The only
23 difference is whether it pays attention to the
24 discrepancy between the toner in the cartridge and
25 the bucket level that shows empty. That's really

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1 the only difference that we're talking about.

2 MR. TEPP: Okay.

3 MR. GREENSTEIN: So, in fact, the
4 technological protection measure still does apply
5 and would need to be circumvented in order for
6 Static Control to put its own chips into the
7 marketplace.

8 Just one little fact that I've wanted to
9 mention, by the way. That Lexmark's counsel said at
10 the hearing that approximately 90 percent of the
11 cartridges that they put into the marketplace are
12 prebate cartridges, non-Prebate comprises 10 percent
13 approximately of the marketplace.

14 MR. TEPP: Okay. Thank you.

15 It sounds like then it's not critical to
16 our analysis under this rulemaking whether or not
17 we're talking about Prebate or non-Prebate.

18 MR. GREENSTEIN: I agree with that.

19 MR. TEPP: If I can indulge with a few
20 more questions.

21 MS. PETERS: Sure.

22 MR. TEPP: Thank you.

23 Let me take the next step then and go to
24 this question of whether or not the toner loader
25 program in the cartridge is being copied and the

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1 issue of reverse engineering.

2 Is there any other way, and I'm asking
3 this of both Mr. Greenstein and Mr. Oman, to achieve
4 inoperatability with a Lexmark printer except
5 copying this code that exists in the toner loader
6 program on the Lexmark printer cartridges, initially
7 at least?

8 MR. OMAN: If I may go first. You can
9 accomplish that purpose by buying the non-Prebate
10 cartridges, remanufacturing those cartridges and
11 using those in the Lexmark printer. The only option
12 that would foreclose that ability to use the printer
13 as intended is by buying a Prebate cartridge and
14 attempting to remanufacture it upon your own or
15 having it done by a remanufacturer.

16 Can I clarify one point from your
17 earlier question? I didn't mean to imply that
18 infringement of the reproduction right in the
19 printer engine program was an element of Lexmark's
20 case against SCC. I was responding in a theoretical
21 sense to what I thought was a theoretical question.

22 MR. TEPP: And that was my question,
23 we're not here to adjudicate the Eastern District of
24 Kentucky Court's job.

25 Mr. Greenstein, before you answer and

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1 I'll give you a chance, I just want to go back to
2 Mr. Oman for a second about that. Because I want to
3 just clarify one point in your answer that I'm not
4 sure I understand. I do understand what you're
5 saying about the use of Lexmark Prebate cartridges.
6 What I'm asking about anyone outside the Lexmark
7 Corporation who wishes to create a program which is
8 inoperatable with a Lexmark printer for the purposes
9 of remanufacture of printer cartridges, is there
10 anyway they can create an inoperatable program
11 without copying entirely the toner loader program
12 off the chip that initially exists in a Lexmark
13 cartridge?

14 MR. OMAN: I think it could be done on a
15 technological level, if that's the point of your
16 question?

17 MR. TEPP: Well, that is what I am
18 trying to find out.

19 MR. OMAN: I think it would be
20 technologically possible.

21 MR. TEPP: Okay. Mr. Greenstein?

22 MR. GREENSTEIN: It can. This was not
23 publicly available information, I guess until the
24 hearing on February 7th when Lexmark's expert
25 witness testified that the toner loading program

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1 could be replaced or you could set a bit in the chip
2 that would -- or it could be all zeros. There could
3 be no toner loading program there at all as long as
4 you properly set other information elsewhere in the
5 chip that would compensate for that. Or, you could
6 set a bit in the toner cartridge that would
7 basically tell the printer not to pull in and use
8 the toner loading program that's on the chip. Those
9 things can be done if you do it at the point of
10 manufacture. You cannot do it after the chips are
11 already into the marketplace. You cannot change
12 them. Those are non-rewritable pieces of
13 information on the Lexmark chip. But if you have
14 this information in hand, if you knew it in advance,
15 you could write your own toner loader program. You
16 could put no toner loading program on there. And
17 the printer and the cartridge would work perfectly
18 well. And, in fact, certainly other toner loading
19 programs are possible.

20 MR. TEPP: Okay. And that would all
21 work with a Lexmark printer?

22 MR. GREENSTEIN: I believe that's
23 correct, yes.

24 MR. TEPP: Okay.

25 MR. POTENZA: I just wanted to go back

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1 to one thing. You had asked the question or perhaps
2 had the conclusion that it was not critical whether
3 it's a Prebate or non-Prebate. I mean, first of
4 all, I think it is critical. If it's a non-Prebate,
5 then obviously it's authorized and you get all the
6 functionality out of it. What happens is there's no
7 need to circumvent in the case that it's non-
8 Prebate, just the way the chip operates and the way
9 the codes are in there. So I just want to make sure
10 you understand.

11 MR. TEPP: Well, now I am confused.

12 MR. POTENZA: Okay.

13 MR. TEPP: Because I heard something
14 different from Mr. Greenstein.

15 MR. POTENZA: I know you did, and I
16 didn't want to interrupt you.

17 MR. TEPP: No, I appreciate you jumping
18 in, because I want to make sure I get this right.
19 The question is for purposes of the analysis under
20 this rulemaking of the three proposed exemptions
21 that are before us, is it relevant whether or not
22 the cartridge being remanufactured was initially a
23 Prebate cartridge or was initially a non-Prebate
24 cartridge? And you're saying it does matter.

25 MR. POTENZA: Well, what happens is a

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1 code is then placed in memory on the chip -- the
2 information is then provided and it instructs the
3 system that it should not be reused. So the point
4 is that it won't be reused in that case if it's --

5 MR. TEPP: That's a non-Prebate
6 cartridge you're describing?

7 MR. POTENZA: Yes. If it's a Prebate
8 cartridge.

9 MR. TEPP: I got it backwards then?

10 MR. POTENZA: Yes. If it's a Prebate
11 cartridge. But the point being that if it's a non-
12 Prebate cartridge there is the flexibility that it
13 is available, it can be looked into to, it could be
14 used over and over again. And that cartridge could
15 be refilled by remanufacturers.

16 MR. TEPP: Can they refill that
17 cartridge and get it to work in a Lexmark printer
18 without implicating 1201(a)?

19 MR. POTENZA: There's no question, that
20 all they need to do is they get a non-Prebate
21 cartridge -- and this is the point we mentioned on
22 availability which I think is very important. Not
23 merely the point that you can scope the chips, you
24 can scope the printer, you can get into the memory.
25 I mean, the toner loading program is actually

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1 transferred over to the printer. I think this is
2 what Mr. Oman was getting at that actually when
3 there is a transfer, it's authorized, the code goes
4 over to the printer at that point. And it's
5 processed. It's a very complicated operation. I
6 know Mr. Greenstein would like to characterize it as
7 you know, a little bit of magic here and it's a very
8 simple thing, but it's quite involved. And it is a
9 technological measure. But the point is that if
10 it's non-Prebate, remanufacturers if they have that
11 cartridge and that chip, they can get it, they could
12 refill the cartridge and they could continue using
13 it. Now, that's not a problem and it can be used ad
14 nauseam. The question is if it's Prebate.

15 And maybe I'm missing something here,
16 but it would seem to me that there is criticality
17 here.

18 MR. TEPP: All right. We've got a
19 difference of opinion. Mr. Greenstein seems to want
20 to respond, so let me give him that opportunity.

21 MR. GREENSTEIN: Thank you.

22 What Mr. Potenza is talking about is one
23 use of the printer engine program or one use of the
24 toner loading program. Because if I wanted to make
25 a compatible chip that performed other functions or

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1 had a different toner loading program on it, or that
2 did-- again, other functions that users might want,
3 remanufacturers might want to offer their customers,
4 I cannot do that without including the technological
5 protection measure on that chip and without
6 providing a means of circumvention to the public.

7 What Mr. Potenza is saying, and is true,
8 is that if you continue to use that same chip that
9 Lexmark originally provided on the non-Prebate
10 cartridge, it will continue to work until the chip
11 wears out or whatever. But the fact of the matter
12 is, is that's only one possible noninfringing use.
13 There are other possible noninfringing uses by other
14 persons, like for example to make compatible
15 programs and offer them to the public. Compatible
16 programs that work with the printer engine program.
17 And those are prevented.

18 I think what is important about Mr.
19 Potenza and Lexmark saying that the distinction is
20 critical is that what they're seeking to protect the
21 business model, not the copyrighted works. And from
22 that prospective I would agree that the distinction
23 they're drawing is absolutely critical because it
24 reveals their real interest in protecting business
25 models, not copyrighted works.

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1 MR. TEPP: Okay.

2 MS. PETERS: Can I just ask a question?
3 Is what you're saying is that if in fact what you're
4 really prohibited from doing is creating a chip that
5 has added functionality? You're stuck with whatever
6 they have in it originally?

7 MR. GREENSTEIN: That's right. And
8 actually, less than what was in it originally
9 because, as I mentioned, there is that toner low
10 meter that no longer functions if you use a non-
11 Prebate chip that's been exhausted once.

12 MS. PETERS: Right. Okay. Okay. Got
13 it.

14 MR. TEPP: Okay. I'm going to give you a
15 chance, Mr. Potenza, but let me do it in the context
16 of this question. Because I think I'm seeing the
17 daylight between the two positions here. It sounds
18 like what you're describing, Mr. Potenza, is reuse
19 of the Lexmark toner cartridge with the same chip on
20 there. And what Mr. Greenstein is describing is a
21 Lexmark toner cartridge where the chip has been
22 replaced with the third party remanufacture's chip.
23 And that chip would necessarily have been reverse
24 engineered so that it's inoperatable. And so let me
25 come back to you with the question is that third

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1 party chip placed on a Lexmark cartridge by a
2 remanufacture, is it necessarily an infringement or
3 is there a Sega-like analysis which will allow that
4 reverse engineering?

5 MR. POTENZA: I'm sorry. Would you --

6 MR. TEPP: Okay.

7 MR. POTENZA: I got lost with the --

8 MR. TEPP: Well, I don't blame you. It
9 was a rather long one.

10 MR. POTENZA: That's okay.

11 MR. TEPP: Let me boil it down and say
12 this is the question. Is it necessarily copyright
13 infringement of the toner loader program or the
14 printer engine program for a third party
15 remanufacture of printer cartridges to reverse
16 engineer the toner loading program and put a chip
17 with that reverse engineered program on a
18 remanufactured printer cartridge?

19 MR. POTENZA: Well, clearly, and I view
20 -- and there's a lot of talent at this table across
21 the board here and up front. And I appreciate that
22 Sega permits the intermediate copying for purposes
23 of reverse engineering as fair use, the 1201(f)
24 exception was consistent with that; it was
25 coextensive with that, you know, but that's another

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1 question that I think we can all talk about that
2 another day.

3 And as I pointed out, there was a lot of
4 language in 1201(f) other than perhaps Sega alone.
5 But if an intermediate copying was made for purposes
6 of understanding the basic ideas that are permitted
7 under 1201(f), and to create your own program from
8 that, of course I think that could be done. The
9 ultimate question is, however, whether or not we
10 would still have violation of the DMCA as well.

11 I mean, what happened in this case, and
12 I know there's been a lot of comments about slavish
13 copying, but you know that language was out of their
14 briefs. Because they were trying to justify copying
15 and argue the point that this was a lock-out code
16 and in fact, that's what they did. And they even
17 included the Lexmark fingerprint as well. So if it
18 was such a trivial program or copyright, it's
19 something I suppose they could easily have picked up
20 along the way without copying all of the code.

21 But I think in terms of the intermediate
22 copy, of course you could review it, you could
23 understand it as part of fair use, what's there, and
24 then do it independently. Unfortunately, they didn't
25 do that.

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1 Now what I'm hearing, though, is that
2 they want to have their own business model and what
3 they want to do is they want to add onto it and do
4 something else. And I can't agree that that is
5 either going to be permissible or not. I don't
6 know. I mean, we're talking about pure speculation
7 here and I would have to see what's going on and
8 what they're adding and what they're doing.

9 I mean, there's a lot of talk lately
10 that something is going to be coming out in the near
11 future. And then I would love to have the
12 opportunity to revisit this at the appropriate time.

13 MR. TEPP: Okay. Mr. Greenstein, you --

14 MR. GREENSTEIN: I think the only point
15 that I wanted to make is that under Sega, and
16 certainly under 1201(f), under Sega itself it wasn't
17 just intermediate copying, it was the fact that the
18 means of fooling the game console also was included
19 in what was being commercially distributed by
20 Accolades, Sega's competitor. And Sega, the
21 decision from the Ninth Circuit, clearly allowed
22 that circumvention means to be distributed the same
23 way that 1201(f) does currently.

24 MR. TEPP: Professor Ginsburg, let me
25 come to you after this long conversation with all

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1 these fellows. What is your view based on the
2 exchange we've just heard about the application of
3 Sega to the facts that have just been outlined?

4 PROFESSOR GINSBURG: I don't know
5 whether--

6 MS. PETERS: Jane, your microphone.

7 PROFESSOR GINSBURG: I said I don't know
8 whether the metaphors daylight or fog under the
9 circumstances.

10 I don't think that I have sufficient
11 grasp of the computing version of the facts to
12 answer that question. Sorry.

13 MR. TEPP: Well, fair enough. That's
14 what I'm trying to get. So, I don't blame you.

15 Let me then just come back to Mr.
16 Greenstein for a second and ask this, if this is not
17 infringing reverse engineering in line with Sega as
18 you contend, why doesn't Section 1201(f) take care
19 of any Section 1201 issues, whether it be (a)(1) or
20 (a)(2) that you your client may have with what
21 they're doing?

22 MR. GREENSTEIN: I would hope that it
23 does. But, unfortunately, I cannot be saying that
24 that's going to be the case, as for the reasons that
25 I pointed out earlier. One being the language in

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1 1201(f) (1) that could narrowly be limited in this
2 particular case because it talks about that it
3 effectively controls access, you're getting access
4 for the sole purpose of identifying and analyzing
5 those elements of the program that are necessary to
6 achieve inoperability. Well, in this particular
7 circumstance, as we've said, the technological
8 protection measure does not protect against access
9 to the underlying code of the printer engine
10 program. So a court could narrowly interpret
11 1201(f) to say that in this particular circumstance
12 1201(f) might not be available. I don't believe that
13 would be a correct reading, but that certainly is
14 one reading.

15 The other issue that is under 1201(f) (3)
16 Lexmark has taken the position that the term "may be
17 made available to others" does not include
18 commercial distribution or sale. Again, I disagree
19 with that, but that is a live issue before the
20 court. And certainly to the extent that it may not
21 be deemed to include commercial distribution, then
22 1201(f) would not be availing and an exemption would
23 be necessary.

24 And I guess the final point that I made
25 earlier was the point having to do with the

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1 difference in standards between your standard of
2 analysis under 1201(a) versus 1201(f) where your
3 duty is to look only at the effect on noninfringing
4 uses without regard to violations of other
5 applicable laws.

6 MR. TEPP: Let me build off of that for
7 my final question. And I appreciate the Register
8 letting me have quite a bit of leeway here.

9 It appears that the Eastern District of
10 Kentucky found that what SCC is doing is copyright
11 infringement. Given that by statute we are supposed
12 to look at exemptions to 1201(a)(1) for purposes of
13 noninfringing I'm asking you both, Mr. Greenstein
14 and Mr. Oman, do we have to conclude that the
15 Eastern District of Kentucky was wrong in that
16 analysis if we're going to go ahead and recommend to
17 the Librarian an exemption, at least one of the
18 three that you've recommended to us?

19 MR. GREENSTEIN: You do not have to
20 conclude that the court was wrong with respect to
21 the infringement analysis. I submit to you, first of
22 all as I said earlier, at all times relevant before
23 these products were first voluntarily taken off the
24 market while the court had the opportunity to
25 consider the issue and in the injunction afterward,

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1 Static Control had no reason to know that there was
2 a copyrighted program on the chip at all and that
3 there was any matter of infringement involve.

4 Notwithstanding, I think it is perfectly
5 clear from the events that have transpired since
6 then that no toner loading program has to be on the
7 chip at all or a competing toner loading program can
8 be on the chip. It does not infringe Lexmark's
9 program, assuming that in fact it's copyrightable.

10 So from that perspective, the
11 infringement issue is essentially irrelevant. What's
12 really relevant in my view is the issue of
13 inoperatability with the printer engine program.
14 Because I am certain that there is every ability to
15 include only originally created software programs on
16 a toner cartridge chip if circumvention is allowed
17 in order to permit inoperatability.

