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UNITED STATES COPYRIGHT OFFICE

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

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FRIDAY,
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The hearing in the above-entitled matter was held in Room 290, Stanford Law School, Crown Quadrangle, Stanford, California, at 9:45 a.m.

BEFORE:

MARYBETH PETERS, Register of Copyrights

DAVID CARSON, ESQ., General Counsel

RACHEL GOSLINS, ESQ., Attorney Advisor

CHARLOTTE DOUGLASS, ESQ., Principal Legal Advisor

ROBERT KASUNIC, ESQ., Senior Attorney Advisor

I-N-D-E-X

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

(9:45 a.m.)

MS. PETERS: Good morning. We're going to start our second day of hearings here at Stanford University Law School. Yesterday I made an opening statement. I will not repeat it. It is outside for those who are not aware of it.

This morning we have several witnesses from the Business Software Alliance. We have Paul Hughes of Adobe Systems, Incorporated, and then we have Emery Simon representing DSA.

We were supposed to have Steve Metalitz representing a wide range of copyright owners. He is stuck in Chicago because of bad weather. He may be getting on a plane and may be able to join us this afternoon, but we're not sure about that. And that may cause adjustment of the starting time this afternoon. We'll know by the end of this morning what we'll be doing. Also with us is Frederick Weingarten, representing the American Library Association.

So we will start with Business Software Alliance, and between the two of you, you decide who's going first. Paul? Okay.

MR. HUGHES: Good morning. My name is Paul Hughes, and I'm Public Policy Advisor at Adobe Systems. On behalf of Adobe, I would like to express my appreciation for the opportunity to appear before you today at this important rulemaking hearing required by the Digital Millennium Copyright Act.

Before turning to certain specific issues raised by this rulemaking proceeding, I would like to talk about the critical importance of Section 1201 of the DMCA and Section 1201(a)(1)(A), specifically, to software companies like Adobe which confront a serious and pervasive piracy problem. The anticircumvention rules enacted by the Congress in the DMCA are the results of a deliberate and considered response by the Congress to two facts: dissemination of works in digital form poses very real piracy threats to copyright holders; and the use of technological measures to thwart such piracy is needed to ensure the availability of legitimate copyrighted works.

Let me tell you a little bit about Adobe. Our chairmen, John Warnock and Chuck Geschke, founded the company in 1982 with a very modest business plan. They envisioned employing

around 40 people in what was effectively a copy shop, doing typesetting based on their Adobe PostScript printer language.

Unfortunately, they failed in that business plan but instead launched Adobe PostScript and PageMaker and went on to launch the desktop publishing revolution. Today Adobe offers software for web, print and multimedia publishing. It's graphic design, imaging, dynamic media and other software tools enable customers to create and deliver visually-rich content across all media.

We are now the third largest personal computer software company in the United States, with annual revenues of a hair over a billion dollars. And it's obviously no exaggeration to say we wouldn't exist -- in our current form, at least -- were it not for the very strong intellectual property laws in the United States that have protected the creative work of all of us who work at Adobe.

Software has the dubious distinction of being both the copyrighted work distributed exclusively in digital form to which technological protection measures were applied and also being the

first type of copyrighted work to be exposed to massive digital piracy.

The markets for software are changing rapidly. With the establishment of the Internet as a major avenue for distributing software products, we see both a major business opportunity and a major potential threat.

First, I'd like to talk about the opportunity presented by the Internet. It provides tremendous prospects for all types of products and services to be provided and distributed more quickly, more efficiently and more cost-effectively worldwide. Forrester Research estimates that annual e-commerce sales just among businesses totaled $100 billion last year and will reach $1.33 trillion worldwide by 2003.

Technology products and, obviously, software in particular are leading the way in online distribution and are obvious candidates for such distribution. IDC, one of the major research firms in the information technology sector, predicts that the worldwide market for electronic commerce in software reached $3.5 billion last year and will grow to $32.9 billion by 2003, as more businesses and consumers become familiar with shopping on the

Net. According to some estimates, as much as 70 percent of software will be sold online by 2005. So that's the good news.

Now, the threat. Unfortunately, like other criminals, Internet pirates are ingenious and adaptive, constantly finding new ways to adapt for illicit purposes the very technology that has made e-commerce possible.

To give you a sobering example, if you search on the Internet today, you will find over 2 million web pages offering links to or otherwise talking about "warez," the Internet slang word for illegal copies of software.

This rough indicator of the problem has increased substantially over the past three years, from 100,000 web page hits two years ago to 900,000 last year, and to over 2 million today. Virtually every software product now available on the market can be located on one of these sites, including all Adobe products.

Indeed, the Business Software Alliance estimates that, of business software in use today worldwide, fully 37 percent of it is pirated. And that figure doesn't include consumer software,

games, things like that, for which the piracy rate frankly, I believe, is probably far higher.

To protect ourselves against pirates, the software industry has used a variety of technological protection measures. Often, these measures require a person loading a computer program on their system to enter a passcode or serial number as part of the installation process. If the wrong code is entered the software cannot be installed or accessed.

More recently, the industry has used a variety of encryption technologies. For example, to access certain antivirus products purchased online and downloaded, the recipient needs a decryption key which is sent by separate e-mail.

As the marketplace for computer programs has developed, it has also become the practice of most developers of business software products to license their works to their customers. This has proved to be a most efficient means of making these works available to both vendors and consumers.

A business or other user will often receive a single copy of the work, and the license will authorize the use of that product by a specified number of persons. This practice, often

referred to as "site licensing," is now an industry standard. And to ensure that only authorized persons use the software, loading a specific copy of the work in a computer often requires the application of a serial number, password or access code to ensure that the person is legally entitled to access and use the software.

Of course, hackers have adapted. Today hacker sites offer serial numbers, access codes and software program "patches" that bypass or circumvent encryption or other technical protections that the copyright owner may have employed. Using a popular search engine again, and searching this time for the word "crackz" -- always with that great "z" -- we recently found over one million web pages which make available such patches, many of which are specifically designed to defeat technological protection measures.

To give just one example, an enterprising hacker has written a small utility program called "The Adobe Serial Number Generator," that unfortunately does exactly what it's name suggests. It will generate usable -- but illicit -- pirate serial numbers that enable access to our

products and updaters by those who do not have legitimate licensed copies of our programs.

The making, distribution, and use of this pirate serial number generator is analogous to selling burglar tools or unauthorized satellite tv descramblers. The latter two categories of devices are illegal under state and federal laws and Congress intended to do the same thing with copyright circumvention devices -- make them illegal.

From our industry's perspective, 1201(a)(1)(A) is an indispensable legal tool needed to prevent piracy and distribution of these illegal access codes and patches designed to defeat technological protection measures.

We believe that it is self-evident that the Congress recognized the critical nature of this cause of action. That is why it is part of the law, and why this Administration pushed hard for the anticircumvision provisions of the WIPO Copyright Treaty that the DMCA implements. The fact that Congress saw fit to establish this rulemaking cannot be treated as an opportunity to overrule the will of the Congress. The consequences for Adobe, and for

the software industry as a whole, would be disastrous.

The vast majority of the comments submitted suggest that the anticircumvention cause of action as a whole should be suspended. We, obviously, strongly disagree. In addition, such an action is not within the scope of this rulemaking, and I'll have more on that in just a moment.

A great many other submissions argue that non-infringing uses of works, such as those contemplated under the fair use provisions of the Copyright Act, somehow trump the copyright holders right to license and enjoy their property interest.

Again, that issue is not the subject of this rulemaking, but much has been made of the supposed danger, such as the development of pay-per-use business models which may develop if this cause of action goes into effect.

The argument that possible non-infringing uses of works deserve a higher level of consideration than the copyright owners' interests has been the subject of much attention recently, including recent litigation. We believe these arguments to be ill-founded.

For example, in the recent UMG Recordings, Inc. v. MP3.Com, MP3.Com made this very argument, and the judge had no trouble disposing of the argument. He wrote:

"Finally, regarding Defendant's purported reliance on other factors (analyzing the four fair-use factors set out in Section 107), this essentially reduces the claim that My.MP3.com provides a useful service to consumers... Copyright, however, is not designed to afford consumers' protection, or convenience, but rather, to protect the copyright holders' property interests.

Moreover, as a practical matter, Plaintiffs have indicated no objection in principle to licensing their recordings to companies like MP3.com; they simply want to make sure they get the remuneration the law reserves for them as holders of copyrights in creative works.

Stripped to its essence, Defendant's "consumer protection" argument amounts to nothing more than a bald claim that Defendant should be able to misappropriate Plaintiff's property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity."

As Judge Rakoff makes clear, the goal of the Copyright Act is, in part, to enable copyright owners to license their works for a fee. There is nothing wrong or inappropriate about this. The fact that access control technologies facilitate such forms of commercialization of works is not only consistent with the intent of the Copyright Act generally, but the specific intent of Congress in enacting Section 1201(a)(1)(A).

Turning to specifics, the goals of this proceeding are clearly spelled out in the statute and relevant legislative history. Those who assert that the effective date of the Section 1201(a)(1)(A) prohibition should be further delayed shoulder an extraordinarily high burden of persuasion. They must demonstrate -- and I'm quoting here -- "through highly specific, strong and persuasive" evidence -- and now I'm not quoting -- a likelihood that, over the next three years, the net impact of outlawing theft of passwords, unauthorized decryption or descrambling, and similar acts of circumvention will be to harm substantially the ability to make licensed, permitted or other non-infringing uses of specifically defined "classes" of copyrighted materials.

The arguments present in the submissions and the oral testimony make a number of arguments why the cause of action should not go into effect. We believe that each of these fails to make the case required by law.

Many submissions argue that Section 1201(a)(1)(A) should not come into effect on October 28, 2000 for any class of work. We believe that this would have the same effect as overturning the law through rulemaking, which I submit would clearly be wrong. Had Congress intended this as a possibility, it would not have enacted the cause of action at all.

The statute, by speaking about specific classes of works, clearly directs the Librarian to examine, on a case-by-case basis, the balance of interests in each case. The case must be persuasive and compelling, and addressed to specific classes of works, and not to broad types of works such as, for example, software.

A number of submissions are devoted to arguments specific to the software industry. These submissions argue that 1201(a)(1)(A) would impede reverse engineering of software. The interrelation between anticircumvention rules and acts of reverse

engineering -- and by which I mean legitimate acts of studying and analyzing the computer program -- were considered in detail by the Congress in the course of its very long deliberations on the Digital Millennium Copyright Act.

Section 1201(f), as you know, was added by the Senate during its consideration of the Act. That section is a specific exception to 1201(a)(1)(A) and thus reflects the deliberate judgment of the Congress in respect of exceptions determined to be appropriate. The legislative history of the Senate bill makes clear that the specific intent of the Senate in adding Section 1201(f) was "to ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs."

Section 1201(f) is obviously not the subject of this rulemaking. Whether changes to Section 1201(f) are appropriate -- and Adobe does not think any are needed -- is a matter for the Congress, and the Congress has not directed this rulemaking to consider that issue.

If you will permit, I'd like to make one final point. The vast majority of the submissions argue that truly bad things will happen if technological measures can be used to control access to software and other works. But these arguments fail to recognize the fact that the use of such measures is not a new development.

As I mentioned already, software developers have long relied on technological protection measures. Passwords and serial code controls have been in use for over a decade. Encryption technologies have been used for more than five years. Over the years, companies have made many changes in how they use these technologies, in part as a response to consumers' needs, and in part to thwart pirates.

The submissions filed do not argue that the use of these technologies has inhibited the availability of works or harmed the legitimate user. Why do they not argue this? Because there is no evidence to bear out such a claim.

The gist of the arguments made is that creating this cause of action against hackers of copy protection technologies would somehow change everything. While the submissions raise a vast

array of hypothetical possibilities, I submit that none present compelling evidence that the ongoing practices have indeed created a problem.

There is substantial evidence, however, that hackers are developing and posting patches and other means aimed at defeating these technologies. Section 1201(a)(1)(A) gives us a powerful message to fight back, and this is what Congress intended.

Adobe and BSA respectfully submit that, based on the submissions and testimony to date, the record fails to demonstrate that any "particular class of works" is likely to be subject, over the next three years, to substantial adverse impact. Therefore, we argue that Section 1201(a)(1)(A) should take effect on October 28, 2000, as intended by the Congress. Thank you, and I look forward to taking your questions later.

MR. SIMON: Thank you. Rather than reading another prepared statement, I thought I'd kind of try to take on some of the issues that have been raised in the various testimony to date, some in Washington, some here yesterday. And there are about five or six of these that I'd like to kind of quickly run through, and then I'd like to say a

couple more words about the reverse engineering issue as well.

The goal of the copyright law is not to promote use of works. It is in part to promote use of works, but that's only one of its goals. The goal of the copyright law is to promote creative expression. And somehow to read into this subsection of this rulemaking the notion that a predominant goal should be to promote use is simply wrong. That's not the intent of the act overall, that was not the intent of the Congress in enacting this.

What the Congress did is balance a series of interests, and it balanced, really, two sets of interests: the interests of those who create works, who make creative expressions and fix them; and those who enjoy the benefits of those works, we, society as a whole.

And it balanced the harm posed potentially by piracy to those who create, against the harm posed potentially to users through the application of technological measures to prevent that harm, to prevent that piracy.

In drafting 1201(a)(1) the Congress determined the harm of piracy was greater. That's

why the way this statute operates is the cause of action comes into effect. That's the fault presumption. It fails to come into effect only if there is some superseding compelling consideration.

And the question there is: Is there enough evidence now that wasn't there two years ago to justify that superseding consideration? And I think the answer is no. I think you have not heard any testimony of any particular instances beyond situations of mistake (like the Lexis situation of a mistake in distributing a CD-ROM that had a time-sensitive fuse on it) which actually suggests that there's harm, that there's a problem out there.

Is the mere presence of a technological protection measure enough to raise a red flag? I think the answer to that is clearly no. What the Congress said in this act in Section 1201 overall is that technological protection measures are appropriate, necessary means that it approves of to be used in the context of preventing people from stealing works.

The fact of the technological protection measure is not particularly liked by some people does not mean that it's a bad thing. But a lot of the testimony you have heard suggests that the mere

fact that somebody has applied a technological protection measure -- like The New York Times applying an access control measure to its articles creates a chilling effect and therefore creates a potential problem -- the statute is not about chilling effects.

The harm that has to be established here to suspend this cause of action is harm, actual or potential. And a chilling effect does not meet that test. There's nothing either in the legislative history, in the Congress debate of this, or in the statute itself that suggests that. In fact, there's a lot of discussion that's just the opposite.

Okay. Class of works versus category of works. Category of works is a term of art. It's a statutory concept which lists particular sets of things that fall into categories. Had the Congress intended for class to be read as broadly as that, it would have said category. Had the Congress intended for class to be read more broadly than category, it would have said that.

But in fact it said -- the legislative history suggests just the opposite. The examples that it gives is that class is somewhere between a category and an individual work. This piece of

paper that I wrote this morning, somewhere between this and I guess all literary works is where class falls. And it probably falls a lot closer to the -- you have to specifically figure out what that universe of works is, where the actual harm is.

Harm is not -- and the reason I believe that the Congress did this is because it did not want a consequence where if, for example, one could establish that chemistry textbooks, because they're subject to access controls, become much less available for educational purposes and that it causes harm in the sense of one of the five factors that have to be weighed here by the Librarian. But the fact that chemistry textbooks create that problem and that therefore all literary works -- which is the category that the chemistry textbooks fall into -- should now no longer be subject to this rule of law, that's clearly not what the Congress meant, couldn't have been what the Congress meant.

Because with that, what you end up doing is sweeping an enormous universe of works out the door because there may potentially be a problem in one subsegment of that universe. So that's category versus class.

Class is clearly much smaller than category, it's probably not as small as an individual identifiable work. But it's somewhere between that and probably closer to that end of the spectrum than it is to the end where categories sit.

Factors to be weighed in your determination. The statute actually lists that the Librarian has to examine five variables. And an enormous amount of attention has been paid to the fourth variable. That fourth variable says "the impact of prohibiting the circumvention of technological measure applied to copyrighted works has on criticism, comment and use, reporting, teaching, scholarship and research."

I also point out that in that list of five, it's a conjunctive, it's an "and." And you have to weigh the impact in each of those areas in order to make your determination, or for the Librarian to make his determination.

And I simply point to two of the other factors. The first factor talks about the availability for use of copyrighted works. And you have received a substantial amount of testimony from Paul, just a moment ago, and from others that the availability of technological measures to protect

our works is one of the reasons why we make works available in more convenient forms to users.

We talked yesterday about an example of what would happen if that CD-ROM containing those French cases had just not been available in digital form. That somebody would have gone to dozens of law journals in physical form and tracked them down, creating an enormous disincentive to research. The fact that those kinds of materials are available in digital form creates an enormous incentive to research, as well as other commercial markets.

So the availability of works has substantially increased, I would pose to you, because of the availability and the increased use of technological measures. That factor weighs no less and no more in the list of five than any other, and it can't be dismissed. It has to be weighed.

The second factor I'll point you to is the fourth one in the statute, the one that talks about the effect of circumvention measures on the market for, or value of copyrighted works. In making a determination that there may be harm -- for example, with respect to chemistry textbooks because in the classroom environment those textbooks become less available and it creates an impediment to

teaching -- before you say that that is a dispositive and final decision, you have to look at the other factors. And one of the factors that you have to look at is what does that decision portend for the market for chemistry textbooks, the commercial market for chemistry textbooks. That's what the fourth factor talks about.

And again, it's a conjunctive between those factors. None of these is dispositive, and in making the determination you have to weigh all of them and balance them. This is ultimately a balancing exercise.

There's been a fair amount of discussion of the evils of a metered world, of a pay-per-use world. I find this baffling. A huge amount of commercial activity in our economy, global economy, is based on metered use. I rented a car at the airport yesterday. I pay so many dollars for so much time. If I want to keep it longer, I pay more. There's nothing wrong with that concept.

Telephone service. I pick up the phone to make a call, and I pay for the amount of time that I use it. Airport fees, airport user fees. We pay user fees. We pay a whole bunch of fees based upon use, upon the notion of the benefit that I

derive from that activity determines the price that I pay for it. That's at the core of a whole universe of economic activity.

The notion that that is now going to be applied to copyrighted works being wrong is, to me, baffling. Because if it's wrong to be applied to an intangible property interest like a copyright, why isn't it also wrong for it to be applied to any other property interest?

Like the fact that Hertz owns the car that I happen to be driving around. And gee, I really like this car. It's got this wonderful navigation device in it, so I never get lost. I'd love to take it home with me.

So I have initial lawful access -- and I'll get to that again in a second -- I have initial lawful access to this Hertz car, and it's got this wonderful navigation device in it. And actually, the thing that makes the navigation device is a combination of some hardware and some software. The software's copyrightable. Does that mean if I could figure out some way to just take that software out of there, and would only use it for fair use purposes -- I'd guarantee it, I swear -- does that mean that I could somehow take this because I have

initial lawful access to this car? I don't know. It just baffles me.

The notion that property can be parsed based upon the benefit that the user gets out of it, and the fee charged can be assigned in a way that corresponds to that benefit, that's a good thing for consumers.

If every time I flew to San Francisco I had to buy a new car, that would make no sense at all. And one of the increasing trends in the software industry is to make applications available off web pages, off the Internet, which enables people to use, for example, a tax-paying program so they can do their quarterly taxes by renting, in effect, the use of that software off the Internet instead of having to buy the product. Much cheaper. Plus, you're getting it constantly updated so you're getting the latest tax laws.

Isn't that a good thing that instead of my having to pay $100 for this software program, I can pay $4 once a quarter? So the business models are evolving in a way that creates fees based upon the benefit that is being derived. Technological protection measures are integral to making that possible. That's a good thing.

Initial lawful use I think kind of has been done to death. But let's kick this one one more time. Initial lawful use was a concept that was much discussed within the legislative process that led to the enactment of the DMCA. It was a concept that was posited by many of the same parties who are putting it forward to you in this rulemaking proceeding.

The term does not appear in the statute because the Congress rejected the concept. For you to somehow read that concept into the statute where the Congress specifically rejected it would do violence to the role that's been assigned to the Librarian. It would be substantially outside the scope of his role and his authority.

It is not for the Librarian to make laws; it's for the Librarian to make rules implementing laws. It's not for those rules to overturn what the role of the Congress is.

I also find the concept of initial lawful use kind of baffling in the library context. Let's do a library context. I went to Georgetown Law School, and Georgetown Law School permits its alumni and its students to use the library but does not permit the general public to use the library.

So does that mean that if, for some reason I, as an alumni, do have initial lawful access to that library on a wonderful Friday afternoon in May, does that mean that I can go into that library at four in the morning on Christmas Eve as well? The fact that I got in once legally, does that mean that I can get in again and again? Obviously, it doesn't. It can't mean that.

Does the fact that I took a book off the shelf and read it and used it for research mean that I can now take that book with me? Obviously, it doesn't. The notion of initial lawful access as the test simply supposes that there's only such a thing as one permission. I only have an on/off switch. I can give you permission or not give you permission.

That simply is contrary to all the business models that are evolving in a digital age, particularly for a software industry but I think for other industries as well. And if that is the rule that you would adopt -- which I would argue to you is simply not permitted because it's outside the scope of rulemaking because it was specifically rejected by the Congress -- but if that were to be the rule that you would adopt, you would defeat the entire purpose of this provision.

There's a problem that's common to all the concepts that have been raised, of the categories that have been suggested to you, whether they're some variation on the initial lawful access notion or thin copyrighted works or some other concept. And the problem with them is that no matter how you try to parse them, they ultimately end up swallowing the whole rule.

There's really no way to say this is an initial lawful access, fair-use type, thin kind of work; and that isn't. They're all either one or the other. Fair use can be exercised with respect to anything.

Okay, last point. You really have only one determination to make, and that determination is adverse effect. It's really a harm test. You have to find harm. If you do not find harm, the inquiry stops. And the burden of finding harm is pretty high. The burden is for people to present to you specific instances where it has occurred. No harm, no action.

Resist the temptation to act. I understand, having been a bureaucrat, that bureaucrats don't like to do nothing. Bureaucrats like to do stuff. And I understand that you've been

charged with rulemaking, and you have this enormous temptation to do something. They're all fidgeting and smiling at me. Don't do anything. It's cool. You know, sometimes you avoid making mistakes when you do nothing.

Okay. One last word and that's about reverse engineering, which is an issue that is entirely outside the scope of this rulemaking. Let me say that again. It's entirely outside the scope of this rulemaking. It is a matter specifically, thoroughly, comprehensively addressed in Section 1201(f), which creates a specific exception to 1201(a)(1)(A). The Congress thought about it long and hard, fought about it, deliberated, and enacted it. That's it.

It may be a lousy rule, but it's not for you to say that. It's for the Congress to come back and think again and say, "Hey, we messed up. We've got to do it again." Or not. That is not the issue posed to you in this rulemaking. Thank you.

MS. PETERS: Thank you. Fred.

MR. WEINGARTEN: Thank you. Actually, I haven't been a bureaucrat in 20 years myself. My experience is that the typical bureaucrat doesn't

want to do anything. And so I'm here to urge you to do something.

My name is Fred Weingarten, also known as Rick or Frederick Weingarten. I direct the Office for Information Technology Policy for the American Library Association, OITP. We're a small research and analysis office for the Library Association.

And for the last year I've had the privilege of working for the five library associations in Washington -- the Association of Research Libraries, American Association of Law Libraries, Medical Library Association and the Special Library Association -- in addition to ALA in trying to do some background digging on this issue and support their efforts in this rulemaking. And so I'm pleased today to speak for all of those.

I come before you, not as a lawyer, nor even in fact as a librarian, as some of you may know. I'm a policy analyst. I've worked off and on on information policy, including intellectual property issues for many years. I was originally trained as a computer scientist, but my old colleagues have warned me long ago never to apply that word to myself these days.

But I was a computing research manager for the National Science Foundation for many years. In fact, I made some of the early grants that led to the NSF.net and Internet, and, thus, may be the cause of some of this heartburn and churning that we're all going through these days.

I've also worked at the Congressional Office of Technology Assessment where, in fact, in the '80s we did more than one study of the impact of technology on intellectual property law. And, in fact, the first study we did was for Senator Matthias and Bob Kastenmeyer's committees. And I'm sorry Steve Metalitz didn't make it because when he was working for Senator Matthias, we worked with him very closely on these issues.

In our first report, one of the questions that the Congress had asked was whether they couldn't resolve some of these technology issues once and for all. Couldn't they pass a copyright law that anticipated technological change and struck the right balances so they didn't have to constantly revisit? And one of our answers was not very well welcomed because it was no. And I think this rulemaking here right now is evidence that we were right.

You've really got an incredibly difficult task, I think. Partly because the law is really a very confusing law, many of the terms are vague, ambiguous. And in our view, in fact, the law's Section 1201 contains a basic paradox. And you're being asked to resolve that paradox in this rulemaking without a heck of a lot of guidance.

Although the description of the process of the bill made it sound very rational and deliberative and carefully thought out, that's not my recollection of how that bill came to pass. It was extremely contentious, right up to the end. Lots of different views, two different committees of jurisdiction in the House, all fighting over what it meant and what it should cover.

And so, in some sense, recourse to legislative history for guidance is not too useful, either. But other people closer to that have already testified for us on that. But we would say that we think that itself is a debatable proposition for this panel to think about.

And, finally, you're really dealing with fundamental issues. I mean, copyright law is rooted in the Constitution. Rental cars aren't. So the basic conflict between the public interest and all

of those terms in the law that we sort of encompass with the term fair use -- with small F, small U -- are deeply embedded public policy values, and one can't dismiss them lightly.

So we've raised in our responses and in our testimony, I realize, some broad issues, broad concerns, maybe uncomfortably broad. But we think it's very important for this panel to consider the fundamental public policy environment in which the rulemaking is taking place. And we understand that, at the end of the process, you have to go into a room and really decide specific words and get into details. And that is a tough problem for you. But there is a context that I think we really need to raise.

I mentioned that the law has a basic paradox. And the basic question before this panel is whether technological measures intended to control access to digital works also prevent users from exercising their rights under copyright law to use the material in non-authorized but non-infringing ways. And it seems patently obvious to us that they do.

In the first place, circumvention is defined by the law as bypassing a technological

measure without authorization. Fair use and other limitations in the law are, by definition, unauthorized uses. Therefore, unless the technological measure itself is programmed to step aside -- or in some sense, maybe pre-authorize unauthorized use -- it must block a non-infringing lawful use. And that's a basic paradox in the law.

Let me say that, as an aside, that it's not clear to me from my long ago technical training, that the technology needs to be that rigid. That we can't have fair-use soft or fair-use friendly technological measures that achieve the objectives of preventing piracy and yet are flexible enough to allow public interest to be fully exercised.

But that's an area in which we, in fact, in my office are trying to open a dialogue with people in the industry with some of the newer entrepreneurial e-book and e-library firms. We've started talking with them and, in fact, would like to work out some sort of convergence of library service models and business models that doesn't end up in a food fight in Washington, which doesn't help anybody. Although it pays my salary.

It seems to me that there are four questions that you have before you. One, does a

technological measure that controls use also control access? The answer is yes. And I'll discuss that a little later, but I think the record for the hearing has clearly established that.

Second question. Are there now or are there likely to be in the next three years technological measures that persistently control access or use after a user has lawfully acquired a work? Again, we think the record unambiguously establishes that the answer is yes. Such measures already exist, and these persistent controls are really central to business models envisioned by the content community.

What works will be or are protected by such measures? Well, I think one could reverse the question and say what won't be. Let me just read -- Steve isn't here, but let me just read the range of industries he will be representing when he testifies: Film Marketing Association; Society of Composers, Authors and Publishers; Media Photographers; Publishers; Association of American University Presses; Authors Guild; Broadcast Music; Business Software Alliance; Directors Guild; Interactive Digital Software; McGraw-Hill Companies; Motion Picture Association; Music Publishers'

Association; Professional Photographers; Recording Industry.

These people are all interested in this hearing. Why are they interested in it? Because they all want to use technological measures to protect and market their works. So how can we, then, say "Well, it's just this work that is of concern to us."

The other reason that we look for a broad exemption, of course, is that libraries don't like to play favorites. We serve an incredibly diverse community. Different libraries serve different communities, and it is hard to imagine a kind of work that is not in our concern that we be able to provide our patrons with access to it.

So what's the harm? Well, we believe that the record has established the existence of harm in four ways. First, we argue that since fair use is basic public policy rooted in copyright law, a balance required by the Constitution, any diminution of it through strict interpretation of Section 1201 is de facto serious harm.

You're removing from the public a basic right they have or a privilege -- however you might

use the term -- under copyright law. And we should not have to go any further.

Those rights and privileges have been established for 300 years. First in British common law, and then in U.S. law. It's been upheld by the Supreme Court for many years. It's basic public policy. Why should we have to show and re-establish and re-argue something that has been in the law for 300 years?

Secondly, current experience with licensed products in which license terms are protected by technological measures shows that harm is already being experienced in areas such as archival rights and first sale. Libraries, the Copyright Office and the Librarian have every legitimate reason to presume that these limitations are just the leading edge of a rapid technological trend, and that such harm will undoubtedly increase over the next three years. And I'll get back to this issue of why I use term "licensing." I'll get back to that in a minute.

Third, although the operative section of the law has not yet come into force, it is reasonable to presume that when it does, the threat of criminal penalties on users, coupled with the

vague and broad nature of the anticircumvention provisions, is going to result in a severely chilling effect. It may have seemed, based on some of the testimony or some of the responses, that librarians just can't wait to get out there and hack. And just can't wait to provide havens for piracy for their users. In fact, what I've observed in my years working for the Library Association is that librarians tend to be a fairly conservative lot.

They really have other things to do than to try to figure out from day to day what the copyright law is letting them do or not. And in such an ambiguous environment, if there's threat of criminal penalties particularly or lawsuit, their answer will be no, even if the result is harm to the user or denying the user access that they might have legal rights to.

Fourth, it's clear that these controls are not only for the purpose of preventing piracy, but they are to implement and enforce a new pay-per-use model on all information users. Now, let me say that we're not asking you to overturn a pay-per-use business model. That's not the job of the Copyright Office, not the job of copyright law.

But it is the job of copyright law to retain a balanced social policy in that environment. And, in fact, if we are moving towards that model of information sale, the role that libraries and schools play in providing safety-valve access to the information works is even more important. And it's even more important to protect that role.

Let me quote from just one publicity announcement from a vendor. And I'm not going to name the vendor in this. I really don't want to pick out and embarrass a particular firm. It really reflects, I think, the view of the industry.

"This firm has developed a way for publishers --" and I'm quoting -- "to receive revenue each time a student accesses even a single page of a title. This has never been possible before. Thus, older titles and out of print books that have been read and studied thousands of times over the years in libraries (yet have not generated new income) will now produce new revenues and become more valuable assets to publishers."

Now, if that isn't a basic threat to the fundamental role that libraries have served and schools have served over the last couple hundred years, I don't know what is. We're not speculating

here; we're not imagining problems. We're saying that this move to a pay-per-use model threatens the very basic foundations of what libraries and schools are all about. And it is important, if that is happening, for us to provide or protect the safety-valves inherent in fair use.

Let me finish by addressing four particular topics that I think have caused some confusion in the past. And although my addressing them will probably increase rather than decrease the confusion, I've been wanting to do this after watching all five days of hearings.

The first is the problem of access and use. I think for the purposes of Section 1201, there's simply no useful distinction between the term "access" and "use." Section 1201 does not prevent circumvention for use. Every time one uses a digital work one accesses it. All technological controls control access.

