

US COPYRIGHT OFFICE PUBLIC ROUNDTABLE MEETING

Wednesday, May 25, 2016

9:00 a.m.

University of California Hastings School of Law

200 McAllister St.,

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

2 MS. SMITH: Hello everyone. I think we're
3 ready to get started. Thank you and welcome to the
4 Copyright Office's Section 1201 Study. I'm Regan
5 Smith, Associate General Counsel of the Copyright
6 Office and I'll let my colleagues introduce themselves
7 then.

8 MR. AMER: Hi. I'm Kevin Amer, Senior
9 Counsel in the Office of Policy and International
10 Affairs of the Copyright Office.

11 MS. MOSHEIM: I'm Abi Mosheim Attorney
12 Advisor in the Office of the General Counsel at the
13 Copyright Office.

14 MS. SMITH: And before we get started with a
15 few, we wanted to say thank you to U.C. Hastings for
16 letting us host this event as well as a couple of
17 words about the purpose of this study. So U.C.
18 Hastings has been incredibly generous in offering us
19 their space and we wanted to thank Dean Faigman,
20 Professor Depoorter, Lan Tran, Tom McCarthy, media
21 services and the ITS groups for all of their
22 assistance. In terms of the purpose of the studies,

1 as you probably know the Copyright Office is doing the
2 study at the request of the House Judiciary
3 Committee's ranking member -- request to Register of
4 Copyrights at an April 2015 Copyright Review Hearing
5 where the Register testified that the impact and the
6 efficacy of Section 1201 merit analysis.

7 In enacting 1201 in 1998 as part of the DMCA
8 Congress recognized that technological measures can be
9 deployed not only to prevent piracy and other
10 economically harmful unauthorized uses of copyrighted
11 material but also to support new ways of disseminating
12 copyrighted materials to users. Accordingly, Section
13 1201 protects circumvention of technological measures
14 employed on the behalf of copyright owners to control
15 access to their works as well as trafficking in
16 technology or services that facilitate circumvention
17 of either access controls or so-called copy controls.
18 The Section 1201 statute also includes a triennial
19 rulemaking process through which the Librarian of
20 Congress, following a proceeding conducted by the
21 Copyright Office and consultation by with NTIA, may
22 grant limited exceptions to 1201. This rulemaking has

1 expanded with each successive cycle.

2 The first rulemaking conducted by the
3 Copyright Office received nearly 400 comments and
4 resulted in the recommendation and adoption of two
5 exemptions. The sixth rulemaking, which was concluded
6 in October 2015, the Office received nearly 40,000
7 comments, considered 27 categories, and 22 exemptions
8 were ultimately recommended and adopted by the
9 Librarian.

10 Some of these categories concern the ability
11 to access and make non-infringing uses of expressive
12 copyrighted works including motion pictures, video
13 games and e-books while others sought access to
14 copyrighted computer code in devices ranging from cell
15 phones to smart TVs, automobiles, tractors, 3D
16 printers, and pacemakers. In writing her
17 recommendation, the Register of Copyrights said it has
18 become clear that Section 1201 has played a critical
19 role in the development of secure platforms for
20 digital distribution of copyrighted works but it is
21 also impacting a wide range of consumer activities
22 that have little to do with the consumption of

1 creative content.

2 It has also become obvious that the
3 regulatory process become burdensome for some,
4 especially when proponents are trying to renew an
5 action and exemptions previously enacted and that some
6 of the permanent exemptions may have not been
7 anticipated concerns that have arisen since 1998.

8 We thank you for those who have submitted
9 written comments which we are studying carefully and
10 we hope these roundtables will facilitate a deeper
11 discussion. And now we'll start the first session.