18 MR. TEPP: Mr. Oman, what's your
19 response to that question?

20 MR. OMAN: If you granted the exemption
21 that's been requested, I think you would in effect
22 be overturning the decision of the U.S. District
23 Court in Kentucky. And in my opinion, you'd probably
24 be overturning the Ninth Circuit in the Game Masters
25 case as well.

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1 MR. TEPP: Mr. Greenstein is perplexed.

2 MR. GREENSTEIN: I don't see either one.

3 I think if you granted the exemption, that would --
4 again, I think what we're talking about; are we
5 talking about a past chip versus a future chip or a
6 future business model or a future possibility of
7 offering a toner cartridge chip that has only
8 originally created software and the means to
9 circumvent in order to permit inoperatability of
10 that software with the printer engine program.

11 So, putting aside the past issues of
12 infringement, I think the issues on the table that
13 we have brought to the Copyright Office really have
14 to do with the future where there is no infringement
15 involved and no infringement allegation possible,
16 but yet circumvention should be allowed under an
17 exemption but is not.

18 MR. POTENZA: May I address?

19 MR. TEPP: Sure.

20 MR. POTENZA: I have to agree with Mr.
21 Oman, not merely because we're both on his side of
22 the aisle. But I think Game Master, Remeirdes and
23 those cases, I mean are really right on point when
24 you're dealing with an authorized work -- for
25 example in Game Masters you're dealing with whether

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1 or not something was authorized in one region or
2 another region. And the console would read the
3 information, would interpret it and decide whether
4 or not it was authorized. I mean, there's a strong
5 similarity between the situation here, what's
6 happening with Lexmarks printers and what Judge
7 Forester decided and the Sixth Circuit is going to
8 be hearing real shortly, and what you're going to be
9 dealing with. And I think it's specious, in all
10 deference to Mr. Greenstein to say that it's not
11 going to cause havoc with the District Court and
12 what you're doing here.

13 I think you're really up against what
14 the District Court and what the Sixth Circuit is
15 looking at. And they're looking at those cases, and
16 those cases are forefront. And Judge Forester
17 analyzed those cases and dealt with them in the way
18 that Mr. Oman indicated.

19 MR. TEPP: Professor Ginsburg, do you
20 want to respond as well?

21 PROFESSOR GINSBURG: Yes. I think this
22 situation is quite distinguishable from Corley, Game
23 Masters, Real Networks and so forth because those
24 all involved access to a work protected under this
25 title. And what we're grappling with is whether the

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1 computer program that helps run the printer
2 cartridge or any of those other devices is enough of
3 a work protected under this title to justify
4 controlling an object that is not. So I think that
5 this is quite a different situation.

6 That doesn't mean that it's right for a
7 rule. I take it that part of your question is saying
8 the extent to which we have a problem is sparked by
9 a particular litigation in which, at least as far as
10 the District Court was concerned, infringing use was
11 found. And so your mandate is something different.
12 Your mandate is the impact that 1201(a) has on
13 noninfringing use.

14 So while the controversy has sparked
15 genuine concern, that doesn't necessarily mean that
16 there is a real problem yet. This reminds me a
17 little bit of the last go around when concern was
18 expressed that technological measures might be used
19 to leverage the protection of public domain
20 documents packaged together with a thin copyright
21 veneer of an introduction or something like that,
22 but the technological measure would apply to
23 everything. And the Office's response at that point
24 was in theory this could be a problem. We haven't
25 seen that it is a problem yet. So perhaps you are

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1 given the record that you have. And as far as I can
2 tell from the other filings that have been made in
3 connection with Static Control's petition, not a lot
4 of evidence going to this specific problem. A lot
5 of fears, not necessarily a lot of actual
6 situations. It makes it all the more difficult to
7 articulate a class in such a vacuum.

8 MR. TEPP: Let me follow-up on that for
9 a minute and the Lexmark side will certainly have a
10 chance.

11 Your view that the TPM here is
12 protecting the physical good or even the business
13 model, I want to ask you about that in light of the
14 earlier discussion where we appeared to have
15 agreement that the toner cartridge could be refilled
16 and in essence remanufactured without replacing the
17 chip, and that the TPM would allow that but that the
18 TPM will not allow a -- or you have to circumvent
19 the TPM in order to reverse engineer a new and
20 interoperatable program. Given those facts do you
21 think that there's an argument that actually it is
22 protecting the program from derivative works rather
23 than the business model because you can refill the
24 toner? Someone else can refill the toner as long as
25 they don't replace the chip?

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1 PROFESSOR GINSBURG: I'm probably
2 confused, because it seemed to me as if that cut the
3 other way.

4 MR. TEPP: Okay.

5 PROFESSOR GINSBURG: That in fact the
6 technological measure wasn't protecting the program.
7 And I thought that some of the Register's questions
8 were trying to get at that, whether if in fact the
9 toner program isn't necessarily affected by the
10 access control, does that suggest that the
11 relationship between the access control and the
12 program, which is a work protected under this title,
13 is specious. And what we really have is an access
14 control protecting a machine part to which the
15 computer program is more or less irrelevant.

16 MS. PETERS: That is what I was asking
17 about.

18 PROFESSOR GINSBURG: I'm glad we're in
19 agreement.

20 MR. TEPP: Then it's clearly me who is
21 confused.

22 PROFESSOR GINSBURG: Having said that,
23 I'm not sure how you create a standard out of that
24 observation. It gets back to the problem of how can
25 you work with the language in 1201(a) itself that

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1 effectively controls access to a work protected
2 under this title? What kind of a gloss do you put
3 on a work? Do you say a work as long as we're not
4 talking about the functional qualities of the work?
5 Do you say a work when it's really a work? And
6 that's the problem.

7 That may be something that courts are,
8 perhaps, better positions to create that gloss than
9 this Office in this rulemaking, except to the extent
10 that you decide you don't need to create a class
11 because of this gloss. I mean, you may not be
12 entirely out of it.

13 I think we see where there is arguably a
14 pretext, I'm not saying in the Lexmark case itself
15 necessarily, but that there may be situations in
16 which the computer program is, more or less, a
17 protectual work protected under this title. But how
18 you turn that into a rule I'm not at all sure.

19 MR. TEPP: Okay. Thank you.

20 Mr. Potenza, it seems like you wanted to
21 respond or are you satisfied?

22 MR. POTENZA: I think I'm satisfied.

23 MR. TEPP: Okay. Then I think, unless
24 there's anybody else.

25 MS. PETERS: No, that's it.

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1 MR. TEPP: I will thank the Register
2 very much for indulging me so long.

3 MS. PETERS: That's right. Thank you.

4 I'm going to let Rob ask one quick
5 question. And then because people can get up and
6 leave but you guys couldn't, we're going to take a
7 short break before David asks his question. So you
8 get one.

9 MR. KASUNIC: My question is just
10 following up briefly on something Professor Ginsburg
11 said, in terms of what the record is here. I guess
12 particularly this is directed to Mr. Greenstein.
13 But what evidence do we have that the congressional
14 solution is insufficient to handle this? What
15 likelihood is there that this could not have been
16 done within the context of reverse engineering that
17 there are at least legitimate interpretations that
18 would have fit within 1201(f). So what evidence is
19 there that would warrant us to act now? Also given
20 the fact that the congressional solution is much
21 more potent than anything that we can offer?

22 MR. GREENSTEIN: Well, certainly, anyone
23 who seeks an exemption under 1201(f) and under
24 1201(a)
25 has the option of going to Congress to get a

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1 specific exemption enacted. But --

2 MR. KASUNIC: I'm talking about the
3 existing specific exemption in 1201(f)?

4 MR. GREENSTEIN: I guess my concern is a
5 couple fold. I've already described the arguments
6 that Lexmark has made as to why 1201(f) might not
7 apply in this particular situation, and there are
8 other, you know, possible I think misinterpretations
9 of 1201(f), but possible ones as Professor Ginsburg
10 has also indicated where 1201(f) might not begin to
11 apply.

12 I think one other reason in this
13 particular circumstance is what effectively happened
14 at the District Court level. Remember there were
15 two claims that were lodged under the DMCA, one was
16 with respect to the access control measure that
17 prevented access to the toner loading program. And
18 on that grounds, you know, the Court consistent with
19 its finding of infringement would say that 1201(f)
20 would not be available. But yet the Court applies
21 1201(f) with respect to the printer engine program
22 where there was no allegation whatsoever of any kind
23 of infringement.

24 And so in that circumstance that leads
25 one to believe that 1201(f) might not avail Static

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1 Control in a similar situation where there was no
2 infringement alleged. From that perspective I think
3 we, again, have approached the Office out of an
4 abundance of caution to begin with because we think
5 that 1201(a) has been misapplied in this
6 circumstance from the inception of the case. But
7 nevertheless, we feel that it's necessary given the
8 risks in not getting the exemption and given the
9 impact of the injunction and of the application of
10 DMCA on Static Control and on the remanufacturing
11 industry generally, and potentially on other
12 remanufacturing industries we felt that it was
13 important to seek an exemption and to use all
14 available avenues for relief under the statute.

15 MS. PETERS: Okay. We're going to take a
16 10 to 15 break. And then we'll come back and we'll
17 resume.

18 (Whereupon, at 12:01 p.m. a recess until
19 12:14 p.m.).

20 MS. PETERS: We're going to have our
21 concluding questionnaire, David, take over.

22 MR. CARSON: Thank you.

23 Before this hearing began I was very
24 confused. And I find myself more confused now. So
25 confused that I'm not even sure I know what I'm

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1 confused about. So I'm not sure I'm going to be
2 able to get the air cleared at this point, and I'm
3 sure we're going to have some questions we're going
4 to be submitting to the witnesses asking them to
5 give us some further clarification in writing.

6 To start with, though, I guess Mr.
7 Greenstein, I guess it's a fact, isn't it, that a
8 consumer always can buy a remanufactured cartridge
9 if that's the consumer's choice, isn't it?

10 MR. GREENSTEIN: I think the answer is
11 not necessarily, the reason being that there are
12 only 10 percent of the cartridges being
13 remanufactured cartridges. So there's probably an
14 issue as to availability in the marketplace.

15 MR. CARSON: Well, they can also get
16 them from Lexmark, though. And I assume there's a
17 lot more available from Lexmark simply because of
18 the Prebate program?

19 MR. GREENSTEIN: I don't know that I've
20 ever seen any fact introduced into the litigation
21 showing prices for remanufactured cartridges coming
22 from Lexmark. I've seen prices for Prebate
23 cartridges and prices for non-Prebate cartridges.
24 But I don't think I've ever seen a separate price
25 for a remanufactured Prebate cartridge.

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1 MR. CARSON: Can you folks shed some
2 light on that?

3 MR. POTENZA: Yes. The prices for
4 remanufactured cartridges are even less than the
5 Prebate, than the non-Prebate.

6 MR. CARSON: Okay. Maybe you could even
7 give us that subsequently.

8 MR. POTENZA: Yes. I can provide that.

9 MR. CARSON: And I know I've got some
10 further clarification. I know, I guess, I think it's
11 the Electronic Frontier Foundation has given us what
12 they say are the figures for the Prebate, the non-
13 Prebate and the remanufactured if I remember
14 correctly. Not yours, but the other remanufactured.
15 You might want to let us know whether those are
16 accurate, and if they're not, give us the whole
17 array.

18 MR. POTENZA: All right. We'll provide
19 that.

20 MR. CARSON: Yes, afterwards. I don't
21 want it now.

22 MR. POTENZA: Okay. Thank you.

23 MR. CARSON: Okay. This may be the
24 first time that the Copyright Office has been asked
25 to consider the environment. I guess it's nice that

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1 some agency is going to consider the environment,
2 but I guess I'm just wondering, the fact of the
3 matter is that there are -- either way if I'm
4 understanding it correctly, these cartridges are
5 going to be remanufactured and get back to
6 consumers? True or not true?

7 MR. GREENSTEIN: It's difficult for me
8 to say what Lexmark does or does not do. I know
9 that Lexmark recycles as well as remanufactures. And
10 recycling is essentially destruction. But I cannot
11 say what Lexmark does and does not do with respect
12 to remanufacturing.

13 MR. CARSON: Well, maybe Lexmark can.

14 MR. POTENZA: We are one of the largest
15 remanufacturers. Let me just explain. Since Lexmark
16 began its Prebate program, the empty cartridge
17 return rates have increased from about 12 percent to
18 over 50 percent. In fact, annual returns of core
19 Prebate cartridges has increased by 800 percent from
20 about 100,000 in 1998 to over 900,000 in 2002. They
21 remanufacture as many empty cartridges as they can
22 and recycle all the rest at a sheltered workshop.

23 MR. CARSON: Okay. Now I know, if I
24 understand correctly from what I read, your
25 customers who buy the Prebate cartridges are, I

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1 gathered, required under a shrinkwrap agreement, I
2 assume, to return it, is that correct?

3 MR. POTENZA: That's correct.

4 MR. CARSON: Beyond just that
5 obligation, that contractual obligation, are there
6 any other character holding out that induces them to
7 do that? Let me put it another way. I bought a
8 Prebate cartridge. What's my inducement to send it
9 back to you?

10 MR. POTENZA: Well, you get a discount
11 up front.

12 MR. CARSON: Up front? So even if I
13 don't send it back, I get the discount.

14 MR. POTENZA: Yes. I can't tell you what
15 else there is. I mean, perhaps if that's the
16 question you have, we could take it back to consider
17 further --

18 MR. CARSON: Well, to the extent that
19 the environment has been put in front of us, it's
20 just sort of interest to me to figure out that
21 really is a concern or whether at the end of the day
22 the environment's going to be just as well off no
23 matter what. That's why I'm asking these questions.

24 MR. POTENZA: And we don't think the
25 environment is a factor, in the way it's been

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1 portrayed by Static.

2 MR. CARSON: Well, it's been put in
3 front of us, so I'm just trying to find it.

4 MR. GREENSTEIN: David, if I can -- Mr.
5 Carson, pardon me. As an aside, I guess I would note
6 that if the return rate is at 50 percent, that means
7 50 percent of them are not going back and are not
8 being remanufactured.

9 MR. CARSON: Although I suspect that 50
10 percent of all toner cartridges probably are going
11 into the trash bin anyway, but who knows. If you
12 know, you can tell us later.

13 Let's move on to something else you
14 said, Mr. Greenstein. You were painting for us a
15 scenario where in the not too distant future
16 automobile parts and even ball point pens have
17 similar kinds of protection on them. And we can
18 certainly understand that scenario, and maybe this
19 is the predecessor of all of those and maybe it
20 isn't. But, of course, our task here to figure out
21 what's the likelihood in the next 3 years this is
22 going to happen. I don't think you've made the case
23 that there's any likelihood whatsoever, but I don't
24 want to put words in your mouth. You tell me. What
25 information do you have that will persuade us that

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1 there is a likelihood that this is going to be an
2 increasing problem over the next 3 years?

3 MR. GREENSTEIN: I would say that the
4 likelihood has been demonstrated, first, by the
5 reality with respect to the cartridge
6 remanufacturing industry. But with respect to other
7 industries, I can only cite to you the fact that
8 there were two automobile parts remanufacturing
9 associations that were deeply concerned about the
10 supply in their context as well. And the reason is
11 because they have been engaged in the same kind of
12 cat-and-mouse games with the original equipment
13 manufactures for decades and have been trying to
14 maintain their own toehold in the remanufacturing
15 industry. And they were concerned enough to hire an
16 attorney to submit briefs to the District Court,
17 amicus briefs to the District Court in the Lexmark
18 mark brought in Kentucky which, as you know, is
19 fairly unusual for anyone to submit a brief, amicus
20 curiae at a District Court level. But that is the
21 facts that are set forth in their brief are the only
22 ones that I know. I don't know whether that
23 demonstrates likelihood or not, but it certainly
24 demonstrates strong enough concern that given past
25 history of what the original equipment manufacturers

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1 have taken in terms of steps to try to prevent
2 remanufacturing and that industry, that they had
3 enough concern that that would happen to them as
4 well.

5 MR. CARSON: Okay. Mr. Oman, I'm not
6 sure I recall clearly what you said on the subject,
7 but my impression, and I want to give you a chance
8 to correct it or not, was that what you were
9 basically saying on sort of the broader subject of
10 not just this particular printer cartridge issue,
11 but the broader issue of using 1201 in a way that
12 prohibit me from refilling this ball point pen, that
13 that really is not something that falls within the
14 purview of this rulemaking, but that's really more
15 of a judgment for Congress? Is that what I heard
16 you say? I just want to make sure I understand?