So if one wants to extract from a work, one wants to print a work, one wants to play a movie on a DVD or play a song off of a CD, or view a picture, what you're really doing is accessing even though, from your terms, it's a use. So access is inseparable from use.

And in my testimony I quote Judge Kaplan on the Reimerdes case. That may be the only thing that Judge Kaplan said that we might agree on, but we think that he clearly views access as playing the DVD on a computer.

Secondly, the problem of persistent controls. We've called these measures that continue to control access after the work is initially acquired persistent controls. That can be as simple as a database system that requires repeated use of a password each time one logs on to use it. Or they can be far more complex as technology evolves.

These persistent controls are not just for the purpose of protecting against piracy, but to develop and enforce new business models, many which seek to charge for uses that in the past been free once a work has been lawfully obtained.

Once again, we're not against the development of those new business models. But we don't think copyright law needs to be invoked to protect particular business strategies. Let me quote from a report by an industry marketing firm that serves the publishing industry:

"For the past several years, digital rights management (DRM) has focused primarily on

protecting digital content from illegal or unwanted uses." And you've heard a lot about that in the five days of testimony.

"Lately, though, the scope and emphasis has been evolving to include more than just copyright protection ... the pressures and opportunities in digital markets are forcing both publishers and their vendors to take a broader view of what a digital rights management platform entails."

And yet Section 1201, under the guise of copyright law, is expected to protect all of those possible models, all of those possible ways of distributing information.

I'd like to talk a bit about circumvention. Many times I've heard the panel ask presenters whether they have had any experience with circumvention. And I've really wished that any one of them has fired back a question, what is a circumvention? What do you mean?

Since the definition of technological measure is so broad and all-encompassing that it can even include passwords and library cards -- as we established in our comments -- what does circumvention mean? Does using a password to access

a database, to use it in a way that is not authorized in terms of the license a circumvention? I don't know. But I haven't heard anybody tell me it isn't.

That makes it very difficult for a librarian to say whether or not she has circumvented or not. Will misuse of a library card now become a federal crime because it is a circumvention to access a database in a library?

Linda Crowe's library offers access to an online database system that requires a password and a library card as an identification and entry measure. Suppose somebody in that district loans their library card and password to a visiting relative, who then goes to the library and uses it to download some information for a school project. Has that person now become a federal felon for circumventing 1201? I'm not sure that they haven't.

Now, we might say, "Well, they would never prosecute such a person," and so on. But that raises a problem that Bob Kastenmeyer used to worry about all the time, whether we're creating in our copyright law the essence of a prohibition that essentially makes scofflaws and criminals of us all

by winking at minor offenses, and we'll decide what a major offense is.

Finally, I'd like to talk a bit about the relationship between licensing and controls because that's come up several times. So let me suggest some considerations, because they do wrap together and are very difficult to pull apart.

But basically there's no direct relationship between the technological issue and licensing. Section 1201 is part of copyright law. Licensing is a contract, a private contract. So we have no objection to knowledgeable parties, consenting adults, agreeing to anything they want to agree to. Librarians do this all the time. What we object is criminal measures under copyright law being tangled up in that.

People can license away anything they want. That has nothing to do with whether Section 1201 and fair use in Section 1201 should be protected and interpreted.

And I'd also like to point to Jim Neal's testimony -- and Lolly mentioned this yesterday also and I think Karen Coyle did -- that copyright law does set some boundary in negotiating licenses, sets some basic principles.

Second, technological measures can really restrict negotiation. Because as they become more and more embedded in the work itself, it becomes non-negotiable. You can negotiate until you're blue in the face, but if the technological measure is part of the work itself, there's nothing to negotiate.

Unbalanced enforcement. If the database provider that Linda Crowe works with decides that that misuse of the password and library card violates the terms of the license, they can jolly well go to court and sue for breach of contract. And if Linda thinks they're being too rigid, she can go to court and sue.

Disputes in contract law can be resolved in court and are all the time. What Section 1201 does, if not equipped with an exemption, is bring the weight of criminal law against one party in that dispute, in addition to breach of contract. That's an unfair balancing. That's an interference of copyright law with licensing, not a support.

And, finally, given the trend towards UCITA and non-negotiated license, the idea that there's some negotiation that goes on between consumers of information products -- even libraries

and their providers -- I think is growing dim. But that's another fight.

In conclusion, much of our testimony has sounded alarming and negative, I think, over the last five days. Deliberately so. We're engaged in an advocacy proceeding here. But, in fact, most libraries have embraced technological change.

We believe that to the information society in this new century, libraries will be even more important, serving the public, supporting health research, care providers, the legal community, underpinning vital research in educational missions of our schools, colleges and universities.

We also believe that content providers should be exploring new ways to serve their public and expanding markets for their work. That's perfectly fine. That's good. We use their products. And copyright is an important tool for them to do so. We're not against copyright. We're not trying to undo the DMCA.

Of course, libraries are also exploring new forms of service models using these new technologies. There's no reason why both interests can't be served, why this can't be a win-win

technological change for society and for the creators and for the publishers. One goal need not be achieved at the expense of the other.

Public services provided by libraries and educational institutions does not threaten, but if anything, enhances business opportunities. Copyright law extends rights to creators, but in the name of the public interest it also assigns responsibilities to them in the form of limitations and exceptions.

They're not new ideas; they date back to the earliest days of copyright law. Nor are they trivial. They've served our society well for 200 years. We see neither technological reasons nor economic reasons to sweep them under the table now in the guise of controlling access to protect against piracy.

A broad use-based exemption would be a strong statement that the public interest continues to be served in the digital age. Thank you.

MS. PETERS: Thank you. We'll have our question and answer session begin with Charlotte Douglass.

MS. DOUGLASS: Thank you. I found all the testimony quite informative. I'd like to get

into just a little bit the question of reverse engineering. I know you said it two times at least. So it's reverse engineering, reverse engineering, reverse engineering. It's supposed to take, like, I divorce you, I divorce you, I divorce you.

But I'm going to raise it one more time. And that has to do with -- suppose there is an adverse effect? It seems to me that Section 1201(a)(1) is supposed to address adverse effects. So that if the Librarian did find an adverse effect as to which non-infringing could not be made, is the Librarian prohibited from dealing with reverse engineering at all or finding that there is an adverse effect that could be remedied by reverse engineering or a computer program, for example?

MR. SIMON: Is reverse engineering a class of works?

MS. DOUGLASS: No.

MR. SIMON: Thank you. Your rulemaking is limited to classes of works. You can have reverse engineering of a whole universe of stuff, not just computer programs. So this notion somehow that reverse engineering requires some specific treatment within this rulemaking is really -- again, it confuses me.

Because this rulemaking speaks to specific classes of works where harm is established. It does not speak about, necessarily, what the cause of the harm is. The Congress addressed a potential cause of harm in Section 1201(f).

MS. DOUGLASS: That referred to computer programs, and I think I heard someone say that computer programs was a category of works, but it was not a class of works.

MR. SIMON: It is. Read 102, Charlotte. It's not a category of works. It's a literary work.

MS. DOUGLASS: Absolutely, absolutely.

MR. SIMON: So it's not a category of works.

MS. DOUGLASS: So, okay. So that could be in a class of works?

MR. SIMON: It could, if you were to interpret the statute as saying all computer programs belong to a single class. The reality is that there are hundreds of kinds of computer programs. There are games, there are application products, there are operating systems, there are business products, there are consumer-aimed products.

So the question would arise, even if you were to hypothetically entertain the question which you asked me -- which I think is a fundamentally wrong question -- the question is, is the harm with respect to what kind of software? Is it with respect to computer-aided design software?

And are you then going to create an exception for the entire class of any computer program as defined in the statute? Which these days, frankly, includes music and movies. Because if you look at the definition of what a computer program is under the act, it's anything that has a series of instructions that performs particular function.

So now you've gone back to, well, what are you excluding? You're excluding not just categories -- not a category, but categories. So it doesn't make any sense to me.

MS. DOUGLASS: Okay. Thank you.

MR. SIMON: You're welcome.

MS. DOUGLASS: Do you have any further comment on that at all?

MR. HUGHES: Other than to say that I agree with Emery, section 1201(f), I guess, was beamed in maybe midway through the long DMCA process

on Capitol Hill and was beamed in specifically because there were people who were concerned about the potential negative effect of Section 1201 on reverse engineering for the purposes of interoperability.

And they wanted a specific section -- the advocates of this concern wanted a specific section of 1201 dealing with that. And they got it. And indeed, you know, by analogy we have, as you know, another section dealing with encryption research and another section dealing with security testing, firewalls, that sort of thing. So certainly it would be my read that those would fall outside the scope of 1201(a).

MR. SIMON: The rulemaking.

MR. HUGHES: The rulemaking. And indeed, therefore this rulemaking.

MS. DOUGLASS: Okay. We had a comment about Fontographer. And one commenter said that in some situations there was a Fontographer program where he was licensed to program, but there was a glitch in the software. And for some reason that the copyright owner didn't have in mind, he could not access that program.

Now, would he be prevented from fixing that glitch by 1201(a)(1)(A) if it came into force without an exemption, with respect to that?

MR. HUGHES: I'm afraid I'm not familiar with the specific case. It's hard to answer. Fontographer is probably a product developed by a company called Altsys, that was then bought by Macromedia. And I guess they haven't done any new revision of this program in quite a long time.

But I'm not, frankly -- you know, obviously there's a licensing issue, whether the license would prohibit reverse engineering. But actually, as far as I know, this program is an old enough program that I'm not sure, in fact, it's protected. This is pure speculation at this point because I've never used the program.

But I'm not actually sure it's protected by a technological protection. And that would then be the issue. If it were, then I would say it would be covered by the 1201(a)(1)(A) prohibition. Emery?

MR. SIMON: I don't know what the problem is, Charlotte. There's a glitch in the program?

MS. DOUGLASS: Yes.

MR. SIMON: This person's trying to engage in what, error correction?

MS. DOUGLASS: Yes.

MR. SIMON: And he can't do so because what?

MS. DOUGLASS: Because the error correction required that he override some kind of technological control. And he's afraid to do that because of 1201(a)(1). He would be afraid of doing that.

MR. SIMON: Well, would be is -- I mean, I can't answer that question. I don't know the product, I have no idea what the technological control is.

MR. HUGHES: Actually, maybe I could just leap in with an analogy that I think is somewhat on point. Firstly, this product is from a company -- you know, it's still in business as far as I know. It's still a supported product. So I would say that his first course of action would be to deal with the company.

But then kind of stepping back, I think this is -- presumably in your example, the person who wants to do this bug-fixing, for whatever reason, either doesn't want to deal with the company

or doesn't -- I'm speculating doesn't want to follow the steps that the company wants him or her to follow and so wants to take some alternate course of action.

I think it would be a little bit like one of the examples Emery cited. I mean, suppose I dropped off my clothes at the drycleaner, and I prepaid for them. Just follow me here. But it wasn't convenient for me to come back and pick up my clothes during the hours that the drycleaner was open so I decided I wanted to come back at some completely different time, break into the store and get the clothes.

I mean, it seems to me if this computer program were actually covered by technological protection measures -- and I'm not sure it is -- your user is putting his convenience above the rights of the company that published the program to protect their property.

In other words, he's saying, "I don't want to follow the steps that the company may have provided for me to fix the program. I want to kind of hack it myself." And I think Congress' intent here is clearly that the company should have the right to control it.

MS. DOUGLASS: Maybe he can't follow the steps. Maybe he can't get a hold of the company. Maybe the company folded or something like that. And, of course, some people might answer "Well, what's the problem? Because the company folded, the company's not around to sue you anyhow."

So I mean, I was just trying to get at, you know, if it's an extremely minor glitch and the person was trying to fix a bug to operate the work, whether that should be something within the scope of an exemption, and I get your clear answer so thank you.

Bear with me for one second, please. I thought I had a question for you, Mr. Weingarten, but I think I don't right now. If I get it later, maybe I can ask. Thank you.

MS. PETERS: Rob.

MR. KASUNIC: Good morning. I think I want to start by returning to the issue of reverse engineering for a minute. And just to clarify that, going into the scope of what is a class of works and how reverse engineering fits in.

First of all, reverse engineering would be a form of circumvention; wouldn't that be true?

MR. SIMON: Not necessarily. Not necessarily. If there is no technological protection measure in place, there's no circumvention.

MR. KASUNIC: Okay. So if we're dealing with a situation where there's a technological protection measure, then in order to -- if there was an exemption to circumvention, reverse engineering would be a way to accomplish that?

MR. SIMON: If you were doing it for the statutorily-permitted purpose.

MR. KASUNIC: Okay. And then in terms of -- there was some discussion about class of works, categories of works that talked about finding computer -- that Charlotte had asked whether computer programs could be seen as a class of works. And you said, I think, Mr. Simon, that that could be too broad as a category.

When you were citing the legislative history before, in terms of narrowing, you were citing references in the legislative history to narrow it from categories. You were saying a particular part that you mentioned -- for instance, motion pictures were cited as something that could be a category of works.

Isn't computer programs exactly related in that way to -- it's something less than a category, but you talked about things like particular games, for instance. Wouldn't that be something that would be too narrow in that same section of the legislative history?

MR. SIMON: No. The legislative history speaks specifically to that issue as well. There are examples in there about motion pictures; there are examples in the legislative history about software as well. And what it does is, it says it's not all of software. It's some subdivision of software.

MR. KASUNIC: And so could that subdivision be something related to a particular type of use then, as opposed to just a particular genre of it, like games?

MR. SIMON: That's not what the statute speaks to. It speaks to classes of works. It does not speak to uses of classes of works. It talks about users, but it does not -- I mean, there are different people that use different works in different ways. So to define a class of uses, I'm not quite sure how you do that.

A word-processing application is used by a huge universe of users. So the statute speaks about the users. It doesn't speak about the uses they put it to. If the definition had been contingent upon function or purpose, then that's what the statute would have said. It doesn't.

MR. KASUNIC: Well, I'm not sure I understand how you can say that the statute doesn't speak to uses when there is quite an abundance of -- the focus being on adverse effect of non-infringing uses.

MR. SIMON: No. The statute speaks to users.

MR. KASUNIC: It says in Subsection D that "non-infringing uses by persons who are users of a copyrighted work are likely to be adversely affected." So there is certainly a part of the focus is on the particular use that that phrase is used in there. Should we just completely ignore that part?

MR. SIMON: Well, maybe I can help you better if you were to explain to me the relevance to the particular example that you're raising of that concept.

MR. KASUNIC: Well, I'm just trying to focus in how we -- with this class of works and the narrowing, that there is a certain amount of -- there isn't anything specifically that says how this can be defined or that necessarily limits within how the Librarian can define a class of works. So that there are certain considerations that are brought into this with non-infringing uses, users and that can go into that consideration of class of works.

MR. SIMON: Do you think the fact that this Congress has spoken specifically to the issue of interoperability and reverse engineering for that purpose is relevant to the determination of harm?

MR. KASUNIC: Well, I don't think I should be testifying on that. But I would ask you that question.

MR. SIMON: Well, I've answered that question. I think it's dispositive on the issue.

MR. KASUNIC: But the fact that there is this scope of non-infringing uses, and looking at adverse effects, that that doesn't have -- even if that was found in that particular area of computer programs, that that would not -- because there is some mention of reverse engineering, that that would

take this outside the scope of the Librarian's authority?

MR. SIMON: The statute speaks to one area where reverse engineering is permitted, and that's for the purpose of interoperability. That was the area where the Congress thought there was a danger, and it spoke to that danger. If it had thought there were other areas where there was a danger in this particular narrow area, it would have spoken to those as well. It did not.

So for you to now somehow read the congressional examination as incomplete or as erroneous, and for you to find other areas of danger than the ones that Congress found, I don't quite know how you get there.

MR. KASUNIC: Well, isn't an essential part of this whole 1201(a)(1) that it's continuing in nature, that technology does not stay static? And so we have a situation where this has to be monitored over time, and that if changes had occurred from the time when this was initially enacted, there has been some time that has passed, wouldn't that be relevant to our inquiry?

MR. SIMON: Sure. Show me the harm.

MR. KASUNIC: Okay. But it is relevant that conditions can change and that the situation that affected the reverse engineering at the time could at some later time be relevant?

MR. SIMON: Hypothetically, anything's possible. Show me the harm.

MR. KASUNIC: Let me switch to Mr. Weingarten for a second. There was -- I give you an opportunity, since Mr. Metalitz is not here to respond to -- part of the argument that was made in his comments -- and see what your response would be to the fact he said that Congress spoke to non-infringing uses, but it was primarily speaking to permitted or licensed uses, as opposed to fair use.

And the rationale being that fair use is not always a non-infringing use, but that only permitted or authorized uses are really always non-infringing uses. How do you think that that fits into it?

MR. WEINGARTEN: It's too torturous for me to deal with. Actually, that's a question of interpretation of law that -- I think you had offered to send me written questions. I would like you to send that question in writing to Arnie. That

might be more direct. I don't even understand the question.

MR. KASUNIC: Okay. Well, you did talk about fair use as a basic public policy. And how would you explain, then, the absence of the preservation of that basic public policy within the statute itself? There was discussion that Congress had the option of including a broad exemption for fair use within 1201, but chose not to include that as one of the specific exemptions. How would you explain that?

MR. WEINGARTEN: It's a very tough, contentious debate. And that law was hotly debated all the way to the end. In fact, these terms of 1201 were hotly debated to the end. If Congress hadn't been troubled by it, this ruling wouldn't have been called for.

And I think the idea that they established the rulemaking, but established the bar of proof so high that no exemption could be -- you know, nobody could possibly meet that test is to trivialize the decision to establish this.

I don't think Congress really was comfortable -- I mean, we're talking about 535 people as if they're one person sitting there. But

I don't think that Congress as a body was fully comfortable with that paradox that I referred to in my testimony that basic public interest was going to be fully served by the restrictions in 1201. And this rulemaking was sort of the uncomfortable compromise that came out of it.

So I don't think it would be fair to say, "Well, they decided and didn't clearly exempt non-infringing uses; therefore, they didn't intend to." I think their discomfort is clear, and that this is a meaningful rulemaking because of that.

MR. KASUNIC: Well, on the same issue of fair use and the other two DSA panel, Mr. Hughes, in your testimony you mentioned that the goal of copyright is to enable copyright owners to license their works for a fee.

There is, however, other case law from that which you cited where the Supreme Court has clearly stated that that's not the primary goal of copyright -- the reward to the owner -- but rather was a secondary consideration, and the primary goal would be the general public benefit.

How does -- isn't that something that should be a factor in this balancing that is a part of this process that you folks talked about?

MR. HUGHES: No, I think absolutely. And we talked about, you know, the different simultaneous goals of copyright law. And indeed, in your rulemaking, I would argue that this five-part test that Emery discussed some of is indeed a balancing exercise.

But I think it might be worthwhile just to kind of step back a little bit, and, you know, just keep in perspective why 1201(a)(1)(A) -- too many letters there -- is here in the first place. And that is because Congress recognized, and indeed, the Administration earlier when it was negotiating the WIPO copyright treaties as you all know, recognized what a problem piracy was in the digital age.

I mean, we probably don't have time for it, but I could give you lots of examples of ways in which our products have been ripped off and ways in which this section of law will, in a way, help us return as it were to the sort of status quo before the Internet by protecting our products.

Because I think it's self-evident that in the copyright world there have always been both legal but also just kind of physical impediments to piracy. I mean, you know, it's physically possible

to xerox a book, but it would cost money and it's a pain in the tush. You know, who would want to do it?

And what technological protection measures on digital works let us do is basically the same thing: reimpose some sort of difficulty, as it were, in pirating works. In a way, it's a means of self-help. But there's also a very positive thing.

1201(a)(1)(A) is not just about us an industry playing defense. I think it's also important to keep in perspective this is really an enabling technology for consumers. I mean, it lets us do all kinds of neat things, and offer all sorts of new technologies that we wouldn't have been able to offer before.

I mean, a great example is "trialware," which you've probably seen if you surf the Internet a fair amount. You know, in the past when you wanted to buy software, you had to go into the store, you'd have to buy the box. And if the software didn't work out for you, you didn't like its features, you'd have to return it. And, indeed, certainly Adobe's license lets you do that, but it's a real bother.

The neat thing about trialware is, from our website for most of our products, you can download a completely functional, full working version of our products with complete documentation. It just has a time-out on it.

So after 30 days or 90 days, whatever -- you know, we disclose right up front, your time's up. And you as a consumer can then decide if you want to buy it, in which case you get some sort of activation device from us.

Now, without the protections of 1201(a)(1)(A) this would be a very dangerous exercise to offer this kind of service. I mean, another example is how Adobe some years ago used to market an encrypted CD-ROM called "Type On Call." And we had the whole Adobe library of typefaces, you know, more than $10,000 worth of retail value, hundreds and hundreds of type fonts on an encrypted CD-ROM.

And the idea was if you were a graphic designer at two in the morning, you're finishing up some project for your client, and "Oh, damn. I don't have the font I need." It enabled, in an era when CD-ROMs were really hot, it enabled you to call

an 800 number and get an unlock key for that particular font that you wanted to buy.

Now, this is in an era before 1201(a)(1)(A). What happened was someone cracked the encryption on the CD-ROM, and we basically stopped selling it. And it's a little bit more complicated than that. There were some other reasons as to why we stopped marketing it, but basically we realized that we were, if not naked, wearing sort of fewer clothes than we would have wanted legally, out there basically handing out our products in encrypted form.

And our cause of action in going after someone that could put a hack up on the matter of distributed or otherwise, how to get around our encryption -- I mean, there are a lot of dots to connect under a contributory infringement theory to get at stopping that hack. And what 1201(a)(1)(A) does, it lets us put technologies like that encrypted CD-ROM back on the market.

So we're excited about the kind of business models this enables -- and you know, we think it will be very good for consumers. And, frankly, we're obviously in business to make -- to do things good for our customers. And if we, as

you've heard in testimony today, make things too hard for our customers or we're too onerous in our technological protection measures as to inconvenience them, they'll go elsewhere. We're very conscious of that.

MR. KASUNIC: Well, I'd say that Section 1201(a)(1) is an effective legal weapon against all these forms of piracy and the use of passwords and serial numbers. Assuming, though, that we found sufficient evidence of adverse effect in some form of non-infringing in some area of computer program. How would we define the class of works that we were going to exempt? Would we just -- would it be computer programs in general, or would it be computer programs related to a specific type of use to -- that would avoid the problem that we -- the specific problem that we have?

MR. SIMON: I think that one would have to figure out what the harm is to figure out what the proper remedy is. And for us to ask the question what the proper remedy is in the absence of knowing what the harm is, I don't know. I don't know how to answer that question.

MR. KASUNIC: All right. So it seems like there could be, then, some relationship -- rather than have a general --

MR. SIMON: There is quite a tradition in American jurisprudence of tailoring remedies to harm, isn't there? So it would make sense in this instance to show us the harm. If you can identify the harm, you can tailor a response to it. The notion that somehow, because there's a hypothetical possibility of some harm, you're going to simply take all categories of works outside the scope of this cause of action doesn't make any sense. That is not just a shotgun, that's a nuclear device in response to a hypothetical possibility.

So the answer to the class question depends on the harm question. And you first need to cross the harm threshold before you can get to the class threshold.

MR. KASUNIC: One last thing on the type of protection measures used. You mentioned serial numbers, passwords and access codes. We've also had testimony on one type of protection measure dealing with hardware locks. And I understand that Adobe has used those.

MR. SIMON: Actually, it's Autodesk that has used those. You're talking about dongles?

MR. KASUNIC: Yes.

MR. HUGHES: We also use them, and have used them in some of our products.

MR. KASUNIC: And what is the specific -- just to get the other side of the perspective on this. What is the purpose of those? Is that an access control measure, or a use control measure, or some combination of the two?

MR. HUGHES: As Adobe has used them, as I understand them -- I'm not an engineer, but it's an access control measure. On very high value software that our analysis has shown has a very high likelihood of being pirated, we have gone to the trouble and expense of engineering a dongle.

Believe me, it's not something that we do lightly, because it adds to support requirements. The dongle is expensive. Dongles, just like software, get cracked. You know, you can travel in the Far East and you can find dongles for sale. People come up with software patches to go around the dongles.

Our users very often tend not to like them much. It certainly -- if you have a computer

program that your license may allow you to use on more than one machine, but not simultaneously, if you have a dongle -- obviously, you're going to have to be moving that around from computer to computer.

So, you know, it's not something at Adobe that we use lightly. And as far as I know right now, the only major product we use it on is Adobe After Effects, which is a very high-end professional film compositing and special effects program, which sells -- has a retail value of about $1,000, but is very pirated.

The other reason we employ dongles is because, on the access issue we have a real issue with end-user piracy. You know, the term of art in the piracy community. Where a company may buy a couple copies of a given product or license a couple copies, and then install it on more than one machine. And again, the dongle is an effective way to enforce the fact that people actually follow that license provision. But again, we're conscious of inconveniencing our users, and so definitively it's a balance.

And I think we trust the market to make this determination, and I would respectfully submit that you should too. Because Adobe competes hard

with Microsoft, Macromedia, Apple, Corel, a whole series of cinema-editing type programs. And shareware and freeware.

I mean, one of the most capable competitors to Photoshop out there is a program on the Mac platform called "Graphic Converter," which is a piece of freeware developed by this enterprising programmer named Thorsten Lemke who lives in Germany.

And so we want to keep Photoshop from being pirated, definitively. But if we cross the boundary in terms of user inconvenience, we're very conscious our customers can go elsewhere.

MR. KASUNIC: Thank you. Rachel?

MS. GOSLINS: Thank you. Mr. Hughes, are the trialwares you talked about available now on the Acrobat, on the Adobe's website?

MR. HUGHES: Yes.

MS. GOSLINS: And how long have these been around?

MR. HUGHES: I think we at Adobe have made trialware available for about a year. One past impediment to doing it is not only, I think, then the fact that we haven't had the imminent arrival, we hope, of 1201(a)(1)(A). But also there's just

bandwidth considerations on the Internet that our programs are -- you know, some of them are a reasonably hefty size. And although, obviously, perform very sveltely and with a 28.8 modem it's just not practical for people to download big programs.

MS. GOSLINS: Okay. I'm just confused by your statement that without 1201(a)(1)(A) making these kind of technologies available would not have been possible, when the law hasn't even gone into effect yet. And you don't know whether it will be applicable to your products.

MR. HUGHES: Well, I'm not sure I said would not have been possible. If I did I'd like to amend that. I'd say it's a far more dangerous enterprise. Because then someone who distributes a crack that basically disables the expire on the product and turns it into a fully functional program, again, I suppose we'd have to use contributory infringement theory to go after the distributor of the crack. And also, obviously, we'd have the license protection as well.

But what Congress was getting at with doing 1201(a)(1)(A), I think was recognizing the pervasiveness of the problem of piracy on the

Internet, of trying to give us an additional cause of action to protect our works.

MS. GOSLINS: Yes, but don't you have that cause of action in 1201(b)? You have a cause of action against anyone who designs, produces or manufactures devices that are circumventing your access control protections.

MR. SIMON: There are some specific aspects of the software industry which is that, as Paul was mentioning -- one of our problems is large corporate end-user piracy. A company will buy a single copy of a product, then load it on multiple machines. In those circumstances we think that we have a much more powerful cause of action based on 1201(a)(1)(A).

MS. GOSLINS: And you also, however, have the license requirements, correct? The contractual requirements that come along with the --

MR. SIMON: As any good attorney will tell you, you want as many causes of action as you can come up with.

MS. GOSLINS: I understand that. I'm just struggling with the idea that any exemption to 1201 would be disastrous to the software industry.

MR. SIMON: It would be. If you characterize it as disastrous, I agree.

MS. GOSLINS: Actually, I don't. You do.

MR. SIMON: I think it would be a serious problem.

MR. HUGHES: And I would say we already have a serious problem.

MR. SIMON: You know, the harm for us is today. We lose billions of dollars to piracy. It's not a hypothetical possibility, it's an actual harm. What the Congress determined that this was a remedy appropriate for that actual harm.

MS. GOSLINS: And Congress also determined, did it not, that we should do this rulemaking to see when and if exemptions are possible or needed to that prohibition?

MR. SIMON: On the presumption the cause of action would stand, unless there was a superseding consideration. Which, frankly, I have not heard any of the testimony coming even close to.

MR. HUGHES: And I would say particularly in the area of software, where I think the Congress has addressed -- as we've been discussing with encryption research and reverse

engineering and firewall testing, at least to my mind, the conceivable kind of fair use reasons you might need legitimately to circumvent the technological protections on software.

I mean, people -- as Emery and I were discussing this yesterday -- with a piece of software I'm not aware of people commonly, or even needing to excerpt sort of a page -- the way you can a page of a book, and make fair use of it. I mean, software's sort of not like that.

And technically, you know, it's an all or nothing proposition with the access controls that you're doing your rulemaking under.

MS. GOSLINS: Emery, you've given us a lot of examples of what a class of works isn't. I'm curious as to what you think a class of works is. Can you give us an example?

MR. SIMON: Not independent of a harm. I think it needs to be decided within the context of the harm. And I think the notion I was answering to another question before, which is -- you know, there is a strong notion in the Copyright Act that remedies should be commensurate with the harm, with injuries. You're talking about a remedy, arguably.

You're talking about curing a potential harm, first you've got to figure out what the harm is.

MS. GOSLINS: I understand that. But your point being that a class of works is something smaller than a category, and something bigger than an individual work. Is there an example of that middle area that you think you could give us as a description of a class of work?

MR. SIMON: Well, presumably everything that is smaller than a category and larger than an individual work is a class.

MS. GOSLINS: Okay. You made the argument, Emery, that we shouldn't be taking into account chilling effects as something that could be construed as actual or potential harm. And I guess I just want to know why.

If we assume for a moment, for purposes of this question, that we have demonstrated to us that if the presence or the threat of prosecution under 1201(a)(1)(A) is deterring people from making legitimate non-infringing uses, why wouldn't that be a harm caused by the statute?

MR. SIMON: No, actually I was quite precise on that point. Which is that I don't think a chilling effect should be a dispositive

determination. Because, frankly, chilling effects are really easy to find in virtually any context.

So it's not -- I mean, a mere chilling effect, a mere cause of my being adverse to doing something is not what the statute requires.

MS. GOSLINS: Okay. So I just want to make sure I understand your testimony. You can look at chilling effects, it's just not determinative or the end of the -- shouldn't be the end of the --

MR. SIMON: No, the statute speaks specifically about the effect you have to look for, right? It talks about adverse effect.

MS. GOSLINS: And is your testimony, then, if we had proof that people were deterred from making legitimate uses because of the presence of 1201, wouldn't that be an adverse effect, or would that not be an adverse effect?

MR. SIMON: Making legitimate uses. What's a legitimate use? You mean, non-infringing uses? You mean deterred from licensing their products? That's a non-infringing use.

So if it would prevent Adobe from licensing its products, would that be a chilling effect? Yes, it could be. If it would prevent the North Carolina Law Library from buying, you know, a

product from Symantec. Would that be a chilling effect? It could be. It's very hard --

MS. GOSLINS: And is that something we should take into account in our determination of whether we've seen a demonstration of actual and potential harm?

MR. SIMON: Sure. But that's the kind of testimony you've been hearing. And I am simply positing to you, find harm and find adverse effect. That's what the statute asks you to look for. It does not ask you -- and I apologize for coming back to what I was raising before. Resist temptation.

The statute does not require you to create exemptions. It requires you to find harm. If you don't find a harm, the statute says don't do anything. And until somebody actually shows real harm, there's no basis for action here.

