The U.S. Copyright Office Public Roundtable on Section 1201 met at 9:04 a.m., at the James Madison Memorial Building, Mumford Room, Washington, D.C., when were present:
ALLAN ADLER, Association of American Publishers
KEVIN AMER, United States Copyright Office
JUNE M. BESEK, Kernochan Center for Law, Media & the Arts, Columbia Law School
BRANDON BUTLER, University of Virginia Library
GABE CAZARES, National Federation for the Blind
KRISTA L. COX, Association of Research Libraries
TROY DOW, The Walt Disney Company
HARLEY GEIGER, Rapid7
SETH GREENSTEIN, Constantine Cannon
MARYNA KOBERIDZE, LLM Graduate (IP Law)
KEITH KUPFERSCHMID, Copyright Alliance
JAMES LOVE, Knowledge Ecology International
DEREK MANNERS, National Federation for the Blind
CHRIS MOHR, Software & Information Industries Association
ANDREW MOORE, United States Copyright Office
RAZA PANJWANI, Public Knowledge
DAVID M. PERRY, Blank Rome LLP
ROBERT S. SCHWARTZ, Consumer Technology Association
BEN SHEFFNER, Motion Picture Association of America
REGAN SMITH, United States Copyright Office

JASON SLOAN, United States Copyright Office

BRUCE H. TURNBULL, DVD Copy Control Association and Advanced Access Copyright System Licensing Administrator, LLC

MATTHEW WILLIAMS, Association of American Publishers, Motion Picture Association of America, Recording Industry Association of America
AGENDA

Session 4:
- Anti-Trafficking Prohibitions /
- Third-Party Assistance

Session 5:
- Permanent Exemptions

Audience Participation
MR. AMER: Good morning, everyone. I think we’re about ready to get started. Welcome to the second day of our roundtables for the Copyright Office’s study on section 1201. Before we begin, I just would like to go over a few logistical items. Apologies to those of you who heard this yesterday. But first of all, my name’s Kevin Amer. I’m a Senior Counsel in the Office of Policy and International affairs here at the Copyright Office.

The roundtable sessions will be moderated by us here at the table. We will pose questions to begin the discussion on particular topics. As most of you know, we ask that to indicate that you’d like to be called on, if you could please turn your name placard vertically. Just given the number of panelists and topics, we ask that, if possible, you could try to confine your comments to about two to three minutes. We apologize in advance if we have to cut you off, but we appreciate your understanding on that. We also ask that you please obviously focus
your comments on the specific topics that were raised in the notice of inquiry and that are asked in our questions. And finally, just at the end of your comment, if you could please turn off your microphone, because that avoids interference with the sound recording.

Our final session of the day is an audience participation session. And time permitting, additional comments from the participants. For the audience, there will be a sign-up sheet. And again, we ask that comments made in that session be limited to two minutes.

In addition, as you can see, today’s event is being video recorded by the Library of Congress. Participants, we provided you with a video release form. If you haven’t yet signed it, please do so and return it to any one of us here at the table. For audience members participating in the last session, if you do decide to participate, you will be giving us permission to include your questions or comments in any future webcasts and broadcasts of this event.

In addition, as you can see, we do have a
court reporter transcribing the proceedings. Finally, we just would like to note that we may seek additional written comments in response to issues that may come up during the roundtables. If we do so, we will issue a formal Federal Register notice as previously.

At this time, I would just like everyone in the audience to please turn off or mute any devices that might interfere with the recording. Does anyone have any questions about logistics before we get started?

Okay, great. Before we begin, I’d just like to invite my Office colleagues to introduce themselves.

MR. MOORE: Andrew Moore. I’m a Ringer Fellow at the Copyright Office.

MR. SLOAN: Jason Sloan. I’m an Attorney-Advisor in the General Counsel’s Office.

MS. SMITH: Regan Smith, Associate General Counsel.

MR. AMER: And so, before we begin, I’d like to invite the panelists to just go around quickly and state your name and affiliation.

MS. BESEK: June Besek. I’m the Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School.

MR. BUTLER: Brandon Butler. I’m the Director of Information Policy at the University of Virginia Library.

MR. GREENSTEIN: Seth Greenstein, from the law firm of Constantine Cannon. I’m here today as the aftermarket replacement part for Aaron Lowe, of the Auto Care Association.

MR. KUPFERSCHMID: Keith Kupferschmid, CEO of the Copyright Alliance.

MR. LOVE: Jamie Love, Knowledge Ecology International.

MR. PERRY: David Perry, from the law firm of Blank Rome in Philadelphia, on behalf of Dorman Products, which is an aftermarket auto parts company.

MR. SHEFFNER: Ben Sheffner, Vice President, Legal Affairs at the Motion Picture Association of America.

MR. TURNBULL: Bruce Turnbull, counsel to the DVD Copy Control Association, and the Advanced Access Content System Licensing Administrator LLC.

MR. AMER: Great. Thank you. So this panel, as you know, involves the anti-trafficking provisions of section 1201. And to kick things off, I’m going to turn it over to Regan with a few introductory remarks.

MS. SMITH: Yeah. So the anti-trafficking prohibitions of section 1201 are not part of the triennial rulemaking, as I think you know. But they are generally prohibitions upon both access controls and section 1201(b), which applies to copy controls. In many of the comments we received, we heard arguments that the intended beneficiaries of exemptions to the prohibition on circumvention are difficult for the intended beneficiaries to engage in without assistance from third parties.

In the most recent rulemaking, the Register
of Copyrights recommended to the Librarian some of the
difficulties that have arisen with anti-trafficking
prohibitions.

She stated Congress may wish to consider
clarifications to section 1201 to ensure that the
beneficiaries of exemptions are able to take full
advantage of them, even if they need assistance from
third parties. While the anti-trafficking
prohibitions can curtail bad actors seeking to profit
from circumvention by others, they also constrain the
ability that allows third parties to offer assistance
to exempted users.

So as the first question to kick off, I
think, rather broadly is how effective are the
participants feeling that the provisions -- the anti-
trafficking provisions have been at encouraging the
innovative digital distribution models and deterring
infringements. Mr. Turnbull?

MR. TURNBULL: In both the DVD and Blu-ray
case and now hopefully in the Ultra-HD Blu-ray case,
the availability of the content protection systems,
the technological protection measures, CSS and AACS
and now AACS-2, are essential to the development of those markets.

And the anti-trafficking provisions have been essential to the integrity of the licensing of those technologies. Both DVD CCA and AACS LA have taken advantage of the anti-trafficking provisions in court cases against entities that are distributing, trafficking in circumvention products. They are absolutely essential to the business of both of my clients and to the development of the market where consumers have enjoyed tremendous new ways of enjoying the content in the digital era.

MS. SMITH: Thank you. Mr. Adler?

MR. ADLER: For the publishing industry, the importance of the anti-trafficking provisions can’t be overstated. The fact of the matter is, again, we’re dealing with a situation where we’re talking about circumvention of technological protection measures that doesn’t involve all the complications of dealing with software that has a separate functionality besides the fact that it is serving as a gatekeeper essentially for authentication of who has access to
So if you think about the way the explosion in online subscription services for journals, e-books, and a variety of other content have taken place, it’s all taken place because of the ability to have that kind of arrangement where authorized and authenticated access is done by passwords generally. And those passwords can’t be circumvented, at least to the extent there’s not wide availability of the kinds of tools or devices or services that would proliferate and basically threaten that type of model.

MS. SMITH: Can you elaborate for a second on the role of the law there in encouraging these models and protecting the password as opposed to just the fact that there is a password on it or do you have to take -- undertake enforcement activities or do you think it is just a broader deterrent effect?

MR. ADLER: Again, as I said yesterday, I don’t think the law had the expectation when Congress enacted it that it was going to really be able to prevent or even deter hackers as such. What it was designed to do, as most laws are, is to make sure that
law-abiding people remain law-abiding. And so, the

notion that you could have some kind of locks that

you’re permitted to use -- you’re not required to use

them, but you’re permitted to use them -- without

having legal protections against people constantly

trying and succeeding ultimately in circumventing

those locks would mean that the locks themselves would

be ultimately ineffectual.

So the law is very important as a general

matter, not because it deters or prevents the hackers

who are determined to engage in illegal activity, but

it generally means that people who are law-abiding

citizens will respect the business model and will

participate in the use of that business model,

understanding why they need to have their

authorizations authenticated.

MS. SMITH: Thank you. I think Mr.

Kupferschmid is next.

MR. KUPFERSCHMID: Yeah. Thank you. It’s

pretty clear I think that consumers in the United

States, as well as large and small copyright owners,
innovation and this explosion of innovation that we see is due, at least in part, because of the protection provided in section 1201 and the anti-trafficking provisions.

Those anti-trafficking provisions have been a very, very important part of 1201 since the very beginning. It’s our belief that they shouldn’t be cut back on at this point. I mean, as Allan mentioned the purpose -- the ultimate purpose is to keep this hacking software out of the mainstream and limit its availability to the infringers so you can’t just walk into Best Buy, for instance, and get a copy.

But there are other -- many other benefits. It prevents trafficking in circumvention technologies. By doing that, it reduces the attractiveness of commercial business models that are based on enabling access to infringing works. Being able to target trafficking is also important because actions of distributors that circumvent that -- sorry, these distributors of circumvention technologies is comparatively -- I repeat, comparatively easy to detect and targeting them is the most efficient and
effective way to actually enforce 1201.

And then, it also helps prevent the sort of capital formation around the black box business dedicated to circumvention of sales of circumvention devices and prevent sort of this arms race, if you will, where a technology is cracked and the black boxes are out there. And so, you have to create a new technology. And it just -- I think that’s the benefit of everyone.

And just lastly, just to repeat is what Allan said, it ultimately keeps consumers honest, if you will, preventing circumvention tools from being conveniently available at Best Buy, Amazon, Newegg and things like that.

That’s the underlying purpose and I think -- and I think a lot of people agree with me that it has served that purpose and served that purpose well and is in large part responsible for the tremendous boom in innovation that we have today and these new business models that consumers have access to movies and music and all sort of copyrighted works.

MS. SMITH: Thank you. Mr. Love, would you
agree with that characterization? Do you have a different take?

MR. LOVE: (Off mic)

MS. SMITH: If you can turn your microphone on and speak into it?

MR. LOVE: No.

MS. SMITH: Oh, okay. Well, you had your placard up. So I didn’t know if you had another thought you wanted to share.

MR. LOVE: Yeah. I do, yes. I mean, there’s a wide range of areas where the public interest in having companies protect their works through technical measures are appropriate. But I think as the evidence in this proceeding has shown, and in other proceedings has shown, there’s a whole set of areas where it doesn’t work out well. It has perhaps like an anti-competitive effect or it defeats people from being able to use lawful exceptions and things like that.

So I think that the task for this group going forward is to figure out how do you address the fact that the law covers a lot of stuff and not
everything is exactly the same in terms of the way things play out.

To us, part of it’s what obligations do you put on people. Part of the answer is what obligations do you put on people that provide -- that expect legal protections from the technical measures. In other words, is there -- can you just do anything and expect to be protected with the full weight of all the laws coming down on your head if you violate anything, no matter what the context or the circumstances is, or do you have any obligation to address some of the other issues that may come up, many which are raised in the proceeding.

So part of it’s that, and part of it is do you have the same rules for every sector of the economy. Is it the same thing for movies as it is for auto parts, for example, which will be discussed here? Is it the same thing for textbooks as it is for computer games and things? And I think it’s a mistake to have a unitary system where everything is kind of thrown together. So I think part of the way forward is to recognize that not all uses of goods present the
same problems.

Part of the solution is to -- is to realize that there should be some affirmative obligations on people that expect legal protection in the state to help enforce their technological protection measures to address public interest in areas. And I think the other area is it may be that there’s more of a realm for a category of people that are authorized to use circumvention devices under certain contexts.

For example, for the area of blind people, it’s great that blind people have the right to circumvent. But I mean, it’s not something all blind people can do without depending on someone to provide a service for them. Same thing I’m sure is for people that want to fix their own cars or something like that. Not everybody can do these things on their own.

But it may be that you -- in some areas, you may feel like you want to have some -- not completely open the door all the way, but you may want to have some sense that the people that are authorized to provide services like that are somehow more accountable and following some more circumspect
things. So I think just in terms of opening things, that’s what I wanted to say.

MS. SMITH: Okay. Thank you. So that raised a lot of issues, some of which we’ll unpack as we go throughout the discussion. But one follow-up question for you, before I let Ms. Besek speak, is yesterday on our first panel, as well as the Copyright Office’s study on embedded software devices, which was the panel -- the roundtables two days ago, we talked about whether there was a way to sort of divide the line between software and embedded devices, perhaps not related to the distribution of expressive content such as a garage door opener, a car versus the consumption of books, movies, music.

Is that -- it sounds like you think some line on that may be relevant to the anti-trafficking laws? I mean, would you support -- are you suggesting statutory reform?

MR. LOVE: Well, I think statutory reform should always be considered. And we would support statutory reform. But whether you do it within the discretion you have, it’s a rulemaking, or whether you
do it through statutory reform, I think these distinctions should be followed. I also think you can make distinctions between content such as entertainment products, such as movies or computer games from material that’s used in an educational context. It’s just another illustration of an additional distinction you can make.

MS. SMITH: Thank you. Ms. Besek? Excuse me?

MS. BESEK: It didn’t go all the way. So I guess I’m not as certain as Mr. Love is about how you can make these discriminations between content, because I think that educators and librarians would say that movies and other kinds of works are very relevant -- you know, music and things like that. So I think one of the difficulties that we all face is how to draw lines. For example, I am sympathetic to the notion that technological protection that protects functional works might be in a different category.

However, how do you distinguish between computer software that runs a particular function, car, whatever and the fact that there still may be a
lot of protectable expression in that computer
program. We have to make distinctions somehow.

The other point I wanted to make originally
was that there were a number of comments to the effect
that the system isn’t working anyway. So why should
people be concerned about anti-trafficking exceptions
or other exemptions. And I would say that a lot of
this isn’t a black or white, an either/or. You can’t
argue that a system isn’t effective just because some
people can bypass it. There’s always been some degree
of infringement. There always will be. The real goal
is to reduce it to the level where you still have a
viable market.

So that -- I think that goes back to Keith’s
comment about, you know, you don’t want it just
available at Best Buy. Well, you don’t want it just
available -- I was thinking of Walmart, actually
Keith, but the same idea. And so, it’s really
important that that material not be -- the
circumvention means not be so generally available.

MS. SMITH: So you would agree to keep it
out of Walmart, Best Buy, sort of the easy access to
the law abiding citizens and the hackers can find things in the dark corners and that’s not proof that it’s not working?

MS. BESEK: Right.

MR. AMER: Just to follow up on that, and I think this picks up on something that Mr. Love said, we had a lot of comments drawing the distinction between devices -- circumvention devices and services. And there was a lot of concern expressed about the need for beneficiaries of exemptions to use or to seek assistance from third parties in order for the exemptions to have any practical effect.

I wonder just from your experience, to what extent is that a concern? Have you seen that out in the marketplace? And if so, to what extent should the law recognize that sort of distinction and what would you suggest could be done about it? I believe Mr. Adler was next. If you -- I know you may have had a comment about the previous question, but feel free to address this as well.

MR. ADLER: Yeah. I think the real problem here -- it’s not so much in distinguishing between the
levels of protection for different types of works. I mean, the issue of dealing with embedded software in consumer products and the functionality issue with respect to driving those products, again, should not become the tail that wags the anti-circumvention dog because the issue for anti-circumvention was primarily about protecting access to expressive works.

And the problem with that is, in response to what Jamie suggested, is simply that there’s no way to allow for the dissemination of tools that only enables the exercise of exemptions or other kinds of authorized circumventions.

Let me give you an analogy when we talk about third-party assistance. In most jurisdictions, if you want to go into business as a locksmith or if you want to seek employment as a locksmith, you have to be bonded. You have to be certified. You have to be licensed. And the tools that you’re able to acquire are very carefully regulated and tracked. And those are mechanical tools, very distinctive types of tools.

What we’re talking about in the online
world, when we’re talking about circumventing various types of technological protection measures, we’re primarily talking about software acting on software or we’re talking about things like random number generators that are going to try to find the proper password or the combination for the authentication key that allows somebody to access the works.

And it’s clear that those types of things are going to have many legitimate uses as well as they’re going to have these types of illegitimate uses. And it seems that it’s going to be extremely difficult to be able to identify them, to be able to regulate them, to be able to ensure that the people who would be authorized to use them to perform circumventions are in fact also properly regulated.

MR. AMER: Thank you. Mr. Greenstein?

MR. GREENSTEIN: Thank you. So there are a few issues here I’d like to address from the past few questions. So I appreciated Mr. Adler trying to draw the distinction between access to expressive works versus trying to get access to the functional aspects of the work or the aspects of a software that control...
function and have no other purpose. And I think that really is a line that is easy to draw.

I mean, where the software interoperates with the part, controls the part and is really part of the part -- it's inseparable from the part -- I think what we're talking about, the ability to circumvent a technological protection measure to get access to the work is really all about repairing the functionality, augmenting the functionality, customizing the functionality and not anything having to do with the expressiveness of the work. Some of these software may in fact not be copyrightable at all.

There's one case in the Ford v. Autel, where the court basically found this is not copyrightable -- the elements that you're trying to get access to are not copyrightable. And the same was true in the Lexmark v. Static Control Components case, where they found the software was not protectable by copyright.

So that's one issue.

Looking at the real object of protection here, the real object of protection is not the expressive nature of the software, the software code.
The real object of protection is the functionality provided and stopping others from repairing that functionality, stopping competition in the repair of consumer products.

And that being the case, I mean, it’s really an interesting question as to whether section 1201(a) actually applies or (a)(1) or (a)(2) really applies because the consumer owns the work -- I mean, owns the product and has the right of access to all the functionality provided by the product.

So is there really an issue with access? The consumer has authorized access to the functionality provided by the software and that is the only purpose of the software. So I would say a good argument could be made that there’s no 1201(a)(1) or (a)(2) issue to begin with and the same would be true for (b).