17 MR. OMAN: That issue was raised by
18 Professor Ginsburg in terms of the ability to use
19 the copyright laws to control the after parts
20 market, the doors on the Ford Explorer, that is a
21 subject of a continuing congressional inquiry going
22 back to the first design bill that was introduced in
23 1906, whenever it was. And that is a continuing
24 congressional concern.

25 I would think that if this issue were

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1 brought before them, they would be able to make the
2 larger policy judgments that are necessary rather
3 than having it made in the basis of a single
4 proceeding before an administrative body. They do
5 have that power and they have exercised that power
6 in the past. And despite some comments to the
7 contrary, I think they made that judgment in the 117
8 amendment related to the repair market back in 1998.

9 I don't think that we should make a
10 blanket exemption for anything that is related to
11 control of an after-market product, a replacement
12 part in a proceeding such as this.

13 MR. CARSON: So let's say it's 3 years
14 from now and we're sitting here again. And we have
15 before us all sorts of evidence that ball point
16 pens and videocassettes and auto parts and all sorts
17 of things has these access control measures on them
18 and people simply aren't able to buy replacements
19 from anyone other than the original manufacturer.
20 Are you saying that it would still not be
21 appropriate in the context of this particular kind
22 of a rulemaking to determine whether people should
23 be able to circumvent those access controls?

24 MR. OMAN: It would be hard to
25 generalized based on the facts that would be brought

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1 before you without getting to the larger issues that
2 are naturally within the purview of Congress. I
3 would say, of course, though that if you do have the
4 hard evidence as required by the regulations and the
5 statute before you 3 years from now, it's something
6 that would be a legitimate inquiry and that you
7 would -- it would be a timely inquiry, unlike this
8 inquiry today which is based purely on speculation.

9 MR. CARSON: Okay. This may amount to
10 the same question that Steve Tepp asked of some of
11 you. It's close to it, I don't think it's identical.
12 But in anyway, I'm certainly still confused about
13 it, so I'll ask it again, if it is again.

14 Is there a way to make a remanufactured
15 Prebate cartridge work in conjunction with the
16 Lexmark printer without infringing the toner loading
17 program?

18 MR. GREENSTEIN: I'm sorry, a
19 remanufactured Prebate cartridge?

20 MR. CARSON: You get a Prebate
21 cartridge. You want to remanufacture it so that
22 it'll work in a Lexmark printer. Can you do that
23 without infringing the toner loading program?

24 MR. GREENSTEIN: Well, the only way to
25 do that under the court's ruling is to do it if

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1 Lexmark does it, so therefore it would not be
2 infringing. Only Lexmark under the court's ruling
3 has --

4 MR. CARSON: I don't care about the
5 court's ruling. I mean, we care about it but this
6 question doesn't care about the court's ruling. As a
7 matter of fact?

8 MR. GREENSTEIN: As a matter of fact if
9 circumvention were allowed in this circumstance, it
10 is entirely possible to make Prebate/non-Prebate --
11 again, the chips are identical. The chips are
12 exactly identical in the Prebate and non-Prebate,
13 other than the identification of a little bit that
14 says this is a Prebate cartridge or not. But the
15 toner loading programs are identical in both.

16 There is no need to have a toner loading
17 program on there at all. You can set the chips so
18 that the toner loading program doesn't exist or that
19 it doesn't get it read, or that there is entirely
20 different toner loading program. In any of those
21 circumstances there would not be infringement. So,
22 yes, it's entirely possible to have a toner
23 cartridge chip with a noninfringing toner loading
24 program or no toner loading program on it.

25 MR. CARSON: Okay. Let me get Lexmark

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1 reaction to that. I'm a remanufacture. I get a
2 Prebate cartridge. I want to be able to market that
3 to people after I remanufacture it. Is there anyway
4 I can do that without infringing the toner loading
5 program?

6 MR. OMAN: Under the current
7 technological regime where they have not reverse
8 engineered a new toner loading program?

9 MR. CARSON: Maybe that's the way I do
10 it. The question as a practical manner, in fact
11 could I do that?

12 MR. OMAN: Yes, you can.

13 MR. CARSON: Okay.

14 MR. OMAN: Technically.

15 MR. CARSON: Yes. All right.

16 Now, I do want to follow up on what you
17 just said and what you were saying earlier, because
18 I'm not sure I understand it. I think you said that
19 it is possible to take a Prebate cartridge,
20 remanufacture it and have no toner loading program
21 on it and it'll work, is that correct?

22 MR. GREENSTEIN: You're saying without
23 regard to the court's ruling.

24 MR. CARSON: Yes.

25 MR. GREENSTEIN: As a pure matter of

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1 technology?

2 MR. CARSON: I think you say you don't
3 need a toner loading program on it, it'll work.

4 MR. GREENSTEIN: That's correct. It
5 could be all zeros.

6 MR. CARSON: Okay.

7 MR. GREENSTEIN: And there's a toner
8 loading program or toner measurement element in the
9 printer engine program itself.

10 MR. CARSON: Okay. I've got to be
11 missing something here. But what's to stop your
12 client from taking a Prebate cartridge, filling it
13 up, not putting any toner loading program on it and
14 sending it out and people being able to use it?

15 MR. GREENSTEIN: The DMCA.

16 MR. CARSON: Okay. What do you have to
17 do? What's the step that's missing? What do you have
18 to do that'll make it work on those printers?

19 MR. GREENSTEIN: You have to circumvent
20 the technological protection measure that's been
21 applied.

22 MR. CARSON: Okay.

23 MR. GREENSTEIN: That is the
24 authentication means between the toner cartridge and
25 the printer engine program to make sure that they're

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1 both authorized Lexmark cartridges and products.

2 MR. CARSON: Okay. I think I get it now.
3 Give me a second.

4 All right. I want to go back to the
5 basics, I mean really basic here. Just to make sure
6 I understand. And I may be the only one in the room
7 who doesn't, but hopefully by the end of this
8 process I will.

9 1201(a)(1) no person shall circumvent a
10 technological measure that effectively controls
11 access to a work protected under this title. In the
12 case before us, what's the work protected under this
13 title? I guess let's start with the folks who are
14 asserting there is one.

15 MR. OMAN: There are two works that are
16 protected under this title that are at issue here,
17 and that is the printer engine program and the toner
18 loading program. Both are copyrighted works. Both
19 are registered in the Copyright Office, and both are
20 entitled to protection under the law.

21 MR. CARSON: Okay. Do you disagree with
22 that, Mr. Greenstein?

23 MR. GREENSTEIN: That's their
24 allegation.

25 MR. CARSON: All right. Are you saying

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1 they're not works protected under title 17?

2 MR. GREENSTEIN: In the court we have
3 stated that we do not believe that the toner loading
4 program is copyrightable and we have demanded strict
5 proof that in fact the printer engine program is
6 copyrightable because it was registered under the
7 rule of doubt.

8 MR. CARSON: Okay. Professor Ginsburg,
9 any views on that question? No. Okay. Okay.

10 Now, Professor Ginsburg, you did suggest
11 that when you're looking at Section 1201(a)(1) there
12 may be some fuzziness on what a work protected under
13 this title is. Am I right about that or am I
14 misinterpreting what you said?

15 PROFESSOR GINSBURG: I said that I
16 didn't think that 1201 was meant to reach
17 circumvention of access controls whose real
18 designation is not a work protected under this
19 title.

20 MR. CARSON: Okay. I'm sorry, go ahead.

21 PROFESSOR GINSBURG: That's however, to
22 the extent that between the noncopyrightable
23 product, the cartridge and the act of circumvention
24 there is a computer program that makes that product
25 work, that's a possible sticking point for 1201(a).

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1 Then you have, I think, some tension between what
2 1201(a) literally says and what it was supposed to
3 mean, assuming that we are in agreement that the
4 target or the beneficiary of Section 1201(a) were
5 copyrighted works, which can include computer
6 programs, too. That's why we have this problem.

7 I don't want to say that no computer
8 program, even a functional computer program since
9 they are all functional, is not a work protected
10 under this title. That's why I'm having the problem
11 of sort of it's not good enough to say I know when I
12 see that there's a pretextual work as opposed to a
13 real work protected under this title, although I
14 think Congress itself was grappling with that to
15 some extent on the reverse engineering side
16 distinguishing computer program from other kinds of
17 copyrighted works. But that's 1201(f) and not
18 1201(a).

19 So on the one hand 1201(f) means, I
20 think, that the work protected under this title, the
21 real target of the access control is a work
22 protected under this title, not a computer program
23 that is making something else function and the
24 something else is not a work protected under this
25 title. But I acknowledge that a literal reading

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1 of 1201(a) would capture those computer programs as
2 well, assuming that they're copyrightable.

3 Now, one could face Mr. Kasunic's
4 question about well maybe some of those computer
5 programs aren't protectable in the first place
6 because there's not enough copyrightable expression
7 or they're de minimis, or something like that. But
8 I can't categorically say, though I would like to,
9 that 1201(a) absolutely does not by its literal text
10 permit its application to this type of situation.

11 I suppose I would like to make an
12 argument along the lines of even if the literal text
13 leads to this outcome, this is such an absurd
14 outcome that we shouldn't read the statute that way.
15 And that is a time honored technique of statutory
16 interpretation. And to make that contention, I think
17 I would have to disagree with something that Ralph
18 Oman said and which I think he implied that the
19 default position in Congress is to allow for the
20 protection of noncopyrightable industrial design by
21 means of Section 1201, an argument that he arrives
22 at, at least in part, from the negative inference
23 from Section 117. And we've talked about why I don't
24 buy that argument.

25 I think there's a different negative

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1 inference that one could draw, and that's from
2 Chapter 13 of the Copyright Act where Congress
3 actually did engage in extraordinarily limited
4 design protection from which one could infer that
5 apart from boatholds, Congress doesn't seek to
6 protect noncopyrightable parts of things. So I
7 think that one could play the negative inference
8 argument both ways.

9 MR. CARSON: Okay. Well, at least we've
10 identified the copyrighted works, although some
11 people may dissent as to whether they're truly
12 copyrighted, that are being protected by the
13 technological measure that controls access. So
14 let's identify. What is the technological measure
15 here that controls access to that copyrighted work?
16 Let's start with the proponents, I guess.

17 MR. OMAN: The proponents of the
18 exemption?

19 MR. CARSON: No, the proponents of
20 invoking Section 1201 here.

21 MR. OMAN: The secret handshake would be
22 the technological measure that controls access to
23 the copyrighted works.

24 MR. CARSON: Okay. And everyone agrees
25 with that? Assuming that they care copyrighted

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1 works?

2 MR. GREENSTEIN: No, not just that.

3 MR. CARSON: Okay.

4 MR. GREENSTEIN: I think the issue of
5 being whether it controls access or not.

6 MR. CARSON: Okay. Elaborate again or
7 remind me exactly why you say it may not control
8 access.

9 MR. GREENSTEIN: Well, because the
10 programs are completely available in the clear to be
11 read, to be copied to be analyzed, etcetera. What is
12 really being controlled here is the ability of the
13 two programs to talk to each other, or the ability
14 of the printer to use the cartridge. That's really
15 what the technological measure addresses. It doesn't
16 really address and protect the programs themselves.

17 MR. CARSON: Okay. Now okay -- I'm
18 sorry.

19 PROFESSOR GINSBURG: I'm sorry. I'm
20 going to be rude. That can't be right

21 MR. CARSON: Explain.

22 PROFESSOR GINSBURG: Because that's
23 taking a rather metaphysical reading of a work
24 protected under this title. It would suggest that
25 so long as the work exists in some form in which

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1 it's not accompanied by an access control, then
2 1201(a) wouldn't apply. At least I think I
3 understand the contention that way. Because if
4 you're saying well the computer program is available
5 in decrypted form on Lexmark's website or other
6 places, therefore this isn't really an access
7 control. It's inferred not really to be an access
8 control, that would mean that the work in this kind
9 of very platonic way being available without an
10 access control somehow somewhere, then access
11 controls that are employed don't count. Do you mean
12 that?

13 MR. GREENSTEIN: Well, I think that's
14 not actually the fact of the situation. Because on
15 the chip and the printer itself, both of the
16 programs appear in the clear and are completely
17 accessible. What is claiming to be access control
18 in this particular case is the ability of those two
19 programs to talk to each other. Whether that's an
20 access control or not is, I think, a relevant
21 question. And I think I've taken the position
22 previously that this is not an appropriate 1201(a)
23 case at all. But notwithstanding, that was really
24 the basis of it. It wasn't that it was available
25 elsewhere in forms in which you could get ready

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1 access to the programs. It was that even in the in
2 situ, in the toner cartridge chip itself and in the
3 printer chip, the programs were completely
4 available.

5 MS. PETERS: Can I ask you a question?

6 PROFESSOR GINSBURG: Yes.

7 MS. PETERS: Now I'm confused. You say
8 the programs are totally the same and the only thing
9 is that they can talk to each other. So sort of what
10 I heard over here is there's a piece of data that
11 basically says a non-Prebate or I'm a Prebate. And
12 if I'm a Prebate, then you talk. Someone help me
13 understand what it is that has a difference between
14 the two and why one talks to the other and one
15 doesn't.

16 MR. GREENSTEIN: No, they will talk to
17 each other under circumstance. Okay. The
18 authentication means, the technological protection
19 measure applies regardless of whether it is Prebate
20 or non-Prebate.

21 MS. PETERS: Right.

22 MR. GREENSTEIN: The only difference is
23 what happens after refilling.

24 MS. PETERS: Okay. That's right.

25 MR. GREENSTEIN: In the case of the non-

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1 Prebate, it ignores the bucket settings that were
2 separately rewritten to show that it was at a zero
3 level.

4 MS. PETERS: After the first, right.

5 MR. GREENSTEIN: After the first use.

6 MS. PETERS: Right. Is that right?

7 MR. POTENZA: Well I don't like Mr.
8 Greenstein's characterizations, but I think the
9 concept of ability-to-talk-to-each-other is
10 something that has come out of the blue. That was
11 never raised before. I mean, as we have put in our
12 briefs and as we have explained that there is an
13 authentication sequence where numbers are calculated
14 on both the printer side and at the cartridge side,
15 and then there's a comparison made. And at that
16 point if it matches, then there's an opportunity
17 that senses that it's an authorized characterize and
18 then the process begins.

19 There also has been some comments made
20 by the panel that indicates that the programs are
21 the same.

22 MS. PETERS: No, actually --

23 MR. POTENZA: Or someone made that
24 comment.

25 MS. PETERS: Mr. Greenstein said that we

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1 said okay, so the programs are the same. Okay.

2 Okay.

3 MR. POTENZA: Yes. Well, that's not
4 entirely--

5 MS. PETERS: I know you registered two
6 separate toner cartridge programs.

7 MR. POTENZA: One is a very complex, the
8 printer engine program has a lot of functionality
9 and a lot of value associated with it. And it
10 obviously buttresses the claim that there's no value
11 associated with this. But that's the printer engine
12 program.

13 MS. PETERS: Right.

14 MR. POTENZA: The toner loading program
15 is smaller.

16 MS. PETERS: Is one page. Yes. I
17 looked at the programs.

18 MR. POTENZA: Okay.

19 MR. CARSON: Okay. What's the purpose of
20 the toner loading program other than to control
21 whether you can use a remanufactured Prebate
22 cartridge?

23 MR. OMAN: It does actually indicate the
24 level of toner in the machine, it gives you an
25 indication like the gas gauge on an automobile.

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1 MR. POTENZA: If I may add, there's
2 really a significant purpose associated with it. In
3 this business once a printer is out there, there may
4 be changes in toner and thus changes in toner
5 characteristics. There's certainly a benefit
6 associated with having at a moment's notice being
7 able to describe that characteristic and having some
8 level of predictability as to where you are in the
9 toner level. So when the characteristics change you
10 want to add a new appropriate toner loading program
11 for those particular characteristics. That way you
12 can include it with the cartridge, you can put it
13 onto the chip associated with that new cartridge,
14 and therefore get the benefits of that new toner.
15 So there is something that's tied to the toner
16 itself. So you want to have that flexibility and
17 there's certainly a value to it, and it's important
18 to do that.

19 MR. OMAN: And it's a value to the
20 consumer as well, because the consumer has the
21 reliability of that updated program to go with the
22 type of toner that goes into the cartridge.

23 MR. POTENZA: And these were issues that
24 were raised with the District Court. I don't want
25 to speak for Mr. Greenstein, I haven't tried to do

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1 it, but you know he said it wasn't worth that much.
2 But I think there was some value associated to it by
3 the federal court.