MS. GOSLINS: I understand that. But what I'm asking is do you think a chilling effect, assuming it was shown, should be included in our determination of whether there's harm or not?

MR. SIMON: Give me a specific example. I can't give you a hypothetical answer to that question because anything can constitute a chilling effect. It can be a de minimis chilling effect, or

it can be an enormous chilling effect on free speech. It can be -- not that free speech chilling effects are relevant to this, but it can be an enormous public interest chilling effect. And you were quite right in pointing out before that it's the public interest we're looking at here.

So I don't know, which chilling effect? If chilling effect as a concept?

MS. GOSLINS: Looking at the statute for a moment, as you read the statute, assuming for a moment that we do find a class of works which we recommend to be exempted from the anticircumvention prohibition, then what happens? Is all uses of that -- are all uses of that class of works then exempted from the prohibition, or only non-infringing uses?

MR. SIMON: Well, it can't be all uses. Because then we're authorizing infringement.

MR. CARSON: No, you're authorizing circumvention at most. You're permitting circumvention.

MS. GOSLINS: You can still prosecute them for infringement, presumably. If they then circumvent access control protection and infringed your copyright.

MR. SIMON: Then I guess I don't understand your question.

MS. GOSLINS: Okay. Let's assume we find a class of works of that is exempted, and the Librarian recommends it to Congress and that class of works is then listed under (a)(1)(A)(C). From that point, under your reading of the statute, are all uses of that class of works exempted, or only non-infringing uses?

MS. PETERS: Or can you basically circumvent the access control for all classes?

MR. CARSON: For all uses.

MS. PETERS: Yes. Can everybody circumvent for all -- if I'm an individual, can I just circumvent it, period? Because it's one of those classes.

MR. SIMON: That can't make sense. That can't be right.

MS. GOSLINS: Okay. So how does the statute work? We find a class of works that is unattached to any kind of use or users. And let us just make up a class of works, whether or not -- computer games.

MR. SIMON: Let's do chemistry textbooks.

MS. GOSLINS: Okay, chemistry textbooks. And we identify that as a class of works. From that point, is your reading of 1201 that anybody can then circumvent access control protections on chemistry textbooks? Or only people who are then going to make non-infringing uses of them?

MR. SIMON: It's got to be the latter.

MS. GOSLINS: Okay. And where do you find the authority for that in the statute?

MR. SIMON: Well, that's what (d) days.

MS. GOSLINS: Great. Okay.

MR. CARSON: Can we just -- does anyone have a different view on that?

MS. GOSLINS: Sorry, I just didn't ask -- I didn't think you'd want to get into that.

(Laughter.)

MR. CARSON: No, I've just been enjoying -- do you want to address that issue, Rick or Paul?

MR. WEINGARTEN: I've not been -- I have nothing to add to that. We probably will in our reply comments.

MS. GOSLINS: All right. I just have one last question for Mr. Hughes, and then a couple questions for you, Mr. Weingarten. Sorry, I know we're getting close to our lunch hour.

Mr. Hughes, you made the argument that we've heard from a number of content owners, that basically a common sense argument that, "Look, we have to serve our consumers. So we're not going to do anything that would make our product less competitive." But isn't that an argument for accommodating, by law and in proceedings such as this one, sections of the user populace that are not protected by the market?

Traditionally non-commercial users like universities or libraries, who -- obviously, they constitute their own market, academic markets. But for a majority of the commercially produced products aren't the same as the average consumer that you are aiming your products to. And indeed, often need different kinds of licenses and different kinds of contracts to accommodate the different kinds of uses that they put their products to, put your products to.

MR. HUGHES: Ms. Goslins, well, firstly I guess I should say I'm not an attorney. So if I gave a sort of common sense approach to it, that's what I fall back on. It's my years in the foreign service.

But I almost think you answered the -- I would almost submit that you answered your own question at the very end. I mean, for us and for software companies, educators, libraries, schools, these are actually important commercial markets. And thanks to our freedom to offer licenses, we're in fact able to offer special educational products, special educational prices, special educational terms.

In fact, we heard testimony yesterday from one of the people on the library side just sometimes how long these negotiations are that are engaged in. Six months, nine months. But I would say there's no contradiction here. That from Adobe's perspective, we want to see as many people as we can using our products in a way that, frankly, maximizes our revenue and our return for our shareholders.

And if there's an educational market to be served, gosh darn it, we'll go after them and do our best to reach a deal that serves both our interests. I'm afraid that's as well as I can answer your question.

MS. GOSLINS: Does anybody else have any comments on that? Okay. Mr. Weingarten, I was

unclear at the end of the testimony what exactly you would like us to do. Are there specific classes of works you are suggesting that we examine? And if so, what are they?

MR. WEINGARTEN: Well, I mean, I think the libraries over the course of this hearing, and in our comments, have expressed what we want to do. I understand that there's a profound difference of opinion about how class can be interpreted. We want a broad exemption for non-infringing use for lawfully acquired works. We don't think that's a troublesome thing to understand, or interpret, as has been suggested by some people.

We think it's fairly clear. Whether it is within the scope of this rulemaking is a matter of legal debate. And you've heard from Arnie and Julie and Peter, who've suggested it certainly is. And you've heard from other people citing their authority saying it isn't. And I really don't know what I can add to that.

Libraries simply do not -- libraries serve an incredible diversity of needs. And on top of that, more and more works that we deal with, digital works, are multimedia. I don't even know, frankly, that categories is going to be much longer

within the law a very useful set of determinations. Because things are sliding around, back and forth.

So to talk about classes now as a subdivision of categories is -- it seems to me just perpetrates an archaic view of the way the whole information marketplace is evolving. And that is changing rapidly in Internet time the last two years since the bill was passed. It's been several years of Internet time.

So, I mean, I think for all of these reasons that you are empowered and ought to consider a broad exemption. And repeating that we are not interested in a broad exemption that essentially legitimizes widespread piracy. We're looking for non-infringing uses.

And I think that that would be the appropriate statement for the Librarian to make.

MS. GOSLINS: Okay. I just have one last question. In your testimony you cite some quotes from different publishers and content producers about where they think their practice is going. One of them was from a firm who had developed a way for publishers to receive revenue from individual titles. And it says, "Older titles and out of print books that have been read and

studied thousands of times over the years in libraries, and yet have not generated new income will now produce new revenues."

I guess my question to you is why should that bother us? If we assume that they are still available in all of those libraries, and that what you are getting is a new kind of access that you would not have had prior to this, why shouldn't you pay for that?

MR. WEINGARTEN: Well, in fact, it seems to me it's not positing a new form of access. It's positing a new revenue stream for access that people have had for many years.

MS. GOSLINS: But you still have that access from the library books on the shelves that you could use and study thousands of times without any revenue, right? It's just you're getting an increased access and convenience and speed by getting it digitally.

MR. WEINGARTEN: There's a basic trend, of course, to digitizing works. Libraries have limited shelf space, and as we move into the future we're going to be basically shelving, in some sense -- whatever that word means -- digital works.

Yes, there is still this question which has come up. You're sort of indirectly going to that question, "Well, if there's print versions what's the matter with this model for digital?" There's a lot wrong with it, particularly in areas of educational research.

Karen yesterday talked about whole new modes of research that are based on digital access to information. We as a nation are busily trying to modernize our schools and our whole education system to use digital products. We're moving towards distance learning models in which students access information and scholars access information remotely. They can't do it from the shelves.

So there is not an equivalent here between the digital and the paper version. But the other part of that quote, or the other reason I put that quote in there is that it illustrates who we are striking at the very heart of what libraries do. I mean, libraries have always bought books. We spend over $2 billion a year in the information marketplace.

We don't steal this stuff. We don't break into bookstores, we buy it. And then it's there, it's there for people to use. And you know,

somehow the presumption of saying, "Well, now publishers can go back in and start recapturing funds for every time a student pulls that book off the shelf."

MS. GOSLINS: But they're not making you take the books off the shelf.

MR. WEINGARTEN: No, they're not making us take the books off the shelf. These are -- this is a vision for the future. But it is a -- it's a vision that strikes at the very heart of what we do.

MS. PETERS: Can I ask one other question that's very related to this? Which really has to do with the -- in the Digital Millennium Copyright Act there was an updating of Section 108. And with respect to a work, a published work that a library owns that is deteriorating or damaged, a library now does have the ability to basically make a digital copy of that work.

MR. WEINGARTEN: Right.

MS. PETERS: Doesn't that in some way answer your question?

MR. WEINGARTEN: Well, it may be. And if so, then there's -- this group won't have any market. But I don't think so. The new products --

MS. PETERS: Well, it will get to -- what it may get to is the new product may have search and retrieval capabilities that are enhanced, that value-added as opposed to what a library may do. Which is more like a plain vanilla type digitization effort.

And if that's true, you know, I would say that the access to the information is still there in the plain vanilla version.

MR. WEINGARTEN: It may be. And what I said at the conclusion of my testimony is that we want to be engaged in a discussion with these entrepreneurs to see that, both what we do as libraries and educators, and what they do in terms of their markets converge. There's no reason why it can't converge.

But these visions of sort of, "Well, now we can charge for every time a student turns a page, or accesses an old out of print book," is -- I think strikes at the heart of education. And yet it need not. We can, I think, find some way out of it. But I guarantee we're not going to find some way of out it on the floor of Congress, or even within the Beltway.

MS. PETERS: But we're looking at the adverse effect today, and the adverse effect or potential adverse effect in the next three years. Based on what I'm hearing you say, we don't have that now.

MR. WEINGARTEN: We don't have that now. And that may be -- if I could address that point a bit.

One, we believe that an exemption done ahead of time serves as a message to the marketplace to develop what I refer to as fair use friendlier, fair use soft technology controls. Or at least pay more attention.

I would agree, Adobe undoubtedly finds the academic marketplace a very attractive one, an interesting one, and they always have. The kinds of products they produce are tuned to that.

But I would refer back to the testimony of the recording industry association -- and I'm just paraphrasing it now, because I don't have it in front of me -- when you asked, "Well, when are you going to have a library friendly version of a DVD music disk?" The answer was, "Oh, 10 or 20 years. This is not a very important marketplace for us."

And I would submit that that -- it's that kind of attitude that we need to -- that we don't trust the marketplace independent of an exemption to address. We're always willing to open discussions with these people, and to possibly even help them find new ways to market their goods.

MS. PETERS: I think fear and lack of trust have a certain role in all of this. Anyway, Rachel?

MS. GOSLINS: I'm done. Thank you.

MS. PETERS: David?

MR. CARSON: Emery, in your testimony you discussed the assertion that there should be an exemption for works with respect to which initial lawful use has been permitted. Is that accurate?

MR. SIMON: Initial lawful access.

MR. CARSON: Initial lawful access, okay. And you said Congress specifically decided not to do that. Can you sort of walk us through how that decision came about, or what the manifestations of that conscious decision by Congress?

MR. SIMON: There were a series of amendments that were offered first in the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, which considered the bill

first. As I recall, Mrs. Lofgren, whose district we're actually in, proposed such an amendment, as did Mr. Boucher of Virginia.

And the objective of those amendments -- and I forget the exact wording of them -- was very much that. Which is that if you have acquired lawful access to a work, thereafter you may make fair use uses of that work without requiring further permission. And you may circumvent to be able to achieve those ends.

And the House Judiciary Committee, Subcommittee in the first instance rejected that. That amendment was a threat -- or a variant of that amendment, but you probably remember this better than I do. Was then considered in the Commerce Committee as well.

And I recall Mr. Boucher offering that in the Commerce Committee, and I recall he actually withdrew it before it came to a vote. There was a discussion of it, and then he withdrew his amendment. That's my best recollection. I apologize for it being sketchy, but I'm getting old.

MR. CARSON: Anyone have any further recollection to add to that? Emery and Paul, I guess I'd like your reaction to an example I think

Rick gave. If I, on November 1st of this year, if I gave Rachel my Lexis password and she accessed Lexis using that password, would she be in violation of 1201(a)?

MR. SIMON: Yes.

MR. CARSON: Do you agree, Paul?

MR. HUGHES: Gosh, it's not Adobe's business right now. But it's always my business to agree with Emery.

MR. CARSON: I think I'm going to have to revisit the question of reverse engineering with you for a moment.

MR. SIMON: And you'll get a very creative answers. Responsive answers.

MR. CARSON: I want to go back to your last exchange with Rob, because I think you may have admitted something to him. But I'm not sure. I just want to get clarification here.

At the end of that discussion did you essentially admit to Rob that if we were to include now, or in three years, or in six years perhaps that anticircumvention measures are preventing users from engaging in lawful reverse engineering, that does not fall within Section 1201(f)? The Librarian would have the power under 1201(a)(1)(A) to create

an exemption that would permit circumvention in order to engage in such reverse engineering?

MR. SIMON: I think you have to go back to what the statute permits you to do through rulemaking. Which is your statutory authority under rulemaking is not to make the rule conform to whatever court decisions there may be. I think your statutory authority under rulemaking is to find what the statute tells you to find, adverse effect.

And that may be found if there are court decisions that have come through time which then cause you to think about those adverse effects. It may not. It is not, as a matter of first instance, your duty to say, "A court opinion and adverse effect are synonymous."

MR. CARSON: Okay. I follow all that. But the reason I'm asking this question is, I think in your testimony you were saying something that came close to saying that Section 1201(f) more or less preempts the field with respect to reverse engineering. And that in the 1201(a)(1)(A) process, the Librarian is powerless to do anything in the field of reverse engineering.

Maybe you weren't really saying that. Because I think what you've just said is inconsistent with that.

MR. SIMON: Well, let me be quite specific. I think whatever the latitude of the Librarian may be in certain areas, the latitude of the Librarian is substantially diminished in those areas where specific issues have been addressed by the Congress. And those are the exceptions that run starting with additional violations.

I'm sorry, not with C but D. Where exceptions for nonprofit libraries, archives and educational institutions already speaks in some respects to that. It speaks to law enforcement, intelligence and other government activities. It speaks to reverse engineering, it speaks to encryption research, it speaks to exceptions regarding minors.

There are a whole variety of areas where there was a specific congressional examination. This is not a de novo review of these issues by the Librarian. The Librarian was not asked to do that, the Librarian was asked to look at areas where there are problems.

And I think that in the areas where the Congress has spoken specifically to what the appropriate exceptions are, the latitude and the discretion of the Librarian was substantially diminished. Would I say to you that the Librarian has zero latitude in those areas? I think that would be a ridiculous statement.

But is it much less? I think the answer has to be yes. Because otherwise these other exceptions would be meaningless.

MR. CARSON: Okay. I follow what you're saying. This may not be the right group of people to ask the question to, but since we're talking about reverse engineering maybe someone can clarify for me. Are there circumstances where, in order to reverse engineer -- and let's assume it's a legitimate need to reverse engineer -- you really would have to circumvent access control measures. Why would that be a requirement in order to reverse engineer?

MR. SIMON: I mean, I'm not an engineer but I can tell you what the engineers tell me. What you are -- the permitted act or acts of reverse engineering under the statute are done for the purpose of achieving interoperability.

Interoperability is defined in the statute essentially as an exchange of information between either two software products, or software and a hardware product.

The points where that information or exchange occurs may be parts of subroutines, and there may be second-level technological protection measures that are applied with a computer program. There may be a general access control that's applied to the work as a whole, and any second-level protection that's applied to particular --

MR. CARSON: All right. I see where you're going. Okay.

MR. SIMON: That is, in fact, the reason why Section 1201(f) is there.

MR. CARSON: All right.

MR. HUGHES: Mr. Carson?

MR. CARSON: Yes.

MR. HUGHES: If I could I wondered if I could just return to the first question you asked on the Lexis/Nexis passwords. I actually didn't want to leave the impression I was lukewarm in my endorsement of Emery's answer.

(Laughter.)

MR. SIMON: Won't be the first time.

MR. HUGHES: And it's not just because he'll kick me under the table, which you would see. But in all seriousness, Adobe in fact is increasingly in this business, and software companies are. And it's not access to databases, but it's what we call -- it's access to programs, as Emery discussed earlier, that are hosted on the Internet.

And in fact Adobe has a service right now where you can basically lease access to a PDF Creation tool on the web. You can basically go to a website, you've got a Microsoft Word document. Let's say you want to make it PDF. For $10 a month you can get unlimited access to this ability to upload a file. It will be crunched on our servers into a PDF and you'll get it back.

Now, clearly, it seems to me, that the dissemination of my password if I posted it on the Internet to allow sort of everyone in the world using my password to use this service -- and the password is an access control measure, that's why we have it there -- I, by posting the password with that intent would be circumventing the access control.

So my answer to your question is yes, and a very firm yes.

MR. CARSON: Okay. We heard Paul talk about trialware. And I think he explained it pretty clearly to me. Is it pretty clear to you what trialware is?

MR. WEINGARTEN: Pardon?

MR. CARSON: Trialware?

MR. WEINGARTEN: Trialware, yes.

MR. CARSON: Okay. Let's take a case where someone gets access to trialware under those terms that are associated with it. And maybe have access for 30 days, and on the 31st day you can no longer use it. Would it be your position, in connection with the notion that once you've lawfully acquired possession or use of a work you should be able to circumvent, would it be your position that on that 31st day or the 31st month thereafter one should be able to circumvent in order to gain access to the computer program that you first obtained access to as trialware?

MR. WEINGARTEN: No. And I think Lolly, in fact, addressed this question yesterday. That if you have access to a toolwork for a specific period of time, and that's the agreement you entered into

when you got the work, on the 31st day you don't have lawful access to the work. And I think that's perfectly fair.

We are not interested in a license to hack or steal, or circumvent license terms.

MR. CARSON: And yet you do say that your concerned, as a general proposition, about the notion that a content provider can use access control measures to enforce licensing terms. I mean, this is a licensing term, isn't it?

MR. WEINGARTEN: Right.

MR. CARSON: So which licensing terms are you concerned about, and which are you not concerned about? And how does one draw the line?

MR. WEINGARTEN: I'm not concerned about you addressing any specific licensing term, I'm concerned about using 1201 in conjunction with technological measures to add the force of federal criminal law on users. On the user's side of a license. That's what I'm objecting to.

MR. CARSON: All right. Let me see if I understand what you're saying, then. Going back to the trialware example, you would object to the use of Section 1201 to create civil liability or criminal liability with respect to a person who, on

that 31st day or the 31st month, circumvents in order to use the trialware, is that what you're saying?

MR. WEINGARTEN: Probably not. Because we established that the circumvention would not be a non-infringing use.

MR. CARSON: We've established that?

MR. WEINGARTEN: Didn't we? Well, I mean --

MR. CARSON: That wasn't part of my hypothetical.

MR. WEINGARTEN: I mean, you asked me if I would want the exemption to include that, and I said no. Because the work was no longer lawfully acquired.

MR. CARSON: Okay. But what I think I'm hearing you say -- and maybe I'm not hearing it clearly enough -- is that licensing terms, okay, fine. Licensing terms are what they are, and people perhaps should abide by them.

MR. WEINGARTEN: Right.

MR. CARSON: But as a general proposition one shouldn't be able to use Section 1201 to create civil or criminal liability for

circumventing technological access control measures designed to enforce the licensing terms.

MR. WEINGARTEN: Right.

MR. CARSON: But then again, I think you've just told me that there's one exception at least, and that's the trialware exception. Where it's okay to use Section 1201 to prevent someone from accessing that trialware way down the road, or are you not saying that?

MR. WEINGARTEN: If I'm no longer in legal possession of it. I mean, I'm not in violation of the license. If I still have that stuff after the expiration of the license, I'm not under license. So, you know, I'm having trouble -- let's posit that there's some way that, say the trialware has limited capabilities. Some trialware does operate that way.

I don't know, it's hard because programs are not exactly what libraries exercise fair use. So suppose it was a trial work, and it had limited capabilities, and we circumvented to make a non-infringing use of it during the period of time that we legitimately had access to it as a trial work.

If we violate the contract, the license, the publisher, content provider is perfectly right

to go after in a breach of contract or some such cause. I do not want 1201 to make a felony out of that.

After the term of agreement is over, and I no longer have legal access, I'm not under the contract. We're not talking about a violation of contract. I don't have lawful access, and it doesn't fall under the exemption that we're seeking.

MR. CARSON: All right. Let's take a different contractual term. Let's say we have a contractual term that says only one person may gain access to that particular work at a time. And you decide, "This is silly. I've got three people in the library who want to use it right now. Why shouldn't they be able to use it? They're using it for research, that's fair use. So I think I should be able to circumvent," not withstanding the fact that there's a contractual term limiting access to one person.

Would it be your position that Section 1201 should not be operative, and you should be able to circumvent to let three people use it at a time?

MR. WEINGARTEN: Those are two separate things. One, yes, it's my position that 1201 should not be operative, that it's breach of contract. I'm

not saying people should do it. I'm not saying people should violate their contract terms, I'm saying I don't want the weight of federal criminal law sitting on the users, when if the content provider violates terms of the contract it's just breach of contract and so sue me. I want an equal playing field. And it licenses what I wanted resolved under is contract law, not federal copyright law.

MR. CARSON: Except when the contractual term is a term -- it has to do with the period of time in which you can use it. I gather you're saying there's an exception. And if the contract says you could only use it for a month --

MR. WEINGARTEN: No. It's not exception. I'm not under the contract at the expiration of the month.

MR. CARSON: But you are under the contract when you're letting three people use it, even though the contract permits only one person to use it?

MR. WEINGARTEN: Yes, that's a violation of contract.

MS. PETERS: But this is exactly the end-user argument that I think you were making.

MR. SIMON: Well, I mean, this is a huge issue for us. And it's a huge issue for us on two different grounds. One is we do side licensing. And we will side license to Stanford University a copy of "Photoshop" for 100 users. And then you have 15,000 students using it. That's clearly a breach of contract. No problem.

Now, the question becomes one -- but it was educational, it was fair use. Is that a defense of breach of contract? Well, I see Lolly shaking her head. But I apologize, Lolly, the American Library Association's been taking the position in the course of enacting the UCITA that that should be a defense to breach of contract. That's an untenable position as well.

So Rachel was asking me before a question about various causes of action. So now we're back to a situation where we have these 15,000 infringers as well as circumventurists at Stanford University. We need both causes of action because while you say with certainty that, "Oh, this should be done under contract theories," it's not clear that we would win under those contract theories in every instance.

We still have infringement, we still have harm being done to us, we still have wrongs being done. And what you're suggesting is -- I think what you're ultimately coming down to is you're afraid of the criminal liability.

MR. WEINGARTEN: If it's infringement, if it's an infringement you have just as much cause of action under 1201. I'm looking for non-infringing uses. I don't see any difference here.

MR. SIMON: I mean, I guess --

MR. WEINGARTEN: I'm not trying to argue with a lawyer.

MS. PETERS: No, I know. But it's an important point. Because the criminal is willful for commercial purposes or private gain, and yet in the context that you're using with your Stanford case, there should have been a license for 15,000 students, correct?

MR. SIMON: Yes. Now, is that willful, is that for commercial gain? Well, the way the statute actually now reads, it's not direct commercial gain, it's actually loss or revenue counts as well.

So, yes, I think -- but, look. Ultimately the reality is -- and I can't speak for

other industries, but from a software industry perspective, we're really not interested in putting Stanford University in jail. What we're interested in doing is selling them 15,000 copies of "Photoshop."

That's what we want to do, sell -- you know, we want the criminal sanctions there because we think they create an effective deterrent. But the reality is we want to sell product. That's what we want to do. And suggesting somehow that a contract-based cause of action alone, given the realities we're confronting in the marketplace right now is sufficient, is just not true.

Now, maybe libraries and educators are nicer than most people. Well, they're certainly better looking. And it may be easier to deal with nice people, but the problem is there's no real way to parse this law between nice users and bad users. You guys kept on asking me, "Tell me who a user is."

Well, can you parse it by nice users and un-nice users? You can't. You can't do these kinds of things that easily. It's all context specific.

MR. CARSON: Well, when we're talking about criminal liability, you can parse the law with respect to certain kinds of users who simply -- you

can't have criminal liability with. 1204(d) exempts libraries, nonprofit libraries and educational institutions, for example.

MR. SIMON: Correct. But again, those are not issues for this rulemaking, those are issues of the operation of law.

MS. GOSLINS: Absolutely.

MR. CARSON: Rick, I think most of the testimony we've heard from other representatives of libraries -- and I'm not sure, you said it seems to be implicit, but let me clarify it first. The types of technological measures, access control measures you're concerned with so far seem to be access control measures that are enforcing contractual or licensing terms. Is that, as a general proposition, the case?

When you run into those technological measures, or when you run into those licensing terms, that the licensee had the opportunity in exchange for, perhaps, a payment of more money to get licensing terms that would have permitted the very act that you're trying to circumvent in order to be able to do it.

MR. WEINGARTEN: There's probably no single answer to that. I mean, I'm not a working

librarian and so I don't know. But you've heard from Karen yesterday that there are times when she has to negotiate for a year or more in order to get terms she needs. And she has told me, so I guess this is secondhand, she's told me that there's simply been times when she has not been able to mount products because she couldn't get the terms.

But there are two other issues. One is that the technological controls become embedded in the product itself, and are part of the product. You really can't -- it's no longer negotiable. And we think that this is going to be, these licenses are going to be less and less negotiable for these sorts of terms.

There are, of course, products, an increasing number of products that come with click-on or shrink-wrap licenses where there's no negotiation whatsoever, we mentioned UCITA which covers those sorts of products. So I don't think there's any single answer.

Yes, if it's a question of, "Well, we'd like three students or three users instead of one user to use it," I'm sure that the provider is perfectly willing to say, "Well, okay. That will cost you this much." Or, "We would like this much

stuff on it, or like the ability to print out of it," or whatever. There are negotiable prices in some cases. But certainly not in all.

MR. CARSON: Well, let's take a case like that, where, in fact, the provider is perfectly willing to license you to let three people use it rather than one. But you decide you don't want to pay that price. You'll just take the license for one, and if we want three people to do it we'll circumvent.

If that case were to arise and that was the choice you made, would it be your position that even though you had the opportunity to negotiate a deal that would give you the right for access for three users, you should be able to circumvent with impunity?

MR. WEINGARTEN: Certainly not.

MR. CARSON: Okay. 1201 should be able to -- should be operative in that case, then?

MR. WEINGARTEN: No.

MR. CARSON: No?

MR. WEINGARTEN: No. That contract law should be operative, not 1201.

MR. CARSON: And why not 1201?

MR. WEINGARTEN: Well, if a court were to determine -- no, I'll take that back. I was too quick on that. That if you violated the terms of the -- one, if you violated the terms of the contract, that's contract law. If somebody took action under 1201 against you, or against the user, and the court determined that it was not a fair use under whatever theory of argument, then 1201 would apply.

If the court said, "Well, you may have violated the contract, but it was a fair use under copyright law, 1201 does not apply, although you still may be in breach of contract." I mean, people give up their fair use rights in contract all the time. It's various kinds of rights for various purposes, and that's their right, as I said, as consenting adults, to do so. And we do not recommend that they be scofflaws, or violate their contract.

MS. PETERS: Well, I just want to take over. If a library today buys a book, only one person at a time can use that book, right?

MR. WEINGARTEN: For the most part, yes.

MS. PETERS: So if, when you now are buying a package you have a choice with regard to

the simultaneous accesses that you're going to provide, which really you're substituting for, in essence, the number of books that you would have on the shelves so you could serve so many people at a time.

So I guess I have a hard time figuring out why that rises to the level of a fair use.

MR. WEINGARTEN: I didn't say it. I don't think I said it did. I think I said -- I just said if a court decides it didn't. And the court, you're right, the court may well decide that that's not fair use.

MS. PETERS: Okay. Do any of you have anything else that you'd like to add at this point? Does anyone else have any questions?

(No response.)

MS. PETERS: All right. What are we going to do this afternoon? First of all, before I get there, I want to thank the witnesses. They were extremely helpful, and I really do appreciate your testimony and appearing here.

Second, we don't know whether or not we will have Mr. Metalitz this afternoon, but we do know that we will have people who can appear earlier than the two o'clock. Because of the time frame,

what we're going to suggest is that we start at 1:30. Not suggest, we are deciding and announcing that we will be starting at 1:30.

Thank you.

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

(1:35 p.m.)

MS. PETERS: Good afternoon. Welcome to the last session of our last day of hearings. We're fortunate that Steve Metalitz made it here after a long and difficult trek. And what we've decided to do is to let Steve present the testimony that he would have presented this morning, and then we will just ask questions of him. And then we'll take the panel that we had intended, if it works out that way.

So, it's all yours, Steve.

MR. METALITZ: Thank you very much. And thank you, particularly, for accommodating the vagaries of my travel schedule. I should have known when I was about to step on Flight 301 from Chicago to San Jose that it would be pre-empted. And indeed it was, but I did get here eventually.

I'll try to be brief, because I am infringing on your schedule here. I wanted just to start by going back to the basics, which I'm sure have been reviewed several times in the last few days, as well as two weeks ago.

Congress established this rulemaking proceeding to answer a single question: Should the

October 2000 effective date of the statutory cause of action against circumvention of access control measures be delayed with respect to any particular class of copyrighted works? That's the first basic.

And the second basic, as in any proceeding, is who has the burden of persuasion. I think it's clear that those who believe that the circumvention of access controls should remain legal after October 28 bear that burden, including the burden of defining as to what particular class of work the prohibition should not go into effect.

On behalf of the 17 copyrighted owner organizations that I represent, we feel that clearly the answer to the question Congress has asked is no, that as to no classes of works should the Section 1201(a)(1) prohibition not come into effect.

And on the second question of the burden, it follows we don't believe the burden has been met to show that there's a need for any exception in this area.

This is a substantial burden, and I think everyone has recognized that. Some of the testimony you heard in Washington called it an illusory goal, or an unattainable dream, stated that

it was impossible for anyone ever to meet this burden. I don't agree.

This burden could be met if the proponents of an exception had specific, strong and persuasive evidence of the likely effects of the prohibition on the ability of users to make non-infringing uses of particular classes of works. That burden can be met, but it hasn't been met. Because that type of evidence has not been presented to you.

You've received a huge volume of evidence, but most of that does not address the question, the only question that Congress directed you to answer. And what does address that question doesn't come close to carrying that burden.

It seems as though some of the participants in this proceeding want to treat it as an open-ended discussion about the impact of technology on the way copyrighted materials are created and produced, marketed and distributed, on the effect of those technological changes on the relationships among creators, intermediaries, customers and other stakeholders.

If that's what we were about here, the copyright industries and the copyright owner

organizations would have a lot to contribute to that discussion. We have a lot of concerns about those issues. But that's not what this proceeding is about. You're not here as moderators of a gripe session, or of an open-ended discussion. You're here as decision-makers or as recommenders of decisions on whether an act of Congress should take effect as scheduled.

You have a specific job to do, you have specific ground rules under which that job should be carried out, and I'd like to focus on those. The question before you, and the quantity of the evidence that's been presented to you. And whether it matches up to the burden that Congress has set in this proceeding.

Now, we've explained in our reply comments, which were quite extensive, why we think most of the evidence that's been submitted, at least so far, is not really relevant to this proceeding. It's aimed at answering other questions that Congress actually not only didn't direct you to answer, but Congress has already answered.

Questions such as whether copyright owners should have the right to employ technological measures to control or manage access to their works.

Questions such as what scope of exception should be provided for reverse engineering. Questions such as what should the relationship be between the anticircumvention prohibitions and the concept of fair use.

Those questions have been asked and answered, and to provide opinions on them in this proceeding really is of no value to you. They don't shed any light on the single question that Congress asked you to answer.