Lastly, I do want to address one of the points that you raised with respect to the differences between devices and services. I think you cannot make that distinction, particularly for the auto repair industry, simply because not every mom and pop shop --
repair shop -- is going to have the ability to develop the software that circumvents, then is able to then repair the software in the car. But everyone should be able to use a tool that is provided by someone else, developed by somebody else that enables that repair, which is why I think you cannot really make the decision based on services. I think the divide really has to be between protection of functionality versus protection of expression.

MS. SMITH: Thank you. I wanted to ask a question that sort of ties what you said to what Mr. Adler just said. Mr. Adler mentioned that it would be difficult to limit any exemption to assistance for permitted exemption. And you’re saying there’s sometimes trouble taking advantage of the exemption on behalf of the intended beneficiary. So my question is to what extent have the intended beneficiaries of the Office’s exemptions relied on tools or services that would be subject to the anti-trafficking prohibition? So I guess getting something in a way they’re not supposed to. And on
the flipside, how much are they prevented from being able to make use of the exemptions? So Mr. Schwartz?

MR. SCHWARTZ: Well, you started off by observing that anti-trafficking really isn’t implicated in 1201(a)(1). And I think that kind of answers the question.

I’d like to quote somebody, and it was in our comments, a quote: “In our view, manufacturers, consumers, retailers and servicers should not be prevented from correcting an interoperability problem resulting from a protection measure causing one or more devices in a home or in a business to fail to interoperate with other technologies.”

And that was Chairman Bliley of the House Commerce Committee at the time on August 8, 1998 in his floor statement. I think he would have included autos if one would have envisioned the importance of functional software at the time. So I think the answer is simply leave trafficking to the courts, where it belongs, and where I know Mr. Turnbull has been very interested in those things.

When it comes to the question of the
Office’s role and the NTIA’s role in exemptions, I think honestly the NTIA had it right and the Office didn’t. There should be a presumption, at the very least, that somebody is entitled to service, however the service is provided, whether strictly as a service or taking advantage -- or the servicer taking advantage of a device -- when it comes to the exemption process.

And I would say that when the question is interoperability and functionality, you have the presumption should be conclusive. I’m not here to talk about the expressive end of that. CTA may have a range of views on that. But CTA was extremely concerned with the outcome of the proceeding with respect to autos and also with the reference to the Unlocking Act.

I mean, again, to refer to what everybody knows about the tools being widely available to people, when the Office processed the previous exemption and the Congress considered the Unlocking Act, everybody knew that unlocking a cell phone required some type of expert assistance. And it
didn’t seem to trouble the Office in the past when it granted the exemption. The Congress acknowledged that in legislative debate.

I don’t think anybody contemplated the fact that Congress said, oh yeah, you’re entitled to expert assistance in the context of cell phones, meant you couldn’t have it when it came to autos. I’ve used up much of my time.

MR. AMER: Can I -- just to follow up --

just to clarify, so when you talk about a presumption that third party assistance should be allowed to make use of an exemption, is that your understanding of current law or is that a change that you would like to see?

And is there any relevance to the fact that in the Unlocking Act, Congress expressly provided for third party assistance? Does that speak to what current law may or may not provide?

MR. SCHWARTZ: The answers are both and no.

I think the CTA’s comments argued by quoting this legislative history and others that there was no intention for an exemption for third party assistance
to be unavailable in the exemption context, so long as it didn’t affect the legal environment with respect to trafficking.

CTA would be in favor of clarifying the law in this regard, and has so advised the House Judiciary Committee. And as one, who on behalf of a cell phone reseller, was involved as a stakeholder in legislative discussions, I don’t think anybody had in mind that this would be decided by the Copyright Office or the Register as a reason to -- the first time the subject came up at all, to say, oh no, you’re not entitled to third party assistance. Thank you.

MS. SMITH: Mr. Sheffner, do you have a view on Mr. Schwartz’s interpretation?

MR. SHEFFNER: Sure. I’ll get to that in a second. Let me just back up for a second. First of all, I just want to attach myself to and endorse the previous comments of Mr. Turnbull and Mr. Adler and Mr. Kupferschmid about the importance of the anti-trafficking provisions to the success of the motion picture industry, various business models over the last 15 years, from DVDs and Blu-rays to all of the
explosion now of 115 legal online services here in the U.S., over 400 worldwide, virtually all of which incorporate technological protection measures of course with the backstop of section 1201, both the anti-circumvention provisions and the anti-trafficking provisions.

But getting to your question from a minute ago specifically about whether the prohibitions on trafficking in anti-circumvention devices and services have impeded people’s ability to exercise the exemptions that they’ve been granted through the triennial rulemaking, and I think the answer is no. I think if you go and look back at the record established during those six rulemakings now, as well as the record developed through these proceedings here, you don’t have people coming forward and saying, you know what, the Copyright Office told me it’s okay to do x, y and z under this exemption. However, I’m not able to do it because of the anti-trafficking provisions, at least in the audiovisual sector, which --

MS. SMITH: Can I -- yeah, I was going to --
do you have an opinion about the auto industry or
would you just treat that as not in your --

MR. SHEFFNER: I’m going to stay focused for the moment on our own industry. You know, as Mr. Adler and Mr. Kupferschmid alluded to, we know that there are anti-circumvention -- there is anti-circumvention software available out there. It’s not importantly on the shelf at Best Buy, et cetera, et cetera.

And we think that’s an important distinction. If it were on the shelf at Best Buy or you could go to Amazon or Newegg and click it, it would essentially send a message to the public that, hey, it’s okay as a general matter to use anti-circumvention software, which it’s not.

Again, we acknowledge that there is nonetheless such software out there. And again, I don’t think there is evidence established by the record of either the triennial rulemakings or in this proceeding that shows that those people who have been granted exemptions are nonetheless not able to take advantage of those exemptions due to the prohibition
of trafficking and circumvention of devices and services.

MS. SMITH: Thank you. Mr. Butler, you’ve represented people who have petitioned for an exemption. Do you have a viewpoint on that?

MR. BUTLER: Yes, absolutely. So a few things to say. So one is a key reason that none of the folks that I’ve worked with in the past and now have been terribly deterred yet by anti-trafficking is that we’re free-riding on the pirates, right? I mean, we just -- Handbrake is there. It’s easy to find and so if you want to rip a DVD, it’s easy to do because luckily the things we want to rip are also things that pirates want to rip, right? And so, we get to -- it’s just --

MS. SMITH: You don’t need it to be at Best Buy to find it.

MR. BUTLER: You don’t need it to be at Best Buy, right. It’s easily -- you just Google it. And so -- sorry Google. So -- I’ll be quoted on that. I’m sorry. But the problem I think that I see going forward is that we are -- like University of Virginia,
for example, we’re really interested and investing heavily in digital preservation and we’re building special collections of digital archives.

So we have Salman Rushdie’s laptop and everything that was on it. Some of that is in proprietary formats. I foresee that as DRM ages, it will -- more and more different formats will become obsolete and we’ll be asking for exemptions to crack things that no one cares about but us, right? And so, the pirates are not going to make emulators for obscure 1980s DRM software. And so, what are we going to do in that context? I think we have to be a little bit forward-thinking about that.

And even if, right, we build some internal expertise, and so, some archivist is -- we have very talented archivists who could build that tool. Can they share it across consortia? That’s generally the way these things work. So that’s one worry that I have is we’ve been free-riding on pirates because we’ve only asked for DVDs. But in the future, what will we do when we’re asking for more and more obscure formats? And then, another thing -- well, did you
have a follow-up question about that?

MS. SMITH: Yeah, I guess -- sorry -- if

you’re suggesting that you develop an archivist who

can create this tool and then shares it with another

archivist, that that would implicate 1201(b) and

trafficking in a technology product or service? I

mean, is that what you’re saying you have a fear?

MR. BUTLER: That’s what I would fear,

right, that there would be some uncertainty about that

or that a very -- another way that libraries

frequently work -- universities, there are of course

many, many vendors who are experts who are external to

the university who develop specialized products and

services only for libraries, only for universities.

And it may be that they might develop the better tool

than we did. And an exemption might empower them to

do that.

So that would certainly be, right -- I mean,

so maybe the archivists working inside could make it

and maybe they could share it. But certainly a

specialized vendor couldn’t say, hey, we’ve got a way

to facilitate digital preservation.
MS. SMITH: Right. But so if the exemption process were to extend to sort of encouraging this market for circumvention tools, I mean, would that bleed into some of the other concerns we opened up to encourage your vendors to market and sell these tools it seems like might implicate what others have said.

MR. BUTLER: Well, I think not. I think there’s security built into the -- in fact, built into the whole reason that we would be coming to the table, which is that no one else cares. And so, Best Buy would not want to buy Windows 98 proprietary file format emulators. And so, there’s just no -- the consumers don’t care. I think no one at this table would actually care. They wouldn’t be harmed. And so, as is often the case, it would sort of only be the conscientious folks who are trying to do their jobs who would be deterred in that context.

MS. SMITH: Ms. Besek, did you want to respond?

MS. BESEK: (Off mic)

MS. SMITH: Sorry, the microphone.

MS. BESEK: There was an earlier comment
about whether the Copyright Office has the power to do
certain things under regulations or whether it would
have to be an amendment to the law. And I don’t think
you can really argue that things like permitting anti-
trafficking or circumvention services are currently
embraced within the law.

I mean, there are specific places where it’s
permitted in section 1201 and elsewhere -- you know,
encryption research and I think reverse engineering
where there’s -- is that -- yeah, for
interoperability. You know, I think there are
definite -- and law enforcement. But I think that in
general, the way the statute is structured, there
really is no good argument that you can do that now.

That’s not to say that the law couldn’t be
amended and we’re talking here about whether that’s a
good idea or not. But I don’t think it can just be
done right now through regulation.

MS. SMITH: Thank you. Mr. Perry, you’ve
had your placard up for a while.

MR. PERRY: Well, not surprisingly, I guess
I would echo a lot of what Mr. Greenstein was saying.
Even this discussion so far today I think illustrates that not all software is created equal, that maybe the expressive versus the functionality divide is something that really needs to be focused on. And maybe it’s easier when you’re in the automotive realm. Maybe that’s an easier case because everybody -- not everybody -- I think a lot of people can appreciate that a lot of the software that’s in your car is not expressive. It’s functional. It’s literally under the hood. And in fact, it’s all over your car. It’s hidden to everybody. And you know, whether there will be litigation to bear out that software that now services what was once a purely electromechanical function does not enjoy protection at all -- that may happen. It may happen in litigation, which of course is very costly.

We -- you know, our client, an aftermarket auto parts company, a large company in that space, was watching with a lot of interest how the exemption was going to come out -- if it was going to come out and how it would be worded. And so I think it’s worth noting that if you look at the proposed class 21
exemption and you compare it with how it came out in
the end, the proposed class included wording, you
know, by or on behalf of the lawful owner.

We were very interested in that wording.

Our client does a lot of work on behalf of owners.

Virtually no one in this room probably could fix most
of their car by themselves anymore. And if you look
at the final class exemption, it now says by the
authorized owner. So our client and many others in
the aftermarket space I think looked at that and said
we still don’t have the clarity that we need to do
what we do, which is a hundreds of billions of dollars
industry.

And I think everybody -- everyone who has a
car, if they haven’t gone to your local mechanic yet
and been told that there’s something that they just
simply can’t fix because of the complexity in the
software, that’s going to happen and it’s increasingly
occurring.

And so, as Mr. Greenstein said, there is a
competitive -- or anti-competitive aspect to this that
has to be addressed. And you know, there needs to be
a way that the aftermarket -- whether it’s automotive
or others -- can deal with software. And I know
that’s sort of embedded software which was dealt with
separately -- but you know, the expressive and the
functional, that’s a pretty important line.

MR. AMER: To that point -- sorry -- I mean,
are there any lessons in that respect that we can draw
from the Unlocking Act? I mean, has there been an
increase in services that content owners might find
objectionable as a result of the third party
assistance being provided for? Please.

MR. SCHWARTZ: No.

MR. AMER: Anyone else want to -- well, Mr.
Love can respond to that or to the previous question.

MR. LOVE: Allan Adler bought up the issue
of regulation of locksmiths. I think that’s something
that people should probably take a harder look at. If
-- I don’t think locksmiths are really regulated
everywhere. But I think that in some states, they
definitely are.

And I think the idea that you’d have people
who have access to tools that are not generally
available and that in some cases they’re posting bonds
-- you know, or the authorities are aware of who they
are. They have certain responsibilities and that --
and that they’re reputable citizens is sort of a --
makes a lot of sense in that particular area. And it
may make sense in this area in terms of the things.

I mean, you could imagine a situation where
libraries develop their own standards for sort of a
self-regulatory-type proposal where they could sort of
imagine practices that were reasonable and limited to
the purposes to which they’re authorized to use works
under exceptions and where that could -- that could
flourish.

I think the problem is you have this
lobbying from the motion picture industry, the
database industry, you know, a few sectors of the
economy, maybe people with operating the software that
were commercial products, mass market-type products
for DRM protection and back in 1996 and things like
that. And then, you have these laws that just sweep
everything into it.

And I think that what would have been better
is if sectors that felt that they deserved to have the
state intervene and make things illegal would
themselves make the case that motion pictures deserve
some kind of protection or it may be other types of
works do as opposed to just starting with the
assumption that everyone automatically, what the
context is, basically gets it.

So I think you should have to make that case
that the state should have to intervene. And in terms
of the cost of some of these systems in terms of
managing the cost of differentiation, I think it would
be reasonable that the people seeking the state to
provide the legal protection could pay money to have —
— to share some of the cost of administering these
systems, which are extensive, and that the people who
are seeking to operate as providing services, they
could also bear some of the cost as well. I mean,
that could be kind of an approach you might look at
some in the other areas.

The other thing I’d like to call attention
to is EFF submitted on April 21, 2016 -- the Food and
Drug Administration, they submitted comments on
management of cybersecurity in medical devices. And they described I think are quite important some of the growth of security interests and problems that you have in medical devices that are implanted in your body, which could kill you, that -- you know, where these issues of DMCA protection come up.

It’s just an example of how far out -- you can have, as other panelists talked about, refrigerators and operating your lights, everything about your home. It’s increasingly becoming -- we’re enveloped in a system of artificial intelligence, of people doing everything you can possibly imagine, automatically driving cars, managing your -- I spent $825 yesterday on getting a pollution control device in my car. It’s probably an aftermarket part. I have to go check.

I think that you’ve got this -- you’ve got this sort of bad model for regulating much more than what people anticipated 20 years ago. And I think you just have to sort of -- you have to sort of get back and take a different approach. You should have to prove that you get the benefits of the technical
MR. AMER: Thank you. I think Mr. Turnbull was next.

MR. TURNBULL: I wanted to make a couple of points. One, while we have no opinion on the sort of things that are clearly distinct -- I mean, the auto parts sector -- the concern that we do have is in drawing the line between functional and expressive, you could unintentionally sort of go too far the other way, if you will. And that is that in a DVD player or a Blu-ray player, what plays the content is a computer program. And so -- and it is subject to certain requirements under our licensing agreements that require that it be robust against attack in and of itself.

What AACS and DVD CCA provide are specifications for how those individual programs would be developed. And so, if you -- if you simply draw the line and say, well, the content itself, the expressive work that’s encrypted on the Blu-ray is protected but the computer program that plays it is...
not, that has the effect of defeating our system. And we would -- we would be very concerned about that. And so, I think in drawing whatever lines anybody is going to draw, that I think needs to be very carefully preserved, that the functionality that actually enables the playback of the expressive content needs to be protected as well.

The other point I wanted to make is that something that both DVD CCA and AACS LA have offered and has never been taken up on is for people who are interested in various exemptions or various functionalities that are the subject of exemption requests periodically ought to come talk to us about ways in which this could be done voluntarily and through tools that we could cooperatively develop and could be licensed and agreed to by the technology providers. And you know, we’ve periodically made efforts to do some on our own. But we would certainly be open to cooperative efforts.

MS. SMITH: Are you suggesting you could license some sort of a tool that would allow -- that would otherwise be implicated by 1201(b)?
MR. TURNBULL: Yes. Well, no -- I mean, it wouldn’t be implicated by 1201(b) because it would be licensed. So -- but for example, a number of the exemptions have had to do with short -- you know, clips, short portions of films that are on DVD or Blu-ray. There could be a tool that could be developed that would enable that specifically and wouldn’t have people using tools that are -- that are copying the entire movie.

And there are various kinds of ways that that could be done. And you know, I’m not saying it would be easy or simple. But there are ways that I think that working together those kinds of things could be developed. And then, they could be presented as part of an exemption if that was important for them.

MS. SMITH: Making it harder for Mr. Butler to get Handbrake maybe.

MR. TURNBULL: Yeah, yeah. Yeah.

MS. SMITH: Okay. I want to steer the conversation a little bit back to Kevin’s earlier question, which is what can we learn from the
Unlocking Act. And I notice Mr. Perry said the proposed class 21 was for an exemption for the auto industry, auto repair for actions by or on behalf of the owner. The Unlocking Act, that language said circumvention in the case of unlocking cell phones may be initiated by the owner of any such device or by another person at the direction of the owner.

So I’m wondering, you know, we can both think big in terms of perhaps there’s actions that would require some sort of statutory reform. But what are people’s opinions on whether the triennial rulemaking process should extend to language such as status or risk or is there a benefit? Mr. Adler?

MR. ADLER: Yeah. I think we should be very careful -- we need to be very careful about generalizing or extrapolating broadly from what Congress was doing with respect to that legislation. And the reason is, is because the legislation was passed only after Congress had satisfied itself that by permitting such third party assistance, they were not threatening anyone’s copyrighted works.

Representative of that, this is a statement
from the House Judiciary Committee report. It says, “Circumvention for unlocking does not compromise the security of the information on the phone and it does not expose any copyrighted works present on the phone to increased risk of infringement. Legalization of circumvention that has such harmful effects is not the intent of this legislation and it would not be authorized by its provisions.”

The Senate Judiciary Committee said the same thing in its report. So --

MR. AMER: Can I --

MR. ADLER: -- they set a pretty high bar by determining before they acted that what they were authorizing was not in fact going to threaten infringement of any copyrighted work.