4 MR. GREENSTEIN: I would just like to
5 point out that for the remanufactured non-Prebate
6 cartridges that they seem to say are so important in
7 the marketplace, well the gas gauge that Mr. Oman
8 described is specifically what's disabled by the use
9 of the non-Prebate toner cartridge. That is the
10 specific level indicator that is no longer available
11 once that toner cartridge has been used once in the
12 non-Prebate toner cartridges. It shows "toner
13 empty," "toner low" I guess is really the only other
14 setting regardless of whether it's full or not.

15 The other point is that, you know, while
16 it may be of benefit to Lexmark to be able to update
17 the toner loading program to reflect different toner
18 characteristics, you know Static Control would like
19 to do that, too. Because, in fact, when you have a
20 non-Prebate cartridge out into the marketplace, you
21 can change the characteristics of the toner that is
22 being refilled into those cartridges, but you can't
23 change the chip without Lexmark's authorization
24 under the court's application of Section 1201(a).
25 And so the public is, in fact, being denied these

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1 benefits that Mr. Potenza seems to think are so
2 important.

3 MR. POTENZA: Mr. Carson, I don't want
4 to argue our case. We'll have an opportunity in a
5 few months before the Sixth Circuit, but what's
6 interesting here now I hear Mr. Greenstein telling
7 us that they're now in the cartridge business. I
8 mean, really what they're in, and their astronomical
9 profits are based upon a chip that they sell. They
10 traffick -- they traffick in chips. They saw an
11 opportunity to have a wonderful profit margin, so
12 they began trafficking chips. I don't think he's so
13 interested about cartridges or they'd be in the
14 cartridge business as well.

15 MR. CARSON: All right. Well, let's move
16 on.

17 First of all, we're not here to decide
18 Lexmark v Static Control. Anyone who has been
19 sitting here for the last 3 hours might be surprised
20 to hear that.

21 MR. POTENZA: I am.

22 MR. CARSON: We're here to determine
23 whether during the next 3 years persons will be or
24 are likely to be adversely effected in their ability
25 to make non-infringing uses of work protected by

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1 title 17 by virtue of technological measures that
2 control access to those works. And we're interested
3 in your situation: (a) because you came here and
4 asked us to be, and; (b) because it may shed some
5 light on whether that is likely to happen in this
6 particular area.

7 So if I heard correctly, I think
8 everyone here agreed that it would possible for
9 someone in Static Control's situation or someone's
10 situation to remanufacture a Prebate cartridge and
11 not infringe any copyrighted work of Lexmark, and
12 put that market but they'd still have the problem of
13 circumventing the access control. Anyone disagree
14 with that statement?

15 MR. OMAN: It is a technological
16 possibility.

17 MR. CARSON: Yes. Yes. Okay.

18 MR. GREENSTEIN: Agreed.

19 MR. CARSON: So what that tells me, I
20 think, but someone might want to tell me where I'm
21 wrong is that Section 1201(a)(1) in fact does have
22 at least the potential, because we don't know
23 whether it's going to happen, but does have the
24 potential of preventing someone like Static Control
25 from engaging in what everyone here agrees would be

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1 a noninfringing use. Is that correct?

2 MR. GREENSTEIN: Yes.

3 MR. CARSON: Mr. Oman?

4 MR. OMAN: They can engage in a
5 noninfringing use by using the non encoded, non-
6 Prebate cartridges.

7 MR. CARSON: Well, sure.

8 MR. OMAN: Remanufacturing cartridges.

9 MR. CARSON: Sure. But that's not
10 really what was my question is. My question is if
11 they choose to take that Prebate cartridge, not
12 infringe the toner loading program, make it so it
13 will work back with the Lexmark printer and in doing
14 so if they circumvent your technological protection
15 measures, well I guess that's the problem. They'd
16 have to circumvent your technological protection
17 measure to do it. But in this scenario they would be
18 doing so to engage in a infringing use, correct?

19 MR. OMAN: The noninfringing use being,
20 if I may ask --

21 MR. CARSON: The noninfringing use being
22 reselling a remanufactured cartridge that has no
23 infringing programming on it?

24 MR. OMAN: Well, we're talking about a
25 noninfringing use of a work protected under this

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1 title.

2 MR. CARSON: Well, there's a question.
3 Mr. Greenstein, what's the work protected under this
4 title that you're trying to make a noninfringing use
5 of?

6 MR. GREENSTEIN: Well, certainly the
7 programs that would be put on the Static Control
8 competing chip would be noninfringing and
9 copyrightable.

10 MR. CARSON: So you're trying to make a
11 noninfringing use of your own copyrighted works and
12 their technological access control is preventing you
13 from doing that?

14 MR. GREENSTEIN: But in addition the
15 printer engine program. We would be making a
16 noninfringing use of the printer engine program.

17 MR. CARSON: Well, is that true, anyone
18 from the Lexmark side?

19 MR. OMAN: This does get into some
20 litigation strategy, so I would like to defer to Mr.
21 Potenza if I could.

22 MR. CARSON: Of course.

23 MR. POTENZA: I'm not certain in all
24 circumstances and I'd like to defer that --

25 MR. CARSON: Okay. You should get back

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1 to us. Lord knows, I'm still very confused so I may
2 be totally wrong.

3 MR. POTENZA: Yes. Okay.

4 MR. CARSON: But this could be a crucial
5 question in our thinking.

6 MR. POTENZA: Okay.

7 MR. CARSON: All right. Just one more
8 line of questions I guess.

9 I know where you are. You don't want use
10 to come up with any exemptions.

11 I'm not sure where you are. But you're
12 not sure where you are, I think.

13 First of all, you're not so sure we're
14 even in the area of 1201(a)(1). And if we're not,
15 there's no need for an exemption. I assume that's
16 what you say. I don't want to put words in your
17 mouth, is that your suggestion that if we conclude
18 this isn't even within the scope of 1201(a)(1), then
19 we shouldn't bother with an exemption?

20 PROFESSOR GINSBURG: Right. Right.

21 MR. CARSON: Okay.

22 PROFESSOR GINSBURG: And similarly,
23 that's: (1) This doesn't violate 1201(a)(1) in the
24 first place, so you don't need to exempt something
25 that's not covered; (2) Even if prima facie is

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1 violated 1201(a)(1), this problem -- not necessarily
2 the facts of this case, I'm not dealing with their
3 case -- but this type of problem can be addressed
4 through 1201(f).

5 MR. CARSON: You just answered my second
6 question. Good.

7 PROFESSOR GINSBURG: Right.

8 MR. CARSON: All right. So your view is
9 you've given us a possible exemption, but that's
10 something we need to reach only if we overcome those
11 first two hurdles?

12 PROFESSOR GINSBURG: Right.

13 MR. CARSON: Now, is that where you are,
14 Mr. Greenstein, or are you telling us you need that
15 exemption come what may?

16 MR. GREENSTEIN: If this were still the
17 day before the case had been filed in Lexington,
18 Kentucky, I would tell you that this case is not
19 under 1201(a). I would tell you that today because
20 I believe that that's true.

21 I would also tell you that I believe
22 that it should be reverse engineering properly under
23 Section 1201(f).

24 Unfortunately, I no longer have the
25 luxury of being sanguine on the issues having had

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1 imposed upon Static Control an injunction that
2 prevents us from manufacturing and competing for the
3 sale of toner cartridge chips that have original
4 Static Control programs on them. And we have other
5 products that we would like to bring market.

6 I cannot be sanguine that a court would
7 agree that 1201(a) and 1201(f) resolved the issue.
8 Therefore, we have come to you to ask for the
9 exemption.

10 MR. CARSON: So it wouldn't be good
11 enough for you if we just said that court in
12 Kentucky had no idea what it was talking about, it
13 was dead wrong. This isn't in 1201(a) and if it is,
14 1201(f) takes care of it? That's still not good
15 enough?

16 MR. GREENSTEIN: That would be more than
17 good enough for me. I think even my clients would
18 agree that that --

19 MR. CARSON: So nobody here really wants
20 us to come up with any exemptions?

21 MR. GREENSTEIN: As I said, the proper
22 result in this case would be a finding that 1201(a)
23 does not apply.

24 MR. CARSON: Understood. Understood.

25 MR. POTENZA: Mr. Carson?

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1 MR. CARSON: Yes.

2 MR. POTENZA: Let me just add one thing.
3 We've heard a lot about distribution. And it's my
4 understanding that the rulemaking here has nothing
5 to do with trafficking. Am I correct on that?

6 MR. CARSON: Well, that's correct, and
7 that was my next question to Mr. Greenstein.

8 MR. POTENZA: I just wanted to know. We
9 keep talking about this.

10 MR. CARSON: What good do we do you if
11 we do come up with an exemption?

12 MR. GREENSTEIN: I can't say that it
13 would solve all of Static Control's problem. It
14 wouldn't solve any of it. I think it could. And,
15 again, I don't necessarily want to start talking
16 about either litigation strategy or other commercial
17 strategies. But I would submit that at the very
18 least granting an exemption would be an important
19 statement about the propriety of the particular uses
20 at issue and the propriety of applying the DMCA in
21 these circumstances. And I think it would be vitally
22 important to Static Control to get the exemption,
23 even if it did not solve all of Static Control's
24 problem.

25 MR. CARSON: Professor Ginsburg?

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1 PROFESSOR GINSBURG: But not if anybody
2 decided to start making negative inferences out of
3 this exception, right?

4 MR. GREENSTEIN: That's right.

5 PROFESSOR GINSBURG: And that would
6 undercut your position. We've heard a bunch of
7 negative inference arguments being voiced in the
8 course of the last few hours. If the Copyright
9 Office creates one of these classes that you've
10 proposed, it seems to me to be not unreasonable to
11 say, especially after all this hang-wringing up
12 here, they must have concluded that they had to do
13 it. That they had to do it, then that must mean that
14 you're wrong and that I'm wrong on 1201(a)(1) and
15 that we're also wrong on 1201(f) and then you're
16 probably in worse shape.

17 MR. GREENSTEIN: I certainly appreciate
18 that as well. And certainly from my perspective, you
19 know, the most appropriate ruling would be one that
20 says an exemption is not necessary because this does
21 not present an issue under Section 1201(a). That
22 would be the optimal result. But if the Copyright
23 Office determines that it cannot take a position on
24 that issue or on the issue of reverse engineering,
25 then an exemption I think is the nevertheless

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1 appropriate. And, again, that may be the conclusion
2 of the Copyright Office. I don't say that that's
3 necessarily is the right one or the one that I would
4 like, but if the Office concludes that it is not
5 proper to take a position on those two issues
6 because that's not -- well for whatever reason, then
7 I think an exemption with those appropriate caveats
8 would be most welcome.

9 MR. CARSON: And you'd probably even
10 settle for us saying, "No, it's not under 1201(a)(1)
11 and if it is, 1201(f) takes care of it anyway. But
12 just in case, we're giving an exemption."

13 MR. GREENSTEIN: I would consider that
14 in a pinch.

15 MR. POTENZA: And maybe you can get Judge
16 Forester to co-sign it?

17 MR. CARSON: I rather doubt it.

18 MS. PETERS: You're done. Thank you.

19 I want to thank all of the witnesses for
20 their testimony. It's been very helpful and will
21 lead, I'm sure, to many interesting and fascinating
22 hours of discussion.

23 MR. CARSON: Which we do not look
24 forward to.

25 MS. PETERS: And so with that, this

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1 concludes the first panel.

2 (Whereupon, at 12:52 p.m. a recess until
3 12:55 p.m.)

4 MS. PETERS: Okay. The order is as it
5 is on the agenda. First the International
6 Association of Broadcast Monitors, Mr. Murphy and
7 Mr. Sherman. Then the Electronic Frontier
8 Foundation, Mr. Schoen. Then the Walt Disney
9 Company, Mr. Dow. And that includes ABC Television
10 Network. And last Mr. Fritz, Allbritton
11 Communications Company and National Association of
12 Broadcasters.

13 So let's start with the International
14 Association of Broadcasters and we can decide how
15 you're going to do this.

16 MR. MURPHY: I'll go ahead and start.

17 MS. PETERS: Okay.

18 MR. MURPHY: Judging from the way the
19 room's cleared out, I can tell that intricacies of
20 printers are far more interesting than what we have
21 to speak about. But I also know that we're staring
22 down the barrel of lunch, so I'll try to be clear,
23 precise and most importantly quick.

24 My name is Todd Murphy. With me today
25 is Pro Sherman. We represent the International

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1 Association of Broadcast Monitors.

2 We are very grateful for the opportunity
3 to share our thoughts on the broadcast flag and how
4 it could affect the public's access to broadcast
5 news and public affairs programming. We realize that
6 the Copyright Office is on a tight schedule, so with
7 the panel's permission we would like to enter our
8 prepared statement into the record and then present
9 a few remarks on the key issues.

10 Is that okay?

11 MS. PETERS: Yes.

12 MR. MURPHY: Okay. Thank you.

13 The IABM is a trade association that
14 represents broadcast monitoring companies throughout
15 the United States. Our members include nearly all
16 the companies engaged in this business in the U.S.
17 and range from companies that are family owned
18 businesses with just a few employees like my company
19 to large multinational companies that are publicly
20 owned. The vast majority are of the smaller
21 variety, and even those that are affiliated with
22 publicly held companies are tiny by comparison to
23 other companies.

24 We monitor radio and television news
25 programs at the request of our customers and then

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1 analyze and index those programs for segments that
2 affect our customer's vital personal and business
3 interests. Broadcast news programs have tremendous
4 influence over public opinion and are extremely
5 important to American business and government
6 leaders. However, news programs are very ephemeral.
7 Once a program is sent over the airwaves, it
8 vanishes into the ether. If viewers are capable of
9 receiving local newscasts, which is often not the
10 case, they could record these programs themselves,
11 but they don't have the capacity to capture each and
12 every news program and story that is broadcast in
13 the United States every day 24 hours a day. And they
14 do not have the resources or the technology, or the
15 know how to review these millions of stories each
16 month for items of interest.

17 The broadcast monitoring industry meets
18 this demand for tracking local and national news
19 programming. Like the traditional press clipping
20 services for the print media, our members monitor
21 national and local television, cable and radio news
22 programs locally, regionally and nationally. We use
23 VCRs and audiocassette recorders to record these
24 news programs, just like a private individual who
25 records programs for time shifting purposes.

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1 However, the services that we provide go beyond
2 simple off-air recording.

3 Our members carefully analyze each
4 program for stories or segments that correspond to a
5 client's interest, such as a segment that mentioned
6 product liability claims in a particular industry or
7 a segment that mentions the client by name. We then
8 create a detailed log summarizing how and when each
9 broadcaster covers a particular subject. These logs
10 identify the station that covered the issue, we
11 provide written synopsis of the segments and
12 indicate the duration of the segment, the time, date
13 and manner that it was broadcast.

14 Each morning we typically provide our
15 clients with a daily summary of the news segments
16 that meet their criteria. Then, if needed, we send
17 our clients a sample selection of segments on audio
18 or video tape, or we send them a transcript of those
19 segments. However, we do not send our clients copies
20 of entire news programs. Instead, we only
21 distribute discreet segments of news program that
22 contain only those stories or references that are of
23 specific interest to our clients.

24 When we send our research to our
25 clients, we also make it clear that the news

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1 segments that we send are only for in-house public
2 relation efforts and related PR research and
3 analysis. Our customers are not permitted to share
4 those segments outside of their own offices or their
5 corporate family.

6 Pro?

7 MR. SHERMAN: Our members offer these
8 services to a broad cross-section of the American
9 public. We serve the White House, we serve members
10 of Congress, we serve Federal, and state and local
11 government officials. We serve corporations. We
12 serve law enforcement and public safety agencies. We
13 serve advertising agencies and public relation
14 firms. And as I mentioned, we serve the government
15 in many forms, most recently perhaps I would comment
16 on the role that our industry played with the
17 Centers for Disease Control and helping them monitor
18 how the news media were covering the SARS outbreak
19 so that they could properly react to what the
20 temperature of the public was and how these stories
21 were being portrayed in various places.

22 In fact, the very movie studios that are
23 the strongest supporters of broadcast flag, the
24 reason we're here today, are among the ones that we
25 believe might be hurt the most if broadcast monitors

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1 could not do their jobs. Literally every single
2 movie studio falls within our industry's top 100
3 client list. That means that if we could not do our
4 job, they could not measure how well their publicity
5 efforts are doing by viewing what various kinds of
6 critics had to say about the movies they produce.

7 We also count among our customers
8 networks such as ABC, NBC, CNN as well as many local
9 broadcasters who not only purchase segments from us
10 in various times and for various reasons, but often
11 refer their viewers to us because it's a business
12 they don't wish to be in to take care of viewer
13 requests.