Now, a few of the submissions that you've received have sought to propose particular classes of works as to which circumvention of access control should remain legal after October 28th. In our view, none of those proposals pass muster. Most of them didn't really designate a class of works.

They really talked about an exemption based on the status of the user of a work. That's an approach that Congress considered during the deliberations on the DMCA, but that Congress ultimately rejected.

And when there has been an attempt in this proceeding to identify a class of works, upon close examination it proves to be an extremely

expansive class, and it's boundaries are very difficult to define.

But I think the main flaw of all these proposals is that they're not based on any specific evidence that the ability to make non-infringing uses of works would be harmed if Section 1201(a)(1) came into effect for all works, as Congress provided.

There have been a limited number of anecdotes that have been put forward as evidence of an adverse effect, but they don't withstand scrutiny. Even to the extent that any real threat of harm has been demonstrated, you have to balance that against the evidence that the use of access control measures has increased, and not decreased the availability of works for non-infringing uses since Congress directed this proceeding to undertake a net calculation.

Let me just say a word about the concept of particular classes of works. I know this has been a frustration to the members of the panel, to try to solve this conundrum that Congress has given it.

The question of what constitutes a particular class of works can't be answered in the

abstract. And from our perspective, trying to answer that at this point would be like asking us to categorize or classify the specific angels that are dancing on the head of a pin. We'd be glad to try, but we just don't see any.

And until we see some evidence of specific adverse impacts, it's very difficult to figure out whether you can design a particular class of works that covers those adverse impacts.

If you agree with this, and if at the end of the day as you assess the evidence, you don't think that the adverse impact has been demonstrated, you may want to take the approach of not addressing the question of what would constitute a particular class of works. You may want to leave flexibility for yourselves and your successors three years from now in the next triennial proceeding, when the evidentiary record may be more complete.

At that time, if there is evidence of specific adverse impacts, that would be a point at which you'll need to decide whether that evidence can be organized to define particular classes of works.

Let me turn to, three issues that were quite prominent in the hearings in Washington. In

fact they're implicit in all of the testimony, but I think the Washington testimony brought them to the fore. And as I understand it, some of them have been revisited here.

The first is the question of initial lawful access, the second is the focus of this proceeding on fair use, and third is what I would call the bugaboo of pay-per-use.

First, the notion that it should be permissible to tamper with access controls as long as they manage something other than initial access to copyrighted materials. I call this the initial lawful access approach, because that's what its proponents called it two years ago when they sought to persuade Congress that these second-level controls, or persistent access controls ought to be fair game for circumvention.

They weren't able to persuade Congress then, and for that reason perhaps they don't use the phrase as much now. But it's basically the same approach.

This approach sees access controls as an on/off switch, and nothing more. Or in fact as something less, because under this analysis once access is switched on it can never be switched off.

In this view every license is a perpetual license, or should be. Subscribers to copyrighted materials, like diamonds, are forever.

That's the approach that underlies Professor Jaszi's suggestion, for example, that works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof, that those users ought to be free to circumvent access controls in that endeavor.

This rulemaking may originally, at one point, have been intended to give a privileged status to those who claim to have achieved initial lawful access to a copy of a work. But Congress thought better of this approach. It was dropped like a stone when the bill reached the conference committee.

And the reasons for Congress' change of mind are, I think, not hard to understand. The concept that people who obtain initial lawful access ought to be free to circumvent thereafter is antithetical to promoting the availability of copyrighted works. If the on switch can never be turned off, there's little incentive ever to provide initial access in the first place.

By contrast these second-level controls, or persistent access controls as some have called them, are being used to maximize access by the greatest number of users in the most efficient manner permitted by digital technology.

For example, time-limited access, which is an example of this type of persistent access control. It's not a new concept, it's not a radical concept. And certainly the library community is familiar with it because the most familiar example might be the public library, where borrowing a book does not entitle you to keep it forever. The video rental store operates on the same principle.

Technological measures have been used for decades to enforce time-limited access to copyrighted materials. Once your subscription to a premium cable service expires, scrambling technology denies you access to reruns of the programs to which you once enjoyed initial lawful access. Black boxes aimed at overcoming this access control mechanism have been outlawed for many years.

Libraries and our research institutions seemed to have survived this development. So it's a little hard to understand the intensity of their expressed concern that extending this model to

online and other digital media will be fatal to their future.

Of course, they're more used to dealing with the traditional environment in which purchase of a physical copy entitled the purchaser to perpetual access to the work it contained. But as long ago as 1976 Congress made it clear that to equate the copy with the work is a fallacy.

You heard testimony earlier this month from David Mirchin of Silver Platter that made it clear that libraries have functioned successfully for years in an environment which includes so-called second-level access controls, such as a licensed limit on the number of simultaneous users.

And I think it's significant that, according to all the testimony I heard -- and perhaps you heard something different in the last day -- libraries haven't found it necessary to circumvent the existing access control measure in order to deliver to their users the enhanced and expanded access to copyrighted materials that digital technology enables.

It's really hard to conclude from this evidence that cataclysmic changes will occur, or any significant adverse effect, once the legal

prohibition against circumvention comes into force on October 28th. Some witnesses have told you that Congress really didn't have these persistent or second-level access controls in mind when it enacted Section 1201(a).

I think if you look at the legislative history it's clear that this is exactly what Congress had in mind when it talked about access controls. The House Manager's Report gives the example of an access control that "would not necessarily prevent access to the work altogether, but could be designed to allow access during a limited time period, such as during a period of library borrowing."

The House Manager cited this as an example of a technological measure that would "support new ways of disseminating copyrighted materials to users, and safeguard the availability of legitimate uses of those materials by individuals."

So in fact Congress not only was aware of these technologies, it counted them on the positive side of the ledger, and encouraged you to count them on the positive side of the ledger in trying to figure out the impact of access controls

on the availability of works for non-infringing uses.

Let me speak a word about non-infringing uses. Congress didn't ask about the impact of the circumvention prohibition on fair use, it asked about its impact on non-infringing use. And, of course, that's a much broader category. It includes fair use, but it also includes licensed or permitted uses.

I had the feeling from some of the testimony and submissions that licensed uses really don't count, because they depend upon the agreement with the copyright owner. It's the same theory that makes the apples that you filch from the orchard taste a little sweeter than those that you buy at the store. But from the standpoint of the end-user, it's hard to see the relevance of this distinction.

I think Congress took the same view, which is a practical view. So long as the public is able to make use of these materials without violating the copyright law, why is that availability somehow tainted, if it takes place with the consent of the copyright owner?

I think the mindset that reads non-infringing use to mean only fair use helps explain

why the witnesses, again, were not able to come up with any concrete instances in which circumvention of technological measures is necessary to serve library patrons, or students or researchers.

Time and again you were told that there are potential problems, but that they so far have been resolved in negotiations with the copyright owner. This may be disappointing to some of the intermediaries who are shouldering the burden of persuading you that there should be exceptions to Section 1201(a)(1). But it's good news for the end-user, and that's the party on whose benefit Congress directed that this proceeding be carried out.

Finally, let me just say a word about pay-per-use. This is a pricing strategy that we find in some areas of the copyright market. And some of your witnesses portrayed it as not only fatal to the American scholarly enterprise, but actually unconstitutional.

Pay-per-use, like time-limited access, has a very distinguished pedigree. Look back to the first concert or play for which admission was ever charged, which was a pay-per-use of the performance of copyrighted work. Up to the present day this is widely used for the delivery of some types of

performances by cable, satellite, over the Internet.

Interestingly, the area where it's probably made the least inroads is in the academic and library markets. Pay-per-use -- or rather, I should say, unmetered use is probably much more prevalent today than it was 10 or 15 years ago, when you had connect time charging, per-search pricing and these other pricing strategies that are less common today.

In fact, you could make the argument that, under some circumstances, pay-per-use may be a cheaper and more efficient means for libraries and educational institutions to serve their constituencies than the unlimited use model which currently prevails.

I think what we'll see, that we've seen so far, is that where that argument has merit the market develops in that fashion. Where pay-per-use is disfavored for whatever reason, it will remain an exception and not the norm. But for your purposes, the purposes of this proceeding, I think the opponents of pay-per-use have failed to make any persuasive showing that the pay-per-use model will become more prevalent unless the effective date of

Section 1201(a)(1)(A) is delayed for some particular class of works.

And even if they were able to carry that burden, they would still have to show that such an outcome would be likely to lead in balance to the adverse impact which Congress was concerned to prevent, and which Congress directed your attention to.

All this gets back to the evidence, how it matches up with the burden that Congress imposed. And I think on review of the evidence, I would suggest to you that there's really not enough concrete evidence on which the Librarian could rationally base a finding that an adverse impact is likely to occur if Section 1201(a)(1)(A) goes into effect on schedule.

You've heard from witnesses their apprehensions about pay-per-use and persistent access controls, but many of those same witnesses said that so far they haven't encountered those phenomena. They're worried about licensing terms that will be inflexible or intrusive. Some of the witnesses quite candidly asked you to use this proceeding to improve their bargaining position.

So far these problems have not materialized. They predict that it will be necessary to circumvent access controls in the future. And therefore they ask you to stop the congressional prohibition on that behavior from taking effect. But so far, even though it is not currently a violation of law to circumvent these measures in most cases, they can't point to a single instance where they've needed to do so.

In short, in a proceeding which must be based on facts, these witnesses have bought you fears. And the evidentiary foundation they presented is too flimsy to support a decision to delay the effective date of Section 1201(a)(1)(A) for any class of works.

On behalf of the organizations representing a broad spectrum of U.S. copyright owners, I urge you to recommend to the Librarian that the cause of action for circumvention of access control measures take effect as scheduled, for all works protected by copyright.

Thank you again for your indulgence in my tardiness. And I'd be glad to answer any questions.

MS. PETERS: Thank you for managing to make it here. I want to start the questioning with Rob.

MR. KASUNIC: Good afternoon. Suppose I told you that yesterday we heard compelling and highly specific testimony that there was a demonstrable adverse effect from access control measures utilized in a particular class of works, namely motion pictures. And in addition, these motion pictures were only available in digital format. So, a sole source situation.

How would we define a coherent, well-defined class of works? Would we exempt all motion pictures as a class, so that anyone could circumvent these technological protection measures, both purchasers and pirates, or would we define the class as motion pictures that were lawfully acquired?

MR. METALITZ: Well, I can't really answer a hypothetical question, based on the evidence that I'm not familiar with. But I think, in general, if you were convinced that there had been this -- or that there was a likelihood of this significant adverse impact, you would then need to try to fashion a definition that would be neither under-inclusive nor over-inclusive.

One that would capture the types of works as to which that impact had been demonstrated, and didn't go far afield into areas where that adverse effect hadn't been demonstrated, or didn't appear to be likely.

Congress obviously didn't give you a lot of guidance on this, but they did suggest that it ought to be a particularized determination. And something that was simply based on one type of protective technology was not appropriate, that a definition based on one category or description of users probably wasn't appropriate.

That the touchstone is what class of works can you describe as to which the -- again, not the use of the access controls, that's not the issue -- but the prohibition against circumvention of the access controls would be likely to achieve that adverse impact.

So I doubt that it would be a category as broad as all motion pictures. I doubt that it would be a category as broad as all motion pictures in a particular technological format. But, again, that's the kind of question that I find it very difficult to answer in the absence of evidence.

Because, for one thing, it may bind your hands -- or those of your successors -- when they actually have to deal with evidence that there has been significant adverse impact. So I think caution is probably advised in this area, except and unless -- except to the extent that you are persuaded that the proponents of an exception had met their burden.

MR. KASUNIC: In the legislative history there was discussion in the House Judiciary Report, early on, that "[p]aragraph 1(a)(1) does not apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such action involves circumvention of additional forms of technological protection measures."

Doesn't this passage support the proposed exemption by some groups that classes of works that are initially lawfully accessed should be -- you should be able to circumvent?

MR. METALITZ: Well, I think to the extent that it does, you have to look at the whole legislative history. That provision was in the House Judiciary Report, which is at an early state. It did refer to 1201(a)(1) which is now

1201(a)(1)(A), and I don't think there's been any change in that language.

But I think if you look at the legislative history underlying this proceeding, and how you're supposed to answer that question, what issues you're supposed to look at, it's clear that Congress thought that access control mechanisms that applied after "initial lawful access," could have a use-facilitating or use-enhancing effect. And that they were a positive element in the calculus for what the impact of these technologies -- and even more importantly -- of the prohibition would be on the availability of works for non-infringing uses. So I think you'd have to put that observation in that context.

MR. KASUNIC: We had discussed, earlier this morning, some of the statements in the comments on reverse engineering. And in your comment, as well, there was a discussion that Section 1201(f) would prohibit the Librarian from making a determination on this area of -- within the scope of 1201(a)(1)(A). That because Congress had already acted in that area, that there was no room.

Is that something that would be -- in terms of changes in technology, if this was -- those

exemptions were done at a specific point in time, if at some point in time adverse effects were shown in relation to that, would reverse engineering be something that the Librarian would be prevented from addressing?

MR. METALITZ: Well, it depends on what they would be. 1201(a)(1), as you know, of course, is not in effect. It is not now a violation to circumvent access control measures for the purpose of reverse engineering, whether or not that reverse engineering would be infringing under the copyright law or not.

On October 28th, it will be illegal to do that. But only within the scope of what 1201(a)(1) provides, and Section 1201(f) provides an exception to Section 1201(a)(1) in certain circumstances. And to kind of oversimplify it, perhaps a little bit, if the circumvention is necessary in order to obtain information in a reverse engineering context that would not constitute an infringement, then there's an exception to Section 1201(a)(1) as well.

So that's an area where the scope of the circumvention prohibition is linked with issues of infringement to a great extent, if not exactly the

full extent. So if in the future, you found that people -- because they couldn't circumvent in the circumstances that didn't fall within the Section 1201(f) exception, because those circumventions remained illegal, that therefore caused an adverse impact on the availability of works for non-infringing uses, then you would be in the realm of the kind of things that the triennial proceedings is supposed to look at.

But it doesn't look at Section 1201(a)(1) in a vacuum. Section 1201(a)(1), when it goes into effect, will be subject to exceptions for reverse engineering, for computer security, for encryption research. I think those are the principal ones, and there may be others as well.

So that's the prohibition whose impact you're supposed to assess, either today its anticipated impact, or three years from now its actual impact, as well as anticipated over the following three years. I don't know if that answers your question.

MR. KASUNIC: Yes. We have also heard a lot of evidence or rather, a lot of testimony from the library community and educators that this would cause the prohibition, and Section 1201(a)(1) would

cause a chilling effect. And to what extent is a chilling effect an adverse effect -- something that should be considered -- or is the likelihood of a chilling effect something that should be considered?

MR. METALITZ: I'm not sure what it would be a chilling effect on. Usually, that term is used in the First Amendment context. Is that what --

MR. KASUNIC: A chilling effect on making fair use determinations. With some of the criminal ramifications and civil penalties involved, and the uncertainty with a number of the terms that are involved in Section 1201(a)(1) -- there has been the claim that there is a certain amount of vagueness to some of the terms -- that this uncertainty would really prevent librarians who, it was stated, were by their nature cautious, from exercising privileges. The penalties and ambiguities would cause a chilling effect on the use of certain privileges that existed.

MR. METALITZ: I think it would help in evaluating that claim if we knew what types of activities were being chilled. The whole chilling concept is, you know, how close to the line of legality do you encourage people to go. And the

evidence so far is that they're all the way across the room from the line of legality.

When you asked the witnesses in Washington whether they had ever had to circumvent access controls in order to serve their patrons, the answer was no. And when they raised fears about some of the areas where this might happen, such as with the image databases and so forth, you pressed them.

It seemed to me that the evidence was that they'd been able to resolve this in negotiations with the copyright owners. So that doesn't sound as though they've been chilled yet. Because every time they felt cold, they've been able to find some warmth somewhere.

So I think you'd have to know more about what types of activities they claim they were discouraged from undertaking before you could evaluate whether a chilling effect was something that amounted to a significant adverse impact, as Congress directed you to assess.

MR. KASUNIC: Thanks. That's all I have.

MS. PETERS: Thank you. Rachel?

MS. GOSLINS: Mr. Metalitz, I think we've asked this question of almost every content owner representative in front of us. And I think we've yet to get an answer we can take to the bank. But I'm going to try again.

You have all provided us with numerous examples of what is not a class of works. And I'm curious as to whether you have an example of what might a class of works.

MR. METALITZ: Well, I'm not sure you're going to be able to bank any more on what I'm saying than what the others have said. And I'd like to explain the reason why. I've referred to this in my testimony.

When you're dealing with a null set, it is extremely difficult to categorize it, or classify it. The danger of doing that is that you set up rules that, in the hypothetical situation, that may not be the right ones when your set is no longer null, and you actually have some examples of adverse impact.

You know, I recall your dialogue about this with Mr. Lutzker. Some things that he said I wouldn't disagree with. For example, it doesn't necessarily have to be a subset of the categories of

works in the Act -- not an exhaustive list -- that's laid out in the act of the cross-cutting. Or you could say a class includes elements from more than one of those categories.

But, again, it's very hard to answer that when we think we're dealing with -- from our perspective, we're dealing with nothing. We're dealing with a null set. Let's see the examples, let's find the clear cases of adverse impact. Then it would be more realistic to try to say, "Well, can we define a particular class of works that kind of covers that waterfront?"

MS. GOSLINS: I had a similar discussion with Mr. Simon this morning, and he similarly said you have look at the harm. The problem, I think, in that is that on one hand we have significant amount of content owners telling us we shouldn't look at uses or users in defining a class of works. On the other hand, how can you look at harm without looking at who is being harmed, and what they're doing in which they're suffering the harm?

So it's hard to recommend -- do you have any suggests on reconciling -- defining classes by who is being harmed, and what they're doing, on one

hand. And not looking at uses or users on the other.

MR. METALITZ: I think when you're looking at the evidence, you have to look at the uses and the users. Because you're going to have examples. The example will be User X is unable to make this particular type of non-infringing use of this particular work, because of the prohibition against circumventing access controls on that work.

Then you no longer have a null set. You'd have an example, you'd have at least a species. And then you'd have to try to figure out -- and maybe if you have two species or three species, then you'd try to figure out what's the generic class of works that covers those examples.

So I don't think it's irrelevant. I think the examples that you would get obviously have to have some explanation of who the user is, and what use it is that they wish to make, or are unable to make. But then at that point you have to go to the next level of analysis and define a particular class of works that covers that. Again, we don't see that first step has been shown.

MS. GOSLINS: As I understood one of the points in your argument, was that non-infringing

uses should cover -- what we should be looking at is adverse impacts on other things, such as licensed uses or specifically-permitted uses under specific exemptions.

And I think, in fact, we have heard some examples of problems in those categories. In the Washington hearings we had a gentleman who talked extensively about dongles, and what happens when you have a lost or damaged dongle. You still have an operating license, but you're unable to replace it because the company isn't willing, or it's out of business.

Yesterday -- I don't think you were here -- but Lolly Gassaway representing the AAU and several other organizations, talked about a CD that she had in her library where the content expired, even though there was no license term restricting the content. Restricting the time or limiting the time that the content should have been available. So that was a mistake situation.

We also had testimony about libraries' statutory rights to lend certain things like books or software programs. And their inability to do so if the material is encrypted, because they wouldn't

be able to lend the decryption key to the person to whom they were lending the object.

So we do have examples of ways in which people may be prohibited from making uses that would be permissible under their license or under the statute. And I'm just curious as to how you would respond to those.

MR. METALITZ: Well, let me take it in reverse order. The decryption key issue, if I understand it, is really a question of whether there's a license agreement that is not -- you referred, I think, to a statutory right to lend something, and that certainly is a right that can be modified by a license agreement.

So that when a library, let's say, acquires a piece of software, they, I would think, ordinarily do so subject to a license that states the circumstances under which it can be lent. So I think that's really --

MS. GOSLINS: But let's assume there's not a license. If a library purchases a copy of Steven King's e-book, "Riding A Bullet," I think it's called. It can only be played on the computer which downloads that for that content.

And even if there's no licensing term restricting them from lending the book, checking it out to the extent that they could do so technologically, they're incapable of doing so because of the access control protections.

MR. METALITZ: Well, I think you're going to hear more about that in the next panel. Because that's a species of the general problem, which is whether the acquisition of a copy -- to say it that way -- necessarily brings with it the right to play that copy, use that copy on a machine of one's own choosing. Or, rather, on the one that the copyright owner intended that it be used on.

I think that would be an expansion of what ordinarily has been considered the privileges of the user. It's kind of like saying if you bought a Betamax tape, you have to be able to play it on a VHS machine, and vice versa. Again, these are not always problems that are as new as we sometimes think they are.

MS. GOSLINS: But, historically, the Copyright Act does go out of its way to ensure libraries have the ability to do certain things that a normal individual user wouldn't have. Like

archive, and like lend, and like preserve materials. I mean, that is --

MR. METALITZ: Right. Section 108 gives them those privileges. And I think that was -- if I understood it, that was your second example that Lolly -- was that a preservation issue that she was raising?

MS. GOSLINS: No. She had purchased -- my understanding is she had purchased a CD without any time restriction on it, and the material expired. And after a fair amount of time she was able to get the manufacturer to replace it, because it had been a mistake.

MR. METALITZ: And, you know, if her library has bought defective books -- that the bindings came apart and the pages fell apart quickly, too. You know, this happens. And I don't know that it's a copyright infringement when that occurs.

The preservation issue, as you mentioned, there are privileges as far as the ability to copy. And I think the issue you'd have to look at there is what exactly is it that the library or archive wants to do that they're unable to do without circumventing access controls.

In some cases what they're concerned about is a copy control. They have it, they have access to it, but they can't copy it to move it from a fragile medium to a better medium, or from an obsolete medium to a non-obsolete medium. And that's a Section 108 issue, as to the copyright side. It's a non-issue to the extent that 1201 affects it, because as you know, it's not a violation to circumvent a copy control.

So those are instances in which they don't need to violate 1201(a)(1) in order to achieve their objective. Then you have some circumstances, I would think, in which even if they did violate Section 1201(a)(1) once it comes into effect, they still wouldn't achieve their objective.

If you have something that is in a medium where the hardware no longer exists or isn't accessible for you to play it, then the fact that you have a decryption key that you can use once you get it on a piece of compatible hardware doesn't really help you.

So whether or not they circumvent Section 1201(a)(1) isn't going to have a direct impact on the ability to make non-infringing uses.

But, again, I would come back to the question of what's the status quo? What's happening today? Today, aside from the cable area and a few other areas, it's not illegal to circumvent access controls. Where are the instances in which libraries are forced to do this in order to gain access to this material?

Or are they able to gain it in other ways, either by locating another library that has the material in a usable format, and then using one of the exceptions in the Copyright Act to be able to gain access to it that way, or by dealing with the copyright owners. I think you'd have to look at the specifics.

MS. GOSLINS: But if we just look at a narrow category in which the owner of -- or a user of a product has a license or the legal entitled to do something. And for some reason in this very narrow category, other than arguably the intent of the copyright owner, they are prohibited from doing so by access control protections -- either because it's malfunctioning or because they can't get a replacement for their dongle, because the copyright owner has gone out of business or isn't responding to their calls.

In those situations do you think -- and let's assume they want to make non-infringing use -- in those situations do you think it would be appropriate to allow them to circumvent the access control?

MR. METALITZ: I think, again, you'd have to look at the specifics. The dongle situation, in some cases the copyright owner, as I recall the testimony, was out of business. And the witness had built a thriving business on perhaps violating Section 1201(a)(2).

I don't know whether that's the case or not, or 1201(b)(1) -- because in many cases these would be copy controls. But in any case he seemed to be having the business unmolested of providing these solutions to them.

But the other thing that he was unhappy about was that in the case of some of this high-end software the copyright owner was saying, "Well, if you buy it with the dongle, and you lose the dongle, you have to buy another copy of the software." It seems to me that's a market issue more than a copyright issue. Unless you think there's an entitlement to a particular license term which is, if you lose the dongle you get a new one free.

I don't think that the copyright law dictates that, nor do I think that that would be a good reason to intervene and bring the -- or hold up the applicability of Section 1201(a)(1). So, you'd have to look at the specifics.

MS. GOSLINS: All right. One final question, just sort of a statutory interpretation question. So if you have a copy of the DMCA handy -- I don't know if you do. You might be able to just answer this without looking at it.

In your understanding of the statute, let's assume for a moment that we were to exempt a particular class of works, assuming we could figure out what one was. So we recommend to the Librarian, who recommends to Congress that a certain class of works be exempted, and that's accepted. Then what happens?

Are all uses of that -- of anything in that particular class of works then exempted from the Section 1201(a)(1) prohibition, or only non-infringing uses?

MR. METALITZ: Well, I don't think you have the authority to decide whether infringing uses are excused. That's a copyright law issue, not a Section 1201 issue. What the Librarian has the

authority to decide without going back to Congress, is whether the Section 1201(a)(1) prohibition will go into effect for a particular class of works.

MS. GOSLINS: And that's what I'm focusing on, what it means to go into effect. If we recommend a class of works which is accepted, then what is the effect of that exemption? Is it that from that point on, anything -- let's use chemistry textbooks. We recommend chemistry textbooks as a -- I know the chemists are going to come after us. I won't keep using that example.

We recommend chemistry textbooks as a class of works that's exempted, and that's accepted. Then can anyone circumvent access control protections to a chemistry textbook, or only people who intend to make non-infringing uses of it?

MR. METALITZ: It would depend on how you define the particular class of works. Because if you define a particular class of work as chemistry textbooks, then I assume that if someone brought a Section 1201(a)(1) action against someone for circumventing the access control on the chemistry textbooks, that that would not be a valid cause of action, at least until October 28, 2003. At that point it would be a valid cause of action,

unless you made a new determination that chemistry textbooks --

MS. GOSLINS: Okay. Can I ask you to look at 1201(a)(1)(D). I apologize, it's a little dense as far as provisions go, and I don't mean to spring it on you now.

MR. METALITZ: No apologies are needed.

MS. GOSLINS: We've had some testimony that once the Librarian publishes an exempted class of works, then -- as you'll see by the last sort of two lines in it, "the prohibition contained in Subparagraph A should not apply to such users," meaning non-infringing users.

MR. METALITZ: No, it doesn't mean that. It means a user who circumvents. I remember this -- I know what you're driving at here, because this was from the earlier testimony. In fact, when we go back and look at 1201(1)(a), "prohibition shall not apply to persons who are users of a copyrighted work." And this is the point I think Arnie Lutzker was making.

The reason it says that is, the only person who can be guilty of a violation of Section 1201(a)(1) is a user of the work. That's the person who circumvents an access control measure. You

don't bring that claim, that cause of action against, for example, somebody who posts the decryption algorithm on the Internet. That person may not be circumventing, but they're trafficking in the tools of circumvention. That's a 1201(a)(2) issue.

But Section 1201(a)(1), the defendant is the user who circumvents an access control. And what you have the power to recommend, or the Librarian has the power to decide, is which users can do that without violating the law for that three-year period.

MS. GOSLINS: Not really which users, right? Which classes of works, that can be done, too.

MR. METALITZ: That's correct. If the user is circumventing the access control for a particular class of work, and that happens to fall within the particular class of work that you have identified, then that person is immune from liability under Section 1201(a)(1).

You have to say "user" because you don't sue the work. The defendant is not the work, the defendant is not the particular class of work. It's a user of a particular class of work who is

privileged -- if you so decide and if the Librarian agrees -- to circumvent an access control measure during a specified period of time.

MS. GOSLINS: But if you look at Subsection D -- and I don't mean to argue with you here, I'm just trying to understand myself as I go through this statute. It says, "The Librarian shall publish any class of copyrighted works for which the Librarian has determined pursuant to the rulemaking conducted under Subparagraph C, that non-infringing uses by persons who are users of a copyrighted work are or are likely to be adversely affected. And the prohibition contained in Subparagraph A shall not apply to such users with respect to such class of works."

So why would they say "such users" unless they were referring to the users who were making the non-infringing uses? The persons who were making non-infringing uses?

MR. METALITZ: Well, the people who want to make non-infringing uses are adversely affected in their ability to do that. That's the threshold that you have to cross in order to make that determination. If you find that there isn't an adverse impact on non-infringing uses, then we're

not going to designate that particular class of work.

But once you designate that particular class of work, it's not that 1201(a)(1)(A) doesn't apply to those uses, it doesn't apply to those users, such users. And I would think that that refers back to persons who are users of a copyrighted work, rather than the non-infringing uses. That's a threshold question you have to decide.

MS. GOSLINS: But then wouldn't such be totally redundant? And why wouldn't it just say the prohibition contained in Subparagraph A shall not apply to users with respect to such class of works. Or the prohibition contained in Subparagraph A shall not apply to such class of works.

MR. METALITZ: I think the reason it doesn't say the latter is probably because the claim is not brought against a class of works, it's brought against a user.

So your question is inevitably -- in other words, in your particular class of work only applied to --

MS. GOSLINS: The prohibition, the exemption would only apply to people who were

circumventing access control protections for that particular class of works who were making non-infringing uses thereof.

MR. METALITZ: Well, I think if you were able to maintain a perfect fit between what the evidence showed and what the scope of your particular class was, that that would be the outcome. Because you would be able to tailor the particular class to only cover the evidence that you were persuaded by, that showed this adverse impact.

MR. CARSON: I just want to make sure. I think I'm following you, but I just want to make sure we're absolutely clear on this.

Let's assume that we determine that motion pictures are one of those classes. I'm not saying we're going to, but just for sake of the example. Let's say Rachel is a professor of film history at some university, and I'm someone who manufactures illicit CDs or DVDs of motion pictures.

Now, motion pictures, maybe even motion pictures on DVDs, have been exempted from this. Are you saying that when Rachel wants to do this, in order to excerpt -- to make excerpts from motion pictures to show to her class in an instructional context, she's able to take advantage of that

exemption to circumvent. That, I gather, would be clear. Are you following me so far?

MR. METALITZ: Yes.

MR. CARSON: And because that class is exempted, if I want to take advantage of the ability to circumvent so that I can make all sorts of copies and market them, I would also be exempt because we've exempted that class. Is that what you're saying?

MR. METALITZ: I think this follows from the independence of the infringement action from the 1201 liability. The fact that you were making an -- that you were setting out to infringe means you're going to be guilty of copyright infringement.

MR. CARSON: Okay. A representative of at least one of the people whom you represent right now, this morning took exactly the opposite point of view. So you might want to clarify just what your view, or the views of all the people you're representing, actually are on that. Not that it's dispositive of the issue, but it would help us perhaps to know whether you're speaking with one voice, or what on that issue.

MR. METALITZ: Well, we're a very diverse group, as you know.

(Laughter.)

MR. METALITZ: We've already had one member of our group tell you that the whole idea of recognizing particular classes of works is unconstitutional, which I don't think is our unanimous view.

But I think this helps to illustrate some of the difficulties you run into when you're talking about this in hypothetical terms. And I know you have to operate that way, but it becomes difficult to answer these questions in the absence of concrete evidence of adverse impact. And thankfully, I think Congress recognized that.

They said you shouldn't find any class, you shouldn't even delve into these issues of what constitutes a particular class, and whether it necessarily includes users who are ultimately making infringing uses, or ultimately making non-infringing uses, unless you have specific strong and persuasive evidence that this is likely to occur.

If you have that, then maybe it becomes a little bit easier to answer these questions. And part of them could be answered, to some degree, definitionally. How clearly do you define a particular class of works? I'm not saying that's a

panacea in all these cases, but I think it illustrates the wisdom of waiting until you have concrete evidence before you try to answer that question.