12 MR. AMER: Thank you. Before we begin I
13 just would like to go over a few logistical items.
14 First, as you know, the roundtable sessions today will
15 be moderated by us here at the table who will pose
16 questions to begin the discussion on particular
17 topics. And to indicate that you would like to make a
18 comment, we ask that you turn your name cards
19 vertically like this so we will then call on you, and
20 just given the number of panelists and the number of
21 topics that we're hoping to cover we ask that you
22 please try to keep your comments limited to about two

1 to three minutes. We apologize profusely in advance
2 if we have to intervene to cut you off but we may have
3 to that and we appreciate your understanding about
4 that.

5 Secondly, just wanted to note that our final
6 session of the day invites comments from the audience
7 and, time permitting, additional comments from the
8 participants. For the audience there will be a signup
9 sheet and again we ask that any comments made in that
10 session please be limited to about two minutes.

11 Second -- or third -- today's event is being
12 live streamed and video recorded. Participants, we
13 provided you with a video release form. If you have
14 not yet signed that we ask that you please do so and
15 return it to us. We would need those back by the end
16 of the sessions today. For audience members if you
17 decide to participate in the audience participation
18 session at the end of today, you are giving us
19 permission to include your questions or comments in
20 any future webcasts and broadcasts of this event. In
21 addition, as you can see, we do have a court reporter
22 transcribing the proceedings.

1 Finally, we just would like note that we may
2 seek additional written comments in response to some
3 of the issues that have come up in the last roundtable
4 session and that may come up today. If we do so, of
5 course we will provide a formal notice of inquiry once
6 again.

7 So at this time I just would like to ask
8 everyone in the audience to please turn off or mute
9 any devices that might interfere with the recording
10 and does anyone have any questions about any logistic
11 matters before we get started? Yes.

12 UNIDENTIFIED FEMALE SPEAKER: (inaudible -
13 off mic)

14 MS. MOSHEIM: The Hastings, it should be on
15 the Hastings website. We have a link.

16 UNIDENTIFIED FEMALE SPEAKER: (inaudible -
17 off mic)

18 MS. MOSHEIM: Right, right.

19 MR. AMER: So if there are no further
20 questions I think we're ready to begin the first
21 session. I will just read the description from the
22 agenda. This session concerns the relationship of

1 Section 1201 to copyright infringement consumer issues
2 and competition. This session will explore the role
3 and effectiveness of Section 1201 in protecting
4 copyrighted content and will consider how the statute
5 should accommodate interests that are outside of core
6 copyright concerns. And before we launch into the
7 discussion I just wanted to invite all the panelists
8 to please introduce themselves and state their
9 affiliations starting with Ms. Chertkof.

10 MS. MOSHEIM: Oh, I think the mics are
11 always on for everyone. Just so you know.

12 MS. CHERTKOF: Hi, I'm Susan Chertkof. I'm
13 the Senior Vice President for Business and Legal
14 Affairs for the RIAA.

15 MS. GELLIS: I'm Cathy Gellis. I'm a lawyer
16 in private practice and I do work with innovation
17 policy and have participated in the rulemaking on this
18 comment. I participated in this study on behalf of
19 the R Street Institute. I'm not here representing
20 them this time but I may happen to say things that
21 were very similar to the contents of that comment.

22 MR. LERNER: I'm Jack Lerner. I'm here on

1 behalf of the International Documentary Association,
2 Kartemquin Educational Films and Film Independent.

3 MR. RILEY: I'm Chris Riley. I'm the head
4 of public policy for Mozilla, the open source software
5 company, maker of Firefox.

6 MS. SAMUELSON: Hi, I'm Pam Samuelson. I
7 teach at U.C. Berkeley. I'm also president of Authors
8 Alliance but I'm here today for myself as a law
9 professor who's been studying the anti-circumvention
10 rules for 20 years.

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

14 MR. STOLTZ: Mitch Stoltz. I'm a Senior
15 Staff Attorney at the Electronic Frontier Foundation.

16 MR. GOLANT: Ben Golant with the
17 Entertainment Software Association where I am the
18 Chief Counsel for Intellectual Property Policy. Thank
19 you for allowing me to participate today.