MR. AMER: Could I just ask, so what sort of evidence would be useful or relevant to making that sort of determination? I mean, would we look to the prevalence of claims that are targeting services rather than devices? I mean, in evaluating whether permitting third party assistance would threaten a particular market, what --
MR. ADLER: I mean, over time, we would be looking at those kinds of claims. We would see ultimately whether or not there would be instances where allegations of infringement resulting from circumvention could be traced back to what had been authorized by the legislation.

I think what Congress did in this instance and what anybody would have to do in being a proponent of such third party assistance is to actually think through in fact what is being circumvented and what are the consequences of that specific circumvention.

That’s what Congress did. And it’s precisely because it determined that that authorized circumvention, done even by third parties, would not allow them to expose any copyrighted works to infringement, was the reason that Congress felt comfortable authorizing that.

MR. AMER: So would that be an argument for allowing the Copyright Office to make a similar assessment within the rulemaking or --

MR. ADLER: No, quite the contrary. I think that this is a task that only Congress should be permitted to do because it is so significant in terms
of its potential implications. And I think it’s not something that can simply be delegated to either the Register or the Librarian.

And if I may just add one other thought in response to what my friend Brandon said before, I mean, we’re very sympathetic to the whole notion about libraries, archives, academic institutions wanting to preserve the works that are produced by the people in my industry and others. But there is another avenue for them to pursue that.

As the Copyright Office well knows, a few years ago there was a very comprehensive study done of section 108 of the Copyright Act which specifically would have allowed for addressing questions about digital preservation, including preservation of works that only exist in digital form. And we have been interested in seeing that study pursued, because we’re not looking to essentially leave these institutions locked into 20th century technology capabilities with respect to preservation.

But there again, you’d be talking about first the question of preservation and then secondly
preservation to what end. Simply the end of access to
to those works would ultimately be what preservation is
about, you would have to be able to determine whether
in fact being able to circumvent in order to preserve
those works is simply going to allow access by
scholars and students, faculty, others who are using
them for legitimate purposes or would the access
policies subsequently threaten infringement in a way
that might question whether or not circumvention
needed to be more tightly tailored.

MR. AMER: Thank you. Mr. Butler?

MR. BUTLER: Oh, boy. Yeah, so I wanted to
-- I’ll resist responding to Allan for a minute.

I wanted to come back to something else
briefly, which is another sort of risk in the question
of whether the beneficiary of an exemption is actually
going to get the benefit of the exemption. That’s I
think a relatively new risk. Is the question of
whether the Office will itself or will ask the
proponents of an exemption to very narrowly tailor
that exemption so that it steers far clear of any
connection to trafficking, because I think there are -
1 - there are activities that we would say are clearly
2 not trafficking.
3
4 So again, internal assistance, right? So if
5 an AV librarian is asked by a faculty member to -- how
6 to make a clip -- I’m entitled to make a clip. How do
7 I do it? What do I use? That’s something that we
8 think is not third party assistance. It’s not
9 trafficking. It’s all internal. If a documentary
10 filmmaker has an AV staff person on the staff of that
11 film, but -- and the wording of the exemptions in the
12 past -- in the 2010 and in the 2012 iterations of the
13 education exception was nicely crafted I think.
14
15 Actually and this is I think probably on me
16 and my students -- we diverged on that crafting for
17 reasons that are lost now to the mists of time. But
18 there was a nice crafting that said sort of the person
19 engaging in the circumvention would be allowed to
20 circumvent for purposes of allowing educational uses
21 by faculty and students. So that distinction between
22 the person and the faculty made plenty of room in the
23 plain text for librarian.
24
25 But that got tightened up this time around
and that may be on us. But I want to make sure that
that is not something that is an outcome of this
care about trafficking, where it gets so tight that
you can’t have the AV person on your staff help you
work on this.

MS. SMITH: Mr. Greenstein, did you want to
follow up on this discussion as to whether activities
on behalf of an owner authorized by should be
something that the Office could consider, and
particularly Mr. Adler’s point that it may be better
considered by Congress but also that Congress, in
doing the Unlocking Act, was looking at whether it was
implicating access to copyrighted works?

MR. GREENSTEIN: Yes, thank you. So the
legislative history that Allan was reciting basically
has a principle that is equally applicable to the
situation that we’re talking about.

The reasoning is exactly the same. Allowing
circumvention by an entity on behalf of the owner of
an automobile does not create any risk of exercise of
anything other than what’s in the exemption. It does
not put at risk the integrity of access controls or
copy controls over other types of software. It is really integral to the particular exemption that’s being granted.

So similar to the rationale of, well, we don’t -- we want to make sure that when you unlock the cellphone, you’re not unlocking all of the apps on the cell phone or other copyrighted works. It’s exactly the same because the functionality aspect of what was at issue in the Unlocking Act is the same kind of functionality concern at issue with respect to automobiles.

Similarly, Mr. Adler tried to draw the distinction between services and devices. And at least in the automotive context, I don’t think you can draw that distinction because there is no way that Click and Clack can provide circumvention service for Toyota, Volvo, Ford, GM, et cetera.

There is just no way that they can hire a hacking expert who understands the ins and outs and intricacies of all of that different software. For some models, up to 70 or more software modules are in a particular automobile and different for each and
every model of automobile. There is no way that they
can do that themselves. They need to rely on others
who can create the tools that make that possible.

MS. SMITH: So you’re saying there needs to
be a market for software for circumvention in the
aftermarket or auto repair?

MR. GREENSTEIN: Yes, and I’m intrigued by
the suggestion that there might be some kind of
authorization for locksmiths or something along those
lines. I’m not sure that I agree with it. But I’m at
least intrigued by the direction of that.

MR. AMER: Well, which way does that cut
though? I mean, if we’re -- if you can’t separate
services from devices, is there a concern that
allowing services could incentivize the growth of a
market -- incentivize the development of tools which I
think some would be concerned couldn’t be limited in
their use to things covered by an exemption?

MR. GREENSTEIN: I don’t think that concern
exists for the particular market that we’re concerned
with, the automotive market, because the nature of the
software is so particularized and particularized to
each and every model of car, that I don’t think you
have a generalized concern of a one-size-breaks-all.
You know, this is really a situation where a specific
tool has to be provided for a specific piece of
software, for a particular part and function of a
particular model of automobile.

MS. SMITH: So I want to ask one more
follow-up about the auto industry and open it up and
then get to Mr. Kupferschmid, who has been patient.
But you know, during the rulemaking, we heard a lot
about the memorandums of understanding and voluntary
initiatives and partnerships. And Mr. Turnbull just
suggested in audiovisual that who he represents is
open to voluntary initiatives. Is there some way to
facilitate cooperation with the aftermarket, short of
upending 1201(b)?

MR. GREENSTEIN: I have very strong doubts
that that is possible, which is why even despite the
existence -- look, if the memorandum of understanding
had solved this issue, Auto Care Association would not
be here on behalf of its 3,000 members. It does not
address all of the issues. And the circumvention
aspects -- well, the anti-circumvention tools are becoming more and more intricate and particularized each and every day and often have absolutely nothing to do with the copyrighted work.

For example, this particular software that’s put in automobiles can be tied to the vehicle identification number of that vehicle. And that’s purely for anticompetitive purposes. It has nothing to do with the copyrighted work or the expression or even the functionality. It’s purely to protect a market. But yet, there’s no way to provide circumvention for that aspect of the car or the software alone without addressing the other aspects of circumvention.

MS. SMITH: Thank you. Mr. Perry, did you want to chime in on that question?

MR. PERRY: Right. Well, I mean, if you’re playing devil’s advocate, I don’t think our client or Mr. Greenstein’s constituents want sort of wild abandonment in the world of the aftermarket for automobiles. Nobody wants a safety -- a safety hazard in trafficking of any kind of software or anti-
circumvention device that’s going to make it unsafe for any of us.

But to suggest -- if there’s a suggestion -- if you’re on the side of the automobile manufacturers, if there’s a suggestion that, well, it’s already -- it’s available, you just have to come to us and we’ll license it to you, I think that suggestion is kind of deceptive. It’s not practical. You know, the aftermarket -- I think the benefits of allowing at least in this industry the aftermarket to do what they have to do far outweigh the parade of horribles that could be attributed to it.

And you know, I think I agree with what Mr. Greenstein is saying about VIN-specific software. I mean, it’s a very real issue. If you are in the bay, in your garage and you find that the software for one Ford F-150 or GM is for this car and then there’s a different one for that car, it makes it -- from a practical standpoint, copyright and DRM has now impacted your ability to do what 25 years ago used to be done on a regular basis.

MS. SMITH: Thank you. Mr. Kupferschmid?
MR. KUPFERSCHMID: Thank you. I hope you’ll give me a little bit of leeway. A lot of questions have passed since I put my card up here.

MS. SMITH: Yeah, you can take it back a little bit.

MR. KUPFERSCHMID: Trying to keep this all on track. So I think kind of going in reverse order here, I have to admit, I don’t know that much about the auto industry. And I do know there’s this sort of MOU we’ve been talking about and voluntary agreement. I don’t know how that came about. I hear from you all that it doesn’t do the job.

But frankly, that’s, excuse me, one of the beauties of voluntary agreements is you can hopefully go back to the parties that you were able to bring to the table the first time and say, hey, this isn’t working. Can we come up with some mutually agreeable solutions and update it? I mean, that’s a lot easier to do than sort of running to Congress, I think.

Our concern, as I think Kevin mentioned a while ago, is of course once you’ve got these anti-trafficking tools available in the marketplace, even
if they’re for ostensibly lawful purposes, they will
inevitably become useful for -- or used for unlawful
purposes and make them impossible to police. Now,
we’ve heard, at least in the auto industry, no, no,
no, that’s sort of very specific. But then we’ve also
heard, wait a minute, you can’t do this dividing line
between devices and services. They want the dividing
line between functional and expressive, okay?

And that becomes a concern because where do
you draw that line? Is Adobe Photoshop functional or
expressive? What about TurboTax? What about iWatch,
or the software on your iWatch? I mean, at the heart
of it, all software is functional, at least to a
degree, or at least I would hope it would be.

And so, sort of drawing that line, I think
it’s interesting and telling that, you know, I
participated in the embedded software roundtable on
Wednesday. And we kind of separated these two issues.
But it’s clear they should not have been separated
because it was sort of taboo to talk about 1201 on
Wednesday and now we’re talking probably more about
embedded software today than we are specifically 1201
or the anti-trafficking provisions.

Ultimately, I think we have to be really, really careful about where we draw the lines, how we draw the lines. I made this point on Wednesday. It could lead to a lot of inadvertent consequences.

And in this particular instance things seem to be, like I said, working quite well. I know that’s not true across the board. But we have to be careful not to throw the baby out with the bathwater here. I think in terms of the auto industry, maybe other industries, voluntary agreements and working outside of Congress is probably a better approach, a better way to go about trying to solve this problem that we’re hearing today.

MS. SMITH: Thank you. Mr. Sheffner, and I think, again, if you feel like we’re talking about 1201 and if that implicates embedded software, feel free. We heard about the swear jar from Wednesday. But you can answer the question if it specifically implicates 1201.

MR. SHEFFNER: All right. I’ll try to be brief because Mr. Kupferschmid actually just made
several of the points that I intended to. But I’d go back, I think, two or three questions ago about whether the Copyright Office itself is authorized under the statute to create exceptions to the prohibitions on trafficking and anti-circumvention devices and services. And as June Besek said a few minutes ago, I think the answer is clearly no. And I believe that the Copyright Office itself has acknowledged that in previous rulemakings. And I actually don’t even think anybody here today has suggested that the Copyright Office on its own, under the current statute, can create those exemptions.

MS. SMITH: And so, to be clear, you’re taking the language of the Unlocking Act, for example, you think would necessarily — requires Congress?

MR. SHEFFNER: Yeah. I mean, I think that’s further — I think it was done that way in part because of an acknowledgement that the current statute does not permit the Copyright Office to do that on its own. And again, I don’t believe anybody here has argued that the Copyright Office can create exemptions
to the prohibitions on trafficking.

MS. SMITH: And do you agree with Mr. Adler that the Copyright Office -- there should not be a reform so that the Copyright Office could make the determination whether service on behalf of an owner might implicate copyrighted works? I mean, and I’m thinking, perhaps providing a way, whether there could be an evidentiary basis so the Office could, for example, draw a line between circumventions for motion pictures versus auto repair.

MR. SHEFFNER: We would agree with Mr. Adler that the time is not right to open up the statute. I mean, I think, look, there are legitimate policy arguments here especially by the auto repair people. I mean, I would point out we haven’t heard from the other side on that issue, at least at this forum. So I don’t think you should necessarily take as gospel everything you’ve heard on that without hearing -- yeah.

MS. SMITH: No, and obviously we’re looking at written comments.

MR. SHEFFNER: Absolutely. But yes, as Mr.
Adler said, this is a major policy change that I think would require an act of Congress. Then of course, once you open up the act, we’re not going to just be talking about this one specific issue. I mean, lots of people have lots of different concerns, things they would like to change, not just about section 1201, but of course other aspects of the DMCA. It’s impossible to confine it to that.

And then, just to quickly wrap up, I think you asked one or two questions ago about, well, what are the risks if we do permit exemptions for the -- exemptions to the anti-trafficking provisions. I think we’ve touched on some of them before.

But again, look, the basic problem is that even if you acknowledge that there might be legitimate reasons or that there are people who have been granted exemptions to engage in circumvention and need a device or a service or a piece of software to do what they want to do, the problem is that those -- especially as to devices or pieces of software, obviously can’t differentiate between the legitimate and the illegitimate uses, at least as to motion
pictures.

I mean, once you put it on the shelf at Walmart, I mean, yes, you might have people -- you know, Mr. Butler may be able -- and his colleagues would use it for legitimate purposes under the -- under the exemptions that they’ve been granted. But probably the vast majority of consumers would think, hey, here’s a piece of software. It says that I can rip DVDs and Blu-ray players. That sounds kind of nifty. I should be able to do that. And it actually sort of confuses consumers and misleads them into thinking that it’s a legitimate activity where it’s not.

MR. AMER: I just wonder though, where does that leave us and is there any sort of proposal that you would suggest? I mean, just sort of anecdotally at least, it would seem plausible to conclude that there is a material set of people who are beneficiaries of exemptions who, just as a practical matter, don’t have the technical capability to circumvent.

So I just wonder are we stuck just without
any sort of possible solution? I mean, I think one thing we’ve suggested is what -- could we be granted authority to at least consider that as part of the rulemaking?

MR. SHEFFNER: Well, I would say at least as to motion pictures and the exemptions that have been granted as to audiovisual works, I actually don’t think there’s a problem. I mean, I think Mr. Butler acknowledged a few minutes ago, and I wrote down what he said -- he said, quote, “We haven’t been terribly deterred from engaging in the activity which is authorized by the exemptions that he and his colleagues have been granted.”

MR. AMER: But yeah, is he talking about prohibited activity or --

MR. SHEFFNER: Well, I’m not saying that he’s engaging --

MR. AMER: Right.

MR. SHEFFNER: And I don’t think -- and frankly, by going -- by going off --

MR. AMER: But I mean, I think that’s the argument, right? I mean, that you’re just sort of
encouraging people to break the law.

MR. SHEFFNER: Well, I don’t believe that I’ve accused Mr. Butler of breaking the law. What I’ve acknowledged is the practical reality that he is able to go and find tools to do what he’s been authorized to do by the Copyright Office and that the other -- the other option, which is to say, okay, well he’s been granted the exemption, therefore there should be a lawful market in trafficking in anti-circumvention devices, has worse results, has worse consequences, that -- look it, I will say that the situation today isn’t perfect.

But the alternative of permitting a legitimate market in circumvention devices or software would be much worse. And it would just mainstream that activity and in a sense swallow the rule against circumvention itself.

MR. AMER: Okay. Thank you. Mr. Schwartz?

MR. SCHWARTZ: Well, just as a rhetorical question, I know you’re here to ask questions, but if everybody agrees that the Copyright Office Register and Librarian do not have the power to grant
exemptions with respect to trafficking, then why worry about giving that appearance in the course of legitimately acting on a petition for exemption that is before you?

To get to this point, as you did in the case with autos, you already need to conclude that this is a lawful activity that is being petitioned for. So why is it necessary, again rhetorically -- is it necessary to look down the page to (a)(2) and (b)(1) and say, oh my gosh, if we grant this petition in the terms for which it’s been petitioned for, so as to -- however you phrase it -- allow some expert assistance in the form of a service or somebody’s aftermarket product or software, no court is going to say -- because they can read the law too -- that, oh my gosh, we’re not going to allow this case against a trafficker to proceed under the DMCA because the Copyright Office granted an exemption to a user who had a lawful right.

I mean, respectfully, I don’t agree that the law should be interpreted to take that power away from the Copyright Office. The NTIA didn’t think so in its
recommendations. At least our reading of the legislative history, when you read all of the legislative history at the time that this was presented to the Congress in terms of black boxes and for one purpose and not wanting to interfere with interoperability or the legitimate activities of retailers and servicers.

So again, back to your question of what evidence is necessary, once you’ve concluded that the activity is lawful and you’ve concluded that it doesn’t involve copying of expressive content, if you still need to look for any evidence, if you’re worried about trafficking, then look to those who oppose the exemption to provide such evidence.

Otherwise, there should be a presumption under the power that you already have that it includes the right to expert help, just as it was silently assumed in the case with phones, or else nobody would have ever gotten the benefit of those exemptions.

MR. AMER: Thank you.

MR. MOORE: So turning -- sorry, turning away a bit from the rulemaking process, the Unlocking
Technology Act is proposing to amend 1201(a)(2) to tie trafficking to -- rather than to circumvention specifically, but to facilitating infringement by circumvention. I was wondering if I could get your thoughts on that as an alternative.

MR. AMER: Just -- I know there were a couple of cards up. If you all wanted to respond to previous questions, I think feel free to do so, while others can think about a response to the proposed legislation. So Mr. Butler?

MR. BUTLER: Sure. So just to sort of revise and extend my remarks from a minute ago, while Handbrake seems to work fairly well, a problem that we’ve seen -- a general problem that we’ve seen in all of these panels from beneficiaries is we don’t know what we don’t know about how much better these things could be, how harmed we are, what we can and can’t do because our behaviors are shaped by the law.