MS. DOUGLASS: I have just a couple of quick, kind of broad questions. And I hope they don't indicate that I have one view or another. It's just that I'm trying to put some clothes on a stick figure in my mind, as far as some of these concepts are concerned. And thinking that it might be helpful to laypeople as well.

You said earlier that, I believe, although some others were saying that the burden of showing specific adverse effects could not be met, it can be met. And I understand that this might be a statement against self-interest or something, but I'm going to ask the question anyway.

Could you tell me how the burden might be -- how might one show adverse effects? Just for purposes of understanding.

MR. METALITZ: Well, I can give one example that may be helpful in that regard. If the library witnesses told you that they had to circumvent access controls in order to serve their patrons, and that was the only alternative that they

had. And they were doing it on a daily basis, and that there was a link to the particular non-infringing use that they would otherwise be unable to do. Certainly that would be stronger evidence than what they've come forward with so far, particularly at this juncture.

You know, in one sense the proponents of the exception do have a tougher burden now, because the prohibition hasn't gone into effect. So you can't say that anyone has been adversely affected by it yet, at least within the scope of that prohibition. But you could, in theory, have evidence that shows the likelihood of an adverse impact, which was that today this was a necessity, a central element of the way that libraries did business. And that if they had to stop doing it on October 28, 2000, XYZ effects would occur.

I'm disagreeing with the statements that you heard that said that basically Congress has sent you on a fool's errand here, and this burden could never be met. I don't think Congress did send you on a fool's errand, I think the burden could be met if the evidence were there. But it should be brought forward. I don't think it has been met, but I don't think it's impossible.

MS. DOUGLASS: I'm trying to think of a line between adverse effect and mere inconvenience. And I'm trying to place, at least, something on one side or the other. And I'm thinking of a situation where a library can either use a digitally-encrypted -- circumvent a digitally-encrypted work, or can go to 12 different other sources and get that same material. Would that be an adverse effect or would that be an inconvenience? Or is it harder than that?

MR. METALITZ: Well, I think it is difficult to draw the bright line. The examples that have been given about people having to come in late at night to get access because there is a limitation on the number of simultaneous users. I'm not sure that would be an adverse effect at all, but if it is, it belongs in the mere inconvenience category.

The issue of availability of alternatives is an important issue -- and I think it's the one you've raised. It doesn't have to be complete substitutability. I think the fact that it is more inconvenient to assemble the material from other sources, rather than to decrypt it -- that could be in the category of mere inconvenience.

I guess the question I would ask in that situation is why is licensed access unavailable? Or did the library simply choose, for whatever reason -- and it could be a very good reason -- not to license access to that material, or to stop licensing access to that material.

I mean, as a consequence of that it may become more inconvenient for them to serve certain users. But I think that's the result, certainly not of Section 1201(a)(1) and not even of the use of access controls. It's really a consequence of a decision the library has made, juggling its priorities and deciding which users it will give priority to, basically.

MS. DOUGLASS: Again, for purposes of understanding. I'm wondering if it could be said that anticircumvention amounts to a per se imposition of liability for non-infringing use. And if that's not correct, why not? And if it is correct, why?

MR. METALITZ: Well, the cause of action for infringement and the cause of action for a violation of anticircumvention prohibitions are two separate claims. Two separate causes of action.

So, it's certainly true that someone could be liable for a violation of Section 1201 without being liable for copyright infringement. And we've already seen examples of that in the cases that have come up under 1201(a)(2) and (b)(1). They may or may not involve copyright infringement, but it's an independent cause of action. I don't know if that's responsive to your question.

MS. DOUGLASS: I think it is. Thank you.

MR. CARSON: Steve, I'd like to get your reaction to one example that was brought up this morning. Let's assume it's November 1st. I happen to have a subscription otherwise Lexis, I have a Lexis ID. Rachel doesn't. She wants to do some legal research, so I give her my ID and she uses it. Has she violated Section 1201(a)?

MR. METALITZ: Has she violated it by using your, or have you violated it by giving it to her?

MR. CARSON: Well, have either of us violated it? Is that circumvention of a technological measure that controls access?

MR. METALITZ: I mean, she's using your password presumably with your permission.

MR. CARSON: But certainly not with Lexis' permission, right?

MR. METALITZ: Right. And it certainly -- let's assume. I don't know, but let's assume it's a violation of the Lexis license agreement which it was the day before October 28th. I think that's probably how that issue would be resolved.

Is it a -- it's a question of whether she is circumventing an access control measure, and a password often has that role.

MR. CARSON: So I gather what you're saying is that if an unauthorized person uses an authorized password, that is a violation of the anticircumvention provision?

MR. METALITZ: I don't know that it would be. Because I think you'd have to see what the apparent authority of the person who gave the password was. You get into those agency questions. But if you're saying could it be a violation, yes, it could be.

MR. CARSON: Okay. Can you help me out by letting me know what the purpose of having this rulemaking is? I'm not saying what are we supposed to be doing, but what is the purpose for having this rulemaking?

MR. METALITZ: I think the purpose for having the rulemaking is that while Congress had an expectation of how things would evolve, they didn't have complete certainty about how the use of technologies and online digital technologies would evolve. How the marketplace would evolve.

And although they expected -- at least the House Manager Report said they thought -- the likeliest outcome would be that the use of technological measures backed up by Section 1201(a)(1) and the other 1201 prohibitions would lead to greater availability, greater access to material for non-infringing, that it was possible that that would not happen.

So I think the purpose of it is Congress built in a safety valve into this system, and your job is to see whether there is, in fact, steam passing through that safety valve. But it's got to be pretty hot before you can blow the whistle. And I'm about to crash my metaphor here, but I think the safety valve function is what Congress asked you to perform. I'm not sure if that answers your question.

MR. CARSON: Well, it's an answer and it's a good answer. I'm not sure it totally answers what I was trying to get at.

MR. METALITZ: Well, try again.

MR. CARSON: Well, if we were to recommend that a particular class be exempt, what would we be trying to accomplish, or who would we be trying to help by doing that?

MR. METALITZ: I think you would be trying to help the end-users who, if you found such a class, would in the absence of your action be substantially adversely impacted in their ability to make non-infringing uses for that particular class of works.

So I think you have to look at the end-user. As I said in my statement, I think that's on whose behalf this rulemaking is proceeding. I think at the same time you obviously have to take into account other factors -- as I said, it's a net calculation.

And you have to take into account what are the ways in which the use of technological control measures, backed up by this legal provision have increased availability, have increased access.

So you have to take into account those interests as well.

But you're looking at the user who is substantially adversely impacted in his ability to make non-infringing uses. That's kind of the litmus test.

MR. CARSON: Okay. Now, I think you've said in either your oral or your written testimony, and maybe both, that in defining a class of works for purposes of this rulemaking, we really can't include in the definition the type of user who we're thinking of. Is that accurate?

MR. METALITZ: Well, it certainly can't be determined based on that. Such as the proposals that it should be any type of work that is marketed to libraries, for example.

MR. CARSON: Okay, fair enough. But let's go back to an example I gave you a little while ago. Let's say motion pictures on DVDs. Assuming the case were made that there were a problem there, would it be a legitimate class to say, "We're not going to exempt motion pictures on DVDs as such as a class. But we are going to exempt motion pictures on DVDs when used by film school professors."

MR. METALITZ: I think that would be very questionable under this scheme, because Congress asked you to look at particular classes of works. I would hesitate to say that you can't make any reference to the type of use. But you have to define a particular class of works. And Congress did not exactly tell you how to do that. But it certainly didn't tell you to define a particular class of privileged users.

At one point it was going to do that. Originally this rulemaking proceeding was to look at whether 501(c)(3), (4) and (6) organizations and people who had initial lawful access, and some other specified categories of users were being adversely impacted. That's not where this ended up. It ended up with a definition of a particular class of works.

MR. CARSON: Well, then, where we seem to end up with your interpretation, having rejected the interpretation in Subparagraph D that Rachel was discussing with you, is that we have a very blunt instrument indeed to use to deal with problems caused by the anticircumvention provision.

We can't tailor the class to the problem. We simply have to find that if there are

some users, maybe a minority of users of a work who have serious problems with this particular kind of work, we've got to exempt that class for everyone. Does that make any sense at all?

MR. METALITZ: Well, I don't know that your tool is quite that blunt. Because, again, I think you have some flexibility in how you define a particular class of work. But I think by directing you to make a net determination to take into account the positive aspects of the use of access control measures, Congress did intend that there might be some adverse impacts that would be counterbalanced by positive impacts.

Even if there were some adverse impacts, that wouldn't by itself justify finding a particular class of works. You have to do a net calculation. It's in the House Manager's Report and elsewhere. It's a net calculation.

MR. CARSON: I don't think you addressed it today, but certainly in your written comments you spent some time talking about the DVD issue and so on. This calls for a yes or no answer. Do you have thoughts you might want to share with us on that issue today?

MR. METALITZ: No, I think I'll leave that to the experts that you're about to hear from.

MR. CARSON: All right. I was going to ask, but I think you may have answered it. Whether it makes sense to have you hang around for the Q and A on the DVD issue. But am I hearing that you don't think you can contribute anything beyond what --

MR. METALITZ: I'd be glad to. I'm at your disposal.

MR. CARSON: Okay. That's all I have.

MS. PETERS: Okay. I don't have any additional questions. Thank you very much, Mr. Metalitz. And we'll now go to our last panel.

All right. As we go to our last panel we're going to start with you, Ms. Gross. Thank you.

MS. GROSS: Thank you. The Electronic Frontier Foundation appreciates this opportunity to testify regarding the adverse effects on the prohibition against circumvention of technological protections enacted by the DMCA.

DVD technology causes an adverse effect on people's ability to make non-infringing uses of copyrighted works, and should therefore be ruled exempt from the DMCA's circumvention ban. The

licensing terms imposed on DVD technology prevent player manufacturers from offering people the ability to bypass the region codes. The same terms prevent players from making non-infringing copies on traditional VHS tapes or computer hard drives for personal or educational use.

People who have attempted to eliminate these restrictions by making competing DVD players from legitimate reverse engineering, rather than by signing a license, have been sued and enjoined under the DMCA by major movie studios. The content scrambling system, CSS, is deliberately designed to prevent legitimate purchasers from being able to view their own purchased movies.

The region coding scheme used by DVDs prevents individual U.S. residents who purchase DVD movies from anywhere else in the world from simply viewing these movies on DVD players sold in the United States. This diminishes the ability of these individuals to use copyrighted works in ways that are otherwise lawful.

In other words, the DMCA is being used to prevent people from watching the movies they own on the machines that they own.

The adverse effect impact on persons outside the U.S. is even greater. A large fraction of the world's movies are created by U.S. movie studios in the U.S., and released first on DVD in the U.S. At that time, persons anywhere in the world are free to purchase these DVDs from U.S. retailers or wholesalers.

However, when they arrive the CSS technical protection measures prevent them from playing. Months later, some of these movies are re-released on DVDs coded for other regions. These re-releases are sold at higher prices than the original U.S. release, particularly in Europe. This delays and diminishes the ability of the entire world's population to use these copyrighted works in ways that are otherwise lawful. DVDs using region coding serve as a technological restraint on the global trade in copyrighted movies. The leading UK grocery chain, Tesco, started selling discount DVD machines in February of 2000. By mid-February they were selling tens of thousands of players from 400 stores, "once Internet sites and electrical magazines showed customers how to change the player to recognize discs from around the world."

Tesco's press release mentions their letter to Warner Home Video "Calling for an end to the 'unnecessary practice' of zoning -- which uses technology to prevent customers from buying DVD discs from around the world to play on machines in the UK. The letter goes on to say that Tesco believes "This is against the spirit of free competition and potentially a barrier to trade." Their World Sourcing Director, Christine Cross, said, "If we find a practice that we believe is keeping prices high -- we'll fight to change it so prices come down."

The licensing organization that controls DVD technology, the DVD Copy Control Association, has taken steps to exterminate this supply of 'region free' players. Its FAQ says, "In cases where DVD-CCA learns of such products, immediate action is taken through the manufacturer to have the product corrected to conform with the CSS license."

Indeed, it enforced a contract term on December 31, 1999 that eliminated its licensees' ability to sell computer DVD drives whose region controls were implemented in software.

Millions of users of DVD technology have been adversely affected in their ability to make non-

infringing uses of copyrighted works. The 'region coding' scheme prevents virtually every commercial DVD from being playable in most regions of the world, raising the prices and reducing the availability of works to legitimate buyers. This has an adverse effect on the ability of buyers to simply view a work which they have purchased -- the most non-infringing use possible.

CSS, together with the web of laws and contracts around it also eliminate the individual's ability to make non-infringing copies of DVD images. Fritz Attaway, MPAA's Washington General Counsel, declared under oath, "Under the terms of the CSS license, such players may not enable the user to make a digital copy of a DVD movie." The restriction is imposed by contracts, implemented by technology and enforced by DMCA lawsuits.

There is no balance to it. It does not follow the boundaries of the copyright law. Professors are unable to make excerpts to show their classes. Parents are unable to make VHS copies for their kids' VCRs. Programmers and artists are unable to manipulate the images with their own software. The CSS's blanket prohibition of copies and excerpts throws the baby out with the bath

water. CSS prohibits all fair use copying, as well as all illicit copying. It prohibits all copying.

Congress expressed its clear intent in Section 1201(c)(1) of the DMCA by stating that "Nothing in this section shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title."

According to the DMCA's plain wording, the traditional limitations to the copyright holders' exclusive rights shall remain in the digital realm. Congress' choice of the word "shall" indicates in the intention is not permissive or optional at the choice of the copyright holder. But rather a mandatory requirement that balance and longstanding traditional doctrines such as fair use and the First Sale Rule continue to have meaning in the digital paradigm.

There is no debate that Congress intended balance in the DMCA and preservation of traditional copyright principles in the digital world. Congress recognized the inherent dangers in enacting a circumvention ban and instructed this body to anticipate adverse effects and rule additional classes exempt from the general ban as a remedy.

As the U.S. Supreme Court has explained, fair use serves as a First Amendment safety valve within copyright law in Harper & Row, Publishers, 1985. Copyright law's fair use privilege fulfills its constitutional purpose by allowing individuals to copy works for socially important reasons without the permission of the author.

Thus, granting perfect control to copyright holders would be constitutionally impermissible. This rulemaking is charged with effectuating the DMCA in such a way that it does not violate the spirit of the constitutional limitations placed on copyright. To find otherwise would allow the DMCA to swallow fair use in clear contradiction to Congress' plain intent in Section 1201(c).

At a recent conference at Yale Law School, the MPAA publicly stated that it was the organization's position that an individual should be required to obtain a license before making fair use of a DVD. Clearly, this position cannot withstand legal sanction.

It would be an abuse of intellectual property law to allow the motion picture industry to obtain all of the economic benefits of copyright protection with none of the accompanying social

responsibilities. Technological protection systems such as CSS that prevent the public from exercising their legitimate rights abuse the copyright bargain and should be exempt from the general circumvention ban.

EFF is not spending millions of dollars in court merely to exonerate one or two individuals, or to enable distribution of a poorly-written software prototype. We are here to establish the principle that the anticircumvention provisions cannot be used to eliminate fair use broadly throughout society.

Nor can it be used to eliminate competitors who would offer legitimate access and copying capabilities to a major consumer market. Several lawmakers verified congressional intent by insisting that the DMCA does not and is not intended to overrule the Betamax Supreme Court case.

Two years ago, there could have been some doubt about whether the ill effects of the CSS system were caused by the existence of the prohibition against circumvention. Certainly the movie studios spent a lot of energy lobbying for these DMCA provisions, but the evidence was circumstantial.

This year it is clear. The movie studios have made a clear and obvious causal connection in their own briefs, tying their motivation in building the CSS system to the technological measures that restrict access to fair use. And then tying those to the DMCA anticircumvention statute.

The top eight movie studios, they themselves declared in their initial briefs, "Each of the Plaintiffs relied on the security provided by CSS in manufacturing, producing and distributing to the public copyrighted motion pictures in DVD format...CSS is a technological measure that (a) effectively controls access to works protected by the Copyright Act, and (b) effectively protects rights of copyright owners to control whether an end-user can reproduce, manufacture, adapt, publicly perform and/or distribute unauthorized copies of their copyrighted works or portions thereof..."

Thus, the DMCA encourages technological solutions in general by enforcing private parties' use of technological protection measures with legal sanctions for circumvention and for producing and distributing products that are aimed at circumventing protection measures like CSS.

To be sure, technology provides opportunity for benefit and abuse on behalf of all parties to the copyright bargain. Individuals engaging in piracy for commercial gain abuse intellectual property and harm society and creators. Likewise, the imposition of technology such as CSS onto the public that prevents creative works from readily passing into the public domain and restricts people from exercising their fair use rights is similarly abusive.

The use of such abusive systems that do not uphold their end of the copyright bargain cannot be backed up by force of law if copyright is to continue to serve as the engine of free expression.

Contrary to the fears expressed by the publishing industry, it is possible to preserve constitutional values without destroying the value behind creative expression. In its justification for greater control over creative expression, the industry claims the new-found phenomena of digital technology leaves copyright holders at the mercy of massive unchecked piracy.

While the industry has loudly overstated any potential harm it might face resulting from digital technology, it quietly looks the other way

without mentioning the unprecedented power technology provides to copyright holders to control access and use over creative expression.

The copyright industries' glaringly self-interested suggestion that this committee exempt nothing from the circumvention ban ignores Congress' stated desire that DMCA not effect this nation's core constitutional values.

It is crucial that this committee consider the longer and societal view in deciding these important issues. If you don't have the ability to exercise your rights, then you don't have rights.

There are greater issues at stake than mere economic interests of a few corporations. Unencumbered access to information is essential to knowledge creation, innovation and the democratic discourse of a free and healthy society. We must diligently resist the content industry's push to build a legal system that optimizes our children for commercial consumption of creative expression at the expense of their imagination, education and cultural enrichment.

I'd like to address the unfounded fears expressed by the content industry that any

additional exemptions would violate U.S.' WIPO Treaty obligations. Article 11 of the WIPO Copyright Treaty provides that, "Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

The DMCA went well beyond what was agreed to among contracting parties to the Treaty by granting an additional and completely separate access right. Thus, any additional exemptions under that right would have no effect on U.S. treaty obligations under WIPO. Additionally, the plain language of the Treaty permits circumvention for fair use.

The Copyright Office should define an exempted class as DVD movies. The movie studios stated in court filings that over one million copies of such works are sold every week. This is the class of works currently showing adverse effects.

It would be disingenuous to designate a class such as DVD movies protected by a region coding system. Since consumers have flocked to hardware and software devices whose region codes can be disabled, and manufacturers are starting to rebel, the movie studios might decide to "throw region coding overboard" in order to save the rest of their restrictive scheme.

A designation that only applied to CSS works with region coding would still enable them to suppress competitors whose equipment provides fair use copying.

Similarly, the industry could evade a ruling against a class such as DVDs protected by CSS by merely switching to a different but equally restrictive protection system. An improved CSS-2 system already exists, and the industry is actively designing stronger ones.

Therefore, the entire class of DVD movies is threatened with adverse effects now, and in the next three years, and should be exempted from the anticircumvention provisions of the DMCA.

The movie studios stated in court filings in January that about 4,000 movie titles have been released in the U.S. on DVD, that over

five million DVD players have been sold, and that over 1 million copies of such works are sold every week. This is not an issue of "individual cases," but a broadly implemented system that impacts all segments of society.

A deliberately-designed inability to play the work you purchased is no mere inconvenience.

In the comments and testimony provided by the content industry before this proceeding, the charge continues to surface that no one has supplied any evidence of actual harm resulting from the use of such dangerous protection systems we discuss today. I need not remind the committee of the hundreds of individuals who submitted comments complaining about their inability to view or simply make fair use of DVDs. Additionally, in testimony before this committee, CCUM described a teaching method using DVD that has become unavailable to educators.

It is imperative that this proceeding recognize that the public's sheer inability to exercise its legal right with respect to certain types of works because technological protections have been applied, is by its mere existence, a

substantial harm perpetrated against the First Amendment.

As the U.S. Supreme Court stated in Elrod v. Burns, "The loss of First Amendment freedoms, even for minimal periods of times unquestionably constitutes irreparable injury." I encourage the Librarian to weigh the constitutional considerations into its determination about the societal harm.

Copyright's goal is to create a world full of creators with a rich and thriving public domain where creativity flourishes. In addition to legal protection designed to enable a market for works, creators vitally rely upon ready access to information, including a vibrant public domain and the ability to engage in a wide range of legitimate uses including fair use. If copyright is to achieve its objective, society's true creators must continue to be allowed to build upon the works of their ancestors.

Because of the demonstrated widespread adverse impact on non-infringing use and fair use imposed by their technological restrictions, DVD movies should be exempt from Section 1201. Thank you.

MS. PETERS: Thank you, Ms. Gross. Mr. Marks?

MR. MARKS: Thank you. First I'd like to thank you for the opportunity to testify at this important hearing. My name is Dean Marks and I am Senior Counsel, Intellectual Property, for Time Warner. I appear here today on behalf of Time Warner and the Motion Picture Association of America. I would like to make a few general statements, and then discuss in a bit more detail the issue of DVD and the CSS protection technology.

As a preliminary matter, much has been written and said in the context of this inquiry that seems to pit content owners against consumers over the fair use issue. My company and fellow content providers not only support the fair use doctrine, but we rely on it every day.

In creating and publishing our movies or music, we frequently rely on the protections that fair use provides, for example, to comment or to parody.

From what I have read and heard during the course of this inquiry, no concrete evidence has been adduced that any user has been prevented from

making non-infringing uses of a work due to the presence of technological protection measures.

Discomfort has been expressed by some librarians over the terms of certain content licenses, but this is an issue separate and apart from whether exceptions to the legal protection of technical measures should be adopted.

Moreover, the potential harms that have been described are hypothetical and speculative. Contrast this with the very real evidence of threats to the rights of copyright owners that arise in today's digital and Internet environments.

On May 10, the New York Times published an article entitled "The Concept of Copyright Fights for Internet Survival." The article describes several new software programs, most notably Freenet, that have been developed and are used to deprive copyright owners of the ability to exercise their rights in the distribution of their works.

As stated in the article, the developers of such programs "express the hope that the clash over copyright enforcement in cyberspace will produce a world in which all information is freely shared." It is that sort of threat that content

owners worry about when we speak about the copyright balance today.

These very real threats to the rights of copyright owners led not only the U.S. Congress, but also the world community in the WIPO treaties to determine that technical protection measures used by copyright owners must be entitled to legal protection against circumvention.

In considering the possibility of any exception to the Section 1201(a) prohibition, the Register of Copyrights and the Librarian of Congress must weigh the lack of evidence of harm to non-infringing uses with the substantial evidence of harm to copyright owners that will result from the weakening of the legal protections afforded to technical measures.

Furthermore, there's an underlying assumption of many -- not all, but many of the remarks made in the course of this inquiry is that technological protection measures will be used to "take" works away from users, or to deny access. I strongly believe that this assumption is fundamentally flawed.

Technological protection measures can actually facilitate the making of works available to consumers.

We've heard discussions of DVD. DVD is a concrete example of this proposition. My company would not have released its motion pictures on the DVD format if DVD did not incorporate technological protection measures. The risk of unauthorized reproduction and distribution of our content in the digital format without protection would simply be too great. Without the content scramble system there simply would not be DVDs in the market today.

The DVD format has permitted users to view and own copies of motion pictures in a new and desirable digital format. This is why DVD has become so popular. Why, in fact, are a million DVDs sold each week? Because it's a popular and consumer-friendly format.

Further, DVD has allowed users for the first time to play high quality copies of motion pictures on their personal computers. These new uses of motion picture content have been made economically possible due to the development and implementation of technical measures, including access controls.

To now argue that these technological protection measures should be subject to circumvention because DVDs may not be playable on all personal computers misses the point that if the integrity of technological protection measures are not legally protected, content owners will be reluctant to make their works available in these new formats in the first place.

A clear real-life example is DVD-Audio. Due to the recent compromise of CSS and the fact that technological protection for DVD-Audio had been developed and premised on CSS, music companies have delayed indefinitely the launch of the DVD-Audio format. The result is that consumers have been deprived of a new music format.

Thus, circumvention of technical measures, whether sanctioned through this process or accomplished in violation of law, can seriously diminish the general public benefit.

I would like to turn and pick up on a point made earlier today by Frederick Weingarten. I agree with Mr. Weingarten that the development and implementation of technological protection measures can be a win/win situation for both content owners and users.

For example, technological protection measures are under development that would permit users to make a copy of certain pay television programs that are otherwise protected by encryption and other technical measures. In the context of the copy protection work underway in the Secure Digital Music Initiative, all participating parties have agreed that consumers who purchase music protected by technical measures should be able to engage in certain levels of copying for private use.

Thus, the development and implementation of technical measures that inhibit massive unauthorized copying and distribution, but permit limited consumer copying opportunities, will actually facilitate the making available of works to more consumers in more formats, and their ability to make non-infringing uses.

These technologies may also make it easier for content owners to make their works available to libraries in digital format, and, in turn, for libraries to make these works available to their users without undue risk of economic harm to the owners due to unauthorized reproduction, transmission and re-distribution.

The development and implementation of technical measures is in its infancy in the digital world, particularly with respect to the Internet. We should give some breathing room for the measures to be developed and implemented before we seek to undercut their legal protection.

It has been mentioned by prior witnesses, including Paul Hughes from Adobe this morning, and Bernard Sorkin from Time Warner at the Washington hearing, that content providers must be mindful of the desires of consumers. We are in the business of selling our content to the public, and we cannot survive as an industry if we do not widely distribute our works to consumers.

Because of this imperative, it is highly unlikely that we will employ technical measures that will be seriously detrimental to the ability of our consumers to make non-infringing uses. But this is only part of the answer, and you don't need to simply trust us.

As a practical matter, content owners cannot unilaterally develop and implement technical measures of their own choosing. Why is this? Well, sound recordings and audio/visual works can only be enjoyed by the use of receiving and playback devices

such as television sets, CD or record players, videocassette players, personal computers, et cetera.

Therefore, we as content owners cannot simply apply technical measures to our works that will cause all receiving and playback devices to be unable to play our works. If we were to do this, we would quickly be out of business.

Equally important, however, the goal of protecting works cannot be achieved if receiving, playback and recording devices do not recognize and respond to the technical measures that we seek to incorporate in our works, but they simply ignore them.

So, to work properly, copy protection technologies must be bilateral. The technologies applied by content owners need to function with consumer electronics and computer devices. This bilateral requirement means that protection measures are not simply a matter of technological innovation. And they are not simply a matter of fulfilling a list of demands by content owners.

Rather, copy protection technologies such as the CSS system for DVD require a high level of consensus among the content industry and the

consumer electronics industry and computer industry. This consensus requirement means that access control and copy protection structures, and the use of technical measures, are heavily negotiated across industries.

And, indeed, the negotiations over the CSS system spanned at least two years and possibly longer than that.

Because the consumer electronics and computer industries have strong vested interests in ensuring that their devices permit users wide latitude to use copyrighted works, the copy protection structures and technologies that are, in fact, being developed and implemented in the area of audio/visual and musical works fully recognize user concerns.

Finally, this inquiry is not a one-shot deal. At the moment it seems clear that there has been no evidence presented of any adverse effect, and hence it seems premature for any exceptions to Section 1201(a) to be enacted. The fears expressed that the DMCA and the anticircumvention provisions will harm users or the fair use doctrine have not materialized, and indeed these fears may never come to pass.

If any of the "parade of horribles" that have been described by some of the witnesses materialize in the future, then the Register and the Librarian will have the opportunity to consider appropriate remedies in future rulemaking procedures. At the moment, frankly, this exercise appears to be a case of attempting to devise a solution in search of a problem.

I now want to turn specifically to the case of DVD and CSS. In several of the comments received by the Copyright Office, reference was made to DVDs and the alleged inability of users of the Linux operating system to play DVDs on their computers.

Much confusion, I would even say misconception and misinformation, surrounds the issue of DVD, CSS and Linux. First, there is no legal or technical barrier to building an open source interface between the Linux operating system and a CSS compliant application that will play DVDs encrypted with CSS on the Linux system.

Second, the CSS technology and manufacturer's license necessary to build any CSS compliant application or device is available on a non-discriminatory basis. The current license

requires a one-time fee of $10,000. It is expected in the future that an annual fee of $5,000 will also be assessed. These payments are administrative fees, the license itself is royalty free.

None of the technical or legal conditions of the CSS license prevent implementation in the Linux environment. And indeed, two CSS licensees have in fact developed CSS implementations for the Linux operating system. One, called Sigma Systems, is hardware-based and another -- whose name I unfortunately don't have with me -- is software-based. But both of these implementations are available on the market.

It is true that most software applications that permit the playback of DVDs are designed for the Windows operating system. But this is simply because of market-driven decisions on the part of software developers who seek to develop and sell applications for the prevailing operating system.

Neither movie studios nor the licensors of the CSS technology have sought to prevent the development of the applications in any other platforms, including Linux. Indeed, much to the contrary, the film studios have a strong interest in

the development of as many CSS licensed and compliant playback devices as possible, be they consumer electronic players, DVD drives for computers, software programs or other platforms, such as the recently introduced Sony PlayStation 2. The greater the number and variety of CSS compliant playback devices available in the market, the greater the demand will be, hopefully, for DVDs that carry our content.

Some consumers who have been unable to play DVDs on their Linux operating system have argued that they should be permitted to circumvent the CSS encryption technology in order to gain access to the content of the DVDs that they have purchased. I want to make clear from the outset that my discussion of that particular argument in this hearing is separate from the ongoing litigation in the Reimerdes case, commonly known as the DeCSS case.

That case involves violations of Section 1201(a)(2) -- the prohibitions concerning circumvention devices, products or services and therefore that case is not directly relevant to the issue at hand in this hearing, namely Section 1201(a)(1) and the prohibition on circumvention

conduct. Because the Reimerdes litigation is ongoing and because my company is a Plaintiff in that litigation, and because understand that I have recently been noticed for a deposition in that litigation, it is inappropriate for me to discuss that case.

With respect to the argument for an exemption on the prohibition of circumvention conduct for purposes of playing DVD discs on the Linux platform, I respond as follows:

First, as the number of Linux users grows, the market will naturally fill the demand for CSS compliant applications that will play DVDs on Linux. As mentioned above, two companies already offer DVD playback applications for the Linux operating system. Hence, adoption of a circumvention exemption is neither justified nor necessary.

Second, a consumer who purchases a copy of a work but does not have the proper equipment to play back the work does not, in my view, entitle the consumer to circumvent access control protection measures.

I want to take an example here. A consumer who purchased a subscription to HBO -- Home

Box Office pay television service -- soon after its launch, but did not own, the consumer did not own a television set that could accommodate a cable set top box necessary to descramble the encrypted HBO signal, would not have been entitled to circumvent the encryption on the HBO signal. That is, he would have not been entitled, as a legal matter.

Encryption television signals are protected by various sections of the Communications Act. None of these sections provide for exceptions for users to decrypt signals without the authorization of the broadcaster. We have all been living with this legal regime for more than a decade with no difficulties, legal or otherwise.

Mindful of this longstanding precedent in the realm of encrypted broadcasts, no exemption to the prohibition of circumvention of access control technology appears justified merely to accommodate users who lack playback equipment that is readily available in the market.

Third, copyright owners are applying technical protection measures today, not simply to ensure proper payment for access to a work, but also to manage the exponentially increasing risks of

subsequent unauthorized reproduction and re-distribution posed by the digital environment.