14 We're proud of the service that we
15 provide and we believe that broadcast monitors
16 perform an important function in our society. We
17 safeguard the public's right to access news reports
18 that bear directly on important issues of the day.

19 Obviously, our clients cannot watch all
20 news broadcasts in all geographic viewing areas on
21 their own. In fact, the public generally has little,
22 if any, advance warning of when and where a
23 particular issue will be aired in a news broadcast.
24 And even if they did have advanced notice, the
25 likelihood is that that newscast is taking place

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1 where they aren't. And so what good does it do them
2 to even know? Without services like those that we
3 provide, they would have no way to review what it
4 was that was said about them so that they could
5 respond appropriately.

6 And I might add at this point that the
7 key issue here is that speed of response is of the
8 most importance. To be able to find out a day or a
9 week later is not nearly enough. When a corporation
10 is facing news that might effect its bottom line and
11 its stock prices, it must react instantly to the
12 news of the day so that it can protect its image and
13 protect its stock.

14 For many members of the public,
15 broadcast monitoring services are the only way that
16 they can keep track of local or distant news
17 programming that effects them directly.

18 Furthermore, broadcasters generally
19 don't provide or have no interest in providing this
20 type of services. Well, some actually refuse to
21 provide it, though that's a few. Some find it
22 difficult to do. Some do it but find it, quite
23 frankly, a pain and they either do it very slowly
24 or, as I said, they simply refer these viewers to
25 members of our industry.

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1 In those rare instances where stations
2 do provide segments of their own programs on their
3 own to the public, none to our knowledge does so
4 with the speed necessary to satisfy, for example, a
5 candidate for high public office who is in the heat
6 of an election campaign or a corporation facing a
7 public relations crisis. Simply put, our clients
8 need to respond immediately to the way that they are
9 portrayed in the news of the day, but frequently
10 days or even weeks would go by before a station
11 could get around to selling a copy of a story if it
12 had a practice of doing so in the first place.

13 Well, as you know, the Federal
14 Communications Commission has initiated a rulemaking
15 proceeding to determine whether or not the
16 Commission should mandate the use of technological
17 measures know as the broadcast flag. The measure
18 would prevent the public from distributing digital
19 broadcast television programs over the Internet
20 without authorization. For us it would also have the
21 unwelcomed side effect of preventing any duplication
22 of broadcast flag enabled digital material, which in
23 turn would ultimately put our entire industry out of
24 business and deprive government, business community
25 and the public of their right to know.

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1 The IABM supports the adoption of
2 digital television and the implementation of the
3 broadcast flag. We realize that broadcasters and
4 other creators of entertainment programming will not
5 transmit their valuable programming in a digital
6 format unless it is safe from Internet piracy. This
7 is a legitimate concern. Even so, we are concerned
8 that this measure would also have an adverse effect
9 on our customers' ability to access segments on the
10 broadcast news and public affairs program that
11 concern them directly and often personally.

12 At present, most of our members select
13 and compile news segments of videotape or in printed
14 transcript, and then send the tapes or transcripts
15 to the client through same day or overnight
16 delivery. However, changes in the technology and
17 increasing technical sophistication of our customers
18 makes it inevitably that sooner, rather than later,
19 our members will be forced to phase out the analog
20 mode of recording and the physical delivery of the
21 tape or a transcript. Even now some of our
22 customers clamor for the speed and convenience of
23 digital delivery, which we supply to the best of our
24 ability.

25 If the FCC adopts broadcast flag with no

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1 news exception, it would destroy our ability to
2 deliver information from local news programs to our
3 clients, which in this evolving digital age would
4 effectively put us out of business. That, in turn,
5 will prevent our clients from seeing and hearing
6 what is being said about them and responding to
7 those allegations quickly and in the geographical
8 market where they remain.

9 Last fall Chairman Tauzin of the House
10 Energy and Commerce Committee met with Mr. Dingell
11 and Mr. Markey, prepared a draft bill that directed
12 the FCC to help promote digital television. The
13 House Subcommittee on Telecommunications and the
14 Internet held hearings on the measure last
15 September.

16 We understand that the Chairman will
17 reintroduce his bill in a few days. If the bill
18 becomes law, the FCC would have to ensure that any
19 device that can process a digital terrestrial
20 broadcast signal would contain a broadcast flag.
21 However, the Committee made it clear that because of
22 deeply held First Amendment concerns the broadcast
23 flag should not be used to block public access to
24 news and public affairs programming.

25 We have discussed this issue with

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1 counsel for the House and Senate Commerce
2 Committees, counsel for the Senate Judiciary
3 Committee and counsel for the House Subcommittee on
4 the Courts, the Internet and Intellectual Property.
5 Some of these officials told us that the IABM should
6 seek an administrative solution from the FCC or the
7 Copyright Office before we seek any legislative
8 solution from Congress. Therefore, we have already
9 urged the FCC to follow the Chairman's
10 recommendation and to exempt news and public affairs
11 programming from the scope of the broadcast flag.
12 Today, we make a similar appeal to you.

13 Todd?

14 MR. MURPHY: We want to continue to help
15 our clients become aware of important news stories
16 in a fast and reliable way. Recognizing this fact,
17 many of our members have excellent working
18 relationships with the national and local
19 broadcasters. Actually, as we mentioned earlier,
20 many broadcasters refer viewer requests for segments
21 of recent broadcasts to us, in part because the
22 broadcasters don't have the workforce to provide
23 that service on their own. They are in the
24 broadcast business, not the clipping business. In
25 this way broadcasters and broadcast monitoring

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1 services working together ensure that the public's
2 need for access to news and information is
3 satisfied.

4 The IABM is concerned that the broadcast
5 flag and access controls generally could prevent our
6 members from providing this important public service
7 that our clients have come to expect. So we ask the
8 Librarian to adopt a narrow, focused exemption
9 specifically designed for the broadcast news
10 monitoring industry. That exemption would allow us
11 to bypass the broadcast flag for the very limited
12 purpose of making news segments available to our
13 customers.

14 We also support the exemptions proposed
15 in comment numbers 27, 28 and 50 because they, too,
16 would allow the public to bypass a technical measure
17 for the purpose of using an audiovisual work for
18 legitimate research and analysis. These exemptions
19 are appropriate because broadcast news monitoring
20 does not have an adverse economic effect on either
21 broadcast news programming or on the broadcasters'
22 incentive to produce the news.

23 Simply put, producing and broadcasting
24 news programming and providing news monitoring
25 services are very different businesses. Commercial

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1 broadcasters generate revenues by producing programs
2 that attract viewers, increase audience size and
3 allow them to sell advertising at rates that
4 increase with the size of the audience.

5 Broadcast monitoring service by
6 definition have no impact on the size of the
7 broadcasters' audience. In fact, most of our clients
8 cannot watch the broadcasters' programs because they
9 don't have the time to watch the programs that are
10 broadcast in their area, or because they don't live
11 in the area where the broadcast occurs. Because
12 broadcast monitors do not compete with broadcast
13 stations for audiences or for advertising revenue,
14 they have no actual or potential negative impact on
15 the market for or the value of the advertising time
16 sold by the broadcast stations.

17 Broadcasters are not exploiting the
18 market for broadcast monitoring services and have
19 indicated no interest in doing so. Instead, they
20 see it as an unprofitable and time consuming bother.
21 As a general rule, they do not sell copies of their
22 news segments in their local markets, let alone
23 nationally. They do not maintain any standing orders
24 from the public for research and analysis of the
25 news, nor do they monitor news programs that are

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1 broadcast by the stations. Again, they're in the
2 business of producing and distributing news rather
3 than monitoring it.

4 If every broadcaster provided its own
5 monitoring service, the customer would have to page
6 through thousands of reports from each of the
7 country's television and radio broadcasters.
8 Obviously, a broadcast monitoring service only makes
9 economic sense if it can scan the targeted universe
10 of news broadcasters at the same time and digest all
11 that information for use by the customer.
12 Otherwise, the service would be so expensive that
13 the customer couldn't afford to pay for it and so
14 cumbersome as to be worthless.

15 So, broadcast monitoring services have
16 no impact on any potential market that the
17 broadcasters may seek to enter, even in the digital
18 age.

19 The nature of news and public affairs
20 programs also argues in favor of adopting the
21 proposed exemptions. Unlike entertainment programs,
22 news programs generally lose their value as soon as
23 they are broadcast. The value of news lies in its
24 up-to-the-minute timeliness. So there is no
25 significant after-market for news programs as news

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1 programs, just as there is no commercial market for
2 yesterday's newspaper. And broadcast monitors would
3 not displace the market for news programs needed for
4 historical research or inclusion in a television
5 documentary or a motion picture like "Forrest Gump."
6 Obviously, those uses should continue to be
7 specially licensed from the broadcaster.

8 We realize that there may be some
9 dispute as to whether broadcast monitoring is an
10 infringing or noninfringing activity. For the most
11 part, the broadcasters have given us permission to
12 monitor their news programs either through formal
13 agreements or informal handshakes. In other cases,
14 we monitor content for which the broadcasters do not
15 own the copyright, such as the video news releases
16 that run during a television news program, or for
17 that matter the commercials. So a formal license
18 agreement is not required in those cases.

19 Unfortunately, there are a few stations that
20 routinely send cease and desist letters to some of
21 the sole proprietorships that belong to our
22 organization. While the number of threats may be
23 small, they have a devastating effect on those small
24 companies. If a monitor has to drop one of the three
25 stations in the local market, it is effectively out

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1 of business in that market because without a
2 comprehensive service, you really have nothing. And
3 that monitor's clients, wherever they are, lose the
4 right to know what is being said about them in the
5 news and to view the context of that news coverage.

6 These disputes are especially troubling
7 now that we are making the transition to the digital
8 age. If the FCC adopts the broadcast flag, the
9 broadcast monitors will have to seek and the
10 broadcasters will have to give their affirmative
11 assent whenever we send a clip to one of our
12 customers. We are not concerned that the
13 broadcasters will object to this activity, although
14 that will happen from time-to-time, instead we are
15 concerned that the broadcasters will simply ignore
16 requests or keep us waiting so long that it would be
17 impossible to deliver our services in a timely
18 manner.

19 In closing, without your action the
20 public, including government and business, may lose
21 its fundamental right to have access to news
22 affecting them.

23 I would be happy to answer any questions
24 afterwards.

25 MS. PETERS: Thank you.

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1 Mr. Schoen?

2 MR. SCHOEN: Thank you, Register Peters.

3 I'm here on behalf of the Electronic
4 Frontier Foundation. My title at EFF is staff
5 technologist, which means that I'm a computer
6 programmer and not a lawyer, so I am here to address
7 to this request from what I hope will be a
8 technological point of view. I'm familiar with the
9 statute, but I probably won't be able to provide
10 legal conclusion.

11 I've been working on the broadcast flag
12 issue for quite some time. My colleagues and I
13 attended all the meetings of the Broadcast
14 Protection Discussion Group where the MPAA developed
15 its regulatory proposal. I participated in writing
16 EFF's filings on that issue before the Federal
17 Communications Commission, which is considering it.
18 And we have conducted several ex parte meetings with
19 FCC staff on this issue.

20 I've been working on the broadcast flag
21 mainly from a technical point of view since I
22 learned about it in the fall of 2001.

23 Now, the broadcast flag measure is a
24 regulatory measure which MPAA advocated to members
25 of Congress and to the FCC. And the FCC has a

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1 proceeding open, captioned Media Bureau Docket No.
2 02-230, In The Matter of Digital Broadcast Copy
3 Protection. And they issued a notice of proposed
4 rulemaking and received comments and reply comments,
5 and they're still meeting with people on this issue.

6 One group of commenters representing a
7 portion of the music industry argued that the
8 Copyright Office should actually be involved in the
9 rulemaking because copyright interests were
10 implicated. I don't know if you like taking on
11 additional rulemakings. There are people advocating
12 that. Currently it is strictly an FCC matter, and
13 the FCC is continuing to consider the question.

14 The FCC rulemaking is not expected to
15 conclude until fall 2003 at the earliest. If a
16 mandate on technological devices were adopted by the
17 FCC, it would probably not go into effect for at
18 least 18 months. I believe that 18 months is the
19 period that was proposed by the MPAA. Mr. Dow can
20 probably correct me if I'm wrong about that.

21 This regulatory measure applies to
22 technology for receiving digital television, which
23 is to say not the analog television signals which
24 have been broadcast in this country for many years,
25 but the new digital standards which are supposed to

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1 replace them.

2 In the MPAA proposal, the regulations
3 apply both to technology for receiving terrestrial
4 broadcast TV, which is free over-the-air TV and to
5 receiving digital cable. They don't apply to
6 receiving analog TV, which is the set of TV signals
7 we are accustomed to, only to the new digital TV
8 technologies. At the same time, digital TV is a
9 very important technology because Congress has said,
10 and so the FCC has said, that all of the terrestrial
11 broadcasters are going to have to switch over and
12 they're going to have to shutdown their analog
13 towers. And if you don't have some sort of new
14 compatible equipment, your picture goes blank
15 eventually. That regulation is independent of the
16 broadcast flag proposal.

17 The switch to DTV will take several
18 years. No one expects the analog towers to go dark
19 right away.

20 The broadcast flag is not an access
21 control, because the broadcast flag is not an
22 effective technological measure under Section 1201.
23 It is a flag, or a tag, or a marker in an
24 unencrypted signal. And there is currently no legal
25 obligation on any vendor to respond or react to it

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1 in anyway.

2 Absent contrary regulatory or
3 legislative enactments, devices can simply ignore
4 the flag. Ignoring the flag does not violate Section
5 1201(a).

6 MPAA, of course, has advocated a new
7 regulation which would create a new violation for
8 devices which ignore the flag in the future. Now, if
9 the regulation is adopted, the output from the
10 receivers is going to be scrambled using
11 technologies on a certain list. And how that list
12 would be put together is very controversial. But
13 those technologies, unlike the flag itself, are
14 access control technologies and they do fall under
15 Section 1201(a). In fact, they are fairly well
16 known digital rights management technologies.

17 The effect of the regulation, then,
18 would be to cause television signals which currently
19 would not be subject to any access control to be put
20 inside of an access control system subsequent to
21 their reception. You take something which is
22 uncontrolled and you add an access control to it
23 after it is received at the point of reception.

24 These approved technologies are access
25 controls and they have certain detrimental effects

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1 on users and views by virtue of preventing certain
2 activities. It is these technologies which we could
3 speak of as circumventing under Section 1201(a). And
4 proponents of the regulation are aware of that, and
5 that is part of what they see as the benefit to them
6 from this regulation if it were to be adopted by the
7 FCC.

8 So if that regulation is adopted, then
9 you can't lawfully get reception equipment except
10 equipment with certain limitations and which is
11 designed to apply certain access controls to the
12 digital television programming under certain
13 conditions.

14 Now, we could note that broadcast flag
15 is not the only potential source of access control
16 that's applied to television programming. Mr. Murphy
17 mentioned that broadcast monitors in some cases are
18 monitoring cable signals and cable systems actually
19 have conditional access controls which are applied
20 to them already, independent of the broadcast flag.
21 And I think there is another source of potential
22 issues there for the Copyright Office to consider if
23 you want to go into it and if you consider it to be
24 within the scope -- that is outside of the broadcast
25 flag their access control technologies on cable and

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1 on direct broadcast satellite. And those have their
2 own set of effects, but I don't know if you want to
3 broaden it that way and if you want to consider
4 that.

5 Now, the exemptions which were mentioned
6 in the request to testify, comment 27, comment 28
7 and comment 50 aren't specific to broadcast
8 monitoring. And as to comment 27, it was proposed by
9 Professor Edward Felten of Princeton University. As
10 you may be aware, we represented Professor Felten
11 and his colleagues in the past with regard to the
12 status of their research under the DMCA. I'm not
13 representing Professor Felten or any of his
14 colleagues today.

15 I am familiar with some of his research,
16 and the reasons that he believes that the anti-
17 circumvention prohibitions may effect it. And I
18 just wanted to observe that the request is certainly
19 much broader than broadcast news monitoring and
20 there are certainly other arguments for that
21 exemption completely independent of broadcast news
22 monitoring which have been presented. Since this
23 panel is about broadcast monitoring, I'm not going
24 to go into those or address those today because the
25 hearing concerns the broadcast monitors' request.

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1 So, that's a picture of the landscape as
2 I see it as far as access controls on television
3 programming which may effect the broadcast monitors.