So we have Handbrake. Handbrake does what Handbrake does. That seems to be great. We don’t know what someone would do if Mr. Turnbull were to license them and they were to take full advantage or
if they were to get the benefit of an exemption. We don’t know what the market would do in terms of generating better tools. We also -- we just got an exemption for Blu-ray, and Blu-ray is harder.

And I’m actually looking forward in a perverse way, looking -- I’m curious what will happen. Will people really get to use it? Because it is harder. It takes longer. It’s a big file. There are sort of two or three different software processes involved in the ripping. So how will that work as easily as DVD. And then, of course, in the future what’s going to happen? And none of this stuff is going to be on the shelf at Walmart.

And so, if that’s what we’re worried about, let’s open the floodgates for the specialized users because they’re not -- mechanics don’t shop at Walmart for the products that they need to rip cars. We don’t shop at Walmart for the products that we need. You know, the digital preservation librarian at UVA has this huge bizarre computer tower thing that has all of these obsolete drives in it. It’s a specialized tool.

That’s the kind of stuff that we buy and we
shop from people who sell that kind of stuff. And it’s not Walmart. So that might be helpful. Maybe there’s some consensus here. If we can keep it out of Walmart, it’s all good.

MS. SMITH: Ms. Besek?

MS. BESEK: I just want to make a couple of points. One is on the power of the Copyright Office to allow circumvention services or tools. You know, I heard the quote from legislative history. But first of all, that was a statement on the floor. So I think we have to take that as that individual’s view. And secondly, legislative history one only resorts to if the statute isn’t clear. And I think in this case, the statute is fairly clear. So that’s obviously the first place you go to, to understand the statute.

The other point I want to make is about the functional versus expressive approach. I’ve been in copyright now for 30 years and I really never thought I’d spend as much time talking about automobile repair as we have today. And I find it a little disconcerting. And I am -- I really would not want decisions about automobile repair and replacement
parts to drive -- no pun intended -- the decisions about circumvention, circumvention devices, circumvention services.

And if that means ultimately there has to be some distinction between software that governs functional works and then, on the other hand, expressive works -- and on that expressive works side, I would add anything that has to deal with any kind of playback device -- then maybe that’s the route we have to go on. But if -- I’m concerned that, you know, there is a lot of understandable concern on the part of the public about not being able to get replacement parts for functional devices.

And if that is going to affect the rules that govern books on e-book readers and movies and all those kinds of things, then I think we have to jettison some of those things or treat them separately because I don’t think that ultimately that copyright interests are going to win the hearts and minds of the American people on this.

MR. AMER: Thank you. So we have a couple of placards up. If you care to respond to the
question about the Unlocking Act, we would welcome
that -- yes, the proposed Unlocking --

MS. SMITH: The Unlocking Technology Act.

MR. AMER: The Unlocking Technology Act
that’s been proposed. Mr. Love, did you have --

MR. MOORE: Yeah, sorry. The Unlocking
Technology Act that was proposed ties circumvention in
1201(a)(2) to facilitating infringement by
circumvention. So I was wondering what your opinions
were on that.

MR. LOVE: I would agree with Professor
Besek’s comment about, you know, not worried about --
you know, like the automobile industry sort of driving
the copyright thing. You can also turn that on its
head and you can sort of say the rest of the economy
maybe doesn’t want the motion picture industry and the
book industry to drive the rest of the economy either.

I think that the marriage between these two
things -- I would agree it is problematic. I go back
to the idea on the -- I think it’d be good if you
imagine at least two tiers of approaches, one for
areas where you think maybe the whole regime is kind
of intended for in the first instance and where people
feel comfortable that they’re kind of working towards
solutions in that area. And then, a second area where
kind of the collateral damage of the DMCA where
automobile sector, medical devices, garage door
openers, inkjet cartridges, all that sort of stuff.
And then, that you begin -- you begin the process of
not treating everything the same.

In Europe -- by the way, in the licensing
issue that was brought up before -- in Europe, there’s
an obligation in the -- for copyright owners to take
measures that make exceptions available to people. It
isn’t really clear what happens if they don’t take
those measures. But it’s sort of -- you know, there
is an affirmative obligation. I don’t think there’s
any obligation like that in the U.S. system and I
think that’s a mistake. If you really want the
automobile manufacturers to license people to compete
against them and sell cheaper parts than the
automobile manufacturer wants to charge themselves and
they have no obligation to do so, I don’t see why they
would want to do that.
And so, this idea that people within a sector should have to have an affirmative obligation to license the technology or the tools or whatever like that to address something as a first step, but it also puts an obligation on people that are seeking to traffic in devices and things like that to pursue that opportunity before they resort to their own do-it-yourself kind of remedies as well.

That may be kind of a compromise where you have a step where the people that are affected the most by it have -- you know, have to be approached, work out the basic details, understand kind of what the parameters and the debate are. And then, if that fails, then you can sort of imagine kind of things moving on to a different set of obligations.

I just want to mention also on the licensing, that in President Obama’s books on Kindle, text-to-speech is turned off on almost all of them. And this is after massive protest in front of the Authors Guild and tons of letters to the president of the United States from blind people, a fairly high profile thing. And if you go on Amazon right now and
check on President Obama’s Kindle things, you will see that text-to-speech is turned off.

So this is essentially a licensing -- it’s a technical protection measure. This is either a switch that’s either turned on or turned off by Amazon. Random House famously turns it off as a default position.

And it just goes to the frustration people have when say just call us up and we’ll fix the problem. That doesn’t often really work. And I think people have to recognize that that’s not a very satisfying thing for consumers, when people say we’ll fix it.

Typically, when you have devices where things have moved on, there’s a lot of cost in fixing the problem. Interoperability interfaces have changed. People talk about having refrigerators with blue screens of death because the software no longer works. I think you have to recognize that people just don’t follow through and fix a lot of these problems.

MS. SMITH: Thank you. So we just have a couple of minutes left. So I think this is going to
be the last call for comments, and if we can try to keep them brief -- but I think since your comments, Mr. Love, involved Random House and publishing, we’ll call on Mr. Adler next. Thank you.

MR. ADLER: I just wanted to address the previous question, if I could quickly respond to Jamie, on the issue --

MS. SMITH: I think speak a little closer on the microphone?

MR. ADLER: Yeah. On the issue of an infringement nexus with access, we already discussed that in the first panel yesterday. So I won’t repeat the comments I’ve made, just simply refer you back to them.

But I would also point out that with respect to (a)(2) and (b), what Congress did was fourteen years before Congress enacted this statute, the Sony decision by the Supreme Court had addressed the question of whether or not articles in commerce that could be used to infringe could be prohibited.

And the Court articulated a standard that talked about not wanting to see prohibition affecting
articles that could be used to infringe but were capable of substantial non-infringing uses. And most people spent the next fourteen, years and probably the time since, then figuring out exactly what that meant. So what Congress did here in the anti-trafficking provisions was to try to be more specific about what the criteria were. And it’s unquestioned that that criteria is in fact linked to infringing works. So I don’t think there’s any need for new legislation on that.

And just quickly with respect to Jamie’s comments about whether or not text-to-screen translation software or the read-aloud functionality in e-books is turned off, that turns out to be more a matter of individual competitive preference among publishers and typically is a function of the way publishers negotiate agreements with authors. Usually it’s if there is an audiobook that is also being authorized for publication by the author, they do not want the e-book to have the read-aloud functionality because they tend to think it competes with the audiobook. But again, that tends to
be more of a contractual issue between the author and
the publisher. It is not something that is don’t just
as a matter of course or particularly because of
concern about violations specifically of a copyright
right.

MS. SMITH: Thank you. Mr. Kupferschmid?

MR. KUPFERSCHMID: Yeah. I just -- I’ll be
very, very brief. I just wanted to address comments
Mr. Love made, not only just recently, but throughout
that sort of this law is being driven or is especially
for the motion picture studios or the book publishing
industry or the record labels or anybody like that.
And I can tell you that we represent over
15,000 sort of small businesses and individual
creators in this space. And they’re very much
supportive of the anti-trafficking provisions.
Specifically, do they sue or do they enforce the law?
No, they don’t have the capability of that. They
don’t even oftentimes don’t have the capability to
even actually bring infringement cases either.
And matter of fact, that’s exactly why they
like this provision in the law because otherwise they
would be in this arms race, just like everyone else.
And that’s an arms race that the individual creator is absolutely going to lose.

MS. SMITH: Thank you. Mr. Turnbull?
MR. TURNBULL: Just very quickly, first, I wanted to associate myself with what Mr. Adler said about the Unlocking Technology Act. I won’t repeat it. But I agree with that. Secondly, with regard to the language, going back a while in the discussion, that was in the prior librarian-related exemptions, the DVD CCA had agreed and accepted that language and would again and think that that would be within the scope of the Copyright Office’s authority and would be appropriate in those kinds of exemptions.

And similarly, the Copyright Office has -- or the Librarian, in the exemptions that have been granted -- conditioned certain of the exemptions on the use of certain kinds of screen capture software, either as a prerequisite to circumventing or in a couple of cases specifically as the method for allowing circumvention. And so, I think there’s precedent for that kind of thing at least in very
specific cases where there’s been an adequate record developed and that sort of thing.

And in terms of the sort of voluntary tool that I was talking about, it would be in that kind of vein that we would envision it being used, as something that would be brought to the Copyright Office cooperatively but would then be part of an exemption.

MS. SMITH: Okay. Thank you. So Mr. Greenstein, next, you know, last call, and I will say the next panel is about permanent exemptions. And I thought maybe I could also invite you to comment on whether in your particular situation for the auto industry, that might be sort of another workaround rather than changing 1201(b).

MR. GREENSTEIN: Okay. Thank you. So first, with respect to the Unlocking Technology Act, it probably would solve the problems of our industry. But I think it’s a much broader solution than is necessary.

And in that respect, I note Professor Besek talked about how this is really kind of a separate
issue. Well, that’s why we sought an exemption, because it really is something that is an individual need and I think best addressed in that way. And from that perspective, I think permanent exemptions are a positive solution. But merely adopting the current solution as a permanent exemption is not going to solve the problems of the aftermarket automobile repair industry.

MS. SMITH: Thank you. And Mr. Schwartz, I think you have the last word.

MR. SCHWARTZ: Yeah, just a while ago I didn’t mean to not comment on the Unlocking Technology Act. I believe CTA has supported that. Of course, as is the case with any legislative consideration, would want to look at what’s being proposed, exactly now in the most up-to-date formulation after discussion. But I think CTA is in support of it.

MS. SMITH: Thank you. Well, that will conclude this panel. We are supposed to start at 10:45. So that cuts the break short by about 10 minutes. But I think we should be on track to just start that on time. Thank you.
MR. AMER: Oaky. Welcome back, everyone.

We are going to start session five, the last session of the day. This session is on permanent exemptions. And I’ll just read the description. This session will explore the necessity, relevance and sufficiency of the permanent exemptions to the prohibition on circumvention and will consider whether amendments or additional exemption categories may be advisable.

So to get started, I’d just like the panelists once again to introduce themselves and along with their affiliation.

MS. BESEK: June Besek, Kernochan Center for Law, Media and the Arts at Columbia Law School.

MR. CAZARES: Gabe Cazares, Government Affairs Specialist, National Federation of the Blind.

MS. COX: Krista Cox, with the Association of Research Libraries.

MR. DOW: Troy Dow, with The Walt Disney Company.
MR. GEIGER: Harley Geiger, with Rapid7.

MR. WILLIAMS: Matt Williams. I’m here on behalf of AAP, MPAA and RIAA.


MR. PERRY: David Perry, with the law firm of Blank Rome, on behalf of Doorman Products, Inc.

MR. MOHR: Chris Mohr, SIIA.

MS. KOBERIDZE: Maryna Koberidze, no affiliation. I’m here as a concerned member of the public and IP law enthusiast. Thank you.

MR. AMER: And a proud alum of our office.

So welcome all. So I thought we would proceed in two parts, first by looking at the adequacy and the functionality of the current exemptions and then turning to proposals for additional permanent exemptions and to get your thoughts on whether any may be necessary or advisable.

We’ve thought of proceeding a little differently in this session. As you know, a lot of the existing permanent exemptions are specific to particular types of uses and are maybe more relevant
to particular -- to certain of you than others. So we may direct questions specifically to individual people to start out with. But everyone obviously is welcome to weigh in and in fact we would encourage you to do so.

So I wanted to start by talking about the library exemption under section 1201(d). We received a number of comments on this exemption from library associations. I think the word useless came up in one or two of them.

And so, if I could direct this to you, Ms. Cox, I just would be interested just sort of generally in your perspective on the current library exemption, if you could elaborate on why it may not be as useful as hoped and any changes you would like to see.

MS. COX: Well, I certainly think that section 1201(d) is not very useful for libraries, archives and educational institutions. It’s not actually an exemption that we asked for in the DMCA legislative hearings and that whole process because it’s so narrowly drafted -- it’s not an exemption for any nonprofit library or educational use.
It’s not even an exemption for any library or educational use that is already granted under section 108 or granted under fair use. It’s so narrowly tailored to only acquisition decisions and you can only use that exemption for the time necessary for an acquisition decision.

And it is our view that if we are going out and looking to make an acquisition, that whoever is selling that book or that product to us would be happy to open up that digital lock for us to make that determination.

We find that we are -- we are constantly using every three years the rulemaking process to pursue the exemptions that we think are really necessary, for example, to -- for assistive technologies for those that are blind, visually impaired or print-disabled, for educational uses of audiovisual materials.

So for us, those are the types of uses that we would find -- that we need continually and that would warrant a permanent exemption versus the very narrow exemption in 1201(d).
MR. AMER: Thank you. And so, just sort of
in practice, I mean, in your experience, is the
current exemption -- I mean, it sounds like the answer
is no. Do you know of many examples of librarians
making use of that exemption?

MS. COX: I don’t, because I don’t know of
content providers who hand something over to a library
locked and say, do you want this product, it’s locked.
No, I mean, it just -- for purposes of acquisitions,
normally the content providers are happy to unlock it
for us as we make a decision in purchasing.

MR. AMER: Okay. Now -- oh, sorry. Go
ahead.

MS. SMITH: Can I ask what are your thoughts
on reforming it to track the contours of 108, which is
different, I will say, than some of the petitions for
exemptions in the rulemaking.

MS. COX: I think that -- I mean, I think
that there are certainly areas where it would be
useful to amend 1201 in order to accommodate what’s
allowed under 108. But there are of course other uses
as well that we would support.
MR. AMER: Oh, sorry. So -- well yeah, so I think that was one proposal. I mean, I know in our comments from the American Association of Law Libraries, there was a recommendation that a permanent exemption be created for any use that was permissible under 108. I assume -- is that something that you’re recommending as well or do you think that the exemptions that you’ve petitioned for pertaining to motion pictures are sort of a more pressing concern?

MS. COX: Can we have both?

MR. AMER: Well --

MS. COX: No. I mean, yes. I think that having -- expanding it to apply to section 108 would be very, very helpful. And you know, I think this just highlights a fundamental flaw of the 1201 process that has been talked about in these roundtables, that it’s not linked to infringement.

And it’s -- you know, from the perspective of our libraries, who really do want to follow the law and -- and ensure that -- simultaneously ensuring that we are fulfilling our mission, that it doesn’t really
make sense to have these exemptions granted under section 108 or be allowed under fair use. But then, you can’t actually do it just because we’ve moved into a digital world.

MR. AMER: Are there any other views on the advisability of -- oh, I’m sorry. I didn’t even see Mr. Williams?

MR. WILLIAMS: (Off mic)

MS. SMITH: We’re mic-less.

MR. WILLIAMS: Oh, mine just came on. Okay, great.

MR. AMER: Okay.

MR. WILLIAMS: Thank you.

MR. AMER: Oh yeah, if we could just ask if you’re not speaking to turn off your microphone?

Thank you.

MR. WILLIAMS: Thank you. I did see that the library community is not finding the existing exemption helpful. And it sounds to me like that’s because the market is working really well. As she said, copyright owners are more than willing to give test access to libraries so that they can sample the
works and decide whether to buy them. So I think that’s a good news story, not a bad news story, that we need to worry about.

I, in the comments, saw that in replace of the permanent exemption, what the libraries seem to be asking for is all non-infringing uses exemption. And we’ve talked in other panels about why there are a lot of dangers associated with those types of proposals and why 1201(a) was designed not to necessarily protect only exclusive rights under section 106, but also to provide a right of access that is very important and that needs to be preserved.

When you get to the slightly narrower approach of just -- for 108-covered uses, I doubt that that is going to go very far in terms of reducing the number of exemptions that libraries seek because what I often read, at least, is that libraries and others are unhappy with the scope of 108 as it currently exists.

And so, they would rather point to section 107 for most of the things that they want to do, in which case you either get back to a kind of pseudo all
non-infringing uses-type of approach or you end up needing, even if you cover all 108 activity, for people to come back every three years and make new requests. So I’m not sure that that would have a very effective impact.

I think what will have a more effective impact is if the more streamlined approach to renewals that was discussed yesterday is adopted in some workable format, the need to make permanent these types of exemptions becomes a lot less important and you actually preserve the ability to have some confidence of renewal, but you also preserve the flexibility of having the rulemaking there so that if someone needs something new, they don’t have to go all the way back to Congress. Again, they can come to you.

Thanks.

MR. AMER: Thank you. Ms. Besek?

MS. BESEK: Well, specifically with respect to an exception for 108 activities, I can’t help but wonder why the libraries need it now when they haven’t made such a request, not necessarily with regard to all of 108 -- specific 108 activities over the last
several years. It seems to me that if the statute were that deficient, they would have consistently asked for that exemption, and it’s not there. So I’m not sure there’s really a basis.

The second point I want to make is I think section 108 is broader than people might realize. I was on the section 108 group, as were others here. And you know, it gives libraries a fair amount of flexibility with respect to providing copies for users, for example.

And so, I don’t think that we should assume that that would be a narrow exception. And I think without -- I think it is really akin to the no non-infringing uses, rather that you should be able to circumvent for any non-infringing use or any fair use. I think it falls in that category and I would be reluctant to see that without more.

MR. AMER: Thank you. Ms. Cox, would you like to respond to that?