The danger of permitting circumvention to facilitate an individual's access to a work is that such circumvention will also likely undermine protections against unauthorized copying and transmission, such as Internet retransmission. Once circumvention is permitted, there is no practical manner -- and likely no technical way -- to ensure that subsequent uses of the work will be non-infringing.

For example, if circumvention of CSS were allowed solely to permit access to content on DVDs to Linux users for home viewing, such circumvention would likely involve a copy of the content being made in the hard drive of the Linux user's computer. Once a copy is readily available in the hard drive, it is easily subject to massive replication and distribution for unlimited purposes.

Such risks are not speculative. Napster, iCrave, Gnutella, MyMP3 and Freenet all stand as very real examples of the ease with which works protected by copyright are subject to enormous unauthorized copying and redistribution once such works reside on the hard drive of a computer.

These very real risks militate against allowing exceptions to the prohibition on circumvention conduct. If any cases of adverse impact on non-infringing uses of works are demonstrated in the future, then that would be the time to discuss alternative remedies. An exception to the prohibition on circumvention conduct should be considered only as a remedy of last resort. Thank you.

I also wanted to express my response concerning regional coding. But I can do that now, or wait for the question period, if you would like. Better to do it now?

There's been some discussion of the regional coding issues, and how regional coding is used or misused by content providers to prevent users around the world from playing DVDs. For example, a DVD disc, a Region 1 disc that might be purchased in the U.S. And I want to make a few remarks about that.

First of all, consumer electronics audiovisual equipment has been developed with a certain degree of regionalization. There are different formats in different countries of the world. The U.S. is NTSC format, Europe is PAL

format. If someone were to buy a videocassette that had been manufactured -- straight old analog videocassette that had been manufactured in the U.S., it would be in the NTSC format.

That videocassette would not be playable in Europe on PAL format televisions and videocassette players. This situation has existed since the introduction of video in the early or mid-80s with no complaint. So I find it a bit interesting that now this issue of regional coding has become such a hot button for certain communities.

Second, why do movie studios impose regional coding in the first place? It has to do with the way the economics of the film business work. Films are very, very expensive to produce, and they become increasingly expensive to produce as the years go by. Many people assume that the revenues from theatrical distribution are the main source of economic return from movie production. That, in fact, is not the case.

As of today, the receipts from theatrical distribution usually, on average, account for only 20 to 25 percent of the gross revenues earned by a motion picture. The balance of those

revenues are earned by what have typically been referred to as ancillary markets. But now they are, frankly, primary markets because they account for the lion's share of the revenue.

These markets include home video, pay-per-view television, pay television and over the air free broadcast. The reason why movie studios are concerned about regional coding is that it is very, very expensive to produce theatrical prints. And therefore, unlike the music business, which currently tends to release new works on a worldwide basis -- the new Madonna CD tends to be released all over the world on the same date -- it is not really economically practicable for movie studios to do so, due to the enormous costs of producing prints, and the costs involved in dubbing or translating of the prints.

Added onto that are just regional habits that we try to take account of. Summer is a big movie-going season in the United States. Summer is a very low season for movie-going in Mediterranean countries, particularly Italy, where even today a lot of the cinemas are not air-conditioned.

So therefore if we have a blockbuster that we want to release in the summer in the United

States, we don't necessarily want to release it in the summer in Italy. The importance of having to exploit the different windows of exploitation of theatrical, video, pay-per-view, pay, free broadcast means that we are concerned that if we released region-free DVDs in the United States six months after theatrical release in the United States, and those DVDs were widely available in Italy where the movie had not even been theatrically released, that the impact would be to cannibalize the theatrical release. And take away from the potential economic return of the theatrical release.

I wanted to lay this out, as part of the explanation as to why we use regional coding in the DVD system.

Finally, I just wanted to turn to some of the fair use and First Amendment questions. It seemed to me that uses described by Ms. Gross were, in large part, not the typical fair uses for education or comment, criticism, parody, but were consumptive uses. Making copies for other people, or copies for your children.

I don't understand how protecting expressive works from piracy with the use of technological measures adversely affects free

expression, dissemination of knowledge or creation. The wider dissemination of works, in fact, that technological protection measures can afford, in my view, furthers the goal of spreading culture and knowledge.

The fact that one million DVD movies are sold each week indicates that these works are getting into the hands of users at a tremendous rate. And not that users are somehow being denied or deprived of access or to the works. If DVDs were not readily playable, it is difficult to understand how millions and millions of DVDs could be sold.

Similarly, I fail to see how the CSS system deprives any individual of his or her First Amendment rights. And I look forward to answering your questions. Thank you very much.

MS. PETERS: Thank you, Mr. Marks. Mr. Riley?

MR. RUSSELL: Russell.

MS. PETERS: Russell, excuse me.

MR. RUSSELL: I'd like to introduce myself. My name is Riley Russell. I am the Vice President of Legal Affairs at Sony Computer Entertainment America. I am also accompanied by Mr. Morton David Goldberg, of Cowan, Liebowitz & Latman.

I think it's worth, very briefly -- as I look around the room and I don't see any 15-year-olds -- at least to describe very quickly what the PlayStation is. And that is a video game device that, of course, plays video games.

Along with the Sony PlayStation, Sony Computer Entertainment markets and sells over 50 video game products and other services. Along with that there are over 350 independent video game publishers or developers licensed by SCEA who produce approximately 300 games a year for the Sony PlayStation system. The independent developers employ in excess of 6,000 people, most of them in the United States.

I would like to thank the Copyright Office for the opportunity to testify in this rulemaking proceeding, which deals with what I believe is a critical issue to the copyright industries and their customers in the digital age. This rulemaking poses the narrow question of whether there are particular classes of copyrighted works whose users have been, or in the next three years are likely to be substantially adversely affected in their ability to make non-infringing use of the works if the class is not exempted from the scope of

Section 1201(a)(1)(A). The rulemaking is to focus on distinct, verifiable and measurable impacts; speculation, de minimis effects and mere inconvenience should be disregarded in this inquiry.

As you are aware, Congress intended that the burden of persuasion as to the necessity of any exemption fall squarely upon the advocates. Congress, furthermore, had no expectation that in this proceeding the conditions for any exemption necessarily would be found to exist. They, in fact, may not.

To the contrary, according to the House Manager's Report, the absence of any such finding would indicate that "the digital information marketplace is developing in the manner which is most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention." I submit to you that this is exactly what's happened.

As a benchmark, Congress described the hypothetical scenario under which it "could be appropriate" to modify Section 1201(a)(1)(A)'s flat

prohibition of the circumventing of technological access controls: one in which the use of technological access controls might result in less, rather than more, access to copyrighted materials because of a confluence of factors including the adoption of business models to restrict, rather than maximize, distribution and availability. It goes without saying that nothing remotely resembling such a scenario has been shown to exist today, or to be likely to arise in the next three years. In fact, experience has shown otherwise.

It is telling that, despite the sound and fury raised in many submissions, few of the advocates of exemptions responded straightforwardly to the questions posed in the statute itself and in the Notice of Inquiry. A number of respondents would have the Copyright Office overturn or subvert the DMCA itself. Others concerned themselves with issues beyond the scope of this inquiry, such as the DeCSS litigation, or issues unripe for examination, such as preservation of works in a digital format.

In short, Section 1201(a)(1)'s opponents -- and they're opponents of the statute as Congress enacted it -- have not identified either distinct, verifiable and measurable impacts -- actual or

prospective -- on lawful use of copyrighted works caused by the prohibition on circumvention, or a class of works -- i.e., a "narrow and focused subset of the broad categories of works of authorship...identified in Section 102 of the Copyright Act," which is subject to such an impact. Accordingly, the advocates of exemption have not sustained their burden, and Section 1201(a)(1) should come into effect intact.

The backdrop for and impetus behind the law under discussion here is, of course, the vastly altered environment in which copyright owners have been operating since the advent of digital media and the Internet. In this brave new digital, networked world, the traditional arrangements among copyright owners, copyrighted works, and the consumers of those works have already been radically transformed by a single unprecedented fact: every consumer, with a single touch of a button, is now potentially a global distributor -- or a receiver -- of an unlimited number of perfect copies of any copyrighted work which may come into his or her possession in digital form. Once distributed, these copies can no longer be retrieved.

Much has been said of the importance of maintaining the traditional balance between the copyright holders' rights and consumers' privileges. The WIPO and Congress have acknowledged that technological access control measures, backed up by laws prohibiting circumvention, are essential to doing just that.

As Congress implicitly recognized, and as it should be clear to any observer, it would be derelict for content owners to release their works in digital form into this new environment without availing themselves of every practical means of protecting those works from unauthorized access.

Congress, we recall, mandated that this proceeding consider the positive effects of these technological measures on the availability of copyrighted materials. For SCEA and, we believe, many other copyright holders large or small, the availability of effective access control measures has had far more than a mere "positive effect" on the ability to make digital works available.

In fact, the availability of technical measures offers to the copyright holders means and scopes of distribution which were unimaginable just a few short years ago. For all of us, however,

effective access control will be a precondition to the wide dissemination of commercial copyrighted works in digital form.

While SCEA and other content owners clearly need the protection of access control technology in order to release works in digital form, it is equally clear that technology alone is not enough. There is not, and there never will be, such a thing as an un-hackable access control technology. At least not one that functions appropriately in the marketplace.

As WIPO and Congress recognized, in order for access control technology to work practically in the marketplace for copyright owners and consumers, it must be supported by laws prohibiting its circumvention. Otherwise the copyright holder is no better off than if the work was distributed without the access control. Such a tradeoff would result in a far narrower distribution for most works than currently exist.

The WIPO's Copyright Treaty, like Section 1201, refers to "effective technological measures that are used by authors in connection with the exercise of their rights." Some contend that once the initial access to a copy of a work has been

made, the prohibition on circumvention should no longer apply -- that the law should protect only a single "gatekeeper" function for an access control measure, after which it may be circumvented with impunity. There is nothing to suggest, however, that Congress and the WIPO intended such a result, and the notion makes little sense.

Here I speak not only for SCEA, but I believe for all copyright holders who deserve the benefit of protection technologies. It is perhaps the author of modest means, the small publisher, who may well be best benefitted by these technologies. He or she may have no other means of enforcing his or her copyrights in the digital world, and therefore it is the smaller copyright owners who require the extra security afforded by strong access controls.

Of course, under copyright law benefit to the consumer is an ultimate interest. To date, the consuming public has benefitted immensely from copyright owners' use of technological access controls which have been instrumental in permitting dissemination in digital form of enormous numbers of works which would otherwise not be available today.

It's worth pointing out that SCEA, like most of the copyright holders that you've heard from, earns its keep by getting its works into the hands and ears and before the eyes of its paying customers.

This fundamental characteristic of our business, and all our businesses, assures that for the foreseeable future the benefits of access control technologies, in the form of enhanced availability of copyrighted works, will continue to flow to the public. The prospect has been raised that this most basic business model could someday be replaced by one based on restriction rather than dissemination.

SCEA, however, sees no such change on the horizon, and continues to have a strong incentive not to risk alienating its customers with unreasonable or unwieldy restrictions on the use of SCEA's copyrighted works.

In my industry, we survive on a plug-and-play mentality. We succeed by satisfying the consumer with what they want. Access control measures which include encryption and regional coding are essential tools in maintaining the high quality of our copyrighted works, and in controlling

the nature and quality of the goods and services that bear our trademarks.

Effective access control measures are of great utility in our ongoing campaign against counterfeiting and other pirated works with respect to our products. As such, they allow us to adopt technologies that help to keep down the price -- and therefore increase the availability -- of our products that purchasers of lawful copies, who ultimately must bear some of the costs of infringement.

Access control measures also help protect the consumer's interest, as well as our reputation and good will, by ensuring that legitimately produced PlayStation video games are distributed only in those areas of the world where they are properly licensed.

PlayStation games, like products in many other industries, are produced in multiple versions tailored, in terms of language and other features, for use by consumers in particular markets. Distribution of these games in other, unauthorized markets will inevitably produce dissatisfied customers and distributors.

The benefits to consumers will continue if the anticircumvention provision is allowed to come into effect unimpaired.

As the House Manager's Report pointed out, the technological measures protected by Section 1201(a) can be deployed to support new ways of disseminating copyrighted materials to users.

Access control technologies enable copyright owners to offer consumers a wider array of options tailored more closely to individual needs, giving each consumer better value, as well as allowing more consumers to access a given work. The importance of such flexibility can be illustrated by an example from today's marketplace.

We all know that consumers currently have the option of purchasing a popular video game, thereby acquiring the right to an unlimited number of private performances. They have the right to dispose of their copy in the marketplace.

While a certain number take advantage of this option, millions more choose instead to spend what is considerably a more modest sum by purchasing a narrower set of privileges. By renting the game for a night or two at their local Blockbuster, or paying

for a single performance, for example, in a hotel room.

We also offer promotional discs that are distributed, often free or for a small fee, that sometimes give limited access to the players to try the game before they actually purchase it. All this is available to us because of our ability to control access.

If the consumer likes the game enough, he or she may find it worthwhile to purchase a copy outright rather than repeatedly either rent copies or pay for views. In many cases the single viewing or rental suits the customer's needs perfectly and they're happy. And if the consumer doesn't particularly like it, at least the consumer only spent a small sum rather than the cost of the entire game.

What is important is that this variety of options enables many more consumers to avail themselves of our work than if only one option were to exist in the marketplace. It is only through the application of these effective technological access controls that this kind of flexibility can be made available in the digital environment, where perfect

copies can be made and circulated around the world almost instantaneously.

Those in this proceeding who have urged you to make broad blanket exemptions would thwart the creation of flexible digital-age business models for making works available to consumers. Without effective controls -- that is, technology reinforced with a legal prohibition of circumvention -- consumers of digital works will in many ways be left with fewer, more expensive options, most of which are less desirable.

Proposals for exemptions that were responsive to the clear parameters the Office set out in the Notice of Inquiry have been conspicuously absent in these hearings. Of course, those who have advocated the crafting of broad and ill-defined exemptions based on classes of users or uses, rather than of works, are asking the Office to do something not within the Office's powers.

Since the number and variety of works which would fall outside 1201(a)(1)(A) under such exceptions is potentially infinite, these advocates are in effect asking that the statute be overturned. Even if properly delineated "narrow and focused" classes of works had been proposed for exemption, we

would remain concerned that in practice any exemption would spill over to encompass the entire Section 102 "category of works" within which the "class of works" fell.

I would like to emphasize that SCEA, as a responsible member of the copyright community, is interested in the vitality of the fair use doctrine. Clearly, however, and contrary to the assertions of certain educators and librarians in this proceeding, the fair use defense simply cannot serve as the basis for delineating a "class of works" that might properly be the subject of an exemption to be recommended in this proceeding.

Fair use is a defense to infringement, whose applicability is determined through a fact-intensive inquiry undertaken on a case by case basis. Fair use, in appropriate circumstances, may be made of many, many copyrighted works. To declare in advance that any work of which fair use might be made is within a class of works exempt from the statutory prohibition on circumvention would render the entire provision a nullity -- which may be the objective of the advocates of "Fair Use Works" as an exempt class.

It appears, furthermore, that to anoint a huge number of works, wholesale, as "fair use works" would be incompatible with fair use itself, as an equitable defense and an equitable rule of reason. In addition, it would contravene Section 1201(c), which mandates that nothing in Section 1201 is to affect either copyright rights or "defenses to infringement, including fair use."

Contentions aside, there has been no showing that 1201(a)(1)(A) has had a negative impact on the availability of the fair use defense, or that any impact is likely in the next three years. The same is true of the first sale doctrine, as to which some commentators has voiced concern.

The first sale doctrine is, of course, the product of a world in which copyrighted content was overwhelmingly distributed via sale of tangible copies. Even in that world, however, there are categories of copyrighted works such as broadcast television programming to which the first sale doctrine have little or no application.

In point of fact, notwithstanding these ill-defined fears for the future of the first sale doctrine, technological access control measures to date have had little discernible negative effect on

it. Visit virtually any computer software store and you will find a section devoted to used PlayStation games. A quick browse of the Web shows that there is a flourishing market in second-hand video games and DVDs as well, particularly if you look on the auction sites on the Web.

The anticircumvention provisions of the DMCA comprise a carefully crafted corrective measure designed to maintain in the digital environment the balance of rights and privileges of authors and users worked out over the past two centuries in the copyright law. The narrow question posed in this rulemaking is whether classes of copyrighted works exist whose users are likely to be substantially adversely affected in their ability to make non-infringing use without exemption from Section 1201(a)(1)(A)'s prohibition of circumvention of access controls.

The advocates of exemptions bear the burden of persuasion, and they have not sustained it.

I thank you again for giving me this opportunity to testify before you, and I will be pleased to answer any questions.

MS. PETERS: Thank you, Mr. Russell. We now will hear from Mr. Jonathan Hangartner.

MR. HANGARTNER: Thank you very much. My name is Jonathan Hangartner. I'm an attorney in San Diego and I represent the company, Bleem Inc. I'd like to thank the Copyright Office for giving Bleem an opportunity to speak today. I'm still hopeful that Mr. Herpolsheimer will make it here so that he can answer any questions you might have.

I think it would be helpful for me to briefly describe Bleem and what it does. And it provides a good counterpoint to both Mr. Russell's testimony and also to some of the DVD discussions that you've heard already this afternoon.

Bleem is a software company that provides interoperability between different computer systems. Specifically, Bleem produces a software emulator that allows the consumer to play their PlayStation video games on a personal computer. And Bleem will soon introduce a new computer program that allows consumers to play their PlayStation video games on a Sega Dreamcast video game console.

For the past year I've spent an awful lot of my time defending Bleem against a lawsuit filed by Sony Computer Entertainment America, and

one of the principal claims in that lawsuit is a Digital Millennium Copyright Act claim, although obviously not under Section 1201(a)(1). It alleged that Bleem is a circumvention device because it allows these games to be played -- the PlayStation video games to be played on a personal computer.

I think it's important to get into a little bit of detail about how this access restriction that Sony alleges works. Because there are an awful lot of different possibilities for access control technologies, and Sony has a specific one in place which -- it has been sort of put on the table here by Sony. And I think it's useful to take a little bit closer look at it.

The access control device that Mr. Russell has described, which he calls the whiz code, is actually a code that is placed onto the PlayStation game discs themselves. A PlayStation video game console, which Sony produces -- and it's their device which plays PlayStation video games -- looks for that access control code. And if it's not present, unless the console's modified, it will not play that disc.

So, in effect, this whiz code only controls access to PlayStation games on a

PlayStation console. If a PlayStation game disc is placed into a regular personal computer, CD-drive or into any other CD-drive, that CD-drive will actually read the data on the disc.

The access control device, this whiz code, does not prevent the information from being accessed by the disc. Because essentially what happens is the disc drive doesn't know to look for the whiz code. And since it doesn't know to look for the whiz code, the access control doesn't take effect.

And this type of situation is addressed in the DMCA in the no-mandate provisions, which do not require consumer devices to search for codes or to look for codes that might control access. But what's happened is that Sony has alleged in the litigation against Bleem that Bleem is a circumvention device.

And, in fact, earlier this week a similar claim in another case brought by Sony Computer Entertainment America against another company which produces a PlayStation device, emulation device similar to Bleem -- the District Court in the Northern District of California ruled

that it was, in fact, not a violation of DMCA's circumvention device provisions.

The concern that Bleem has at this point is that similar lawsuits will come along as soon as Section 1201(a)(1) takes effect. But those lawsuits could be directed at Bleem's customers. It's a very real and likely possibility that, upon enaction of this provision, when this provision takes effect, Sony could allege that Bleem's consumers, when they access the information on the PlayStation disc and play a PlayStation game on either their PC or their Dreamcast are, in fact, circumventing Bleem's technological measures that it alleges are designed to control access to its copyrighted works.

This concern, while we think that Bleem certainly could defend such claims, or could assist its customers in defending such claims, the threat of these claims could have a very serious chilling effect on the sales of Bleem and on the use of Bleem's products by consumers.

It also has a serious risk of chilling Bleem's ability to distribute its products. Because distributors, retailers, all of the folks up and down the distribution chain are very concerned about potential lawsuits against customers. So the threat

of a lawsuit, even if successfully defended, has a powerful impact on the market.

The risk is also, I think, very real given the behavior that's been exhibited by Sony in the past. Bleem felt early on, quite strongly, that its device was not covered under the DMCA. It was not a circumvention device. But it's taken a year's worth of litigation and substantial expense to go through the process of litigating claims under this new act.

So, in considering these issues of burdens of persuasion and the availability of evidence that establishes a class of works that may be affected by this new provision, I think it's important to keep in mind the detrimental effect of ambiguity. Ambiguity works in favor of large companies, and it allows them to bring lawsuits which, while ultimately unsuccessful, can drive a small company right out of business before they ever get to market.

Taking this sort of to the next step, I think it's useful to compare the situation with the PlayStation disc with the DVD/CSS issues that we've been talking about, which involve complicated issues of licensing up and down the distribution chain.

The PlayStation CDs don't have any of these issues. As Mr. Russell described, the PlayStation CDs are actually acquired by the user. So we don't have a situation where the copyrighted work is being licensed to the customer. You have a situation where that customer lawfully acquires a copy of the copyrighted work.

Bleem feels very strongly that the consumer's ability to play that copy of the copyrighted work on any platform they choose is a non-infringing use of the copyrighted work, and that must be protected. This provision opens the door for substantial impacts on the consumer's ability to perform that non-infringing use.

If, in fact, it was determined that playing a PlayStation disc using Bleem was a circumvention, then all of these consumers would be foreclosed from a clear non-infringing use of that copyrighted work which they paid $40 for, for a simple CD.

So in looking -- again, taking this to the specific and maybe working outward, and trying to get to the particular question the Office has to address here, should there be a class of works that

is exempted from this. The PlayStation game CD provides a pretty good example.

You have a disc which is sold to customers, which this provision could and is likely to substantially affect their ability to perform non-infringing uses. To the extent that you can get around the chicken and egg problem that you have with this provision in trying to put the burden on the proponents of a particular class of works when the statute has not yet taken effect, so it's virtually impossible to come up with discrete verifiable measurable impacts, this example goes pretty far towards that.

Because we have shown the impacts, or we can show the impacts that even a simple DMCA has had on Bleem in trying to sell its product over the past year. And that it's likely, very likely to have a similar effect on consumers down the road.

The problem with letting this act take effect, so that we can then ultimately prove this impact, is that three years down the road is an eternity in the age we live in, in terms of the technological advancements. There's a new PlayStation platform coming into effect that's DVD-based. A variety of changes.

So these issues will tend to become moot over the course of that time period. So there's a real risk here that in the course of the three years that it would take to reevaluate a particular exemption, the question will no longer be relevant.

I think with that I'll kind of stop my comments here -- we've been talking a lot about in theory and the different ideas going out -- and maybe open it up to questions. If you have any particular questions we can certainly discuss how these access devices work, and the distinctions with the licensing issues between the DVD issues.

MS. PETERS: All right. Thank you. It is now five minutes after four. Some people have been sitting here since 1:30. And what we're going to do is take a short break.

When we come back, before we ask our own questions, I'm going to give anyone on the panel an opportunity to say anything else that they may want, based on what they've already heard. So why don't we take -- it's now, what, 4:15? We'll come back.

(Whereupon, a brief recess was taken.)

MS. PETERS: Good afternoon again. We are going to resume the final part of our hearing. And for those of you who find this room a little

warm, we have been told that all the facility people have gone for the day. And so there is nothing we can do about it. So, hopefully this won't take too much longer.

I left it with anyone who had anything that they wanted to add before we got into questions could do so now. So is there anyone who wishes to speak?

MS. GROSS: I just wanted to go back to a few points raised by a couple other folks, and talk about them. The first would be the example given why it should be illegal to circumvent a DVD the same way it's illegal to circumvent HBO. It's really an irrelevant example.

Circumventing HBO is something you haven't paid for. If you bought a DVD, if you purchased it, it is something that you have a right to view as opposed to HBO. So that example really doesn't add anything to this discussion.

I think it's also important to point out that if many VHS movies are unplayable on machines because of the international difference in standards, that's a pretty good reason to exempt them, simply because it will provide greater opportunity for people to receive copyrighted works

they never would have had a right to, or the ability to receive beforehand.

I think it's also important to point out that equipment to play a different region's DVDs is not readily available. CSS prohibits such equipment from being marketed in other regions. And Sigma Systems website offers an OEM card for Linux drivers, but it does not sell its computers. So as far as I'm aware there is not yet an available Linux player available to consumers.

Another point I wanted to make was that if having content on a single hard disk means that instant massive piracy will occur, why is there no massive piracy since October when DCSS was released? Or since December when it was publicized?

I think it's also important to note that the MPAA has said, both publicly and in court depositions, they don't have a single piece of evidence of DCSS-related piracy. Technological measures can never implement the true contours of fair use. So far, every measure offered by providers has been more restrictive than the law allows, not less restrictive.

And I also think it's important to point out that Congress intended that access to things

like a book be protected, only before purchase, not after. Not after it's been read with impunity. So what's wrong with that for the new media, too? In fact, the DMCA states explicitly that the same limitations shall apply.

And my last point is I want to raise that the Supreme Court has said that every person's a publisher on the Internet. And that gives a greater First Amendment protection than paper or other traditional media, not less protection as the copyright -- so I just wanted to make those few points regarding different views that you've heard.

MS. PETERS: Thank you. Anyone else? Mr. Goldberg.

MR. GOLDBERG: I'm Morton David Goldberg. I have some general comments based on all five days of the hearing.

Much of the five days' testimony appears to me as a scenario scripted by Lewis Carroll. I don't propose to revisit the entire scenario, but only to comment briefly on what we've been exposed to, and what may seem to some of us to be a trip down the rabbit hole.

Specifically, I propose to mention briefly just the following: One, the purported

threats of being thrown in jail or fined criminally. Second, the issue of a congressional imbalance -- and I refer to the legislation, not the legislators. Third, the treaty obligations of the United States. Fourth, the claim of an exemption for so-called "fact works" or "thin copyright" works as constituting a particular class for an exemption. Fifth, the First Amendment, freedom of speech, and 1201. And lastly, an overview of the five days of testimony.

First, with regard to the criminal penalties: there's been a good deal of apprehension voiced, both here and in the hearings in Washington, about the criminal provisions. Apprehension, that is, by librarians and educators.

This is perhaps raised, or these statements of apprehension are perhaps made, as a proffer of evidence as to some sort of adverse effect. But unless I'm missing something in my reading of the statute, these claims ignore 1204(b), which exempts libraries and educational institutions from criminal liabilities with regard to 1201 and 1202.

If the witnesses are concerned, not about the institutions themselves, but about the

library users, the students and faculty, and researchers, then I think we have to look at 1204(a), which says that to constitute a criminal violation it has to be willful, has to be for purposes of commercial advantage or private financial gain.

As the panel knows, this is essentially the same language as in the criminal copyright provision, 506(a)(1). And I'm not aware, and I don't think the panel is aware, of any evidence that the longstanding 506 has filled our prisons with librarians, educators, researchers and students.

Second, with regard to the matter of balance: the claim has been made that it's up to the Copyright Office and up to the Librarian to strike a balance. Congress has already done so in many pages -- many, many pages of exhaustive and exhausting detail.

There is essentially just a single sentence to 1201(a)(1)(A), but there are pages and pages of exceptions.

And nothing in Section 1201(a)(1) suggests or permits this panel, or the Librarian, to make amendments to those exceptions, to enlarge them or to diminish them.

There are also numerous exceptions in Section 108 and elsewhere giving special treatment to a variety of not for profit institutions. Congress has again struck the balance in those provisions. You can mumble various Latin phrases, but in English the essence of it is that specific legislation is to be followed specifically.

Treaties: We have the WCT and the WPPT, (the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty), and we have TRIPS (the World Trade Organization agreement on Trade-Related Aspects of Intellectual Property Rights) and we have the Berne Convention. As Ms. Gross has reminded you, Article 11 of the WCT (and the parallel provision in WPPT) obligates the U.S. to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures."

Whether there is "an access right granted" under Section 1201 really doesn't make any difference. It's clear that "adequate legal protection and effective legal remedies" can't be provided against circumvention without 1201. TRIPS requires the U.S. also to give "effective and adequate intellectual property rights."

The broad exemptions of the sort that have been requested in the five days of the hearings clearly would violate these international obligations. The exemptions would not qualify under the three-step test under WCT Article 10.2, Berne 9(2) and TRIPS 13, namely, the three steps that such exemptions can be permitted only in certain special cases, not for all works, not for all works of which fair use is to be made, et cetera.

And secondly, exemptions have to be those that do not conflict with a normal exploitation of the work. Selling copies of the Bible in Gutenberg days was the normal exploitation of the work. Now we have many, many, many normal exploitations of the work. And clearly the kind of exemptions that have been requested here would not comply with that portion of the three-step test.

And lastly, the three-step test requires that any exemption “not unreasonably prejudice legitimate interests of the author.” There has been a great deal of testimony by the copyright owners as to the significant prejudice that would be incurred by them if the exemptions were to be adopted.

Third, with regard to “fact works" and “thin copyright” works: mention has been made that

the anticircumvention provision with regard to these works should not apply, that there should be an exemption for them. And if we look at some of them, we have to wonder what such an exemption would bring.

Newspapers are, of course, notably fact works. The Wall Street Journal, it's my understanding, is available online, as is the New York Times. But unlike the New York Times, the Wall Street Journal charges for its subscription. It seems to me that the Wall Street Journal has many, many facts in it.

And I just do not think that the congressional contemplation was that the Librarian should adopt an exemption for fact works in order to permit people to circumvent the access control mechanisms of Dow Jones (which I do not represent)in order to thereby make fair use of the facts that are found in the Wall Street Journal.

Likewise, with regard to fact-heavy legal treatises. I think the argument would be that they give you the facts of the cases, and the cases, of course, are public domain; so it's clearly fair use to just look at a treatise and get at the public domain material if you just want to know what the

case held. I don't think that such fact-intensive works should qualify for exemptions. And on and on.

Histories have also been mentioned. I guess this would permit us to circumvent access control mechanisms with regard to Arnold Toynbee, Carl Sandburg, Winston Churchill, and on and on, all historians, because clearly there are lots and lots of facts, and we want to get fair use access to them.

Fourth, the First Amendment and freedom of speech. Freedom of speech is what the protesters yesterday and today in this proceeding have –- quite properly -- been exercising, telling Congress and the Copyright Office what they should do with the DMCA. That's kind of a bass ostinato to the themes of this proceeding.

That's fine. That's freedom of speech. But freedom of speech is not what I understood a speaker to say in the Washington sessions: some sort of right to get at and use copyrighted expression. And if I heard correctly, the speaker in Washington said that the Supreme Court in Harper v. The Nation supported her view.

My recollection of Harper v. The Nation is that the decision held just the opposite. That

the First Amendment gives no privilege to use copyrighted expression, even when the expression is of such great public significance as the memoirs of a former President of the United States.

And contrary to what may have been the implication attributed to that decision earlier this afternoon, the fair use safety valve certainly does not exculpate all infringements as mere free speech.

I may be the only one, other than the members of the Copyright Office panel, who has sat through the entire five days of the hearings. But it's apparent to me that only in a Lewis Carroll scenario could it be deemed that there's been a sufficient showing of the actual impact or likely impact that the statute requires.

There's been no showing of any “substantial diminution” of availability for non-infringing uses; there's been no showing that the prohibition is the cause of any “substantial adverse impact.” And prospectively, there has been no showing of “extraordinary circumstances” of likely impact, and no evidence that is “highly specific, strong and persuasive,” in the absence of which, Congress has made clear, “the prohibition would be unduly undermined” by conferring any exemption.