4 I might preempt something that Mr. Dow
5 is likely to say by saying that the broadcast flag
6 regulation is not designed to prevent ANY
7 duplication of broadcast flag marked content. It
8 prevents duplication using certain technologies and
9 in certain circumstances, but it isn't intended as a
10 blanket prohibition on duplication. And it is
11 possible that subject to certain limitations, the
12 broadcast monitors would certainly be able to
13 perform duplication using physical media in ways
14 similar to the ways they do today.

15 And I'll be happy to get into some of
16 the technical details later on in response to
17 questions.

18 Thank you.

19 MS. PETERS: Okay. Thank you.

20 Mr. Dow?

21 MR. DOW: Thank you for the opportunity
22 to appear here before you today. In the interest of
23 time, I'll make my testimony brief. I really just
24 want to make three points.

25 First, with respect to the proposed

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1 exemptions that have been set forward. The
2 proponents here today have argued in support of four
3 proposed exemptions that have been put forward by
4 other commenters in earlier rounds in this
5 proceeding. I just want to point out at the outset
6 that three of the four of these exemptions fail to
7 identify a class of works primarily by the
8 attributes of the works themselves as the Copyright
9 Office has found is required by the statute. Rather
10 they define the proposed class by the identity of
11 the user and the type of use, which is the Register
12 determined to be beyond the scope of the Copyright
13 Office's statutory authority in this proceeding.

14 So only the fourth proposed category of
15 works properly identifies a class of works,
16 specifically as has been before, all photographic,
17 video and audio digital content that is or purports
18 to be record of fact, e.g., news footage. Now, this
19 is a class that is very broad and, as I'll explain
20 in a minute, is one for which there is no evidence
21 of either existing harm or a likelihood of future
22 harm to users' ability to make noninfringing uses of
23 works in that class.

24 I'll also note that the commenter who
25 actually put forward this proposed exemption appears

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1 to be concerned about the ability to access digital
2 as opposed to converted analog copies of works in
3 the proposed class, something that as we'll also
4 talk about is not impacted by the broadcast flag.

5 My second point is that a fundamental
6 prerequisite to crafting an exemption in this
7 proceeding is that there be an infringing use that
8 is being impeded by the use of technological
9 measures. In this case the bulk of the existing
10 legal authority points to the conclusion that the
11 purported noninfringing activity at issue here,
12 mainly the reproduction and distribution of
13 broadcast news programming by commercial
14 broadcasting monitoring service, is not in fact
15 noninfringing. It is the proper subject of
16 licensing by the copyright owners.

17 And my third point is that even were we
18 to make an assumption that such activities were
19 noninfringing, the proponents of an exemption simply
20 cannot meet their burden of persuasion in this
21 proceeding.

22 As set forth in the notice of inquiry
23 that initiated this proceeding, proponents of any
24 exemption must provide evidence either that actual
25 harm exists or that it is likely to occur in the

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1 ensuing 3 year period. This requires a demonstration
2 of actual instances of verifiable problems occurring
3 in the marketplace or proof that adverse effects are
4 more likely than not to occur, and such proof cannot
5 be based on speculation alone.

6 So, let's talk for a second about the
7 broadcast flag. First, there is no broadcast flag
8 regulation in place today. As Mr. Schoen has
9 indicated, the broadcast flag today is a bit that is
10 a bit and there are no licensing agreements or
11 regulations that require a response to that bit.

12 Now, such a regulation is the subject of
13 a proposed rulemaking at the FCC, as we have
14 discussed. We believe the FCC should adopt a
15 broadcast flag regulation. We're optimistic that the
16 FCC will adopt a broadcast flag regulation. But all
17 of you have been in this town as long or longer as I
18 have. One cannot predict with any certainty what the
19 FCC will do, when it will do it or how it will do
20 it. Thus, the proponents of the exemption are asking
21 the Copyright Office not just to measure the
22 likelihood of a technological measure having a
23 substantial adverse impact on a purported
24 noninfringing use, but instead are asking the
25 Copyright Office to: Measure first the likelihood

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1 that the FCC will adopt a regulation implementing
2 the broadcast flag technology; the likelihood that
3 such regulation will be adopted and implemented
4 within a given time frame; what that regulation will
5 look like including what robustness of compliance
6 rules might be adopted; what limitations might be
7 adopted to those robustness in compliance rules and
8 even what technologies are likely to be implicated.
9 And then on top of all of that, the likely impact of
10 that regulation on the ability of the users to make
11 noninfringing uses of the works in the proposed
12 class.

13 Now, as Mr. Schoen indicated, even if
14 the FCC is to adopt a broadcast flag regulation this
15 year, as we hope it will, there will still be an
16 implementation period of 18 months or more before
17 the obligations associated with that regulation
18 would kick in. Again, precisely how long an
19 implementation period will be provided for is among
20 the issues that the FCC will have to decide if it
21 decides to adopt a regulation.

22 We believe that all of these questions
23 make it impossible for the Copyright Office to make
24 a meaningful assessment of the real likelihood of a
25 substantial adverse effect on noninfringing as it's

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1 required to do under the statute. In fact, we
2 believe as a general matter that proposed exemptions
3 that depend upon the outcome of pending rulemakings
4 or other regulatory proceedings are improper
5 subjects of this 1201(a)(1) proceeding.

6 But let's assume for the moment that the
7 broadcast flag regulation were in place today in the
8 form proposed by the MPAA studios, the NAB and
9 others. Even if that were the case, the proponents
10 would still be unable to demonstrate a likelihood of
11 substantial adverse effect on noninfringing uses.
12 We must remember, as Mr. Schoen pointed out, that
13 the broadcast flag is a technology designed to
14 protect digital over-the-air broadcasting. Analog
15 broadcasts will not be effected by the broadcast
16 flag. And analog broadcasts will continue for at
17 least the next 3 years, and probably longer.

18 Even with respect to digital over-the-
19 air broadcasting, the proposed broadcast flag
20 regulation would not restrict the ability to make or
21 redistribute analog recordings of over-the-air
22 digital broadcasts, including electronic
23 distribution of digitized versions of those
24 recordings. The broadcast flag does not even
25 prevent a broadcast monitor from making a digital

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1 recording, or even an unlimited number of digital
2 recordings of over-the-air digital broadcasts. Nor
3 would it prevent a broadcast monitor from
4 distributing a physical copy of the digital
5 recording to its clients just as it does today with
6 its analog recordings. The only thing that it would
7 prevent is the redistribution of a protected perfect
8 digital recording over a wide area network like the
9 Internet.

10 This case is, thus, similar to other
11 previously rejected proposed exemptions in which the
12 technology measures applied do not impair the
13 ability to make a noninfringing use, but rather
14 limit the means by which those uses are achieved. As
15 the Second Circuit has made clear, fair use has
16 never been held to be a guarantee of access to
17 copyrighted material in order to copy it by the fair
18 uses preferred technique or in the format of the
19 original.

20 So, to conclude and simply put, the
21 problem described is not one of the impairment of
22 the ability to make noninfringing uses. At most it
23 is one of preference and inconvenience, and it is
24 one that is entirely speculative in nature and which
25 deals with a use that is not noninfringing to begin

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1 with. We believe that all these reasons compel the
2 conclusion that the proposed exemption must be
3 rejected.

4 And I'll be happy to answer any
5 questions at the appropriate time.

6 MS. PETERS: Thank you, Mr. Dow.

7 Mr. Fritz?

8 MR. FRITZ: Thank you.

9 My name is Jerold Fritz, I'm Senior Vice
10 President for Legal and Strategic Affairs for
11 Allbritton Communications here in Washington.

12 Our company owns television stations
13 around the country, including WJLA here in D.C. as
14 well as News Channel 8, which provides local news
15 and public affairs programming via cable systems in
16 the Washington market.

17 I'm here today not only representing
18 Allbritton, but also in my capacity as a Director of
19 the National Association of Broadcasters, the trade
20 association representing the thousands of radio and
21 television broadcasters throughout the country.

22 I want to make only a couple of points
23 this afternoon.

24 First, this proceeding is simply,
25 indisputably, practically and legally premature.

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1 Second, even if it wasn't, the video
2 monitoring industry has not come close to meeting
3 its burden to prove harm in the next 3 years, or
4 ever for that matter, since the use they make of our
5 programming is absolutely an infringing use and
6 doesn't come close to meeting the requirements of
7 fair use.

8 I must say that in thinking about how to
9 respond to the video monitors proposal, I'm struck
10 by what appears to be nothing more than a back door
11 attempt to get the Copyright Office to play in the
12 FCC play in FCC's broadcast flag proceeding. The
13 monitor's 13 page request to testify is virtually
14 identical to its reply comments to the FCC filed 3
15 months ago. This Office, frankly, should not
16 countenance this type of forum-shopping attempting
17 to leverage one agency against another.

18 The FCC is struggling with an extremely
19 complex set of issues involving all aspects of
20 transitioning the analog television world to a
21 digital one. This massive sea change raises a host
22 of intricate technical and conceptual problems that
23 go to the very heart of the business model that's
24 been used by broadcasters for a half of century.
25 Among those complicated issues is how to protect

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1 against the free redistribution of perfect digital
2 copies of broadcast material over the Internet.
3 There are literally thousands of comments before the
4 FCC in the broadcast flag proceeding, and based upon
5 statements from the Media Bureau Chief and several
6 Commissioners, the earliest that the Commission will
7 address these aspects of the digital transition will
8 be late this fall. As a result, this proceeding not
9 only isn't ripe, the seed isn't even in the ground.

10 With respect to Mr. Schoen, and while we
11 support it, not one party to this proceeding has any
12 idea what the broadcast flag will look like, how it
13 will operate, who will be effected and when, if
14 ever, it will become effective. The current
15 statutory date for the digital television
16 conversion, which not one party including the FCC
17 thinks is real, is 2006. That's somewhat past the
18 three year horizon of this Office's current
19 proceeding.

20 And that, of course, assumes that all
21 analog broadcasting will cease in 2006, a
22 nonsensical notion. There is no specific tangible
23 threat, much less the draconian prediction that Mr.
24 Sherman makes that his members will go out of
25 business. The bottom line, there is nothing before

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1 this Copyright Office. There's just no "there"
2 there.

3 That being said, the video monitors are
4 way too fast and loose with their description of why
5 they need broadcaster's products for free. Let me
6 be clear. We have absolutely no qualms with the
7 authorized service provided by the monitoring
8 industry. Our stations around the country have
9 agreements with several AIBM members, including
10 right here in D.C. If monitors didn't exist, the
11 market would create them. For every soccer mom who
12 wants a clip of Johnny's winning goal on the news
13 that night or ever subpoena requesting a story for
14 evidentiary purposes, or every request from a
15 company about product related stories our stations
16 can refer people to monitors who fulfill the need
17 and relieve our stations from those tasks. The
18 point is we do that today via contract and we're
19 certainly willing to continue that business
20 relationship in the digital world, but not for free.

21 Whether using videotapes or sending
22 information over the Internet, there will still be a
23 relationship between broadcasters and monitors. The
24 monitors have a service business that needs a
25 product, like McDonald's needs beef and buns. But

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1 McDonald's has to pay for their raw material. They
2 don't get the meat for free. Our news material, our
3 meat that we spend millions of dollars to produce,
4 shouldn't be available for free either in an analog
5 or in a digital form.

6 Let me say a word about why the
7 protection afforded by the broadcast flag is so
8 important. When our stations convert to digital
9 format, there is a potential for someone to take our
10 digital over-the-air broadcasts, make perfect copies
11 and send them all over the world via the Internet.
12 If there is no protection against such Internet
13 distribution, and that is all we're talking about
14 here, there is a clear and present danger that the
15 quality news and entertainment programming will
16 migrate to pay services that can encrypt and protect
17 them. That would not be good for my company, it
18 would not be good for the free terrestrial
19 broadcasting industry, and it would not be good for
20 those members of the public unwilling or unable to
21 pay for subscription services. Indeed, it wouldn't
22 even be good for the monitors.

23 WJLA's coverage of the Air Florida
24 disaster and dramatic helicopter rescue in the
25 Potomac River 20 years ago is a classic example of

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1 why our news is proprietary. We get numerous calls
2 annually for copies of that video. Similarly, our
3 station in Little Rock has an enormous archive of
4 video involving Bill Clinton as Arkansas Attorney
5 General and Governor that people pay us to use
6 today.

7 Our award winning investigatory pieces
8 involving cellular phone, radon tests and fire
9 retardants are certainly the kinds of material the
10 clients of the video monitors want. We didn't
11 produce those stories for free, and we don't license
12 them for free.

13 One last point. What the video monitors
14 claim is fair use is categorically not. Despite a
15 fairly tortured reading of the Sony Home Recording
16 case what the monitors do is commercial copying and
17 redistribution for money of programming that we own.
18 Monitors are commercial. They create multiple
19 copies. They distribute. They publicly perform.
20 They create derivative works. This ain't home
21 copying.

22 Virtually every significant court case
23 addressing the issue of fair use in relation to
24 local news copying by monitors has been lost by the
25 monitors. What they do is not fair use.

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1 What it appears the video monitors would
2 have you do in this proceeding is remarkably to
3 craft a national fair use law preempting a case-by-
4 case determination of the traditional four part test
5 in favor of a rule that says because it's convenient
6 to transmit news to high profile customers over the
7 Internet, it's then fair use. Well, grade A for
8 creativity, grade F for legality.

9 More to the point, an attempt at a
10 national fair use standard for an entire category
11 called news begs the question what is news. Is it
12 "Entertainment Tonight," "Glenn Harris' Sports Talk"
13 show, "Oprah Winfrey," "The Gardening Advisor,"
14 "Computer Guy," "The View," Kathleen Matthews'
15 Capital Sunday"; all those are programs on channel 7
16 or channel 8 in this market. All have elements of
17 news. Do the video monitors get a free pass to
18 transmit them all over the Internet just because
19 it's convenient?

20 The implications of what the monitors
21 propose are simply stunning. Bottom line: There's
22 no issue here for this office to decide and if there
23 were, the premise would have to be that the use of
24 our news is noninfringing, and it's not. We believe
25 that this Office should summarily reject this, what

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1 could best be described as a creative effort by the
2 video monitors to involve the Copyright Office in
3 the FCC's broadcast flag proceeding. This isn't
4 close to a ripe Copyright Office concern.

5 Thank you.

6 MS. PETERS: Thank you, Mr. Fritz.

7 Start the question with Mr. Carson?

8 MR. CARSON: Does anyone on the panel
9 here believe it's more likely than not that the FCC
10 is going to issue a regulation that in some way or
11 another requires use and recognition of the
12 broadcast flag?

13 MR. FRITZ: We don't know.

14 MR. MURPHY: Well, what the question was
15 is it likely --

16 MR. CARSON: Is it more likely than not
17 the FCC will issue a regulation requiring that use
18 and recognition of the broadcast flag?

19 MR. SCHOEN: So it's obviously --
20 there's never any way to predict what an agency is
21 going to do while they're in the middle of a
22 proceeding.

23 MR. CARSON: We'll prove that.

24 MR. MURPHY: I'd like to be able to
25 speak to -- all right. I'm sorry.

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1 MR. SCHOEN: We could talk about the
2 advocacy skill of the MPAA attorneys and argue that
3 because the MPAA has very skilled advocates that the
4 Commission --

5 MR. CARSON: Not anymore. Mr. Dow is no
6 longer there.

7 MR. SCHOEN: Mr. Baumgarten.

8 But I do think it's a difficult
9 question. Certainly we filed comments arguing that
10 the broadcast flag is unnecessary and ineffective
11 and that they should not adopt a rule. And so a lot
12 of organizations have filed on both sides, and I
13 think it's really very difficult to predict which
14 way it will go. The last we've heard they're
15 certainly still considering it very actively, and I
16 would not want to make any bets on which way it will
17 go.

18 MR. MURPHY: One thing I would like to
19 say, we know a couple of things. We know that
20 Chairman Powell is adamant about moving to digital
21 television quickly.

22 We know Chairman Tauzin is adamant that
23 news and public affairs programming should not be
24 covered by the broadcast flag.

25 If we didn't feel that broadcast flag

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1 wasn't inevitable or wasn't going to happen soon, I
2 would have stayed in Omaha today and not spent \$500
3 to fly out here and talk to you, although you've
4 been very gracious to accept us.

5 The bottom line is I'm not an attorney,
6 although Mr. Fritz presented a very careful comment
7 against us, a lot of that's not true but some of
8 what he did say is very true. We enjoy a very good
9 healthy working relationship with nearly every
10 broadcasting station in the country. There are a
11 very few stations that feel that what we do is not a
12 service, at least not a service to them.