MS. COX: So of course, the libraries -- Mr. Williams is correct, we do support the Unlocking Technology Act, which would tie infringement to
circumvention. But as a next best option, we do very much believe that permanent exemptions are warranted in certain cases.

For example, for assistive technologies for the blind, library services, authorized entities that were often providing accessible formats for the blind, also for the audiovisual exceptions for educators and students at our colleges and universities, for K through 12 educators.

These are all exemptions that we have supported in the past. And in the most recent rulemaking cycle, the NTIA recommendation to the Register in that report, it said that they acknowledge the concerns by the rights holders who oppose these exemptions, but that -- emphasizing that these exemptions don’t legalize copyright infringement and that the record doesn’t show that previous grants of similar exceptions have led to piracy.

So I think in those cases, it makes a lot of sense to move towards a permanent exemption, to expand our current 1201(d) exemption to include the activities that are really important to us, like these
exemptions that we request every time. I think the
Library Copyright Alliance joined four different
proposals for exemptions for audiovisual classes in
this past rulemaking cycle. And you know, it seems
that that just keeps expanding.

And so, I think having a permanent exemption
that is broad enough to cover these areas would make a
lot more sense than us having to go through this every
time, especially when there isn’t any evidence that
infringement occurs in having these exemptions.

MS. SMITH: Can you speak to Mr. Williams’s
point that perhaps streamlining the renewal would
serve a great deal of your concerns, while still sort
of leaving the door open in case there were changed
circumstances in the market or something or some
reason to not etch it in statutory stone and make it
permanent? Could you live with that instead?

MS. COX: Well, I certainly think that
streamlining the process would of course help. But I
would have to see what the contours of that
streamlined process would look like because previous
rulemaking cycles, of course, were I think much less
involved than they are today, where you have a 400-page report from the Copyright Office.

I think that if there is a presumption of or an automatic renewal unless there is evidence of changed circumstances, that would certainly be helpful. But what would be even better, of course, is that if there’s a permanent exemption where time and time again, the Copyright Office is granting exemptions for persons who are blind or disabled, for educators and educational institutions, for students in college and universities.

I think where there’s strong evidence that there has not been infringement as a result of these exemptions, I just makes sense to make them permanent.

MR. AMER: Thank you. Could I just follow up on the 108 question? We received some comments that talked about the need to circumvent for -- of libraries to circumvent for, for example, preservation purposes and they used the example of works in obsolete format, which may include TPMs in obsolete format.

I’m just wondering if you could elaborate on
that. And I wasn’t totally clear whether that sort of issue goes to access controls or whether the issue is copy controls.

In other words, if you have -- if a library receives a collection of VHS tapes or something, is the issue with respect to preservation that the library can’t access the works or is it more that there is a copy control which would prevent you from digitizing it?

MS. COX: Well, I think with the VHS, it would be a copy control mechanism, not an access control mechanism. I think my colleague, Brandon Butler, who actually works in a library may have more information on this issue.

MR. AMER: Okay. Okay. No, that’s -- that’s fine. Well, Mr. Dow?

MR. DOW: Thank you. So just a couple of points. I served with June on the section 108 committee and I had a similar reaction to the proposal that there’d be some sort of exception that would apply to section 108-covered activities and that they apply to such a broad range of activities, including
things like interlibrary loan, copies for users.

I know that in the course of our discussions there in the section 108 group, we talked extensively about the fact that copies for users for private study was contemplated by many libraries to include loaning of materials and providing of materials for personal review, including the loaning of movies and things like that for personal review.

And so, the notion that you would have an exemption that would allow you to circumvent copy protection, to provide unencrypted copies of expressive works as part of interlibrary loan or as part of copies for users I think would be of concern to us.

On the issue of not having evidence of infringement, one of the concerns throughout even with the rulemaking process is that it’s very, very difficult to tie resulting acts of infringement to the particular uses that are being made pursuant to the exemptions, right?

And so, if you have an exemption to allow people to make copies for a variety of uses, tying
then downstream -- if the result is that that allows
for circumvention to release unencrypted copies of
works, then it’s very hard to tie the downstream
copies of unencrypted copies to the first initial copy
that was made. So while there’s not an abundance of
information in the record to show infringements, it’s
actually really hard to say what the impact of that is
in the marketplace.

The last thing I’ll say is that in terms of
section 108, the other thing that I think we learned
in that process is it’s very -- that’s a section that
is sort of technologically and marketplace-dependent.
And part of the reason we were gathered together to
talk about section 108 was because technology had
eclipsed the statute. And Congress had attempted to
make some updates in the context of the DMCA. And
even those updates have been eclipsed by time and by
technology.

And so, I think in that sort of context, in
the types of things you’re talking about in 108 for
things like preservation, there’s a benefit to having
a rulemaking process that can respond to those types
of changes in the marketplace, to the specific technologies that are being used, to the specific concerns about what the impact of allowing circumvention in those circumstances would be, that would allow not only streamlined access to those exemptions along the lines that were discussed but also to have exemptions that are tailored to the particular needs and to the particular concerns much better than you would be able to do with a permanent exception that you might find yourself looking at, very much like 108, becomes quickly outdated.

MR. AMER: Thank you. Mr. Love?

MR. LOVE: Thank you very much. If the permanent exceptions are by statute only and the statute sort of sets out all the conditions, I think that the problem in the past is you end up with a fairly narrow statute that is frustrating for people who are supposed to be the intended beneficiary of the statute.

A better approach, in our mind, is if the statutory mandates an exception but permits the Copyright Office to provide more information about the
contours of the exemption at a later date, like so for example if the statute -- let’s take the issue of uses for people who are blind.

If it was to address the obligations in the Marrakesh Treaty for people with disabilities, if the mandate was broad but there was some sort of understanding that there could be, at some point, more contextual information provided if necessary by the Copyright Office down the road, it might be -- it might be a better situation than trying to spell out every particular issue that you might want to do by statute.

Another thing I think that’s important -- I mean, we think that the idea of more or less permanent exceptions -- I think permanent is a funny word because nothing’s really, even in a statute, permanent. So I think what you’re talking about is durable and persistent exceptions. And so, I think the Copyright Office surely should be able to do -- the three-year thing I think is a mistake. I think a lot of people have talked about that in other panels.

One thing -- one of the reasons -- there’s a
high cost of developing and implementing both the
tools to use the exception and, as important I think,
the standards and the best practices for implementing
exceptions.

Now, if you want to have a conversation, for
example, among authorized entities for people that are
blind or you want to talk about archivists or you want
to talk maybe about auto mechanics or whatever group
you want to have, for them to sort of sort out the
problems of the different stakeholders so that they’re
not just looking at their own interests, but they’re
looking at the interests of third parties that are
affected by the policies that are implemented, that
can be a pretty complicated thing.

And then you want to -- and then you have a
small enough number of people, like the number of
people in this room, can kind of figure out what that
rule should be. And then, you want to educate
thousands of people as to how to sort of use that
standard so that they do it in an appropriate way.
And then, you sort of say, but this whole exercise is
going to be revisited three years from now.
I mean, this kind of defeats this idea that you’re really serious about doing it in a thoughtful way, where you have buy-in and implementation that’s really consistent. So I think that one of the reasons for the more persistent and durable exceptions is the fact that it really is time-consuming and costly to design the tools for exceptions and to implement them appropriately. Thank you.

MR. AMER: Thank you. Mr. Williams, did you have --

MR. WILLIAMS: Just a quick point to go back to something that Troy Dow said on evidence of harm from any of the existing exemptions, he’s absolutely right. It’s almost impossible for us to collect data to show that someone who used the exemption ended up circulating pirate copies on the Internet.

On the other hand, in every cycle I think since the AV works exemptions have been in existence, we have pointed to examples in the proponent’s comments of uses that we think are likely to be infringing. They are not uses that my clients have had any interest in pursuing litigation over and
calculating the actual harm involved is quite difficult.

But I just wanted for the record to note that we have each cycle come across uses that the proponents have said are examples of how they’re using the exemptions and our response has been, well, some of these are actually probably unlawful.

MR. AMER: Great. Thank you. I want to go back to Ms. Cox, and then I think we’re going to move to the next topic.

MS. COX: Just because 108 has been such a focus of this discussion so far, I just want to say that there have been some criticisms that 108 is out of date and therefore libraries just look at fair use. And while it’s certainly true that fair use is critical to libraries, we do use 108 every day. I mean, I talk to -- any librarian that I talk to, they say, of course 108 is still relevant. It’s still -- it’s still something we use. Is it as good as fair use? Probably not because fair use is adaptable and it is flexible enough to accommodate these new technologies. But 108 is not an obsolete statute.
And just with respect to whether it’s hard
to get evidence of downstream uses, while I
acknowledge that, yes, Mr. Dow and Mr. Williams may be
correct that it can be difficult to trace back exactly
where an infringing copy came from, I certainly hope
that you’re not suggesting that libraries and
educational institutions are using this exemption and
passing out infringing copies.

MR. AMER: Thank you. So I think now we’re
going to move to talk about the reverse engineering,
encryption research and security testing exemptions.

As you may know, in the 2015 recommendation, the
Office found a compelling case that 1201(f), (g) and
(h) are inadequate to accommodate their intended
purposes.

So I just would like to start with a general
question. I’d like to ask your views as to how these
provisions might be amended to more effectively
facilitate legitimate reverse engineering activities
and security research. I think this may be
particularly relevant to Mr. Geiger and Mr. Mohr. But
others, of course, are welcome to comment as well.
MR. MOHR: Sure. Thanks. Well, just a couple of -- a couple of preliminary points. Essentially, from our perspective, we believe we don’t -- I’m not sure we share the Office’s conclusions on this particular point. We believe that the current statute is working, that it can work.

Let me just address a couple of things. I mean, one of the things that I have heard today that probably would cause my members a bit of heartburn is some suggestion, maybe implicit, maybe not, that software is let’s say a second class copyright citizen and that is something that we wholeheartedly reject.

And we heard that, I think, in some -- as if one can separate the function from expression easily. I really -- I have looked at a decent number of cases examining these issues and that’s not an easy line and it hasn’t been an easy line basically for a long, long time. And it’s true not only with respect to computer programs, but it’s also true with respect to cheerleader uniforms and plays and all kinds of idea expression. It’s the same line that’s expressed in different ways. And it’s a really fuzzy one.
With respect to the exemptions themselves, I mean, we believe the reverse engineering exemption is adequate. With respect to security testing, our members have relationships with the security testing industry. If there are areas in which voluntary agreements may be useful to kind of allay section 1201 concerns, we’re certainly open to discussing those. But at this time, we don’t see any need to open up the statute.

MS. SMITH: Can I ask a more targeted question about 1201(f), the reverse engineering statute? So in the rulemakings and in yesterday, we heard a lot about how 1201 was not intended to prevent a lock-in effect for printers or garage door openers or something. And when I read 1201(f), it says you can circumvent for the purpose of identifying and analyzing elements necessary to achieve interoperability.

Do you have an opinion on whether it makes sense to reform 1201(f) to include things necessary to enable interoperability? And I think the Breaking Down Barriers to Innovation Act has some specific
language to that too. I mean, what are your thoughts on going beyond I guess identifying and analyzing into helping facilitate interoperability?

MR. MOHR: I think there’s -- I think that if my recollection is correct, and it very well may not be, that this particular -- that the standard in 1201(f) came out of existing case law. I can’t recall which case.

I would have concerns about the breadth of the concept of facilitating interoperability covers I think a wealth of sins. And many of them could lead to pretty bad things for a lot of my members. So I’m not -- color me skeptical about that particular proposal.

MR. AMER: Mr. Geiger?

MR. GEIGER: Thanks. So unsurprisingly, we disagree that the statute is currently working with regard to security research. The temporary exemption is a big deal for us. It is extremely helpful.

But that aside, in talking about the permanent exemption, as it stands right now, 1201 does chill very important security research, research that
will help prevent harm to individuals and it will help
prevent breach of sensitive data. And we gave you an
example in our comments.

We have a researcher that is employed by Rapid7 who is a diabetic. He wants to research his
own insulin pump but was prevented from doing so, prior to the temporary exemption, because of 1201 of
the DMCA. In addition, a lot of independent security
researchers, folks that are not necessarily employed
by us but that we work with to help improve our own
security products, they are chilled.

That is, they don’t engage in the research
to begin with or many of them actually receive cease-
and-desist letters that reference the DMCA. This is
again prior to the temporary exemption. So we don’t
think that it works and we think that this issue of
security research in software is becoming a lot more
important.

As discussed previously, we are seeing this
explosion of software, both in the physical world and
virtually. And there are a lot more security flaws
than there are people to fix it. And in many cases,
manufacturers either don’t know about the software flaws or they turn -- they’re willfully ignorant of them.

Part of the problem with voluntary agreements, and this goes to the requirement of authorization in the permanent exception, is that it hampers independence. It means that the manufacturers themselves get to control completely how the security research takes place and what the publication is like.

And if you’re a manufacturer that doesn’t support independent security research or if you are a manufacturer that has something to hide, as Volkswagen, for example, right, then that will -- that will make the research a lot less effective and not as independent. There are also several other problems with the permanent exception, one of which is this requirement that it violate no other law.

The CFAA is very, very broad. It’s very ambiguous. It is the subject right now of some pretty sharp circuit splits. So you’re importing a lot of the ambiguity from these other laws into 1201, laws that have their own chilling problems and doing it
largely for non-copyright reasons.

There’s also a part of the permanent exemption that says that the information derived from the research cannot be maintained in such a way that could facilitate infringement or violation of another law. Well, what happens if you’re a security researcher and you’ve contacted the manufacturer about a problem in their product? They do nothing and standard practice is that eventually you will make that disclosure public.

MS. SMITH: Well, doesn’t the statute contemplate that by saying it’s a factor that should be considered? And maybe in that specific use case, it would make sense to not stick it with the manufacturer, but go broader?

MR. GEIGER: Absolutely. The fact that it’s just a factor as opposed to an outright requirement, sure. But both factors are cutting against the security researcher, right? One is --- you know, if they’ve publicly disclosed it and then others can use that for nefarious purposes, which is part of the point, right? Part of the reason why you publicly
disclose is to encourage a manufacturer to actually correct their flaw if they haven’t been previously. And then, the second was whether the information is solely for the purpose of benefiting the manufacturer, the owner of the computer system. And a lot of time, security researchers are doing this for the benefit of the public, not necessarily the owner of the computer system.

I want to make three other points really quick because we’ve talked about --

MS. SMITH: Right, keep it quick because we’ll have follow-up questions.

MR. GEIGER: I’ll talk about it quickly. We talked about this in previous panels, right? So this idea of an embedded software exception or in the temporary exception we’re talking about consumer devices. These lines are blurring, right? And things that are embedded in software now may not be -- or embedded in devices now may not be in devices in the future, consumer devices, likewise.

Security researchers work on more than just devices. They work on networks. They work on
completely virtual software. And what counts as a consumer device is also in many cases a business device or is used by infrastructure. And we want to encourage that kind of security research. So, thank you.

MR. AMER: I’d like to ask you a follow-up and then others can weigh in as well. It’s sort of a more general question. I mean, you mentioned the multifactor framework that both 1201(g) and (j) provide for.

As a general matter, do you sort of think that type of framework is helpful, where there’s sort of a multifactor analysis that a court can take into account, or does that in itself provide -- sort of reduce some of the certainty as to what’s permitted and under what circumstances?

MR. GEIGER: It absolutely reduces the certainty. And in our opinion, we’d prefer to see a blanket security research exception for things that are not -- just for the sole purpose of improving the safety and security and correcting software flaws. So I would kind of cut it off right after the definition
of security testing.

So in many cases, we are seeing agencies move to protect the other types of equities that you see in the permanent exception, like privacy, like safety. The NHTSA -- the Transportation Security Agency as well as the FTC and others, like they are already moving to protect against hacking in a way that violates privacy. We’ve got laws for that. So it’s unclear to us why 1201 ought to be the vehicle, so to speak, to prevent those types of activities.

I will also say that when it comes to trafficking we -- because we are a penetration testing company, we actually do use software. We market software that can be used to circumvent. And some of that includes circumventing passwords or brute forcing encryption. Companies -- this is very valuable to them because they want to know what flaws they’re susceptible to.

And so, we have to traffic in that software in order to -- in order to run our business. And we work with security researchers that send us updates and exploits. They traffic in the circumvention tools
to us so that we can keep our products up to date. So this is an important component of security research. And I would just -- I’m saying this not because I want to see trafficking fall by the wayside if we’re talking about reforming the permanent exemptions.

MR. AMER: Thank you. Mr. Williams?

MR. WILLIAMS: Thank you. I’m primarily here to talk about books and music and movies. So some of these issues are to a certain degree separate from those interests. However, I do have some concerns that if you start taking a lot of the limitations out of some of these permanent exceptions, that there will be unintended consequences that will impact the industries that I’m here representing.

I went through the statute this morning and had the pending legislation and started marking through the portions that would be deleted. And a lot of the safeguards that Congress decided it made sense to put in there are being taken out. And some of that might be for perfectly legitimate purposes. I can’t speak to that. But some of it could cause some harm.

And so, I’m skeptical of whether it’s
necessary because usually when Congress decides to amend an exception that’s already in the statute, there’s a number of cases that have come through the courts. They’ve either come out the wrong way or there’s a lot of indecision between them when you compare them. And I don’t think that’s been the case here. There’s been a lot of debate in the rulemaking about what the existing exemptions would allow or not allow. But I haven’t seen much in the way of litigation to point to.

So I think to take it to Congress without those types of badly decided cases, it might be a bit of a stretch. I mean, I can think back to when the last sentence of section 107 was added and I think that was 1992. There was five, six, seven I think unpublished works cases that took place before Congress decided we should add this sentence that just basically says if it’s an unpublished work, it might be a fair use.

MS. SMITH: Well, can I ask you a follow-up question? Because, you know, I take your point about treading lightly on statutory reform. But we do have
this rulemaking process where if the permanent exemption doesn’t work, perhaps you’re not seeing litigation but you are seeing petitions before the Copyright Office. And the security testing might be such an example, where they said the requirement that there’s authorization from the owner is not working for us. Could you grant us a different exemption?