I, too, thank you for the opportunity to make these observations at the hearing. And I join Mr. Russell in being pleased to answer any questions you may have.

MS. PETERS: Thank you very much. Anyone else? If not, we will start the questioning with our General Counsel, David Carson.

MR. CARSON: Thank you. Mr. Marks, we heard from Ms. Gross that there is not yet an available -- Linux player available to consumers. That the Sigma player was the only one available. It's available in OEM product. Is that your understanding, first of all?

MR. MARKS: I wish I had more information on that. I know there are two licensees of the CSS technology who are producing applications for Linux system. I know the Sigma design is a hardware application. I don't know exactly how it functions. But I will be happy to get information, more information to you when I find out the details of this license.

MR. CARSON: Yes. Thank you.

MR. MARKS: I also wanted to mention that the DVD Copy Control Association was actually the organization responsible for administrating the

CSS licenses. I would be happy to supply the Copyright Office and the Register with any information that they would like.

So I will try and get that information, but I would also suggest perhaps an inquiry to them. Or maybe I should suggest to them that they file additional written statements with you.

MR. CARSON: The latter might be a good idea. Let's assume for a moment, though, that the statement is correct. Which means, I assume, that if I'm running Linux operating system on my computer, and I want to play DVD, there is no way that I can do that unless I go out and buy a new computer which has this driver on it that's an OEM installation.

Isn't that a problem?

MR. MARKS: I don't think it's a problem. Because I think, first of all, if you have bought a DVD and you have a software operating system that doesn't support an application to play the DVD, you don't have to buy a new personal computer. You might need to purchase a new operating system, or you might need to purchase a new software application when it becomes available to play DVD, to install on your computer.

For example, even under the prevalent Windows operating system -- and if I am misspeaking myself, I hope maybe someone who's in the audience from Microsoft will correct me. But I think on prior versions of Microsoft, Microsoft Windows operating system, they didn't have media player pre-installed on the Windows operating system that would allow for playback of DVDs.

Therefore if you purchased a DVD and you had a Windows operating system, and you had a PC that had a DVD-ROM drive, you might still need to purchase a software application to enable your PC to play the DVD. So I really don't see where there's a great difference between that situation and the Linux situation.

MR. CARSON: Although anyone can get a little media player for free, I think. Can't they?

MR. MARKS: That may be the case. But then there's no prohibition to a software developer in taking out a license to create the equivalent application, software application for the Linux system and making it available to its users for free.

MR. CARSON: But if no one has done that, why is it a problem for an individual user who

wants to be able to watch that DVD on his own computer, which happens to run a Linux operating system, to do what he has to do so that he can view it?

MR. MARKS: The problem with that is that it's not simply a matter of the encryption and protection on the DVD disk guaranteeing the payment by that individual user for the copy of the disk. The whole purpose of the encryption in the first place is because it carries with it certain copy control applications.

As Ms. Gross correctly said, one of those applications, for example, is that the content not be permitted to flow out a digital output from a computer. If the user is allowed to circumvent the technical protection measures, yes, that may enable the consumer to view the content from the DVD disk.

But it may also, and likely would also, undermine the other protections that are inherent in the DVD system, and allow for very easy unauthorized reproduction and distribution of the content of the DVD. For example, over the Internet. So that's the risk that is entailed by allowing for that individual circumvention.

MR. CARSON: Ms. Gross, let's assume that between now and October 28th, Sigma or somebody else do release whatever equipment it is for commercial purchase, so you can go down to Comp USA or wherever, and buy what you need to put on your machine running with this operating system and view DVDs. Is that going to moot the issue, at least with respect to Linux users?

MS. GROSS: Well, the problem is that there are additional operating systems that are being created every day. And individuals should not be required to go out and purchase a $10,000 license in order to build an application that will play their DVDs. That's something that would be unprecedented in other forms of media.

Additionally, there are problems with -- there are antitrust problems for tying the hardware, the machine, to the software itself, the DVD. Microsoft is about to be broken up for this very reason. And so I think you need to think about antitrust implications in tying the two together as well.

MR. CARSON: Okay. But let's focus just on Linux users. I know there are other operating systems out there. But certainly, from personal

experience I can say, having looked at the comments that have come in to us, the vast majority of comments we have received in this proceeding have been from people who run computers on -- with a Linux operating system that are upset that they can't use those computers to watch DVDs.

So let's focus purely on those people.

MS. GROSS: Linux users.

MR. CARSON: Linux users, yes. If, in fact, the Sigma piece of equipment suddenly were available on the shelves of your nearest computer equipment store, would there still be a problem for Linux users? Or would Linux users basically -- would you have to say on behalf of Linux users -- assuming you're speaking on behalf of them -- will find that problem solved? No need for the Librarian to address that aspect of the problem?

MS. GROSS: Well, I think it would depend on the terms of the license for CSS. The thing that is so attractive to people for using Linux is their ability to manipulate their own software on their own machines.

And if the Linux player prohibits people's ability to use their machines, and to manipulate the software and images in ways that they

have a legal right to do, I think we'd still have a problem. So I wait and see this machine, and what it does and what it doesn't do.

MR. CARSON: Okay. Let me ask a question for any of the representatives of the copyright owners who would like to take a stab at it. And I recognize we've heard this a hundred different ways over the five days of testimony. But if someone could just sort of put in a nutshell why is it that we want to protect technological measures that control access to copyrighted works? Why is it important to do that?

MR. METALITZ: I'll answer that question on two levels. One that we should never overlook, is that it’s important because Congress has decided it is important. And that obviously constrains what this rulemaking proceeding can do within that determination that's already been made.

But I think the larger reason, and the reason why Congress decided that it was important to protect it, is that these types of measures are really key enabling tools for electronic commerce. If we're serious about developing electronic commerce works of authorship, then we have to recognize -- as you've heard today from Sony

Computer Entertainment America and from Time Warner and MPAA -- that that commerce is not going to exist, or it's going to be extremely stunted and distorted unless copyright owners have the ability to use these types of technological control measures.

They need to have the ability to manage and control access to their works in order to disseminate them more broadly. They need to have the legal back-up to prevent, or to deal with instances of circumvention.

So if we want to see a thriving electronic marketplace in these works, we need to have these tools to do that, and Congress recognized that. And so did the other countries, the more than one hundred countries that adopted the WIPO treaties. That's a very important step.

Because this is a new aspect to international discipline in the field of copyright. It really is not like what has been done in the Berne convention, or the TRIP Agreement. It goes a step beyond that. And I think that is fueled by a recognition that this is essential. We need these tools in order to make copyrighted materials

available around the world in a global electronic market.

MR. GOLDBERG: If the value can be taken without having to pay for it, then the copyright owners are not going to create the value.

MR. MARKS: I would also like to supplement that. While the legal protections for technical protection measures are new in our copyright law with the DMCA, and are relatively new internationally to copyright law dating back to 1996 with the adoption of the two WIPO treaties -- the concept of giving legal protection to technical measures that control access to works is not new.

The Communications Act of our United States law, as passed by Congress, has protected encrypted broadcast signals, whether they be radio signals or television signals, for decades. I cannot tell you exactly from when that law dates. I have it back in my office, and I'd be happy to do a supplemental submission on that.

But there's the Satellite Home Viewer Act of, I think, 1988 or 1984. And Section -- I think it's 301 or 201 of the Communications Act beforehand which prohibits the unauthorized descrambling of encrypted signals for exactly the

reasons that have been stated by the other speakers. That it has been deemed necessary to provide legal back-up for these technological protection measures to facilitate commerce and copyrighted broadcasts or signals and, now in the new digital environment, other works that can be made available in electronic form.

MR. CARSON: Now, CSS -- clarify for me. CSS is an access control device, or a copy control device, or both?

MR. MARKS: I'm so glad you asked that question. Because this is the way CSS works. Can I give a little bit of background on this?

MR. CARSON: I think you need to answer it, yes.

MR. MARKS: Okay. Originally, when content owners were looking to try and protect their content on this new digital format of DVD, they tried to come up with a legislative approach whereby copy control flags would be inserted in the DVDs, which is strictly a copy control technology. And playback devices, whether they be consumer electronic devices or computers, would be mandated by legislation to look for and respond to those copy control flags.

So that would have involved strictly a copy control technology, as enforced by law. Somewhat similar and based on the Audio Home Recording Act. The Motion Picture Association of America started -- entered into negotiations with the consumer electronics companies to develop exactly such a technological system and legislative structure.

Those discussions resulted in a draft piece of legislation called the Digital Video Home Recording Rights Act, or Home Recording Act. Something like that, DVRA, I think we refer to it.

When those discussions were opened up to the computer industry, the computer industry said, "No. We cannot sign onto this. We do not agree with the concept of having Congress mandate that our devices look for and respond to copy control flags and content. Copy control flags are essentially ancillary data that are easy to get lost and it would be very burdensome to make our machines have to look at all the streams of data, especially digital data which basically are just ones and zeroes, and have to affirmatively look for these copy control flags. We won't do it, we won't sign on for it."

And the strength of the computer industry is really demonstrated in the no-mandate provision of the DMCA. That there is no mandate to affirmatively look for copy protection measures.

So here we were, after months if not years of work, kind of back at square zero. What are we going to do? The computer industry did acknowledge that making our films available in digital format did pose works. We did, after weeks and months of discussions, get them to realize that, unlike software, you know, Warner Brothers is still exploiting Casablanca in Version 1.0.

Now, we don't update it, we don't change it. We -- you know, it's the same classic movie that we exploit. So once somebody has a copy of it, they don't have an incentive to get the revised copy. The work is the work.

Understanding that, the computer industry came back to us and said, "Fine. This is our position. If data is coming to our machines in the clear," meaning unencrpyted, descrambled, "We believe we have no obligation to look for any copy control flags, to look for any copy protection devices, or to really follow any rules with respect to that data. The data comes in the clear, and we

can -- our machines should be able to do whatever they like with that data, and send it out the machine in the clear."

Now, this is completely apart from any copyright rules, or the fact that if a user is making unauthorized copies that he may be infringing the copyright law.

They said, "But if that data is scrambled, if it is encrypted, and we want our machines, our computers to make use of that data, then we have a choice. We can either sign up and get a license to decrypt that data and follow the rules and conditions that are in that license. Or our machines will simply pass along the encrypted data, keeping it in encrypted form. We agree that our devices and machines should not be permitted to simply descramble and hack through an encryption system without any sort of authorization or permission."

Having reached that understanding, that is the basis upon which we built the CSS system. The CSS system, called Content Scramble System, involves initially scrambling the content on the DVD disk. So it is encrypted, even though that's completely transparent to the user.

Because when you put your DVD into your DVD player, or your DVD computer, in most circumstances you just press "Play" and the disk plays. So you don't even necessarily realize that it's encrypted, but the disks are encrypted.

Those device manufacturers whether they be players or personal computers or the Sony PlayStation who would like to have their devices be able to display and play back those DVD disks need to get a license to be able to decrypt the CSS encryption system. They do that by going to the DVD-CCA and applying for a CSS license.

That CSS license gives them the keys and tools to be able to decrypt the disks. It also imposes certain conditions on what the device can do with the content once it is decrypted. One of those obligations, for example, is that the content is not allowed to flow out in the clear on a digital output.

Another example of an obligation is that the device has to insert Macrovision on the content before it goes out the analog output. So by this combination of encryption technology and licensing, you have really a structure that involves access control and copy protection.

MR. CARSON: Well, it sounds -- I'm sorry, someone else?

MR. HANGARTNER: I was just about to jump in with a comment. I mean, I think this discussion needs to step back a little bit and look at the DMCA. As Professor Samuelson mentioned in her comments to the court in one of the CSS cases back in New York, that these DMCA access provisions, circumvention provisions are really an adjunct means of regulating company infringement. They're not really an end in themselves, particularly when we're talking about a lot of different situations.

We've got broadcast situations, we've got pay-per-view situations, you've got end-users that actually buy a copy of the copyrighted work. It really has to be viewed in that context, that this is a means of regulating copyright infringement rather than an end in itself.

I think it's also important to, as you look at these things, to think a little bit about what these access control mechanisms do. For example, the whiz code that's used by Sony is not really a copy protection system. What it does is it limits the games that can be played on a PlayStation console.

This serves a variety of purposes. By linking together this access control system with the patents that Sony has obtained that relate to that access control system, Sony's created a system where PlayStation video games can only be published by a licensed game developer. So they use this as a means to control the ability of people to make games that can be played on a PlayStation console. So that they maintain control over all of the creative works that can be used on that console system.

They also use it to put in place these regional controls that we talked a little bit about before. So this whiz code, it doesn't prevent copying of the disks. I mean, you can copy a PlayStation disk. It may or may not copy that whiz code, but you can copy the PlayStation disk and access the information off that copy on a device other than a PlayStation console.

So, I guess the thrust of my comment is really to keep in mind that core purpose of access, circumvention and control as an adjunct to copyright infringement, which is what this is really all about. Preventing infringement of people's copyright.

I wanted to mention, David Herpolsheimer has showed up. I think he may want to jump here with a quick comment on the same subject, if that's okay.

MR. CARSON: Well, if we get a chance, in a while. But I sort of would like to stick with what I was talking about with Mr. Marks.

It strikes me that what we are describing is perhaps a copying control device in access control clothing. In other words, you've got a device that controls access to a work, but not in the way that, certainly before this rulemaking began, I thought we were talking about. We were talking about access control devices.

In other words, I assumed -- naively, perhaps -- that a technological measure that controls access to a work, the purpose of that is to make sure that authorized users and only authorized users are getting access to the works. So if I paid the price to the copyright owner otherwise be able to use that work, then I'm entitled to use it.

And if he somehow gets access to it by circumventing encryption or passwords, or whatever, then she's in trouble because she's not an authorized user. I'm not in trouble because I am.

That's got nothing to do, as far as I can tell, with what you're talking about.

What you're really talking about, I think, is an access control measure that is designed to channel someone towards a device which has copy controls on it. Is that a fair description, or am I misdescribing it?

MR. MARKS: I think it's partially a fair description. I think it is also used -- the fact that the work is encrypted is used to try and guarantee that the user has legitimately -- has legitimate access to the work as well. I mean, I don't think it's completely devoid, the CSS system, of trying to ensure that those people that -- for example, would just simply duplicate the DVD disks -- you know, pirates who would duplicate the DVD disks.

And if there were pirate players that were unlicensed, they wouldn't be able to play those disks because they were encrypted with CSS. That serves an access control function as well.

MR. CARSON: But a duplicated --

MR. MARKS: A duplicated DVD disk is going to duplicate the CSS encryption.

MR. CARSON: And can be played on any legitimate player.

MR. MARKS: And can be played on any legitimate player, legitimate licensed CSS player. And not be played on non-licensed players.

MR. CARSON: Okay. So I don't see how you're stopping the -- I don't see how you're stopping the piracies of DVDs in that respect. Pirated DVDs can be sold on the open marketplace and played in any legitimate DVD player.

MR. MARKS: Without infringement copyright?

MR. CARSON: No, no, no. Certainly not. But we know pirated goods are on the market all the time.

MR. MARKS: Yes, they are.

MR. CARSON: And infringing copyrights, that's very nice to know they're still out there. So I'm trying to figure out what this technological measure is doing, and I'm not seeing it as really in any way restricting access to authorized users. I'll get to you in a moment, Steve.

In other words, there's no reason to believe as a general proposition that someone who has a commercially manufactured and marketed DVD,

manufactured by Sony, perhaps, or any of the major studios -- Time Warner, whatever -- is not an authorized user.

If someone has that DVD which is manufactured by Time Warner, you're going to presume they're an authorized user, aren't you?

MR. MARKS: Yes. Although you'd have to sort of define what you mean by authorized user. If someone has purchased a DVD from Time Warner, they're authorized to play it on a licensed DVD player. They can play it as many times as they want, there's no restriction on saying it's a one-time play, it's a two-time play.

Are they authorized to make reproductions of it, are they authorized to copy it to their hard drive, are they authorized to redistribute it in electronic form? The answer is no. So what do you mean by authorized user?

MR. CARSON: Are they authorized to view it on any machine they can find, that they can make to view it?

MR. MARKS: No, no. They're authorized to view it on a licensed device. If someone were to buy a VHS cassette, and they didn't have a VHS player, are they authorized to disassemble the

videocassette, reproduce the film in there and convert it into a 35-millimeter print and play it on their film projector? I don't think so.

MR. CARSON: Okay. But, first of all, there's no contractual privity between the purchaser of that DVD and Time Warner, I assume. There's no shrink-wrapped license. You know, you don't sign a license saying, "I agree only to play this on an authorized player," when you purchase the DVD.

MR. MARKS: That's correct. And neither is there a shrink-wrapped license when you buy a VHS cassette that's in NTSC format, and you only have a PAL player.

MR. CARSON: Okay. I go to Europe, I buy a videocassette, it's PAL. I bring it back here and when I play it, I find, oh my God, I got a -- what was I thinking?

MR. MARKS: Right.

MR. CARSON: But, wait a minute. I can take it down to a shop and they can convert it for me to NTSC, and they'll make a copy for my own personal use for NTSC. Would doing that be a violation of Section 1201(a)?

MR. MARKS: It would not be a violation of Section 1201(a), because that's not a technical

protection measure. The fact that it's in PAL is not a technical -- or encryption. It's not a form of technological protection measure.

I thought you were going to ask me, frankly, would that be a violation of copyright. And I'm not sure I have the answer to that. A commercial service that is reproducing copyrighted films into different formats, I think they might well be violating copyright law.

MR. CARSON: We don't have to resolve anything here.

MR. MARKS: I'm glad we don't have to.

MR. CARSON: But getting back to what we were talking about. The kinds of things you were talking about -- yes, if I buy the DVD I certainly would not have the right to make copies of it, I'll grant you that. But why don't I have the right to put it on my computer that maybe running a Linux operating system? And maybe I can't get a hold of any equipment that is authorizing license that will allow me to view that DVD player.

But if I can get a hold of that DCSS code, and if I can manage to crack that myself, so that I can view it on my own computer, where's the problem? Whose rights have I violated?

MR. MARKS: Okay. I'm a little uncomfortable about talking about DCSS because of the ongoing litigation.

MR. CARSON: Well, let me tell you that you better get comfortable because this is a rulemaking that could affect DCSS.

MR. MARKS: That's fine, that's fine. But, you know, let me try and answer the question for you. It's a matter of balance.

As I was trying to describe before, if I can, as an individual user, circumvent the technological protection measure on a DVD disk, and copy that content to my hard drive, there is a risk that the content owner has that the use by that individual will not simply be home viewing, but may also be infringing. Making unauthorized reproductions, making distributions over the Internet.

This is not sort of speculative use, people do that with MP3 files of music all the time today. Given that degree of risk, the inconvenience that is posed to a user who purchases a DVD disk, but doesn't have a DVD player -- which you can get for under $200 -- or a software program that he can install on his computer, or her computer to play the

disk, if you balance those out I think the inconvenience to the individual user is far outweighed by the risks to the copyright owners.

And the risk to the general public that if this sort of circumvention is permitted, then millions of DVDs that are sold today may not be sold tomorrow. Because content owners may decide it's simply too great of a risk for them to put their content on that digital format. That's the balancing that needs to take place, in my view.

MR. CARSON: And I'm not sure you've got the wrong balance there, philosophically. But just looking at the scheme we have in Section 1201, Congress made the judgment that it was not going to make it unlawful for an individual to circumvent the technological measure that controls the use of a work. Copying and so on.

It did make the judgment that it would make it unlawful to circumvent a technological measure that controls access to a work. And again, isn't this access control measure -- CSS that you're talking about -- a measure that is really designed as its end, not to control access but to control the use, by channeling you to that device whose purpose is to control use?

MR. MARKS: Well, I think the problem is, is it's mixed. I mean, as I was trying to describe, we could not put in an effective technological measure that would not fail us with respect to the no-mandate provision in the DMCA, without employing encryption, which is an access control technology.

So the very structure of the DMCA itself, in terms of the no-mandate provision kind of forced our hand to go to the structure. Now, I want to be very clear. We already had devised the CSS structure prior to the implementation of the DMCA in October of 1998.

But the DMCA only reinforced that structure that we adopted with CSS, as a result of the computer industries saying to us, "If the content is scrambled, we will not descramble it. We will not have our machines descramble it without authorization. If the content is in the clear, don't ask us to try and follow any rules with respect to that content."

MR. CARSON: Steve, you've been wanting to jump in.

MR. METALITZ: Yes. If I may, just three reactions to this line of questioning. First, I've said it before and I'm sure we'll say it again.

But it is significant that in your drawing a distinction between access controls that are set up with the goal of preventing infringement, piracy, unauthorized uses, and some other types of access controls that perhaps don't have that close a link to infringement -- it is significant to me that Congress did not make that distinction.

Congress did not say that access control mechanisms that are for some pure and noble purpose other than preventing piracy have a privileged status, and more protection against circumvention than those that are -- as I think Dean has indicated -- closely linked to the preventing or dealing with a huge risk of rampant piracy that CSS is intended to address.

And since this is not a congressional committee, but a rulemaking created by Congress, I think it's important to respect both the distinctions Congress did make and the distinctions Congress did not make.

Secondly, I don't think that the type of system that CSS represents is quite as brand new and

unprecedented as your question might have implied. I don't think it's really much different in kind from other types of access controls such as what we've heard about before, and probably you heard about earlier this week. A license that would only allow access to certain material from certain designated machines, designated by IP number, or some other fashion.

Now, that's not the exactly the same as only allowing it from licensed players. But it's similar in the sense that it is an access control that manifests itself by saying, "This material may be accessed on certain machines, and not on other machines."

And again, that's exactly the kind of access control Congress had in mind when it enacted Section 1201(a)(1), and that it wanted this rulemaking to look at.

Finally, it just strikes me that this whole CSS issue is almost a model for a business case of a problem, if it is one, that can be solved by the marketplace, and probably is being solved by the marketplace.

If there isn't currently a freestanding Linux player, a Linux plug-in that can be used to

play DVDs on a Linux-based computer -- if there's a market to do that, it strikes me that having to pay $10,000 for the license, if the market is more than a couple thousand people, that's probably a pretty good deal. And that market need will be filled.

It's also important to recognize that we sometimes think of the only platforms for playing DVDs as DVD players and computers. But, in fact, I would venture to say that at least in Japan today, neither of those is the main way that people watch DVDs.

The main way they watch DVDs is using their PlayStation 2. That did more to advance the sales of DVDs in Japan than anything else. That may someday be the case here.

There are going to be many platforms. There already are, and there are going to be more. I think the only thing that perhaps makes it a little difficult for us to see that this is an issue that the market is going to solve, and that people will have access to a wide variety of platforms on which to play DVDs is that there's kind of a theological taint to this as well. I think we ought to get it out in the open.

And even if the plug-in for playing, for example, a DVD on Windows were available for free -- and maybe it is, for all I know. I don't know what the strategy is for distributing that. Even if it were free, there are people, probably some in this room, that wouldn't do it because they don't want their machines to be tainted by anything that emanates from Redmond, Washington.

That's a fact. And if that constitutes a sufficient market, that market need is going to be fulfilled. But it is a little different from the typical market situation, where people aren't theologically motivated in their decisions, but they're motivated by other factors of what's cheapest and what's most efficient and what works best, and so on and so forth.

So, I think that sometimes clouds the picture a little bit. It makes it a little harder to see that this is really a marketplace issue that the marketplace is likely to resolve. And the result is going to be that virtually anybody that wants to watch DVDs on any platform that's readily available will be able to do so.

MR. MARKS: Can I take one more shot at responding? I think one of the underlying

assumptions of your question, if I can be so presumptuous, is that if you have bought a DVD disk you have the right to access the content that's on the DVD disk. And so if you don't have the appropriate playback equipment, why shouldn't you be able to circumvent the protections to get at the content?

I think that argument would be more powerful if, in fact, the content was only released on a DVD disk. But, in fact, if you want to see "The Matrix," you don't have to buy a DVD to do so. You could see it in the theater, you could see it on VHS.

So the fact that the work is available in many alternative formats seems to me to also justify the fact that one should not permit circumvention of a technological protection measure by a user simply because the user has chosen to purchase the work in a format for which the user doesn't have an appropriate player. And for which alternative players are available on the market at very consumer-friendly prices. It seems like a fairly weak argument to me.

MR. CARSON: But it is my understanding that the quality of what you see on DVD is much

better than that which you see on VHS, for example. And it's also my understanding that oftentimes when you get a motion picture on DVD, there's a lot of added value material that you don't get on a VHS.

MR. MARKS: Precisely why consumers go out and buy new equipment. When CDs were first released, nobody had CD players. Consumers decided that, "Hey, this is a great format, it's worth my investment in a new piece of playback equipment." I see no difference in the DVD context.

If consumers like the new material that's available on DVD, like the new quality that's available on DVD, they have a choice. They can buy the DVD and buy a piece of playback equipment, or not.

MR. CARSON: Ms. Gross, maybe you can help me out. I'm reading my notes, but I'm not quite sure I'm recalling what you said. But you said something to the effect that -- were you saying that someone from MPAA had stated that a person wanting to make a fair use of a DVD should have to obtain a license to do so?

MS. GROSS: That's right.

MR. CARSON: Repeat that, and tell me who it was that said that.

MS. GROSS: Sure. Let me just remember. I was at a conference at Yale Law School a few weeks ago, and General Deputy Counsel of the MPAA -- I believe Geckner was his last name. One of the audience members posed him a question, and said, "I'm a multimedia artist, and I rely on making fair use of clips of videos for creating new works. If I want to use the DVD to copy a small clip of that to include in a new work that I'm going to create, is it your position that I would be required to get a license?" And the MPAA said yes, it is.

MR. CARSON: Would that be your position,
Dean?

MR. MARKS: What my position would be is that I don't think wanting to use clips from a DVD that might constitute and qualify for fair use in a new work would be sufficient justification to circumvent the technological protection measure of a CSS system that's on a DVD.

Does that mean that the multimedia artist is completely out of luck? I don't think so. Because the multimedia artist can access clips of the content from a VHS copy, or when the content

from the DVD is playing on screen, make a camcorder copy of the content and use it.

And people may laugh about that, but the highest -- one of the largest sources of piracy of our films is from people bringing camcorders into movie theaters and making camcorder copies, and then reproducing them. And you'd be surprised at how good the quality is.

MR. CARSON: Well, I've seen some of the pretty poor quality ones.

MR. MARKS: Some are pretty poor quality, some are pretty good quality.

MR. CARSON: Okay. One last thing I'd like to ask you, Mr. Marks, on this subject. You give a very articulate explanation and justification for the regional codes, and the way in which motion pictures are marketed.

Given all that, however, why should it be a violation of the law for an individual who may go to Europe or Asia, or wherever, and pick up a DVD of a motion picture there and bring it home, to circumvent for his or her own personal use, so he or she can view that DVD in his or her own home? Why is that a problem?

MR. MARKS: It really goes to the same question you asked about the access control, why it's a problem if they don't have a player. It's because of the fact that the technological protection measure is not only dealing with access, but is also dealing with subsequent uses of the content.

I would like to just say a couple of points about the regional coding, which I missed. And which some of my colleagues pointed out to me.

MR. CARSON: Okay.

MR. MARKS: Another reason why we need regional coding, why we do regional coding is that the law in various territories is different with regard to censorship requirements. So we cannot simply distribute the same work throughout the world in the same version. Local laws impose censorship regulations on us that require us to both exhibit and distribute versions of the films that comply with those censorship requirements.

In addition, the way -- at least the economics of our business currently work, when we license distribution of our works to licensees in other countries, whether it be video distributors or broadcast distributors, often a precondition in the

license contract that the distributor seeks is that the film has had a theatrical release in the U.S. prior to being exploited in the foreign country.

So, those are two other additional considerations as to why the regional coding scheme is in place in the first place.

MR. CARSON: Now, if I understand your explanation why it's a problem to even let the individual user circumvent, to watch that foreign DVD, it's not that it would be such a horrible thing for the copyright owner if one person, one individual happened to see it in his or her home at a time when he shouldn't have, but that it's linked to these other protections.

MR. MARKS: That's correct. If there was some way to guarantee that a person who was circumventing the CSS protection technology to view a Region 2 disk on a Region 1 player was only going to view that disk on the player in the privacy of his or her own home, without further distributing or copying the disk, it would be less of a problem.

There's still the problems associated that I described before about the windows of exploitation. Which would make it problematic if instead of your one individual, it was with the

entire population of Italy that, each in the privacy of his or her own home circumvented regional coding to play a DVD of a movie that had not yet been theatrically released in Italy and was scheduled to be released in the future. Yes, that would have a detrimental impact on us.

But in your hypothetical of a single individual user, I would say, yes. If that single individual user were circumventing solely to be able to view the content of the DVD disk in the privacy of his or her own home, with some iron-clad guarantee that the circumvention was not going to lead to further risks of unauthorized reproduction and distribution, I would agree with you, this is not a “horrible thing – i.e. a substantial problem for – the copyright owner.

MR. CARSON: But why is it that CSS had to be designed in such a way that someone who circumvented in order to overcome the regional coding, also necessarily would be circumventing the copy protection? Couldn't you have done it in a different way that it wouldn't have been a problem?

MR. MARKS: No. It isn't that it's necessarily designed that way. Well, let me back up.

The way the CSS system works is that the content in the clear is restricted from being made available on a hard drive of a computer, or what's known as a user-accessible bus. I can only speak to the unauthorized decryption systems that have -- that the hack, frankly, of DSS that has occurred to date. And with that hack the content of the DVD disk is made available in the clear, on a computer user's hard drive. And so that is a problem.

We didn't design it so that any attempts to circumvent would mean it killed the whole system, but in fact the circumvention device program that's been developed to date accomplishes that, imposes that risk. And the problems with that is that that circumvention device is distributed with messages that say, "Here it is, copy DVDs to your heart's content, send them to your friends." So it poses the parade of horrible risks that we're concerned about.

MR. CARSON: On the subject of regional coding, Ms. Gross, you spent a fair amount of time talking about that as being a problem. I'm trying to figure out how big a problem it really is. And how many U.S. residents actually go abroad and bring

back foreign DVDs, and then find themselves frustrated by their inability to play them?

MS. GROSS: I think many probably do. I don't have a number, I don't have a statistic. But I think it's fairly common. When you travel, you like to -- myself, I like to get music from whatever region I'm in, and bring it back home with me. I'm sure some people are perhaps the same way for movies. And so I think it's a huge problem. But again, I don't have a number that this number of people by DVDs abroad. That I can't tell you.

MR. CARSON: You think it's huge enough, though, that we should make an exemption to a right that Congress has said that copyright owners have a right to do, just because you think that there may be a few people -- or even quite a few people -- who might find themselves inconvenienced in that way?

MS. GROSS: Well, I think I know that we are. I think that, judging from the enormous number of comments that were received from people complaining about their inability to watch their DVDs, that it is a problem. It's a rather large problem. And it also is a problem outside the U.S.

The proceeding here was not just designed to decide whether or not U.S. residents would be able to watch their DVDs, but whether people in general were allowed to watch their -- would be restricted from non-infringing uses.

And you think about entire worldwide audience of people who want access to watching DVDs from worldwide producers, that's a large number.

MR. CARSON: Are you saying that Section 1201 has extra-territorial application? I'm not sure I follow what you're saying.

MS. GROSS: No, I'm not saying that at all. I'm just saying that there's a lot of people in the U.S. and in the world who are prohibited.

MR. CARSON: Okay. But I'm trying to figure out why we should be concerned about people elsewhere in the world who are prohibited. Because I don't understand how Section 1201 affects them, and therefore I don't understand why we should be considering an exemption for Section 1201 for their benefit.