13 We are not asking for anything for free.
14 In the circumstances where a station wants to enter
15 into a formal contract and license us for that use,
16 we are more than happy and willing to enter into a
17 reasonable licensing situation.

18 To say that I am trying to play you
19 against another agency, I appreciate that but I
20 don't think I'm nearly that sophisticated to pull
21 something like that off. I'm not an attorney, like I
22 said.

23 MR. SHERMAN: I guess I just need to add
24 one thing. We're doing that at the request of
25 congressional staff.

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1 MR. CARSON: You're doing what?

2 MR. SHERMAN: We went to both the FCC
3 and to the Copyright Office because that's what they
4 told us to do.

5 MR. CARSON: They said to come in in the
6 context of this rulemaking?

7 MR. SHERMAN: In the context of
8 rulemaking.

9 MR. CARSON: OF this rulemaking?

10 MR. SHERMAN: Yes. Yes.

11 MR. CARSON: Okay.

12 MR. MURPHY: Yes. They thought it would
13 be better to seek an administrative solution before
14 we have to go after a legislative solution.

15 MR. CARSON: Give them our thanks.

16 MR. MURPHY: What's that? Anything else
17 you want me to tell them?

18 MR. CARSON: Talk to you later.

19 MR. SCHOEN: Are you sending them back
20 to the Congress?

21 MR. CARSON: I'm not sending anyone
22 anywhere.

23 MR. SHERMAN: I think what Todd's saying
24 is if we knew that there wasn't going to be one, we
25 would not have wasted your time on such an important

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1 issue. We don't know.

2 MR. CARSON: Anyone else?

3 MR. FRITZ: Look, I've spent several
4 tours of duty of at the FCC, most recently as chief
5 of staff, and when the Commission puts out a notice
6 of proposed rulemaking, it takes it seriously. It's
7 got thousands of comments. Even if it adopts it,
8 and we hope that it does adopt the broadcast flag
9 because that will enable the transition to the
10 digital world much faster and in a cleaner way, and
11 we hope they do it. But having it adopt a broadcast
12 flag and predicting in this proceeding what it's
13 going to look like and whether it's going to be an
14 access control, what it's going to be that then
15 implicates this statutory environment for us to show
16 or for anyone to show harm in the next three years
17 is ludicrous.

18 MR. MURPHY: And, again, we're not
19 opposed to a broadcast flag technology. We're just
20 saying that we would like to ensure that some of the
21 committees' hear our interest in making it not cover
22 news and public affairs programming, we're just
23 hoping that the concern is heard. And if it requires
24 the Librarian to make an exemption or an exception
25 to do so, we would be for that. But we do everything

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1 in our powers to preserve the copyright and to make
2 sure that there is no misuse of entertainment
3 programming or anything broadcast by our stations.
4 We work very well with them, very closely, and many
5 of them subscribe to our services to such a level
6 that without us, their services would be harmed as
7 well.

8 I want to make sure I get myself on Mr.
9 Fritz's side. We are not opposed to them in anyway.
10 We are supporters of broadcasters. Without them our
11 services would not be able to be delivered to
12 probably even people in your area, into the White
13 House, both political parties, Salvation Army, Red
14 Cross; everybody who uses these services. But hear
15 me clearly, we're on the side of the broadcasters.
16 We just want to make sure that the broadcast flag
17 doesn't make it technically impossible for us to
18 monitor and deliver information to our clients, like
19 the government.

20 MR. CARSON: Mr. Dow, I think you were
21 next.

22 MR. DOW: Yes. I just wanted to say, I
23 think that Mr. Fritz is absolutely right that you
24 can't place odds on exactly whether or not there
25 will be a rule. But more importantly, perhaps, Mr.

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1 Murphy pointed out that they are, in fact, in the
2 FCC advocating an exemption that would disallow the
3 use of the broadcast flag for broadcast news
4 programming which, if applied, would mean that there
5 is, as Mr. Fritz says, no "here" here because it
6 just wouldn't apply whatsoever.

7 You can't just not predict whether the
8 FCC will act and you can't predict what the FCC will
9 do with the comments that are before them, including
10 the comment proposed that broadcast news be pulled
11 out of it altogether.

12 MR. CARSON: Is it safe to assume that
13 your organizations or organizations like yours have
14 filed comments with the FCC objecting to such an
15 exemption?

16 MR. DOW: Yes. Yes.

17 MR. CARSON: Has the FCC in any of its
18 notices expressed any views whatsoever on such an
19 exemption or whether news programming should or
20 shouldn't be included?

21 MR. DOW: Not that I'm aware of.

22 MR. CARSON: Has it even asked the
23 question?

24 MR. DOW: Not that I know of.

25 MR. FRITZ: Whether or not news or news-

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1 like programming is covered has not been raised by
2 the Commission. I will point out that the fact that
3 the broadcast monitoring industry has a form
4 agreement that was adopted under the auspices, the
5 attempt to form agreement under the auspices under
6 the Register of Copyright a dozen years ago
7 indicates, and as Mr. Murphy says, we have contracts
8 with them. But it indicates that that makes it a
9 noninfringing use. We have a product, we've
10 contracted with them, it becomes a noninfringing
11 use.

12 If it's a noninfringing use, then we
13 have nothing to discuss here. There's no exemption
14 to a noninfringing use.

15 MR. CARSON: Let's talk about those
16 contracts. I gather that a great many broadcasters
17 do have contracts with video monitors.

18 MR. MURPHY: Correct. And Mr. Fritz --

19 MR. CARSON: Well, I've got a question
20 for Mr. Fritz here. I assume you intend to honor
21 those contracts even if we have a broadcast flag
22 regime in which there are access controls which make
23 it difficult for them to do what they say they want
24 to do.

25 MR. FRITZ: Exactly.

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1 MR. CARSON: Can you give us any sense
2 of what broadcasters will do under such a regime if
3 such a regime is instituted to enable the video
4 monitors to do what they need to do?

5 MR. FRITZ: Well, we'll take a look at
6 what the technology, what they want to do with it.
7 If they want to just do what they're doing today,
8 which is copy it onto videotapes and redistribute
9 via videotapes; if they're going to take it and send
10 it to their clients over the Internet, what
11 subsequent use would be made of it. But we will
12 charge them, we will come up with some arrangement
13 by which we're willing to license our copyrighted
14 program to them for a fee.

15 MR. CARSON: Are you currently charging
16 fees?

17 MR. FRITZ: Yes.

18 MR. CARSON: Okay. Mr. Murphy, why
19 can't you just assume that they'll make it available
20 for you in the way you need it available?

21 MR. MURPHY: As long as they would do
22 that, and I don't have any reason to believe that
23 they wouldn't do so. What we're most worried about
24 with broadcast flag is that it could become
25 technically impossible for us to perform our

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1 service.

2 The reality is that analog is on its way
3 out. I don't know if you've been to a Circuit City
4 or a Best Buy lately and tried to purchase a VCR if
5 you have children who want to watch "Barney" videos
6 or whatever. You have a very hard time buying an
7 analog VCR anymore. The prices have dropped to a
8 point where it's almost not even worth Panasonic's
9 time to manufacture them.

10 So, the idea that we could continue to
11 do our services into the future using analog
12 equipment is shortsighted, at best. So we realize
13 that we have to make the conversion as broadcasters
14 are to digital equipment. Digital disseminating via
15 the Internet. And we would never engage in anything
16 that would be construed as rebroadcasting or public
17 transmission of any of our information.

18 We maintain a one-to-one relationship
19 with our client. If there's one segment that the
20 client ultimately decides that they need, they will
21 request that we provide that to them as an excerpt
22 and unedited. We don't alter the content in anyway
23 that would make the station look --

24 MR. CARSON: Okay. I understand all
25 that. But if I were your lawyer, I would be telling

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1 you pretend you're in a deposition and listen to the
2 question and answer only the question that's asked
3 if you and we'd all get through this a lot quicker.

4 MR. MURPHY: I apologize.

5 MR. CARSON: What you're saying is all
6 very interesting, but I've read it. I understand.

7 MR. SHERMAN: I'd like to add that not
8 every broadcaster feels the way that the folks from
9 Allbritton do. There are several broadcasters who
10 simply will not permit the monitoring. We have any
11 number of our members that have simply been sent
12 cease and desist letters. And when they approached
13 the stations and say "Can we talk about this? We'd
14 be happy to license." They say absolutely not. This
15 is our stuff, you can't have it under any
16 circumstances.

17 MR. CARSON: And you're nodding your
18 head, Mr. Fritz?

19 MR. FRITZ: And they get to do it. It's
20 their programming. It's their right.

21 MR. SHERMAN: Yes. Understand.

22 MR. FRITZ: And in most instances where
23 we've had to go to court, and when we go to those --

24 MR. SHERMAN: I would argue that some of
25 it is not their programming.

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1 MR. CARSON: Let's hear it one at a
2 time, if only to spare the court reporter here.

3 MR. SHERMAN: Okay.

4 MR. FRITZ: With all due respect to Mr.
5 Sherman, he gets to make those arguments on a case-
6 by-case basis in front of courts. And every court
7 that's considered his fair use arguments have
8 rejected it.

9 MR. CARSON: Well, we'll talk about that
10 in a moment, but I want to get back to my earlier
11 question.

12 Okay. Let's assume that there will be
13 some broadcasters who are just going to say no.
14 Let's also assume what I've heard, I think, which is
15 that most broadcasters are more than happy to work
16 with you.

17 MR. MURPHY: Yes.

18 MR. CARSON: Any reason to believe that
19 that segment of the broadcasting community won't do
20 whatever it takes to make sure that once the
21 broadcast flag is implemented, if it is, that you
22 have the tools available to do whatever you need to
23 do to transmit this stuff to your clients?

24 MR. MURPHY: Do I have any reason to
25 believe that they won't?

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1 MR. CARSON: That they won't? Yes.

2 MR. MURPHY: I have no reason to believe
3 that companies like Mr. Fritz are with would not
4 make that available to us.

5 MR. CARSON: Okay. Now let's go on to
6 those who aren't quite so cooperative. Is it your
7 position that when you want to take off-the-air or
8 record off-the-air news broadcasts of a broadcaster
9 who is not willing to say yes to you, that it's a
10 noninfringing use when you do that for the purposes
11 for which you're doing it?

12 MR. SHERMAN: There are certain
13 instances where I would say it should be -- that I
14 believe it is a noninfringing use. Could I give you
15 an example?

16 MR. CARSON: Please.

17 MR. SHERMAN: Procter and Gamble puts
18 out a video news release about a new product. They
19 would like an opportunity to see how the station --
20 they clearly are the owner of that video news
21 release, the copyright holder of that video news
22 release. They would like to see how the station used
23 that video news release and portrayed it. They
24 could not.

25 MR. CARSON: Now, I believe that we've

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1 heard from Mr. Fritz, and I believe Mr. Dow as well,
2 both recounting -- and this jives with my
3 recollection, not that I've looked at them lately,
4 that there are a number of cases in this area and
5 they all seem to say it's not a fair use and it is
6 infringement. I may be wrong on that, but here's
7 your opportunity to correct me. Are there any cases
8 that go your way?

9 MR. SHERMAN: Yes, I believe there's one
10 that's inconclusive, let me put it that way.

11 MR. CARSON: And what do the others do?

12 MR. SHERMAN: That's CNN. And that was
13 my company that was involved where a lower court
14 held that it was an infringing use. It was
15 overturned on a three judge panel in the Eleventh
16 Circuit. And when it went to en banc, they actually
17 remanded it back to the lower court on a
18 technicality and said start over again. And that's
19 when CNN and VMS came to a resolution on it. We're
20 licensed by CNN. Actually, we have license with Mr.
21 Fritz' company as well.

22 We're not opposed to licensing. We're
23 not opposed to paying. And that's not what we're
24 here about. That's not the issue.

25 What we are here about is being

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1 technically impeded from doing our job when we can
2 under law.

3 MR. CARSON: Okay. Mr. Fritz and Mr.
4 Dow, any reason to believe that as the Internet
5 becomes even more and more the method of choice for
6 people, including video monitors to deliver
7 information, that your companies and companies like
8 yours are going to be hesitant about permitting
9 video monitors to use that to transmit what you
10 agree that they can make copies of to their
11 customers?

12 MR. FRITZ: Mr. Carson, I think that
13 there's a marketplace for what the monitors want to
14 do. When a court issues a subpoena for a news story
15 from us, and we have no capabilities to preserve
16 those stories, or the soccer mom or even a
17 congressman that wants to know how he's playing or
18 she's playing in the news, broadcaster pressed for
19 staff may want to turn to somebody else to provide
20 that service. So there's a marketplace for it.

21 Wherever there is a marketplace,
22 businessmen will find a way to make that marketplace
23 work.

24 To the extent that the Internet or
25 digital copies make that more difficult, so be it.

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1 We'll try to come up with ways to make that
2 marketplace work, absent just shutting it down.
3 There is a need for it and I think we'll come to a
4 way to work it out.

5 But I will tell you, that it isn't going
6 to be this year. It isn't going to be next year.
7 It isn't going to be the year after. And case
8 closed. That's all you need to concern yourself
9 with, at least at this point in time.

10 MR. CARSON: We'll get to that in a
11 moment.

12 Do you have any response to that?

13 MR. DOW: No. I agree. I think that this
14 an area in which there are relationships that have
15 gone back for some time. This is an area in which
16 these things will continue to be pursued pursuant to
17 licensing agreements and that the particular uses
18 will be dealt with as they're presented and
19 evaluated on what the use is that's trying to be
20 made. What the impact of the use is. And will be
21 dealt with in the licensing structure between the
22 parties as it has been in the past. I have no reason
23 to think that that relationship won't continue into
24 the future.

25 And, again, this is again is sort of

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1 speculative because this whole area of striking
2 licensing deals for recording of digital television
3 so that you can then transmit that digital
4 television over digital connections is down the
5 road. Because all of this is taking place right now
6 with respect to analog broadcasts, which the
7 broadcast flag is simply not a factor in.

8 MR. CARSON: Let's get into that. I
9 heard that 2006 is the current deadline for digital
10 conversation. What's the date in 2006? Before or
11 after October 28, 2006?

12 MR. SHERMAN: My recollection is it's
13 June, but I'm not so sure I can't agree with Mr.
14 Fritz. You know, we've been around this place along
15 time. Things don't necessarily happen when people
16 expect them to happen.

17 MR. CARSON: Sure.

18 MR. SHERMAN: And the fact is that there
19 are many broadcasters who already haven't met their
20 deadlines for conversion, and so there is real
21 question as to whether it's going to happen.

22 MR. FRITZ: There's a two part statutory
23 test, Mr. Carson. One is 2006. But there has to be
24 85 percent penetration in any particular market,
25 that's digital penetration. That means household.

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1 That means all your houses have to have a set that
2 gets a digital broadcast. And there's not an
3 economist, there's not a government, Billy Tauzin,
4 Fritz Hollings, nobody on the Hill will step out on
5 a limb to say that that's going to happen in 2006.

6 If it happens while we're all still
7 practicing, I'd be surprised.

8 MR. CARSON: Is there anyone here who
9 would assert that by the end of 2006 analog signals
10 will no longer be available?

11 MR. SCHOEN: You might have some
12 particular programming that's digital only, as you
13 have for example a few new networks that are
14 starting up that are all digital networks and things
15 that are produced only in digital. So the
16 programming may not be exactly equivalent, but I
17 would not assert that there would not be analog
18 programming.

19 MR. CARSON: Okay. Well, let me rephrase
20 my question, because that's a valid point, I guess.
21 Is there anyone who would assert that with respect
22 to what we're talking about here, which is
23 essentially news broadcasts, that some of those news
24 broadcasts by the end of 2006 will not be available
25 in analog?

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1 MR. SHERMAN: Yes.

2 MR. CARSON: Sorry. Who was that?

3 MR. SHERMAN: That was Mr. Sherman.

4 MR. CARSON: All right. And elaborate.

5 MR. SHERMAN: The fact is that there is
6 original news programming already occurring on the
7 Internet. We're already being asked by our customers
8 to monitor that programming and to provide them with
9 either links to it or copies of it. And to the
10 extent that it's already digital, there is no
11 analog.

12 MR. CARSON: Okay.

13 MR. FRITZ: It's not broadcast.

14 MR. CARSON: Not broadcast. Okay.

15 MR. SCHOEN: There is a possibility,
16 certainly, of broadcasters producing material of
17 that nature.

18 MR. CARSON: Sure. Okay.

19 The final question, broadcast itself is
20 not an access control, but we're talking about the
21 fact that it would work in connection with access
22 controls. First of all, assume the FCC issues a
23 regulation requiring adoption of the broadcast flag.
24 Is it inevitable in such a case that part and parcel
25 of that regulation will be that people will have to

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1 employ access controls?