I think in prior rulemakings, we saw that more specific for certain devices. But there’s sort of a repeat echo of security research being something if properly defined, that might be permissible through the exemption process. I mean, would you oppose maybe not crossing out all of the statute, but for example, that specific -- you know, could you speak to specific reform proposals, the requirement of authorization being one of them?

MR. WILLIAMS: I guess I would say again that I think that the easier and preferable route to addressing those issues that have already been raised in the rulemaking is to do the streamlined renewal process as opposed to taking this to Congress and asking them to rewrite the statute.
One, because I am worried that there will be unintended consequences, but two, because I also think it’s such a difficult task to draft it in such a way that no one who’s writing a law review article is going to be able to come up with a hypothetical case that would come out the wrong way. And then, people are going to have to come back and present issues to you guys anyway.

So I’m not so sure that trying to rewrite it will actually fix the problem of people needing to bring to your attention issues that are of concern to them. I’m not ready to go through line by line on the things that have been proposed to be taken out and give you a position for my clients on each one of them. But the things that concerned me were the completely striking out the factors that are to be considered. As you said, they’re just factors to be considered. Violations of other laws in the context of these things, that also I think is something that would have to be thought about very carefully.

MR. AMER: Thank you. Mr. --

MR. WILLIAMS: I’m sorry. I had one last
One thing I would just ask you to do, if you do decide to make recommendations in this area, is if you’d go back to, I think, 2010 and earlier rulemaking decisions, there were issues that came up about whether or not you’re entitled to access a movie or another expressive work on every different type of device that you might want to access it on. And the Office consistently concluded that that’s not the case, that you don’t have that right. And I would just ask that if you make changes in this area, you take a look at those prior decisions and just make sure that you don’t overrule them essentially without intending to do so. Thanks.

MR. AMER: Mr. Love?

MR. LOVE: When a -- there’s this automatic protection that is associated with technical protection measures right now and we would prefer a system where you’d apply, pay a small fee and register the fact that you have a technical protection measure that you believe is entitled or should be entitled to
And then, in the application for doing so, that you would describe how you would address legitimate use of users under exceptions, issues of interoperability, perhaps issues of unsets on the protections such as depositing unlock keys for the Copyright Office and that you would have a terms of service for the technical protection measure which describes the impact of the technical protections on what you believe the user rights to be, something along that line where you begin to sort of treat the legal protections of TPMs as a privilege, not a right, and that you associate the privilege with obligations on the person who wants to stay to enforce the right for them, recognizing that there are these competing areas.

I think that that would -- some of the problems you have right now of people are looking for permanent exceptions and things like that. I mean, sometimes it’s because the practices in the TPM thing are so inconsistent with public policy and it’s just the -- it’s obvious that you want -- you want to have
some carve-outs. But people always raise these issues like, well, do you anticipate all the problems and things like that.

I think just starting with the idea that everything’s protected and you have to kind of claw back the exceptions, I think that creates a lot of the problems. If you sort of create the environment where you have to sort of make the case of exceptions for at least that you describe that you believe you’ve met the case at a very minimum, I think it begins to make the whole process more manageable.

Also, I’m a little concerned about the relationship between trade agreements and what you’re doing in this proceeding because you’re -- the government is involved in these trade agreements where you’re creating exceptions about what we have to do within the contents of the trade agreements and then they’re creating these investor state agreements where people can bring lawsuits against the -- or bring arbitrations against the United States around those things that their expectations aren’t met and things like that.
And I think that it would be important for the Copyright Office, to the extent that they’re modifying the rules or changing the rules in this thing to also talk to the United States Trade Representative to make sure that there’s ensuring enough flexibility in our agreements.

And if we change our philosophy about how to do these technical locks on things across a wide range of industries, not just the motion picture industry or the book industry, but in these areas that involve automobiles and consumer electronic devices and all the other things affected by the trade agreements, that we’re not in a situation where you’re trying to do one thing where the United States Trade Office -- Trade Representative is making that difficult.

MR. AMER: Thank you. And that actually sort of anticipated a quick question. So are there any other examples around the world of that sort of system where, you know, providing for a registration of TPMs that you’re aware of, and might that implicate international obligations of the U.S.?

MR. LOVE: I think right now the closest --
the closest model for that would be the obligation in the European Directive that you have responded -- that you have obligations to provide user rights in areas that are part of the Directive, although I don’t think it’s really spelled out very clearly. And it’s not the same as sort of registering works.

I think though that the movement against registration and copyright across the board for everything has been a mistake. And I think the idea -- you could make an analogy between the collateral damage and harm that’s been done by having copyright always -- I mean, everything --

MR. AMER: I think we do --

MR. LOVE: -- on TPMs there’s exactly the same problem. It’s just too sweeping. And the combination of no obligation on the person that’s protected and the fact that everything is automatically protected, those things collectively create a lot of problems.

MR. AMER: Okay. Thank you. Mr. Geiger?

MR. GEIGER: If I can respond to a couple of things Mr. Williams said, part of the reason that we
1 don’t see a ton of litigation on 1201 in security research is because, for two reasons. One, a lot of security research is chilled and by 1201 doesn’t actually get to the litigation stage. You know, so we’ll see researchers get cease-and-desist letters and many times they are not able to -- just don’t have the expertise to evaluate the legal claim. And it just doesn’t go to litigation. And then, second --

MS. SMITH: Can I interrupt? Is that -- are you speaking academically or commercially or both?

Because I know in the rulemaking, there seems to be sort of a divide between the researchers for research sake and those who are perhaps unaffiliated with an organization and then entities such as Rapid7.

MR. GEIGER: So for folks that are unaffiliated with an organization, that’s typically where the cease-and-desist letters tend to have the most impact. If you’re affiliated with an organization, then you have more resources to draw on to evaluate your legal claims. We play in both worlds. We work a lot with independent security researchers and try to help be a steward to that
community. But we also have our own researchers. And in cases where you have an institutional affiliation, a lot of times you just see it ignored, right? You just see -- you see the cease-and-desist letter just kind of ignored, and you say, well, if you want to go to litigation over this for real, then we’ll do that. And often, it doesn’t get to that stage. Either way, the system is broken. It may have made more sense when it was enacted, but as it is now, it’s not working.

And we have --I mean, cybersecurity is a national priority. Everybody recognizes that. So why in the world would we wait for bad cases to be litigated?

Two other points. One is when it comes to not violating any other law, most of these other laws, including the CFAA, provide a private right of action. It would seem odd to us to -- if the security research is violating the CFAA, why suddenly the permanent exception protection should also fall away? I mean, the punishments under CFAA and other laws are already relatively harsh. So why add onto that with
1 copyright? I don’t understand why that would play into it?
2
3 And in addition, if it’s a matter of violating a licensing agreement, then you do have recourse through breach of contract to go after the researcher there. So there are other avenues that don’t need to necessarily rope in section 1201.

4 MS. SMITH: Can I ask you a more targeted question? Because I am hoping that these roundtables sort of focus us on potential areas of reform or why they may not be advisable.
5
6 But if you can trust the encryption exemption with a security testing exemption, security testing exemption I think needs to be with the authorization whereas with encryption you just need to make a good faith effort. And I know in the rulemaking, we heard a lot about the bug bounty programs or front door policy or ways in which there is sort of an understood protocol or norms or ethics that one might go about in getting authorization.
7
8 If we made some revision to call it a good faith effort to get authorization as opposed to a
requirement, would that help you out? Would that be -
do others see problems with that?

MR. GEIGER: So, unfortunately, no. And for
a couple of reasons. It’s definitely better than a
requirement. And our standard practice is that we do
make a good faith effort to try to contact the vendor,
whoever has the flaw. And however, that is not ---
not every manufacturer, not every vendor actually has
a means of being able -- of contact.

And it is a policy that, in fact, the
Department of Commerce is working now to try to get
more adopted through its multi-stakeholder process.
But it is not really the norm among industries right
now. And especially with the Internet of things,
where we’re seeing a lot of companies that are
entering this computer space and that maybe have not
had a lot of experience in it before, they don’t
necessarily think to have a vulnerability disclosure
process. And sometimes, it is very difficult to get
in touch with them. The other problem with it --

MS. SMITH: Well, in that case, wouldn’t you
have made your good faith effort or --
MR. GEIGER: The other problem is that you don’t always know how to contact a vendor. And some of the research that we do is entirely online. Some of it is automated. We have a Project Sonar that scans the entire Internet in fact, does it every week. And it is not always feasible to contact the owner.

And it’s often not feasible to contact -- in the case of Project Sonar, where we’re scanning billions of devices, there are millions of owners. How do you contact all of them? So it’s a best practice. But it is not one that I think the protection ought to hinge on because it doesn’t scale.

You know, you don’t always know the owner.

Even if you do know all the owners, it doesn’t scale and it’s not -- it’s not always the practice of every manufacturer to have an avenue. And so, there is -- we’ve experienced it -- sometimes dispute over whether the effort was good enough.

MR. AMER: I think we’d like to go to Mr. Mohr and then turn to the next topic.

MR. MOHR: Just a couple of pretty quick points. It’s difficult for me to figure out exactly
what Mr. Geiger’s company does. I don’t know 
precisely what they do and how they do it. I would 
actually like to discuss that with him afterwards, in 
a nice way.

MR. GEIGER: Anytime, anytime. I didn’t 
want to take up time in the panel, but I’d be happy to 
do that.

MR. MOHR: That would be -- that would be 
useful. I mean, just a couple of things. Look, I 
mean, computer networks existed at the time this 
statute was enacted. Things are different now. 
Certainly the connectivity of ordinary devices is 
expanding. But our members certainly have -- are 
quite fond of the CFAA, for example, in its current 
form. And they are also quite fond of the DMCA in its 
current form.

We -- again, I mean, a lot of our -- I mean, 
a lot of our concerns are -- they may not be as much 
with the legitimate activities that Mr. Geiger’s 
company does. I mean, sonar to me does not sound like 
cracking. It sounds like looking. That’s not 
something that would necessarily implicate the
1 circumvention of a technological protection measure.
2 And that’s -- I heard that and that’s why it struck
3 me. I was puzzled as to how the DMCA would be
4 implicated in a situation like that.
5
6 MR. GEIGER: So I just used Sonar as an
7 example of a large-scale security research program.
8 And for the most part, Sonar is just looking. And
9 we’re looking at ports and website -- or web router
10 and website connections that are not encrypted or that
11 have -- appear to have no password protection and so
12 forth. And CFAA actually stops us from going further
13 in many cases.
14
15 But I’m mostly using that as just an example
16 for the problem that you would have with scaling for a
17 large-scale research project and something that you
18 are able to provide notice to individuals for.
19
20 MR. MOHR: And my concern would be with a
21 large-scale -- something dubbed a large-scale research
22 project that did much more than let’s say walk around
23 a neighborhood and see whose blinds were down. I
24 mean, at that point, we would have concerns. We would
25 have obviously security concerns and we would have
MR. GEIGER: Well, I understand that. I’m not really sure where the copyright infringement concern is there on your end. But let’s say that it is a project like Sonar that is scanning for routers that are sending unencrypted traffic or that there is a flaw in the implementation of the encryption. And so, you’d want to check to see whether or not that flaw was present in these routers all around the world. And I would guess that you could probably find thousands of routers at least that meet this flaw.

In order to find out that they are in fact flawed, then you may have to test it. And I don’t see where the -- where the problem is for the availability of the copyrighted work. I don’t see where the copyright infringement is. It’d be difficult to get authorization in order to do that beforehand or to inform the router owners directly after the fact. And it would not be covered currently by any of the permanent exceptions. And --

MR. AMER: Yeah --

MR. GEIGER: Sorry. Go ahead.
MR. AMER: Sorry. You all are certainly welcome to continue this after the roundtable. I think we -- I think did you have one more question on --

MS. SMITH: Yeah, before we moved off that, I just wanted to open it up to anyone else who wanted to comment about these three permanent exemptions and specifically the one for interoperability, 1201, if anyone had thoughts on that. So Mr. Dow?

MR. DOW: Just two thoughts very quickly. One is -- I think this goes to Mr. Williams' point that this notion of interoperability -- I don't know what Mr. Geiger's company does either. But just listening to him, I have every belief that what he does is in good faith.

But what we've seen even in some of the CSS litigation is that we've had people who've tried to take advantage of the exceptions for things like security testing and interoperability, but for things that really were just about removing content protection from movies and other entertainment. And so, unfortunately --
MS. SMITH: And so, in those instances, they’re doing it in the name of research or how do they link that together?

MR. DOW: Well, so for example, in the Corley case, you had a defense that was put forward that said that what was going on there was really just a matter of trying to make DVDs interoperable with Linux computer systems because they said there wasn’t a Linux player that could play those DVDs. In fact, there were licensed Linux players at the time.

But the problem was that the way they preferred to make those movies viewable on a Linux player was to remove the copy protection. Remove the encryption so they would play on any player, right? That makes the movie interoperable by making sure that there are no protections, right?

Now, the court saw through that and didn’t see the permanent exemption as applicable in that circumstance. But it was an example of somebody who was not a good actor who was trying to leverage some of these exemptions for purposes other than the ones that were intended. And we need to be mindful of the
1 ability of people to do that in the way they’re
2 crafted.
3 The second point I was going to make -- and
4 this is sort of probably taking my Disney hat off and
5 putting back on my former Judiciary Committee counsel
6 hat -- that this interaction between Mr. Geiger and
7 Mr. Mohr I think just highlights the fact that these
8 exceptions in the statute were very, very carefully
9 negotiated, down to every word between the relevant
10 impacted parties.
11 If we just start going through and crossing
12 out words, we start -- we start upending a balance
13 that was struck. Now, whether or not this balance
14 continues to work today is a totally separate
15 question. But the notion that somehow we could just
16 start rejiggering things and that we would maintain
17 the type of balance that was maintained I think is a
18 concern.
19 If Mr. Mohr and Mr. Geiger go off and figure
20 out what the right modifications are to it and it
21 doesn’t implicate the types of concerns I was
22 referring to, that may be another thing. But I think
this sort of counsels towards a consensus-based approach to these things.

MR. AMER: Ms. Koberidze?

MS. KOBERIDZE: I wanted to pick up on something that Mr. Love mentioned regarding European Directive. Europe went with another approach than the U.S. The U.S. decided to give fewer exemptions and to go with rulemaking process. European Union went with giving an originally long list with exemptions. But some of the countries decided to provide a mediation process.

And maybe with permanent exemptions under 1201, that could be a position for the parties to get into that mediation process, like we just saw with Mr. Geiger and Mr. Mohr. They are open to discussion.

And that would be helpful.

So for example, it could be like the first step would be for the interested beneficiary of the exemption to come forward and contact the copyright holder and say we would like to make certain uses under the permanent exemption. Do you agree or not?

If they do not, then the intended beneficiaries could
go and request certain agency -- in this case, it would be Copyright Office -- to help to accommodate the access or third party assistance, whatever is applicable in the specific -- under a specific permanent exemption.

MR. AMER: Thank you. I do think we need to move on. I want to turn to talking about proposals for new permanent exemptions. And I wanted to start with a proposal that we saw pretty substantial agreement on in the written comments. And that would be an exemption for the print-disabled and visually impaired.

As you know, the current exemption applies to literary works protected by TPMs that prevent read-aloud functionality or screen readers or other assistive technologies. I would be interested in your thoughts about whether Congress might consider making that specific exemption permanent. If so, whether the current language is sufficient or whether it should be altered in some way. And I’d like to start with Mr. Cazares.

MR. CAZARES: I think that I first and
foremost would be remiss if I didn’t recognize the
effort that both the publishing industry and the
libraries have done in the last few years to try and
ensure that accessibility is something that’s
incorporated from the beginning.

I think Ms. Cox brought up a good point on
the exemptions that the libraries really do rely on to
ensure that assistive technology and other
technologies used by the blind and visually impaired
are available, and likewise the publishers have done
great work with their members to ensure that products
are being produced accessibly.

Having said that, I think that it’s safe to
say that for people who are blind and visually
impaired, that circumstance certainly isn’t going to
change. I expect to be blind three years from now.
So I think that the discussion is worth having on
setting up a permanent exemption. I think that the
language that we have now is worth revisiting, with
all of the interested stakeholders.

Accessibility has been something that has
quite literally taken a village to try and bring to
the mainstream. So I think that the discussions that we’ve spearheaded, both with the libraries and the publishers and the discussion that we’re having now is a good start. But I definitely know that the National Federation of the Blind is supportive of such permanent exemption.

MR. AMER: Thank you. May I ask a follow-up? I just would be curious to know your views on sort of how the market -- and you mentioned this at the outset of your statement -- is responding. Have you noticed a change over time, an increase in accessible format copies becoming available in the marketplace, such that maybe the need to circumvent may be diminished?

MR. CAZARES: So I certainly don’t think that we’re at a point where the need to circumvent needs to be diminished, particularly in the realm of education. There’s still a lot of work that needs to be done to ensure that e-books and digital books that are produced particularly with the DRM are accessible. What we’re finding now is that a lot of time authorized entities have to then take such materials
and ensure that they’re accessible. I think that
we’re doing -- we’re making significant progress. But
I don’t think we’re at the happy-go-lucky day where I
can safely say that everything that is produced
digitally, particularly in the literary realm, is
accessible from the beginning.

MR. AMER: Great. Thank you. Ms. Cox?

MS. COX: So you’ve heard me say earlier,
but of course we agree with the position of the
National Federation of the Blind that these permanent
exemptions are necessary. And I would just add a few
points, that as the Obama administration earlier this
year submitted the Marrakesh Treaty for ratification
by the Senate, also submitted implementing
legislation, it’s really important to note that if the
Marrakesh Treaty comes into force, that in order to
comply with the treaty and really make it useful, it
would be good to have that permanent exemption to
ensure compliance with the treaty.

Additionally, as Mr. Cazares pointed out,
that even though, yes, there are more works being
produced digitally, it doesn’t mean that those works
are necessarily accessible, especially in the educational realm. Our libraries work very often with the disability services offices to ensure that we are able to provide accessible formats of various textbooks, which are often not created in an accessible format from the start. You know, we would love for everything to be immediately accessible for our users that are print-disabled. But that’s simply not the case today.