MS. GROSS: Well, I think it's also important to note that it's not just when you travel that you want to get a DVD and bring it back. But you simply can't purchase or order DVDs from foreign

distributors. Maybe you want to get a DVD of an Indian movie, and you're prohibited from playing it on your device when you bring it -- when it arrives in the mail.

MR. MARKS: But if I could respond just for a moment. The Indian producer, the Indian film producer is not prohibited from producing DVD disks that would be playable on Region 1 machines. So, for example, we produce DVD disks that are playable on Region 1 devices and Region 2 devices and Region 3 devices, etc. And there's no prohibition on a producer from producing DVD disks that are playable on different regions.

And, in fact, the producer has the ability to produce a single DVD disk that would be playable on all regions. If you have a producer, a content owner who is not concerned about the windows of exploitation, they can produce a DVD disk that's multiregion, and playable on all regional players throughout the world. So there is flexibility built into the system.

MR. CARSON: I may be exhausting your knowledge here, but let's take that example. And India has, I think, the second-largest film industry in the world. First? Okay. And yet, outside

of India the market for those films is probably fairly limited. Do you know whether most Indian films are coded so that -- on DVDs, so that they can be viewed worldwide? Or are they simply regionally coded?

MR. MARKS: Do you know what? I don't know, but I will try and find out. I don't even know if Indian producers are making their films available on DVD, but I will try to find that out.

MR. CARSON: Okay.

MS. GROSS: I just wanted to clarify what I was saying. The Notice of Inquiry was requesting whether or not there was harm to people, and it didn't ask whether or not there was harm to U.S. people.

MR. CARSON: Okay. But let's keep in mind that ultimately what we're trying to do here is figure out whether we should recommend an exemption, and that exemption -- I don't think -- can directly affect what happens outside the United States.

All right. So, the harm I've heard from yourself -- and I want to make sure I've got your catalogue of problems here with DVDs. We've got the problem for people with Linux operating systems, which some people would say is being resolved or may

soon be resolved, depending on how available this driver is, I guess. You've certainly got your doubts about that.

You've got the problem of regional coding. What are the other specific problems we've got that we need to be worried about with respect to DVDs?

MS. GROSS: The fact that fair use is completely prevented. As we've heard here today, people are required to get a license in order to make a fair use of a DVD. This idea that, well, you can simply go out and buy a VHS, it doesn't work. And it doesn't work because DVDs are a completely different experience than a VHS.

They have director's cuts, you can look at different shot angle, different camera angles. There's all sorts of additional information that is included in the DVD that you simply cannot get on a VHS. There is no equivalent to a DVD, so fair use is severely impacted. It's completely prohibited.

MR. CARSON: What other fair uses of a DVD can't engage in under the current regime?

MS. GROSS: If I want to make a back-up copy for my own personal use.

MR. CARSON: Okay. Let's stop with that. What case law tells you that you have a fair use right to make a back-up copy of the DVD for your own personal use?

MS. GROSS: I think that Sony v. Universal Cities says that.

MR. CARSON: Really? That's an interesting proposition.

MR. MARKS: I don't think Sony says that.

MS. GROSS: Software law specifically allows you to do that, and DVDs certainly fall under software.

MR. CARSON: DVDs fall within Section 117, is that what you're saying?

MS. GROSS: DVDs are software.

MR. CARSON: Okay. Are you saying that they're covered by Section 117?

MS. GROSS: I'm not really sure what 117 is.

MR. CARSON: Okay. You might want to take a look at it, and let us know in your post-hearing comments.

MS. GROSS: But I think that the 9th Circuit decision in the Diamond RIAA case, that

people have a fair use right to copy an entire song onto their computer hard drives for personal use -- I think you'll find a lot of that in the case law.

MR. CARSON: You might want to cite a few cases to us, then, too.

MS. GROSS: I will do that.

MR. CARSON: I'm not terribly familiar with a whole lot of case law that says you can do that. Let's go on. What are the fair uses are that you're saying can't be done right now?

MS. GROSS: Well, in one of the affidavits submitted in the DCSS case was Professor Charlie Nessen (phonetic) from Harvard Law School, who talked about how he typically would like to use a portion of a DVD from the movie, "The Client," I think it was, as part of educating the law students on how to handle certain situations.

And he's now prohibited from taking that snippet of the DVD and showing it to his students. That's an educational use that is prohibited.

MR. CARSON: Okay. He could do that with a VHS version, correct?

MS. GROSS: Well, he might be able to. But there's no guarantee that he could.

MR. CARSON: Why is there no guarantee that he could? What on earth could stop him?

MS. GROSS: Because there's no guarantee that the film will be released in VHS. There's no guarantee that the DVD is the same equivalent content.

MR. CARSON: Okay. That particular film is in VHS right now.

MS. GROSS: Okay, that film may be.

MR. CARSON: Okay. We're talking about now and the next three years. Are you seriously telling me that there are films that are going to be released in DVD in the next three years that will not be available in VHS?

MS. GROSS: I think that's right.

MR. CARSON: Why do you think that's right?

MS. GROSS: Because they're completely separate products, a DVD and a VHS.

MR. CARSON: Well, if they're the same film -- although the DVD may have added value.

MS. GROSS: I think they're very different. When you incorporate all the additional information and the incredibly rich multimedia

experience that a DVD provides, it's not at all the same.

MR. CARSON: Okay. Professor Nessen wants to show a film clip from the motion picture. He's going to be able to do that with a VHS version. There's no question, is there?

MR. MARKS: He'll be able to do that with the DVD version. I mean, if he has a DVD player in his classroom, Section 110 covers that use of display in the classroom. There's no prohibition on that.

MR. CARSON: I'm just baffled. I don't know how he can't do what you're saying he can't do, with what's available to him now. And I think Mr. Marks is correct. He can take a DVD player into the classroom, and a tv, and he can show that clip.

MS. GROSS: As long as that movie is available in that format, that's true.

MR. CARSON: Well, if it's not available in that format, he's in trouble anyway. Because we're talking about a DVD right now, and a DVD player. I'm sorry, I'm just trying to understand the fair uses that people can't engage in using the currently authorized equipment. And so far I haven't heard any.

MS. GROSS: Simply playing their DVD on their computer --

MR. CARSON: Okay, we've talked about that. Let's talk about fair use, though. What are the fair uses that are prevented under the current regime?

MS. GROSS: If I wanted to make a small copy, or a small excerpt of a certain part for a certain reason that's only available in DVD, I'm prohibited.

MR. CARSON: Is that correct, Mr. Marks?

MR. MARKS: Are you talking about legally prohibited?

MS. GROSS: I'm talking about --

MR. MARKS: Or having technically -- making it technically difficult to do so?

MS. GROSS: I'm talking about technically prohibited.

MR. MARKS: Again, my answer would be that, yes, when it comes out the analog output it will be protected by Macrovision. And yes, the content will not go out a digital output at the beginning. So it makes it more technically difficult to make a copy of a small clip from a DVD.

Is it impossible? No. And that's the

camcording example that I used. When the DVD is playing, you can copy a snippet of it on a camcorder. It may not be convenient, it may not be the best copy quality that you would like, but I don't believe the fair use doctrine says that a user gets to reproduce copies of the best format and in the best quality.

Nobody has ever argued, for example, that film studios have to make their 35-millimeter theatrical prints available to users who want to take out clips or snippets for the purpose of fair use.

MR. CARSON: So you're basically saying analog is good enough for fair use?

MR. MARKS: Yes, I am.

MR. HANGARTNER: But doesn't the law already actually cover that, in that you've kind of separated the idea of access versus fair use. That if this person wants to copy it, that they have to circumvent Macrovision in order to make the snippet. I thought that that was covered under fair use in some of the comments -- actually, Marybeth Peters early on before Congress that access versus infringement, or am I just totally out of my mind?

MR. CARSON: We're not psychiatrists, we couldn't answer that.

MS. PETERS: Thank you.

MR. HANGARTNER: In actually being able to copy the works, I thought we were talking more here about access than really talking about copying the works. It this professor wants to copy the work with a Macrovision output that comes out, and they circumvent the technological measure for that purpose, that's very separate from what we're talking about here in Section 1201(a) for access in particular.

MR. CARSON: Well, the point's a fair one. That if the access control is preventing you from having the means to make a copy which might be fair use, then maybe you have a problem. I think that's Ms. Gross's point.

MR. HANGARTNER: That already exists, I guess, with Macrovision and with the copying that's there. Not to argue the other side of things. I'm just trying to understand it as well.

MS. GROSS: Since all copying is prohibited by the DVDs, fair use by definition is prohibited.

MR. CARSON: All right.

MR. MARKS: See, I think that's a mistake in conception of fair use. To equate fair use with copying is almost like equating fair use with consumption. I mean, fair use can involve not literally copying a work, but copying some of the expression of a work for parody. Copying some of the expression of a work for criticism and comment. It's not just about physically copying the format that the work happens to be in.

MR. CARSON: Well, I'm trying to think. Aside from the time-shifting situation in Sony, have there been cases holding that the actual copying of a motion picture is fair use?

MS. GROSS: The Diamond multimedia decision, RIAA v. Diamond. That's not motion pictures, but MP3.

MS. PETERS: And there's an Audio Home Recording Act.

MR. MARKS: That's correct.

MS. PETERS: That has the serial copy management piece in it, that says there's no infringement when you make the copy.

MR. CARSON: So I think we're going into, at best, maybe a murky area as to whether fair use is even available in that context. I'd be

interested in hearing or seeing some authority from you about actual replication of portions of motion pictures as being fair use. Because I'm not sure the case law is out there, but I may have overlooked it.

MS. GROSS: Well, I think that the Sony v. Universal Cities case was about people's ability to make a complete copy of a complete movie.

MR. CARSON: In the context of time-shifting, you're absolutely right.

MR. MARKS: Time-shifting of free over-the-air television. Sony v. Betamax does not stand for the proposition that you can make a complete copy of a work from pay-per-view television, from a videocassette, from DVD. It simply does not stand for the proposition that copying audiovisual works by individuals is fair use. Fair use always balances the rights of the copyright owner and the use interests that are being asserted by the putative fair use user. It's not an absolute.

MR. CARSON: All right. Mr. Hangartner and Mr. Herpolsheimer, feel free to jump in. Well, first of all, you mentioned a decision just handed down here in the Northern District of California. We're not aware of that decision, but we'd certainly

like to know more about it. If you have a copy of it, we'd like to see it.

MR. HANGARTNER: Oh, there actually is not a written decision yet. It was an oral ruling from the bench last Tuesday in the case, Sony Computer Entertainment America v. Connectix Corporation.

MR. CARSON: Oh, this is on remand?

MR. HANGARTNER: No. Actually, this was on summary judgment. Connectix moved for a summary judgment on the DMCA claim brought by Sony, which claimed that it was a circumvention device.

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

MR. HANGARTNER: And the court granted summary judgment for Connectix. The transcript should be available next week, and we could provide a copy if you'd like that.

MR. CARSON: Yes, that would be great. And I gather you expect a written decision to be forthcoming?

MR. HANGARTNER: It's not clear. The court was not clear if it would be doing a written decision in the near future, or if it would be holding off on a written decision until sometime in the future. But I think the transcript may -- well,

it will contain the court's comments regarding a written decision.

MR. CARSON: Okay. One thing I wasn't able to get out of your testimony is what classes, if any, you are advocating that we recommend the Librarian exempt from Section 1201(a). Do you have a suggestion for us?

MR. HANGARTNER: Well, the thing of that I threw out, right off the top of my head, was -- I mean, I'm not sure of his name, but the fellow over here in the green tie who was talking earlier. He mentioned that one way to look at this is to start from the very specific and move to the more general.

And so I was sort of throwing out to start from the very specific. In our instance, the particular class of works that Bleem is most concerned about at this point is PlayStation video games, which are produced on CD-ROM.

Now, I know David's been thinking a bit about other classes of works, and maybe I'll turn it over to him. This is one of these things that I'm sure we'll have an awful lot to say about in our post-hearing comments. But how you move from that very specific example, which as I described earlier, you've got a class of works which are distributed

without license, that are actually sold so that the person acquires a copy of it. And they're sent out on a CD format that is accessible. So it's a very specific type of disk that forms that very particular class of works.

Now, whether there is that class of works shall be defined more generically than PlayStation video disks is an issue that, I think, requires some thought. How you can create a class of works that strikes the right balance here. I don't know, David, do you have thoughts on that?

MR. HERPOLSHEIMER: My concern is more with the way that we've seen 1201 used specifically against us, and against the Japanese variant of that law used against some of our retailers in Japan. Is that it seems to be being used to expand the scope of copyright beyond where it already affords protection for copying for infringement for a lot of areas.

That they're taking this sort of technological measure and applying almost a self-help program that some content providers can use to really lock down their content. And limit the ability of end-users to actually not just have fair uses, but have uses at all to the content that they

have gone out and lawfully purchased copies of copyrighted works.

And that the imposition of -- like I said, expanding 117 to go beyond -- or not 117. It should be 1201 to go beyond what I've seen in some of the early history, and some of the statements, again from Ms. Peters, really talking about it being something to expand the growth of digital networks. And to allow copyrighted works to be disseminated more freely over digital networks by protecting the rights of copyright holders. And we're all in favor of that, because we produce content just like everybody else here. We want to have our works protected.

But to then take that protection that's really going more towards specific kinds of uses. When you're talking about digital networks, it's almost like protecting -- in the example that he had of walking in and videotaping a movie in a movie theater.

What we're really talking about here is specific accesses of watching a one-time pay-per-view movie, or you know, playing a copyrighted video game over a network where you need to protect that

content to make sure it doesn't just get kind of sucked off and reproduced.

I think it's a different issue, when you start taking that protection to access, where the encryption is really essential to protecting the work over that network. And then trying to apply it to areas where there are already substantial and very effective protections against infringement.

You know, to start wrapping access around that starts, I think, hobbling the ability of users to actually use their works. And gives an unfair amount of control, I think, to the copyright holder that's beyond the rights that they should have under the copyright law. The rights that this Act is supposed to support.

MR. CARSON: Mr. Russell, if I don't happen to have the Sony PlayStation equipment, but I've got a Sony PlayStation game, why on earth shouldn't I be allowed to use the Bleem emulators where I can play that game on my computer, or on the Sega equipment or something else?

MR. RUSSELL: Well, quite frankly, and I don't want to try our case here. It's not limited to the DMCA claim. We have concerns about other IP rights that we have in these games and in the

system, and to the way we build these games, that we have alleged that both Bleem and Connectix have violated.

So I think the case goes well beyond what is on issue here, which is 1201(a)(1)(A), and that is not -- we did not bring any action, of course, against Bleem or Connectix in those. And the ruling in the court is not under that section.

MR. CARSON: All right. Okay. But what I'm trying to get at -- let me put it another way. If I did use the Bleem emulator, say, after October 28th of this year, so that I could play one of the PlayStation games on my PC, would it be your position that I would be violating Section 1201?

MR. RUSSELL: I think that the issue is an interoperability issue. And I think that is dealt with in the DMCA under, I believe, it's --

MS. PETERS: F.

MR. RUSSELL: F. And I think F amends or is an exemption from Section 1201(a). So you know, I think that what we're dealing with here, if that's what we're concerned with, there is a provision that deals with this. And then the question is whether it's lawful reverse engineering to achieve interoperability.

And I'm not going to go through that. That's not the area of discussion here, and I think that's something that is very, very fact-specific. And certainly should not be made -- determined on the -- they come up on an individual basis, and shouldn't be determined on a broad exemption by a video game class.

MR. CARSON: This is late in the day, so maybe I'm not making myself clear. But what I'm trying to understand is if I were to use a Bleem emulator, would I, in engaging in that conduct, be circumventing some technological measures that Sony has that were designed to restrict my access to the PlayStation games? And if so, would I be violating Section 1201(a)?

MR. RUSSELL: Again, I believe that it will fall under the exemption that falls under Section 1201(f). Because I believe what's happening here is, no, you may not be violating the -- you may not be circumventing it, you will be having reverse engineered it.

MR. CARSON: No, I wouldn't be. I'm using the --

MR. RUSSELL: You're the end-user?

MR. CARSON: I'm the end-user.

MR. RUSSELL: No, I don't believe the end-user is if the emulator is legal.

MR. CARSON: And you don't think the end-user is circumventing technological protections, either?

MR. RUSSELL: The technological protection is in the disk and in the machine. So I don't believe that the end-user is if the emulator is legal.

MR. CARSON: Okay, okay. That's really what I was getting at. Thanks.

MR. HERPOLSHEIMER: Okay. Well, just on that level, one thing that's interesting is that's exactly what they alleged against us in court. Is that if the end-user isn't doing it by using our product, and our product certainly couldn't be doing it -- and the thing that I'm really afraid of here in the United States is what's happening to us right now in Japan.

They have a very similar implementation as we do in 1201. Their law there, I think, is the Unfair Competition Act. But it's very similar in that it protects against unauthorized circumvention of technological measures that effectively control -- blah, blah, blah.

But they have some very specific language that say that the playing of pirated video games -- this is one of the concerns that, in our particular circumstance, comes up, is that because this whiz code is proprietary to Sony, and in fact patented, if we were to recognize it we would be in violation of their patent.

That because of the whiz code -- that because we don't recognize the whiz code we are violating or we are circumventing their protections. In Japan, they say the that the act of playing a pirated game isn't actually an infringement. It's making the copied game is an infringement there.

They specifically preclude video games, they specifically speak towards issues like whether or not the protection on the disk is actually voluntary. In the case of video games it's one where every manufacturer of PlayStation games is required to appoint Sony as part of their license for the development tools. They're required to make them their sole manufacturers of CDs, and that protection is included in the CDs. So is it truly voluntary?

In spite of all this, Sony is still going out and going to our retailers there and

basically threatening them with lawsuits unless they cease to carry our product and pay back -- I don't know, $200 per copy, I think, for every copy they've sold. And write a letter apologizing to Sony for ever carrying it in the first place.

And these are the kinds of things that, if there's any vagueness or if there isn't a clear exemption for certain kinds of uses in the law that we can point to, and that we can make clear and understandable -- this is in the face of MIDI (phonetic) in Japan. Actually telling the people, "No, we don't see that there's anything wrong with it, but who knows what the judge will say?"

But I'm just afraid that we're going to have the same kind of issues in this country. Where they can go and they can say, "Look, Bleem is a product that violates the DMCA. You, by selling it as a store, are in violation of the DMCA," with the further enactments going down to end-users. And putting out ads and saying, "Anybody who uses Bleem is in violation of the DMCA, and we're going go after them."

Contrary to what he said here today, that's not what they have expressed in court and in numerous threatening letters to our retailers.

MR. RUSSELL: Quite frankly, I don't feel this is an appropriate forum to try our case.

MR. CARSON: I'm not trying to try anyone's case. I'm just trying to figure out whether there's an issue here within our domain, which is why I'm asking --

MR. RUSSELL: No, I understand that.

MR. HANGARTNER: I'd just point out, too, that it's not really a matter of trying the case. But the fact is that Sony and many of the other folks who have spoken here today are putting the burden on the proponents of a specific exemption to establish that there is an impact. And I think that this discussion is relevant to that.

This is an actual impact that, despite the fact that 1201(a)(1)(A) is not yet in effect, we can point to -- provide tangible evidence that this is a -- there's a real risk of this. And that's the only reason this is coming out. It's not an issue of trying cases here, or anything else. But it's relevant experience that I think bears on this discussion.

MR. GOLDBERG: May I point out that it is not the copyright owners who have placed the burden, it's Congress.

MS. PETERS: That is right. And we still do have one more comment period for people who want the opportunity to add additional material.

MR. CARSON: In response to positions taken at these hearings.

MS. PETERS: It is now quarter of six. So instead of going in order, I'm just going to basically ask if there's anyone here who wants to ask questions. I'm going to look around. Okay, Rachel, we'll start with you.

MS. GOSLINS: I know it's late and it's hot. So I'll try and keep it really, really brief. Ms. Gross, I was just wondering how you would respond to Mr. Marks' argument that, without these technological protections in existence, without the existence of them, his company or other companies wouldn't have put out these products at all.

So, you know, in a sense they're out there and they're doing some consumers some good. Why should the fact that they decided to put them out in a protected format mean that you -- that anybody has a right to circumvent that, in lieu of -- if we accept his argument that in lieu of these protections, they wouldn't even be on the market.

MS. GROSS: Well, I wouldn't say anybody has a right. But I think that it's really kind of false to say that people will not create, that society will not create absent of technological protection measures. People have always created, and they will continue to create.

And I think we can look right now to the music business, and what's going on in the Internet with music and MP3s. And companies like MP3.com and eMusic, and all sorts of new business models that are coming up and proliferating, and all sorts of new artists who are putting their music out there.

Society has never had more choice in accessing music legitimately. So I think it's really sort of false to say that society will discontinue creation of intellectual property absent this level of protection.

MS. GOSLINS: Okay. Dean, just two really quick questions. Do you currently stagger video? Does your company, or do you know if other companies currently stagger video releases between the -- whatever the initials are of the U.S. format and the PAL format?

MR. MARKS: Yes, there is staggering. Really, it depends upon the distribution channels of

the media -- windows of exploitation.In general, movies are released first in the United States before they are released overseas. And in general -- this is subject to some exceptions -- video release occurs six months after theatre release in the United States.

So, to the extent that the theatrical release in Europe is later than the theatrical release in the U.S., the video release in Europe is later than in the U.S. And in some countries -- and I'm not sure it's still the case today, but it certainly up to recently was the case in France, there was a law that said you could not release on video prior to six months after theatrical release. So we're constrained by some of those laws as well.

If I may, I just wanted one quick response to Ms. Gross' reply to your answer -- your question, rather. It's late in the day for all of us.

I wasn't asserting that absent technological protection measure people would stop creating. I was saying that, absent the ability to use technological protection measure, creators and publishers and distributors may not make their works available on certain formats like DVD. I was not

saying that there would no longer be creative activity.

MS. GOSLINS: Okay. And one more quick question. And I know -- I certainly don't want to get into a long discussion about it at this hour. But I'm curious, the question I posed to Steve this morning about what happens if we do decide that we exempt a class of works, what does that mean under C & D. I'm just curious to hear your answer to that, since we're taking a poll.

MR. MARKS: I was hopeful that Steve's scholarly and forthright answer would settle it for everyone. But I basically agree with what Steve said. And it's -- on the one hand I'm sort of sympathetic to the argument that the reference to users in 1201(d) is users who are making only non-infringing uses.

But the problem that I have with that is fair use is -- as we all know and as the Supreme Court has said -- a balancing test that operates on a case by case basis that's very factually intensive, and like in Acuff-Rose you have courts that, at every level of the way, reversed one another.

So it's hard for me to imagine creating bright line rules concerning classes of works for non-infringing uses, and determining ab initio what those non-infringing uses are. Is it impossible for all non-infringing uses? No. I would say private viewing of videos, for example, in one's own home is a non-infringing use. Clear. Clear enough.

But there are all sorts of copying for where it's really hard to come up with those bright line rules ab initio. And so that leads me to think that maybe Steve is correct, that when 1201(D) was referring to users, it was referring to users in general, and not just users who are making non-infringing uses.

The second point being, if one read the provision to limit it to users who are making non-infringing uses, how do you really monitor and sort of enforce that? It would be rather difficult.

That being said, I was very sensitive to Mr. Carson's argument that we don't want to necessarily turn 1201(b) into the bluntest instrument possible. So I think it's a very complicated question.

MS. GOSLINS: Okay. Mort, do you have a response to that?

MR. GOLDBERG: ~~I'm not sure I agree that the users are to be defined in that way. But I'll have to take another look at it~~. The users potentially immunized under 1201(a)(1)(D) would be all users of the designated "class of works."

MS. GOSLINS: Four questions, and then that's it.

MR. KASUNIC: I have one question. This is in regards to CSS. I know we've talked a lot about it. But CSS protects both access and the Section 106 rights of the copyright owners, as you said before.

MR. MARKS: Right.

MR. KASUNIC: 1201(a)(1) protects only technical protection measures that protect access.

MR. MARKS: Right.

MR. KASUNIC: And Congress specifically chose not to have a prohibition for the conduct circumvention of measures that protect the Section 106 rights. So if we have a technological protection measure that does not discriminate between access and copy protection measures, the latter of which was not specifically chosen by Congress to be prohibited, who should bear that burden of this indiscriminate use of technology?

Since Congress did choose that the latter will not be protected, shouldn't this burden be placed on the copyright owner to show that there's a need for this, or why the indiscriminate use is necessary?

MR. MARKS: Let me answer that in a couple of pieces. One, that I don't think it's indiscriminate use. I was trying to describe through the history of the development of the CSS copy protection structure why the content industry was really -- I don't want to say forced, but really led to develop a structure where encryption was the hook.

It was because of the reactions we were getting from the computer industry, and the fact that we knew these works were going to be played on computer platforms. And by the limits in the law that say if you employ a mere copy control technology, like an SCMS flag in audio, absent a particular legislative provision like the Audio Home Recording Act that mandates consumer electronic players to look for and respond to SCMS, the DMCA says there's no obligation to respond.

So the notion of trying to implement copy protection technology in a way that devices

will respond, required us to go to a system where encryption was the initial hook. So it's not really an indiscriminate use, it's a way -- it was really, frankly, our only way of trying to implement effective copy protection technology.

But I'm not quite done yet, though. Thankfully, in the area of CSS -- and this goes to the gentleman, David, David's remark. In this particular instance, the content flows out the analog output with Macrovision. Macrovision is the copy control technology that inhibits copying of the analog signal. A condition of the CSS license is that devices, whether they be the computers or the DVD players, apply Macrovision to the signal as it goes out the analog output.

If a user circumvents Macrovision on the content of the DVD as it flows out the analog output, in order to make a copy, the law does not prohibit the individual conduct involved in this type of circumvention .

So, therefore, if the individual user -- and I think this is what you were getting at -- were to circumvent Macrovision, it doesn't fall within the 1201(a)(1)(A) prohibition. It would be a

circumvention of a copy control technology that is permitted under the law.

MR. METALITZ: Rob, could I add just a sentence or two to that answer?

MR. MARKS: But I want to clarify, if there are any lingering questions on that. Because I think it's a very important point.

MR. METALITZ: I was just going to say your question used the word "burden," and we may be confusing two burdens here. In any particular case if someone were alleging a violation of 1201(a)(1)(A) the Plaintiff would have to prove that what was circumvented was an access control. And if that's the issue, and it was put into issue, the burden of proof on that would rest with the Plaintiff to show that.

Here, of course, we're only talking about the burden in this proceeding. Things are a little bit different. Congress has already decided that these circumventions should be outlawed, and the question of exception is that the burden is on the proponent of the exceptions. But I just wanted to clarify that.

MR. KASUNIC: But the burden is on the proponent of the exemptions for the access controls.

Here we have some testimony that there are adverse effects from CSS -- whether they're cured or not is another question. So there was some showing that there were adverse effects to certain users of this, in terms of the access.

The hypothetical we had in Congress of going into the bookstore to buy the book doesn't seem appropriate here, in terms of access. Here we had legitimate users going into that bookstore and buying the book, the DVD, only to find that then it too was locked. In addition, different uses of that DVD were restricted after that lawful access was --

MR. METALITZ: The way you pose that question -- and it really has come up in a lot of the comments here. You know, it almost sounds like you're raising a consumer protection issue. That somehow the consumer is surprised to find that when she buys a DVD in Europe that she can't play it on a U.S. machine, or that if you -- to use the late lamented DIVX technology -- it's probably unlamented by many in this room. But that was a technology that was a time-limited DVD, in effect. And you could only play it three times or over a certain period of time.

I think we have to distinguish between whether someone maybe wasn't aware when they bought it, and therefore didn't know what the limitations were, versus the question of whether it's legitimate to have the limitations at all. Or whether there's some problem, from the perspective of this proceeding, with using access control mechanisms to enforce those limitations.

Now, when people subscribe to HBO, they generally do know. They're put on notice that it's a time-limited subscription. They can't go back later and put in a black box to see again what their subscription has expired to.

But, the consumer protection side of that is a separate question from whether, A, the copyright owner can use those access control mechanisms, and B, whether it's illegal to circumvent those. And, as Dean has pointed out, for some 20 years it's been illegal to circumvent those protections. So this, again, is not really a new concept.

MR. MARKS: Steve, I just want to supplement the HBO example, because there had been a comment that the HBO example was irrelevant because if you were descrambling because you hadn't paid for

your HBO subscription, that was a different case from having bought a DVD, paid for it and not be able to play it.

That was not the example that I used in my testimony. The example I used was you had purchased a subscription to HBO, and during the time that you are a legitimate purchaser of HBO's service, you own a television set -- granted there aren't many around today, probably, except maybe in antique stores -- a tv set that was not cable-ready, that could not accommodate a set-top box.

The HBO signal would be coming to your home in encrypted form. If you had a television set that could not accommodate the set-top box with a descrambler for the HBO system, under the Communications Act you do not have a right to buy a black box and decrypt the HBO signal in order to get the content. Even if you're a subscriber and have paid for HBO. And that's the point I wanted to try and make.

MR. GOLDBERG: May I comment on the implication of the question there? I think the question implicates the matter of burden very clearly. And we are to focus on distinct, verifiable and measurable impacts. Isolated or de

minimis effects, speculation, conjecture, et cetera, do not amount to meeting of burden. And I think that those effects that are isolated, de minimis, speculation, et cetera, should be regarded as such. And not as meeting a burden.

MR. KASUNIC: I just want to offer Ms. Gross or anyone else an opportunity.

MS. PETERS: I just want to ask one question on behalf of libraries. Libraries purchase DVDs. And DVDs, do they deteriorate or do they stay good forever? You're a library that's an archive.

MR. MARKS: Right. My understanding -- and again, this is going to be an additional question for me to research for you -- is that the life of a DVD disk is greater than the life of a VHS tape, an analog videocassette. That that will deteriorate more quickly than a DVD disk will. But it is not my understanding that a DVD disk will not ever degrade over time.

MS. PETERS: Are you aware of libraries purchasing and then seeking in the purchase, the ability to somehow make a back-up copy that isn't in exactly the same format, but in a neutral format that they can basically have as machines become not

available? Or do you know what libraries are doing with regard to that?

MR. MARKS: I don't know. And I haven't heard of any such request being made.

MS. PETERS: Well, they clearly have a right under Section 108, to the point where it's deteriorating, to make back-up copies. And the question is if you had an access control on it, wouldn't that then inhibit the ability that they have by law with regard to the copy?

MR. MARKS: It may, it may. And I think if that sort of problem develops, I think a much more sensible remedy to that problem is for the library and the content owner to work out some sort of guideline, whereby the content owner needs to make available a copy that's suitable for archiving to the library. I think an approach that is specifically tailored to this potential problem would be far better than enacting or adopting an exception to the prohibition on circumvention.

I understand that 1201(a)(1)(B) really only gives you rulemaking authority in this context, to adopt exceptions or exemptions for circumvention. But I know the Library of Congress has other rulemaking abilities in terms of preservation or

archiving or library exceptions. And I think that would be proper place to address those concerns.

MS. PETERS: Okay. Well, it's now after six o'clock. I want to thank all the witnesses for -- I'm looking around before I do this. Is there anyone else who wants to ask a question on the panel? Is there anyone else out there who wants to say anything?

All right. It's after six, and that I really do appreciate all the effort that went into people to appear here today. And also your willingness to answer our questions so thoroughly. And I also want to thank people who attended.

There is one more opportunity to have input into the evidence that we're gathering. And that, of course, is the comments that can come in up to June the 23rd on what was raised in here. Thank you very much.

(Whereupon, at 6:05 p.m., the hearing was adjourned.)