20 MR. AMER: Thank you all. So I think we
21 wanted to start with just sort of a general question.
22 The first panel obviously concerns the overall

1 effectiveness of Section 1201 and we have diverging
2 viewpoints in some of the comments. A number of the
3 commenters talked about how in their view Section 1201
4 really has given rise to a lot of distribution models
5 and new business channels that allow consumers to
6 access content in a lot of different ways. Others
7 really question the relationship between the legal
8 protections provided by Section 1201 and the
9 effectiveness that TPMs may provide to consumers.

10 So I think to get started we just would like
11 to hear your general views about to what extent you
12 feel that the development and use of effective
13 technological protection measures are attributable to
14 the protections provided under Section 1201. Mr.
15 Sheffner.

16 MR. SHEFFNER: So when Congress passed the
17 DMCA in 1998 one of the stated, the main stated
18 purpose of passing 1201 was to give copyright owners a
19 certain level of certainty that their works would not
20 be widely pirated when they were placed on the
21 internet.

22 Again, it was meant to encourage the

1 distribution of copyrighted works on the internet. By
2 that measure it has been a rousing success. Back in
3 1998 there were virtually no ways to legally access
4 movies and television shows on the internet. Today,
5 sitting here, there are approximately 115 legal ways
6 to access movies and television shows on the internet,
7 over 400 worldwide.

8 Virtually every single one of those
9 distribution models, and there's a wide variety in how
10 they're done, but virtually every single one of them
11 are protected in some way by DRM, whether they be
12 access controls or copy controls. And as we've
13 actually seen the distribution models move from
14 ownership from a physical item like Blu-Ray disc or a
15 DVD towards access-based models, whether it's
16 subscription models like Netflix or Hulu or iTunes, et
17 cetera, access is really what's at issue here.

18 And, again, the protections in Section 1201
19 of the DMCA against authorized, unauthorized access
20 and, also very importantly, trafficking tools and
21 devices and services that allow you to circumvent
22 those access controls are vitally important to the

1 industry today, even more so I would say than 1998.

2 MR. AMER: Thank you. I'm not sure who is
3 next so I'm going to go down the line. Ms. Chertkof.

4 MS. CHERTKOF: I would echo much of what Ben
5 said. It's been well publicized in the music industry
6 that the industry is shifting from an ownership model
7 to an access model and that access is really kind of
8 where all the growth is. In Q1 of 2016, for the first
9 time ever Warner Music Group announced that the
10 majority of its recorded music revenues came from
11 streaming and the year before that they announced that
12 streaming exceeded their download revenues but now
13 streaming is the majority.

14 There was also a recent press report that
15 Universal Music Group was earning \$4 million a day
16 from streaming. So these access models are really the
17 key to the future of the music industry and you can't
18 have an access-based model if you can't control
19 access.

20 If you're trying to earn money from selling
21 people access to your recordings, you need to be able
22 to know whether somebody has paid for the access or

1 they haven't paid for the access, otherwise there's no
2 business left there. As far as whether they're, you
3 know, they've brought about what they were supposed to
4 bring about, we have a website called Why Music
5 Matters that lists about 75 digital music services
6 that have been directly licensed by the major record
7 companies. IFPI runs a similar website called Pro
8 Music and they list over 400 digital music services
9 that have been licensed worldwide and I think that's
10 attributable to the fact that circumvention is
11 prohibited both here and elsewhere pursuant to the
12 treaties that gave rise to this law.

13 MR. AMER: Ms. Gellis.

14 MS. GELLIS: Thank you. I wanted to jump in
15 at this point I think the question presupposes --
16 there seems to be the presumption built into it that
17 1201 is a good thing or it may in some aspect be a
18 good thing and I think I want to, I'm sure return to
19 this point, question, that assumption of whether it's
20 a good thing.

21 In discussing how does this help certain
22 business you have to also ask the question of and how

1 many businesses has this hurt? How many businesses
2 has this killed? How many enterprises and innovation
3 can't go forward because they're running into the
4 anti-circumvention protections or some other language
5 within 1201?