And just, you know, I think -- I think the example of the print-disabled also ties into this question of interoperability because oftentimes individuals with print disabilities have a specific device that they use. And while it might be accessible on one format on an iPad, it might not be accessible on a Kindle. And it’s really unfair to ask someone who is print-disabled to buy five different devices to find the one that works for them.

And this actually came up I believe in the 2006 rulemaking process where the joint reply comments from rights holders groups like the AAP, MPAA, RIAA criticized the American Federation for the Blind’s
evidence showing that four of the five works that they looked at were not -- were not accessible to them. They actually found that three of those four were accessible. They just weren’t accessible on the format -- the platform that was being used to test this in the evidence. So I think it’s really important to ensure that, especially for the print-disabled, that you’re not -- you’re not restricting that exemption.

MR. AMER: Thank you. Ms. Besek?

MS. SMITH: Microphone.

MS. BESEK: This is an appropriate area for Congress to act because I think the history of the rulemaking indicates that this is an exemption that’s regularly been sought and granted without a lot of opposition. And I think there’s strong public policy reasons for raising it to the level of a permanent exemption. So I would favor it in general.

Although, you know, I can’t say sitting here the exact formulation of a past rulemaking is the correct one. And that’s something that we would have to look at. I do have some concerns about the
accessibility discussion that we just had. And you
know, because there’s also the other side of the coin.
You don’t want to discourage the market for creating
accessible versions for other types of devices as
well. So there are both sides of that to consider.

MS. SMITH: Do you have a view as to whether
a discussion about implementing a permanent exemption
along this line should be limited towards sort of the
general subject matter of the prior exemption for the
print-disabled as opposed to accessibility or
assistive technology more broadly?

I mean, we’ve received written comments of
an organization representing individuals with
degenerative diseases, not necessarily related -- so
not necessarily related to e-books or accessing books,
but maybe playing a videogame, for example.

MS. BESEK: At this point, I think because
part of my rationale is that there has been -- there
have been a series of exemptions already granted, I
would mean the print-disabled, that doesn’t mean that
other groups couldn’t seek in the future an exemption
under the rulemaking. And perhaps at some point that
would be deemed worthy of a permanent exemption. But
I think it would be premature to do that right now.

MR. AMER: Mr. Williams?

MR. WILLIAMS: Thank you. I think we would agree that this is an important exemption that’s been in existence now for some time. I think you’re also right to say that there’s generally consensus that it should continue to exist and be renewed. And at this point in time, the market isn’t adequately addressing the problem and that’s why we don’t oppose the existence of the exemption.

I think the streamlined renewal process, again, is something that would be more effective at addressing this than trying to make the exemption permanent for a couple of reasons. The first is my understanding is that there are formats in development that are going to roll out that will make this problem much less significant if it doesn’t go away.

There’s EPUB-3 and HTML-5 which I understand are going to help address these issues. And so, if that were the case and circumvention became unnecessary, then there wouldn’t be a need to have an
exemption sitting in the statute when we could just
renew it through the rulemaking process.

The other issue is that if the language does
need to be revisited, I think that’s something that we
would be open to. But I don’t think I’ve seen any
specific proposals about how that needs to be done.
So that’s something that could be worked out before
the next rulemaking or during the next rulemaking.

If we could come to consensus, we could
address what the changes are that need to be made.
And again, if you put it in the statute as it
currently is drafted or in some new slightly revised
form, then that’s how it will be. And the rulemaking,
the benefit of it is it’s more flexible than that.
You can revisit it. You can figure out, well, if it’s
not fixing the problem, let’s get together and fix the
problem. So that’s I think the better way to address
it.

MR. AMER: Although, I mean, a permanent
exemption wouldn’t preclude future requests
administratively.

MR. WILLIAMS: No, I agree with that. But I
also question whether it makes sense to go through the whole legislative process of putting new permanent exemptions into the statute when it’s unlikely they’re going to end up being the ultimate solution. And I think that’s why Congress created this rulemaking is that it knew there’s going to be a lot of things that come up that we can’t address in the statute. And so, you know, Title 17 is very long already. And if we start putting new things in it that very quickly become irrelevant or become no longer capable of addressing the problems, then I don’t find -- I don’t think that that’s a helpful way to go about it.

MS. SMITH: So, I hear you, but Congress also implemented a variety of exceptions to the prohibition on circumvention, which are these permanent exemptions. I mean, should we treat these on par with a continuously renewed exemption or, you know, where is the line? Why have one for encryption but not have one for assistive technology?

MR. WILLIAMS: Sure, and I think you have to assess every issue as it comes up. As I was saying
earlier, I think a lot of the permanent exemptions appear to have largely done their job in that litigation is not taking place that results in bad outcomes. And I think there’s a lot of people who seem to have concerns about the scope of these exemptions.

But there’s not a lot of evidence that if it actually got litigated, they wouldn’t have addressed the problem. But that being said, the fact that no one is content with them to me indicates that no matter how we work through over the next couple of years creating new permanent exemptions, someone’s going to figure out a reason why in a couple of years they’re worried they’re not going to work right.

And they’re going to come to you with those concerns. And so, I feel like that renders the legislative work that everyone would have to do a little more suspect because there’s already a process that, as I said yesterday, is working quite well where the Office is able to address these things. And if you can get them renewed in a much less burdensome fashion, that to me is far preferable to going with
the legislative route.

MR. AMER: Mr. Love?

MR. LOVE: I don’t know if you’re aware of this, but we spent -- I spent maybe five years of my life working about half-time on -- you know, on this issue. So we’ve followed the debates on it. I’d call attention to -- I mean, if you look at the -- certainly the temporary thing has been a problem for the groups. There’s been years when almost no evidence was provided for the renewal, just because it was such a burdensome proceeding.

And it would have been -- and there was a recommendation by the professional staff to get rid of the exception because the burden had been met in the administrative proceeding. But I think the Library of Congress wisely extended the exception anyhow because it recognized that it was just such a failure of the process and that the need was still there.

So I think the idea of having a permanent exception is appealing, or at least a more durable exception in some ways. The language in the treaty that people have referred to, which says that the --
that you shall take appropriate measures to make sure that beneficiary persons can enjoy the limitations of the exceptions that they should have, is kind of the level of generality where maybe the specifics of how that’s done could be done more administratively.

I’m sympathetic to the idea that rigid statutory frameworks are not necessarily that appealing in a lot of cases.

I know that there was an earlier exception for the blind that had a commercial availability provision in it. And there was a letter on the 21st of September, 2012 from NTIA to Maria Pallante that discussed this issue. And some of this is I think described in a note that Krista Cox is the author of, June 7, 2013, Marrakesh number four, when Krista was working with us, was addressing this issue. And I would recommend that memo because I think it’s quite - - it’s quite well-written and I think it’s informative on this point.

But it’s -- the finding by NTIA was that the interoperability problem had gotten worse, not better. The hope was -- we always hear at these talks that
you’re not going to -- you know, licensing will solve
the problem, technology will solve the problem, blah,
blah, blah, blah.

But then, the thing that Krista mentioned
earlier about the cost of obtaining different devices
-- also in the context of the treaty, you saw people
making these presentations in the treaty negotiations
that would get up and they would show you what was
considered to be accessible.

Like one blind person from South Africa, he
had had a PDF reader. It would read an entire page of
text to him in the sort of permitted format that they
had accessibility. And he was just trying to get the
footnote at the bottom of the page. And he’d try and
copy it down after he’d hear it.

And then, he’d have to start it again and
again and he’d have to do it several different times
because the reader he was using didn’t allow him to
stop or cut and paste and things like that, whereas
other readers that people were using were designed
more functionality and were really easier to use and
more effective for people. Not only could you speed
up the process quite a bit, but you had other abilities to sort of utilize the text in other ways. I think people that are not really familiar with it -- I wasn’t that familiar with it myself and I started to learn about these things -- just don’t really understand how high tech some of the assistive technologies really are and how idiosyncratic they are for the users and things like that. So for that reason, NTIA really changed its position on the commercial availability because they just didn’t think it was really a workable standard.

Now, that said, I think this balance between having a permanent mandate to do something that makes people unequal in the way that you’re supposed to is the right approach. And then, being able to fine-tine the details of how the exception is implemented over time, probably a good idea.

My mother’s deaf. She was one of the people who was excluded from the Marrakesh Treaty because the motion picture industry insisted on that in the negotiations. Her situation’s better today than it was in the old days because we used to have to
buy separate devices to do kind of captioning and now you can get that more -- even Netflix has it these days, which is kind of nice.

   But it is the case that it was I think a disappointment that the Marrakesh Treaty on print disabilities was as narrow. It was a political decision. But it also permitted countries to implement them more widely. And I think U.S. law is wider in a lot of areas, certainly in the area of education. So I think that striking the right balance as to how inclusive it is, but also recognizing that maybe the exceptions are maybe better understood in some areas of disabilities in terms of the overall effect on all the stakeholders is probably accurate as well.

   MR. AMER: Thank you.

   MR. LOVE: So you know, I think maybe -- sort of arguing against myself a little bit -- sort of maybe sort of giving kind of like -- accepting that you sort of know what you’re doing in some areas and you know you should be doing something in other areas, but maybe you’re not quite as confident you know what
that thing is just yet is probably realistic.

MR. AMER: Thank you. I think we’re going
to go to Ms. Koberidze and then back to Mr. Cazares.

MS. KOBERIDZE: I believe there is a strong
support for a permanent exemption for print-disabled
people. And we have rulemaking records since 2003.
We have case law, Authors Guild v. HathiTrust. We
have Chafee amendment and we have also international
obligations under Marrakesh Treaty.
And although despite all this regulations,
print-disabled people still cannot benefit from the
exemptions that are granted within the rulemaking
proceedings. And this is because they need
accessibility and they need third party assistance.
And I think it would be very important when we
consider permanent exemption to consider these two
issues, how to facilitate accessibility and how to
facilitate third party assistance.

Whether it will be through mediation
process, as I mentioned, with the copyright holders or
whether it will be with help of the Copyright Office
or maybe there could be a third solution, to create a
separate management organization similar to Sound Exchange in the music industry which will help to manage third party assistance issues. Thank you.

MR. AMER: Thank you very much. Mr. Cazares?

MR. CAZARES: -- that a couple of great points have been made. I agree in part with Mr. Williams. I think that the forthcoming of EPUB-3 and HTML-5 are going to kind of revolutionize the way accessibility is approached in the mainstream.

But I also want to address the fact of the permanent exemption. The fact is that people with disabilities, particularly the AFB, the American Foundation for the Blind and other folks have been requesting exemptions that have been, by and large, being renewed with little to no opposition because the circumstances really don’t change for people with disabilities.

I think given the notion -- the fact that we have a large number of people who are blind or visually impaired in this country alone guarantees a permanent exemption. I don’t see the need, until the
process is reformed, for the renewal -- the rulemaking process -- I don’t see the reason why people with disabilities, people who are print-disabled have to go through the burdensome process of requesting for and waiting to be granted another three-year exemption. I think that this particular circumstance, given the situation of blind and print-disabled Americans, warrants a permanent exemption.

MR. AMER: Thank you very much. I think we have quite broad agreement on that topic, which is encouraging. We have -- we’re getting close to the end. And so, I think we just had one or two sort of suggestions for permanent exemptions that we wanted to ask your views about.

One proposal that came up in the comments was to make the current unlocking exemption permanent. We’d be interested in your views on the advisability of that. Mr. Dow?

MR. DOW: So I think it was Mr. Adler in the previous panel who read some from the legislative history and the contextual part of the unlocking -- the circumstances of the unlocking legislation. And I
think that that counsels towards an approach that says
a permanent exception for that type of thing is really
not the way to go. And I think that’s not unique to
unlocking per se.

I think that really applies when you’re
dealing with very technologically specific items in
general. But the one thing on the unlocking
legislation specifically was that the unique
circumstances of that was that we knew what that
meant. We knew what it meant to unlock a phone. We
knew that what it meant was the entry of a code,
right?

It was a handful of digits that could be
entered in and the only thing that resulted from the
entry of those digits was that you could connect that
phone to a network. It didn’t expose the content on
the phone. It didn’t expose personal information.
There weren’t privacy interests that were affected.
There weren’t copyright interests. It was a very
narrow thing.

But we didn’t know what that was going to
mean for the next device, right? I mean, that was one
of the issues that we talked about when asking should this be expanded into the context of tablets and other computing devices, right? Does circumvention for the purposes of connecting the device mean the same thing in those contexts? Does it simply mean that you can connect that device to a different network or does it mean that all of a sudden it does implicate some of these other interests that didn’t exist at the time of the cell phone unlocking legislation?

And so, I think the legislative history speaks specifically to that. It talks about that being a unique circumstance and why congress was comfortable doing it. And I think it speaks towards why, in the context of trying to look at that for other devices and in other contexts, it really requires a specific focus and one that’s uniquely suited to something like the rulemaking as opposed to the legislative process and the permanent exemption.

MR. AMER: Thank you. Mr. Love? Oh, that was from before? Okay. Anyone else want to weigh in?

MS. Koberidze?

MS. KOBERIDZE: I support this type of
exemption, although I understand it will be very hard to agree on the language, especially since, as was mentioned a lot today, new devices are coming in and it’s very hard to predict what kind of users and what kind of uses will need to be exempted. But we need to start discussing it now because as the last rulemaking showed, it will be -- it was the beginning.

   All those devices, smartphones, TVs and medical devices. Now we will have Amazon Alexa and then we will have smart homes. And everything will be connected. And a lot of security testing would be needed. A lot of privacy issues will arise.

   And those will not be concerned with copyright law by itself, but because a lot of those devices and technologies use copyrighted material, which is computer programs, it would be helpful to at least start drafting some permanent exemption that will help us to start moving in that direction of unlocking certain devices for certain uses. Maybe it would be very narrowly tailored. But we can at least use the rulemaking record to find out which ones are more important to make now.
MS. SMITH: Can I ask just one follow-up question? Then I think we’re going to move to another proposal.

But just should we consider the specific narrow case of unlocking your phones differently than the broader jailbreaking classes, right, where you’re opening up an activity -- you know, host your device maybe as the technology works differently, sort of going to Mr. Dow’s point and we may not know exactly what software is being implicated for that? Should we treat unlocking differently than jailbreaking?

MS. KOBERIDZE: Yeah. What I’m talking about, unlocking, it means I’m trying to just cover all the aspects, including car tinkering and including jailbreaking. I don’t expect those -- all of those could be even become permanent exemptions. But at least wireless devices, just unlocking, to be able to change carriers.

And it’s interesting how the rulemaking itself resulted in changes on the marketplace because now, even if we look at the Amazon Alexa, the system is open to third party applications. And we don’t --
might not need jailbreaking for that specific device. But changing -- at least changing carriers, I think it could be very helpful to have for the mobile devices.

MS. SMITH: Okay. So I think I’ll go to Mr. Williams next and then, I think, in your answer, you sort of open up where we were going to go next anyways, which is sort of repair and auto tinkering. So if you would like to comment on that, also feel free, since we’re running short on time.

MS. KOBERIDZE: Thank you.

MS. SMITH: Mr. Williams?

MR. WILLIAMS: Thank you. Just on your last question about how to handle jailbreaking, I would be opposed to trying to create a permanent exemption for jailbreaking for the reasons that Mr. Dow expressed related to unlocking and also because even within the context of the rulemaking, there have been things referred to as jailbreaking proposed that the Office has concluded should not be granted.

And going back to what I referred to earlier and Mr. Dow referred to, the Linux situation with DVDs, there are a number of times that people have
sought to impress on the Office that they were entitled to access an expressive work on any device of their choice. And the Office has concluded that’s not correct.

And so, to try to craft a permanent exemption for jailbreaking the things the Office has concluded you should be able to jailbreak, but not sweeping in the things that you’ve already concluded you should not be able to hack and then also address future devices and future products and services, I think that would be a very unworkable task. So I’d be opposed to that.

MS. SMITH: Okay. Thank you. Mr. Love, and I’d ask you to keep it short, just because we are running out of time for all of our next commenters.

MR. LOVE: Right now, the Copyright Office is the decider on a lot of these things. And then, other agencies petition the Copyright Office with their concerns. In the FDA proceedings right now, there’s been requests that the FDA as a regulatory thing regulate some of the -- some of the technical protection measures on medical devices as part of a
broader work they’re doing on medical devices and hospital networks in terms of cybersecurity.

I’m just wondering if in some cases it makes sense for the Copyright Office to farm out some -- like in the jailbreaking case, I mean, maybe the -- I’m not sure that it makes sense for the Copyright Office to be the be all and end all of the decision-making in terms of future way you might imagine doing this or should this be something that you envision that other agencies could -- I mean, does it always have to be your rulemaking authority or could another agency basically be --

MS. SMITH: Thank you. I mean, I do take your point and in fact, in the last rulemaking, the Copyright Office did solicit some viewpoints from other agencies when commenters had suggested that it may fall under their bailiwick.

I think the discussion of jailbreaking is getting a little fuzzy, whereas in the rulemakings it’s been referred to opening up a device in order to install different apps on it. So it wouldn’t -- that wouldn’t necessarily extend to medical devices. But I
do take your point. And Mr. Mohr?

MR. MOHR: Just quickly, I mean, I think, you know, we -- SIIA has had some experience with trying to move I think in hindsight a bit too quickly. So we were supporters of UCITA and I was not representing them but I was at many of those drafting meetings. And what you had was somebody trying to draft a statute that codified practice that would literally change every two months.

We would have new language proposed because AOL did something or CompuServe did something. And it just never stayed still. And I think in terms of -- for a lot of the kinds of things that we are talking about, that the type of flexibility, particularly with, as Mr. Williams mentioned, the kind of streamlining which we’ve discussed and which enjoys pretty broad support, with that type of flexibility, I think you will produce better policy results.

MS. SMITH: Thank you. I know we’re running out of time. I have one final question. Others may have other questions about just some of the other permanent exemptions, if anyone wanted to weigh in on
There’s one, for example, for privacy, if we can beat the hypothetical to death right now, is it working if you want to turn off your smart refrigerator so it doesn’t spy on you or protection of minors, analog devices. There’s one for federal agencies. Does anyone else want to comment on potential reforms to those? Mr. Perry?