2 MR. FRITZ: I'm not really sure I agree
3 with your premise that it's not an access control.

4 MR. CARSON: Okay. Great. Well, then by
5 all means disagree with me and explain to me why I'm
6 wrong.

7 MR. FRITZ: I'm not sure.

8 MR. CARSON: Oh.

9 MR. FRITZ: I'm not sure what the
10 Commission is going to come out with, and no one
11 here can predict whether it's going to be an access,
12 because we don't know what it's going to look at.

13 MR. SCHOEN: As a non-lawyer, I would
14 point to the statute, which I probably ought not do
15 and I'll probably get in trouble for doing it as a
16 non-lawyer.

17 We have 1201(c)(3), the no mandate
18 provision, and we have the definition of effective.
19 And when I go and talk to lawyers, many of whom are
20 good friends of mine, they refer to the broadcast
21 flag as exactly the kind of thing that 1201(c)(3) is
22 in there to say that you don't have to respond to.
23 It's where you have some information, but it doesn't
24 actually have an effect, it doesn't actually do
25 anything in the ordinary course of its operation,

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1 but it's sort of notifying you and it's sort of
2 informing you.

3 What I hear from the lawyers is that as
4 a statutory matter you can't say that the broadcast
5 flag itself in the absence of any other legislative
6 or regulatory enactment is a measure that
7 effectively controls access to a work.

8 MR. CARSON: You can't say that it is?

9 MR. SCHOEN: You can't say that it is,
10 that is you can also say that it is not.

11 MR. CARSON: Okay. Well --

12 MR. DOW: In the absence of a regulation
13 is what you're saying?

14 MR. SCHOEN: No. If you had a
15 regulation, then you may have a new legal situation.
16 But in the legal status quo. My impression is that
17 even that the lawyers among the broadcast flag
18 mandate advocates agree with that, and they believe
19 that that's why a regulation is appropriate. Because
20 they believe that existing law 1201(c)(3) says that
21 you don't have to respond to it because it's not
22 effective.

23 MR. CARSON: Okay. Well, of course the
24 reason we're here is we're here to determine whether
25 we need to come up with an exemption to the

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1 prohibition on circumvention of technological
2 measures that control access to copyrighted works.
3 So I guess what I need to hear and I'm not sure I'm
4 hearing it, is whether it's likely and if so how is
5 it likely that we're going to be dealing with
6 technological measures that control access to
7 copyrighted works that are implicated by the
8 broadcast flag proposals. So could someone explain
9 to me just how it is that we're dealing with access
10 controls here?

11 MR. SCHOEN: When the programming comes
12 out of the receiving device, if the receiving device
13 is behaving the way that the movie studios said that
14 the receiving device should behave, it is only
15 allowed to put it in certain forms. And I believe
16 that people would assert that those forms that it's
17 allowed to come out in, are access controls.

18 MR. CARSON: Everyone here agree with
19 that? Okay. Good. I'm done.

20 MS. PETERS: Okay. Mr. Tepp?

21 MR. SHERMAN: Can I just suggest my
22 nodding my head does not mean I agree with it. I
23 didn't understand it.

24 MS. PETERS: Oh. Okay.

25 MR. TEPP: All right. I think I'll make

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1 everyone on the panel happy by saying I think I just
2 have one quick question. I hope it's quick.

3 There have been a number of statements
4 by Mr. Dow and Mr. Fritz which are potentially
5 devastating to the proposed exemption. But let's
6 assume all of those go in favor of the proposed
7 exemption so that we're assuming that within the
8 next three years there will be a substantial number
9 of news broadcasts that are digital only. We're
10 assuming that the FCC in that time period issues
11 this regulation and that it applies to news
12 broadcasting. We're assuming that Mr. Sherman and
13 Mr. Murphy are talking about is a noninfringing use.

14 All that, what prevents the companies
15 that your organization represents and that you're
16 representing before us today, from using something
17 like a hand held digital recorder to get a screen
18 shot of the news broadcast as it's being rendered on
19 a television and then using that, which obviously
20 takes you back outside the broadcast flag system, to
21 give to your clients copies of the broadcast, sort
22 of the segments of the broadcasts they're interested
23 in seeing?

24 MR. MURPHY: What would prevent them
25 from doing that?

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1 MR. TEPP: Right.

2 MR. MURPHY: I guess nothing, although
3 it seems it would be rather cumbersome. They'd have
4 to have thousands of these hand held devices trained
5 on television screens recording the screen shots and
6 the audio.

7 MR. SHERMAN: And it's multiple screen
8 shots. I don't know how frequently you take these
9 screen shots. But visuals are an important part of
10 the medium, otherwise it would be called radio.

11 MR. MURPHY: I mean it's possible. It
12 seems very cumbersome and it would probably be cost
13 prohibitive. We'd have to charge you \$50,000 a
14 segment to compile that.

15 MR. TEPP: All right. Well, screen shot
16 isn't the right word. I shouldn't have used that
17 term. I'm talking about simply recording with a
18 recorder the actual broadcast with moving video and
19 the sound that goes along with it. But let me --

20 MR. SHERMAN: Probably nothing more than
21 the affordability by the clients who ultimately pay
22 for it.

23 MR. TEPP: Is that substantially
24 different from whatever investment is necessary in
25 order to do whatever it is your companies do now to

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1 produce these videoclip services?

2 MR. SHERMAN: I don't know the economics
3 of what you're asking, so I can't answer.

4 MR. MURPHY: If the question is, is it
5 possible to do it another way, probably. You could
6 use digital to analog conversion. But then I think
7 we're coming back, and I'm not an engineer nor a
8 lawyer, circumventing something that had been put in
9 place to prevent you from doing that. And if the
10 broadcasters allow us to do that, that's fine. But
11 we don't want to put ourselves in a situation where
12 we are having to break a law to prevent breaking a
13 law.

14 MR. SCHOEN: I would actually another
15 non-lawyer opinion on that. MPAA is actually
16 advocating another regulation, because they also
17 believe that activities that are somewhat similar to
18 that are also not prevented by existing law. And so
19 it is certainly the opinion of many lawyers that
20 that kind of activity is also not an act of
21 circumvention; if you were to, say, tape off the
22 screen or going through analog.

23 MR. CARSON: Is not an act of
24 circumvention?

25 MR. SCHOEN: That it is not an act of

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1 circumvention.

2 MR. DOW: And I think the simple answer
3 is, is that what we're talking about is assuming
4 that the proposed broadcast flag regulation gets
5 enacted the way it's been proposed by the MPAA and
6 the NAB and others, that broadcast flag regulation
7 would have no restrictions on analog recordings, and
8 so it wouldn't be an act of circumvention to act in
9 compliance with the rules that are set forward in
10 the regulation. But I think all of this goes to the
11 point that what we're talking about again here is a
12 matter of preference, not a matter of an impediment,
13 the ability to make fair uses.

14 MR. MURPHY: But I think it's true, and
15 I don't know if everyone will agree or can we agree
16 that analog is going away. Analog will be gone.
17 Analog signal will be gone.

18 MR. TEPP: Well, my question presumed
19 that there's substantial number of broadcasts of
20 news programming in digital only format. So that's
21 not the point I was trying to ask about. The reason
22 I'm assuming all that for the purpose of the
23 question is to focus on whether or not you can use,
24 for example, a hand held recorder, analog or digital
25 recorder, to record what's being rendered on the

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1 various TV sets, and I guess it would take a lot of
2 them, for your companies to do essentially the same
3 thing they're doing now without offending 1201(a)?
4 And correct me if I'm wrong, your answer has been
5 primarily that it would be a lot more costly or that
6 it would be burdensome and you're not sure how much
7 the cost would be as compared to the equipment they
8 have now?

9 MR. SHERMAN: I just don't know what the
10 cost would be. If there were an impediment, the
11 only impediment is that it would make it eventually
12 so costly that nobody could afford the service and
13 it would simply go away.

14 MR. SCHOEN: I can think of something
15 that they lose by doing that, and a way in which
16 it's not equivalent. And the simplest place to
17 start on that is closed captioning. Broadcast
18 monitors, as I imagine not being directly familiar
19 with their business, would get a lot of benefit from
20 having access to captioning data that's transmitted
21 along with the news program. One reason is that in
22 the digital television world they could do a text
23 search on the captioning data and that could be very
24 useful to their customers.

25 In the digital television standards

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1 there's actually a lot of what engineers call
2 metadata, which is like program scheduling and the
3 captioning and text descriptions and things like
4 that. And that's actually carried along with the
5 programming.

6 And a television set is not actually
7 going to display all of that information that it's
8 present in the signal on the screen. So I think to
9 the extent that their customers are relying on
10 getting access to some of that metadata, there's a
11 thing called the PSIP and it has some of that
12 information. And I don't think that they can get
13 that information in a straightforward way without
14 access to the digital signal. I'm skeptical whether
15 they could get that.

16 MR. TEPP: Do they get that now?

17 MR. SCHOEN: Well, that data doesn't
18 exist in the analog TV signal, so it's specific to
19 the digital TV signal. You have captions. But in
20 the digital TV signal you have whole other
21 categories of information beyond captions.

22 MR. FRITZ: I just have one quick
23 response, and that is that's essentially what's
24 going on today. And in the context of your
25 hypothetical where you assumed it was a

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1 noninfringing use, I'm not sure you can make that
2 assumption. Because what goes on today, either we
3 own it or we don't own it. And remember, what this
4 broadcast flag and what the proceeding at the FCC is
5 attempting to do is to protect programming that we
6 own so that it's not transmitted all over the world
7 via the Internet and we don't end up in another Jump
8 TV or I Crave TV situation where we're having to
9 essentially protect an entire industry from massive
10 theft.

11 MR. SCHOEN: I regret Mr. Dow and Mr.
12 Fritz going to the merits of the broadcast flag
13 issue. Because I really think that that's not before
14 the Copyright Office and I hope that we don't have
15 to get into a discussion of the merits or the
16 purpose of the broadcast flag.

17 I think the issue that's before the
18 Copyright Office is the effect of the broadcast flag
19 on the broadcast monitors or other users and not
20 whether the broadcast flag is a good idea or what
21 it's for.

22 MR. DOW: I would actually agree with
23 that with just one small exception, which is that
24 the extent that the Copyright Office is examining
25 the extent to which technical measures are use-

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1 facilitating, that the merits of the flag, one of
2 the arguments in favor of the flag is to preserve
3 the vitality and the creativity and the value of
4 free over-the-air broadcast programming in the
5 digital environment. And so I think that it would
6 be relevant to the extent that you're getting into
7 the details of the flag to have that consideration
8 before the panel.

9 MR. TEPP: Okay. Thank you.

10 MS. PETERS: Okay. Charlotte?

11 MS. DOUGLASS: I just have an initial
12 question for Mr. Dow. I think I've heard from
13 everybody else, about whether or not the broadcast
14 flag as you are before the FCC, and as you proposed
15 it, do you consider that to be an access control or
16 do you consider it to be something else?

17 MR. DOW: Well, I think as I said, the
18 broadcast flag in the absence of a regulation is a
19 signal which right now is simply not responded to.
20 If your question is assuming that a broadcast flag
21 regulation is put in place, is the broadcast flag an
22 access control? I think that Ms. Schoen is
23 absolutely right, that what the flag does is it
24 triggers certain protections. It says when your
25 content comes across and it's flagged, it says treat

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1 me in accordance with certain rules. And those
2 rules dictate that certain technologies be applied
3 and that those technologies are in fact access
4 controlled technologies.

5 MS. DOUGLASS: Thank you.

6 Mr. Fritz, if a person wanted to get a
7 copy of a certain segments of your broadcasts from
8 one of your member companies, what would that person
9 need to do in order to get companies?

10 MR. FRITZ: Typically the way it
11 happens, Ms. Douglass, is that the station would get
12 a call from Johnny's mom saying I saw my son, can I
13 get a copy of that. Some broadcasters will say,
14 "Sure, here it is." They'll charge them 35 bucks
15 and you'll get a copy in the mail.

16 Similarly, a station might get a
17 subpoena from either in a civil case or a criminal
18 case wanting a particular story that was broadcast,
19 and the station would on its own.

20 In other instances where there are so
21 many requests; if GM has a story on a new car or
22 there is a controversy because of cellular
23 telephones and Motorola wants to know what stories
24 came out that day on Motorola, they'll ask the
25 broadcast monitors for a nationwide search, and our

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1 broadcasters, many broadcasters just don't have the
2 time, the staff to respond in the time frame that
3 those entities would want. And so we would say,
4 "Listen, we can't have it," or they would go
5 directly to the monitors. The monitors would then
6 provide the analysis and the good product that they
7 have for a few.

8 In order for the broadcast monitors to
9 do that, they would have had to have had a contract
10 with my stations, and we're happy to do that. The
11 contracts are nonexclusive, meaning that we allow
12 other monitors to do it. We don't have an
13 exclusivity to any one particular monitor service.
14 And two, we get to do it ourselves if we want,
15 because sometimes the court will want it. And so
16 that's the mechanics of how it would happen.

17 MS. DOUGLASS: Okay. So you do it
18 sometimes and sometimes you refer them to broadcast
19 monitors?

20 MR. FRITZ: Yes, ma'am. And one further
21 thing. In the case where we have archival material,
22 like all of the material we have on former President
23 Clinton when there is a movie to be made or if
24 there's some story to be made, if there's a death of
25 a prominent citizens and one of our stations has a

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1 lot of its tape in its archives, we make it called
2 directly for that for use in a longer public affairs
3 programs or such. So we'll do some of it ourselves
4 and some of it we'll refer to the broadcast monitor.

5 MS. DOUGLASS: I see. And do you
6 register these news programs at all?

7 MR. FRITZ: If you watch our television
8 programs, you will see at the end of every one of
9 our television programs copyright Allbritton
10 Communications Company.

11 MS. DOUGLASS: Well, do you then fill
12 out a copyright application and send it to the
13 Copyright Office?

14 MR. FRITZ: No, ma'am.

15 MS. DOUGLASS: Ah, okay. Let me see.
16 In your statement, I believe, from International
17 Association of Broadcast Monitors you said that
18 there wasn't any commercial market for news
19 programs. From whose perspectives were you talking
20 about when you said there wasn't any commercial
21 market?

22 MR. SHERMAN: And after-market. What
23 we're talking about is that the after-market for the
24 kinds of things that Mr. Fritz was talking about for
25 providing them for almost any kind of purpose other

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1 than being able to understand how the news is
2 impacting your business is something our industry
3 doesn't involve itself in. We don't archive the
4 news. As a matter of fact, the licenses we have
5 with Mr. Fritz' company and my particular company
6 has with his company and as a matter of practice, we
7 keep our tape no longer than 60 days and then it's
8 recycled. And most, quite frankly, of the monitors
9 do that because we simply can't afford to buy and
10 archive large quantities of tapes.

11 We're serving the communications and
12 public relations industry who need to know now.
13 Sometimes they will wish to archive it for their own
14 purposes so they can refer back to it somewhere in
15 the future, but they all know that for them to do
16 anything with it other than their own internal use,
17 they're going to have to get permission to do so
18 something with it. And I suspect Mr. Fritz' company,
19 and I certainly know others, we as a matter of fact
20 facilitate this for CNN. When someone wants to put
21 a CNN piece on their website, we facilitate putting
22 those people and CNN together so they can do it. We
23 absolutely do not give them any permission. And as a
24 matter of fact, one of our association's code of
25 ethnics states that we have to very, very

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1 specifically state that this is for internal
2 research and review purposes only and may not be
3 rebroadcast. And every single segment we send to any
4 client, every single transcript we send to any
5 client states that very plainly on it.

6 MS. DOUGLASS: So when you say no
7 commercial market, you're saying that you're giving
8 these clients copies for their own personal use and
9 for their own corporate use?

10 MR. SHERMAN: Yes. When we say that we
11 were putting in the context of there's not a heck of
12 a lot of use for yesterday's newspaper either.

13 MS. DOUGLASS: Okay. Thank you very much
14 all of you.

15 MS. PETERS: Okay. Then that will
16 conclude the hearing.

17 I want to thank all of you for being
18 here and bringing to our attention the various
19 aspects of the proposed exception.

20 And this will conclude our hearings in
21 Washington.

22 Thank you.

23 (Whereupon, at 2:13 p.m. the above-
24 entitled hearing was concluded.)

25

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