MR. PERRY: I thought you’d never ask.

MR. AMER: We appreciate your patience.

MR. PERRY: That’s okay. I won’t repeat what was said in the previous sessions. And our client is a player in the auto aftermarket industry. You know, we haven’t -- to be honest, I talked at length with our client about permanent -- the permanency of the exemption. I think it’s -- and I’m not really sure what a streamlined renewal process would be, as distinguished from permanent, exactly how it would work.

I think if we liked the exemption, we would want it to be permanent. We don’t like this exemption as it’s written so we haven’t spoken about it very
much. The class 21 exemption, as I pointed out in the
prior session sort of morphed from as it was proposed
to as it ended up.

And some of the wording in there with
respect to, “on behalf of the owner or authorized
owner” -- some of the wording in the exemption
essentially for the $200 billion auto aftermarket
industry sort of left them basically hanging. If you
-- and a point I did not make in the prior session was
-- and this may be the only exemption of all the
classes -- the class 21 exemption really doesn’t kick
in from I think 12 months from when it was originally
promulgated.

And it also has an explicit sort of
directive over to the DOT and the EPA, which sort of
ties in with a point that Mr. Geiger made earlier
about, you know, those laws are there. Do we need to
have the Copyright Office in an exemption essentially
give sort of a tentative shout-out over to the DOT and
the EPA saying we just want to make sure that what
we’re doing here isn’t going to violate your laws.

So just to be safe, let’s not make any of
this happen for 12 months. And the effective result, at least for the aftermarket industry, was to basically look at this exemption and say well that basically didn’t really give us much of anything except maybe another year to wait and see what litigation is going to ensue, what kind of lobbying is going to take place.

And you know, if you’re -- if you’re -- however, if you are a car repair enthusiast, starting, I guess, in October of next year, if you want to circumvent and fix your windshield wipers and break into the chip that exists in there, I suppose this exemption is for you.

The reality is that it doesn’t help the average person. It doesn’t help any of us, the average person who drives a car who goes to their local mechanic, which is about I think 70 percent of automobile aftermarket repair is done through your local mechanic. It’s not done at the dealer.

Of course, this ties in hugely to automobile manufacturers and big auto and all the tensions between the automakers and their own dealers, where
there’s great tension, the aftermarket, where there’s additional tension, and, to Mr. Mohr’s point earlier, I mean, I think we fully agree, the expression versus function -- functionality, that dichotomy, it’s not easy. It’s not easy at all. Some cases I think with cars are easier to see than others if you’re talking about a windshield wiper or a door, the button that brings your windows down. But there are a lot of grey areas in this. So sort of a long answer to address a variety of issues that came up earlier. But this particular exemption in class 21 is so watered down and tentative that there’s no reason for us to want this to be permanent as written.

MR. AMER: Thank you. Ms. Koberidze?

MS. KOBERIDZE: I just wanted to add that even ask whether the wording in our permanent exemptions subject to privacy and security and other regulations will resolve the concerns expressed today and earlier in the roundtable regarding privacy issues and safety issues. So will it give some deference to other agencies who are best positioned to address
MR. AMER: Thank you. Mr. Love, and then Mr. Dow, and then, I think we’re going to open it up to the audience.

MR. LOVE: If it was possible, we would think it would be useful if the Copyright Office would have a permanent exception in this to the extent of remedies to anti-competitive practices or possibly you mentioned privacy, maybe that’s another area to that the Federal Trade Commission would spread out and it’s like sort of the idea of not just having this office but maybe kind of a decentralized area where, in addition to whatever you do, that another agency such as the Federal Trade Commission, which deals with anti-competitive practices and interoperability issues on a regular basis may play a role.

Also, I said this earlier in terms of medical devices for the FDA, I think if the FDA asserts some kind of role in the area of security of medical devices and networks, I think they should be able to extend the benefits of an exception and then I think that should kind of be hardwired into the
And the last thing I would say, the final thing would be on the National Science Foundation. I think they should be able to make similar recommendations as it relates to artificial intelligence systems, a topic which we addressed in some of our comments earlier.

MS. SMITH: Thank you. And I just want to make clear, currently under the statute, 1201(i) is an exemption in the Copyright Act for the protection of personally identifying information. So that’s an existing place to either accept, build off from, et cetera.

MR. AMER: Mr. Dow?

MR. DOW: Okay, just very quickly. One thing that I think we really haven’t touched on has been the incentive value of the rulemaking process. The rulemaking process in part was adopted to give copyright owners an incentive to use technological protection measures, to apply them to protect their works in ways that can accommodate non-infringing uses because there was this process that
said if you use these things in ways that cut out non-infringing uses and impair that, then there’s the likelihood that you will wind up with an exception that’s going to allow people to hack into your technological protection measures, an incentive built in there to try and be responsible about the way you apply those.

And I think we’ve seen some of that. There was a comment I think a few minutes ago about maybe some movement that we have seen in the market for accessibility and perhaps having something to do with some of the rulemaking proceedings with respect to unlocking and how that may have driven the marketplace in some ways. Whether we’re talking in security research, whether we’re talking in unlocking and jailbreaking, whether we’re talking in licensing.

And we heard Mr. Turnbull earlier talk about the willingness to talk about solutions to provide licensed mechanisms to achieve these things because the backstop alternative really isn’t appealing. The rulemaking process, the ongoing nature of it, provides those incentives.
The permanent exceptions really don’t provide those incentives. If you have a permanent exception, the incentive is really to say, okay, well I guess we have nothing there. That’s just the way it is. And there’s no incentive to work going forward. So I think it’s just worth remembering that there was a purpose to be served in the incentive nature of the rulemaking. I think it works. I think it has some impact and I think there’s value to it.

MR. AMER: Thank you. We are over time. So I think we’re going to have to leave it there. Thank you all very much. This was very helpful. And now, our final session is an audience participation session. We have a microphone at the back. Oh, here it is at the front.

And so, if you have signed up, you’re welcome to come forward and ask any questions or make any comments either about this particular topic or any of the topics that we’ve talked about. And you can still sign up.

MS. SMITH: Do we have anybody who’s already signed up who wishes to speak? No? All right. All
right. Head on up.

MR. AMER: And if you could just -- yeah, right.

MR. BUTLER: I can lean down.

MR. AMER: If you could just identify yourself? I know who you are.

MR. BUTLER: Yes, of course. Absolutely.

Brandon Butler, from the University of Virginia Library. I just wanted to chime in. Earlier there was a discussion about the scope of section 108 and a question of whether in the context of preservation activities, one would need to necessarily violate the ban on circumvention for purposes of copying as distinct for purposes of access.

And the answer is absolutely yes. Best practices for preservation and for access include to make multiple copies in different formats, often in different locations so that -- for example, you don’t want to be pulling up an emulator of an outdated DRM thing and the original file every time a researcher wants to read that thing that was on Salman Rushdie’s laptop. What you would do is do that once, export
that content into an access copy and then try not to ever have to do that again so that all that stuff stays safe and not changed by the processes that you’re applying in order to preserve the thing.

MR. AMER: Thank you very much.

MR. BUTLER: And can I say one other thing?

MR. AMER: Sure.

MR. BUTLER: Because I was not on the earlier panel about the first panel yesterday, I wanted to weigh in a little bit about the question of competition issues and non-copyright interests that come into play in the context of 1201. Someone mentioned earlier on this panel, I think, the notion that other agencies should be able to weigh in.

And I just wanted to agree with that, that if the question is, if we’re really thinking about overhauling the whole 1201 system, changing the legislation, not just thinking what can we do without changing the legislation, it would be great to have the agencies that really know cars be the ones that drive, so to speak, the process that has to do with cars.
MS. SMITH: Great. I mean, I hate to put you on the spot during open mic time, but currently, there is consultation with NTIA and other agencies can participate in the rulemaking. I think you saw a lot of them did reach out to the Copyright Office or we solicited them. You know, so is it broken and in need of fixing or is it sort of working and you’re just saying I acknowledge that this is happening and that’s okay?

MR. BUTLER: I think there is a real risk that where the interests at the heart of the issue are car safety or consumer safety or competition, that having an agency that deals routinely with copyright issues and with people who care about copyright issues in the driver’s seat consulting the people but ultimately the last word is in the copyright-relevant agency seems maybe like something that is not ideal.

If we could -- if we could move the driver’s seat over to the other agency and then they would consult with you so that you could weigh in and say, you know, no, there’s not a problem for the copyright industries, the primarily copyright-oriented
industries. This is primarily about cars. It would make more sense for them to control and to consult you than the other way around.

MS. SMITH: Yes, and I think the Office has probably, in our defense, has tried to stick to the copyright interests or thinking of it under the title of the Copyright Act. But that’s good to consider.

MR. GEIGER: Can I make a quick point on that, which is that we’re not really seeing the agencies that have relevant expertise in these areas hold back either. So it’s not as if though 1201 is keeping these agencies at bay and they’re not issuing their own regulations or their own legislative proposals to enhance car safety or prevent hacking or circumvention because of 1201.

In many cases, we’re seeing both move forward. In the case of the FDA, they just released their aftermarket cybersecurity guidelines for medical devices. We saw NHTSA come out with -- or at least support legislation that would have addressed hacking in cars. So it’s unclear to us why -- like what benefit 1201 is serving for these agencies if they’re
coming forward with their own proposals or in many cases have existing regulations anyway.

MR. AMER: Thank you. Mr. Adler?

MR. ADLER: At the moment, my name is the only one on that sheet back there, just so you know.

MR. AMER: Oh, okay.

MR. ADLER: Yes, I just wanted to make an additional comment -- the discussion about the accessibility exemption I think was very interesting. When we -- as Mr. Williams indicated -- do think that if we get the streamlining process right for renewal, that renewal with respect to the exemption is more appropriate for all the reasons that were mentioned about flexibility and particularly because of the fact that the market is changing.

It’s not changing fast enough. It hasn’t changed to the point where it is satisfactory. But it is continuing to change. And that’s the reason why commercial availability was always discussed as an exception to the exception, even when we talk about the Chafee amendment. And I would point out that, for example, the importance of access controls cuts in
many different directions.

For example, we helped to validate the legitimacy of Book Share, which was an authorized entity under the terms of the Chafee amendment that became the first authorized entity to exist online and to be able to provide access to accessible format copies of works in digital forms on a subscriber basis.

And we supported that and it was worth pointing out that Book Share uses access controls such as encryption to make sure that when these materials are being delivered to beneficiary persons who are entitled to use them, who need the accessible format copies, that they’re being delivered to the right people. I would also point out that there was a lot of discussion about the Marrakesh Treaty.

With respect to the TPM provision of the Marrakesh Treaty, it’s generally the view that U.S. law already complies with that language precisely because of the exemption that has been created and renewed in the 1201 rulemaking process, as well as a result of the Chafee amendment itself.
But with respect to the comment I just made about Book Share, I would also just point out that there’s an agreed statement that goes along with the Marrakesh Treaty, that in referring to the TPM section, specifically says that because the ability to transport across national borders accessible format copies of works is what the treaty provides for and intends to be able to facilitate, this language was agreed upon:

“It’s understood that to distribute or make available accessible format copies directly to a beneficiary person in another contracting party, it may be appropriate for an authorized entity to apply further measures to confirm that the person it is serving is a beneficiary person and to follow its own practices as described” in the article that delineates what an authorized entity is.

So access controls are going to be important in order for the Marrakesh Treaty to be a success, to make sure that not only can accessible format copies be delivered across national borders all around the world from an authorized entity in one country to
another, but as the treaty also provides, from authorized entities in one country directly to beneficiary persons in another country without having to have the intercession of an authorized entity.

So I would also just mention that we have emphasized the importance of making sure that people understand what an “authorized entity” is, that an authorized entity indeed is willing to undertake what is necessary to make the Marrakesh Treaty a success and to facilitate its purposes properly. And I hope that we will have support for that with respect to others who commented favorably on the notion of the importance of an accessibility exemption in the 1201 process.

MR. AMER: Thank you very much.

MR. MANNERS: Hello. My name is Derek Manners. I’m from the National Federation for the Blind as well. I just wanted to comment briefly. I think there’s a lot of agreement that the accessibility exemption is important. I think it’s nice to hear that we’re sort of debating about how to best preserve it, how to make it easier for everybody
and I think that’s widespread agreement about that.

One point I would like to make though is that Mr. Williams in particular indicated that the rulemaking process encouraged parties to work together. And I don’t think that a permanent exemption would discourage parties from continuing to work together, in particular because many of the entities -- third party entities that have been discussed that have to make things accessible for the blind and print-disabled have legal obligations to do so under sections 504 of the Rehab Act and titles II and III of the ADA.

And so, there will be a continuous dialogue on how to make sure that that’s done well because they have a legal obligation to do so. And that’s going to require buy-in also from the publishers and manufacturers to make sure that it’s not being -- like Mr. Adler was talking about, that there are controls to make sure that it’s not being abused or that copies aren’t getting leaked out.

And so, I don’t think that the permanent exemption would be -- would preclude continued efforts
to work together to ensure that blind people have access to accessible material while still protecting the interest of the stakeholders. Thank you.

MR. AMER: Thank you very much. Did you --

MS. COX: Yeah, I just -- I mean, I wanted to clarify that I agree with Mr. Adler that we can comply with our treaty obligations by renewing this exemption and ensuring that this exemption continues to persist. My point was simply that having a permanent exemption really makes a lot of sense and it would ensure compliance rather than risk at some point that the exemption is not granted in the future.

MR. AMER: Thank you.

MR. PANJWANI: Good afternoon. Raza Panjwani, from Public Knowledge. There are just a few general comments I wanted to add based on this panel and some of the prior panels. I would encourage the Office, as it’s undergoing this study, to adopt a lens of asking what was the bargain in section 1201 between rights holders and the public and is that bargain and the assumptions underpinning that bargain about the marketplace and the incentives actually functioning.
And I think a great example of considering that is that throughout the discussion, we’ve heard some folks say that we think the exemption process is working fine. We think the renewability discussion is academic. And most of the folks making those -- taking those positions are the folks on the rights holders’ side.

And I think it’s important to realize, as Professor Tushnet put it yesterday, that there are asymmetries in the process, that if the process is falling short of its goal, for example, of providing the exemptions that are necessary to the public, that leaves the rights holders whole in a sense, that the ban is working, the 1201(a) prohibition on circumvention is still working.

You know, the process only isn’t working for them when the exemptions go too far. And I think it’s worth sort of noting that because, especially I think the discussion about the renewability being academic I think is important to realize because there have been cases where exemptions haven’t been renewed. And I think for those on the proponent side, it’s not
academic that there is a risk of exemption not being
granted, that the burden is on them to provide the proof necessary to get the exemption. So I don’t think that’s an academic discussion.

And finally, on that point, and especially tying into the accessibility discussion, the example that Mr. Love brought up of footnotes not being accessible, that might be a case where someone might say, well, 95 percent of literature is accessible. That’s just an edge case.

When you’re the user and that particular case implicates you, it’s not an edge case. That is a failure of the system. And I think the exemption process and the user carve-outs in the permanent exemptions aren’t meant to cover those edge cases in particular. So I would urge the Office to consider in terms of evaluating what the burden of proof should be, is considering that edge cases don’t necessarily mean the system is working. Thank you.

MR. AMER: Thank you very much. Did you have another comment? No? Okay. That’s okay. Anyone else? Ms. Koberidze?
MS. KOBERIDZE: Just a quick remark regarding accessibility. So the rulemaking exemption for print-disabled people was renewed since 2003. Today, now it’s 2016 and still there is statistics that over 90 percent of the books are not available in the form for print-disabled. And even tech companies like Microsoft, in their comments, they agree on that. And they fail and they acknowledge that they were not able to accommodate all the needs of the print-disabled people.

MR. AMER: Thank you. Mr. Love?

MR. LOVE: Well, I want to mention I was contacted recently by someone who supported our work in the past in different areas. And he asked me a bunch of questions about artificial intelligence. And I guess he was -- he was following a lot of things that you’re beginning to see more and more in the literature of concerns about the potential, really almost existential threat or at least in some people’s minds these things kind of represent, different points of view.

But then, there’s like a wider range of
things about just as we get enveloped more with software that we barely understand what’s going on in our lives, you know, we’re being told what movies to watch or how to drive to work. I mean, it’s just become such a huge part of our life these days that this idea that you need to audit and monitor and understand better these forces which are shaping our lives.

I don’t think people are really here to cut up with how different life is today than it was five years ago, 10 years ago or 20 years ago in terms of the relationship between us and software. And I think it’s important to realize that being able to look under the -- to have somebody to have the authority to basically take a look under the hood to sort of see what’s going on is going to become more important, not less important.

So to the extent that you’re making the system more leaky, not less leaky, I think that’s a good thing, not a bad thing. I just wanted to say that.

MR. AMER: Thank you very much. Oh, Mr.
Williams?

MR. WILLIAMS: Thanks. Briefly, I just wanted to return quickly to something the gentleman from Public Knowledge just said about considering, you know, is the bargain that was struck in 1998, is that being met and are rights holders fulfilling their end of the bargain. And I think if you look through the several pages of our initial filing in this proceeding and in all of our rulemaking filings, you’ll see that there is just a vast array of new products and services that have hit the market and that my clients have been meeting their side of that bargain to the best of their ability.

And I just wanted to make sure that that was on the record. I think consumers have benefited greatly from the existence of 1201. There are all kinds of products and services that no one would have thought would be available that have been made available. Thank you.

MR. AMER: Thank you very much. That concludes today’s session. Thank you all very much.
(Whereupon, the foregoing adjourned at 12:46 p.m.)
CERTIFICATE OF NOTARY PUBLIC

I, Natalia Thomas, the officer before whom the foregoing proceeding was taken, do hereby certify that the proceedings were recorded by me and thereafter reduced to typewriting under my direction; that said proceedings are a true and accurate record to the best of my knowledge skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Natalia Thomas
Notary Public in and for the District of Columbia
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I, BENJAMIN GRAHAM, hereby certify that I am not the Court Reporter who reported the following proceeding and that I have typed the transcript of this proceeding using the Court Reporter's notes and recordings. The foregoing/attached transcript is a true, correct, and complete transcription of said proceeding.

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