6 I think that's absolutely core to the
7 question in deciding whether this is functioning at
8 all in the way it intended because it's clearly, it
9 appears to be functioning in some ways it may not have
10 been intended or if those ways were intended a second
11 look needs to be given to them. There's demonstrable
12 harm happening to businesses and innovation and that
13 has to be part of the inquiry and I suggest at this
14 point that one of the problems is that 1201 extends
15 beyond dealing with essentially digital rights
16 management or the consumption of a traditionally
17 expressive work whose market is not for the thing it's
18 on but the expression itself.

19 When we start seeing TPMs everywhere, which
20 we are, then we see something that -- that's where we
21 start to see the harm. So if we want to look at in
22 the context of purely expressive copyrighted works is

1 this a good thing or a not thing, I think the first
2 thing to do is tease out that there's an entire
3 category of ways that 1201 is applying that is
4 negative and then we can also look at whether even in
5 the capacity of the traditional copyrighted works
6 whether it's being a good thing. And I think others
7 on this panel will suggest -- perhaps not. But I
8 think the first thing is that it is reaching beyond
9 that scope where it's not just delivering that
10 potential benefit but an awful lot of harm that needs
11 to be acknowledged.

12 MS. SMITH: So I think you've jumped ahead
13 to some of the follow up questions that we would have
14 but we did start with a first premise of what 1201
15 says they were trying to do. So given that and given
16 these core consumptions of expressive content through
17 DRM, so you think, can you maybe agree with Mr.
18 Sheffner and Ms. Chertkof that it might have worked
19 for their industries? It might have been a good thing
20 in that context whether or not it's leaked over to
21 other areas that we can discuss?

22 MS. GELLIS: I don't think I could agree

1 with that because it's also interfering with clearly
2 fair uses and the fact that it does interfere with
3 fair uses I think is a problem full stop. So even if
4 it may have certain upsides for business that's a
5 pretty tremendous downside for part of the copyright
6 bargain which is what the public gets out of it. So
7 the public is taking a hit and if the measurement is
8 how bad that hit is versus what the upside is for
9 certain businesses, I'm not sure that tips in the
10 balance of benefit to business. I think that's a
11 pretty significant cost.

12 MR. AMER: Mr. Lerner.

13 MR. LERNER: So I'm here on behalf of the
14 independent film making community. Our comments
15 represent the views of hundreds of thousands of film
16 makers and arts organizations. We are creators and
17 our entire membership comprises copyright holders.
18 But the Section 1201 has not worked for us. We have
19 not found that it is anything that prevents piracy.
20 We have been victims of online infringement and online
21 infringement doesn't distinguish between high revenue
22 and low revenue producers. What we found over and

1 over in talking to our constituency, our members, is
2 that it chills speech, it makes film making more
3 expensive, and it has created fear and befuddlement
4 across this community.

5 I think that Ms. Chertkof and Mr. Sheffner,
6 we appreciate that DRM is used and is a useful tool.
7 Our works are distributed with DRM and our works are
8 subject to the documentary film making exemption and
9 possible other exemptions. We understand that, and we
10 appreciate that. To me, I don't see a correlation
11 between the legal protections of 1201 and the models
12 that Mr. Sheffner and Ms. Chertkof talking about,
13 right? So to me it's where is the connection between
14 these special legal protections and these DRM models
15 because I think it's important to look also at whether
16 1201 has created a dent in online infringement, and I
17 would argue that it has not.

18 Many DRMs have been broken and the thing is
19 that lawful, people who want to abide by the law and
20 who want to do the right thing end up hamstrung by
21 1201, At least in the film making community. At the
22 same time people who want to go ahead and access

1 materials or do whatever go ahead and do that. And so
2 it's had an effect that really punishes people that
3 want to do the right thing and has had little to no
4 effect on people that have no interest in doing the
5 right thing.

6 MR. AMER: Thank you. Can I just follow up?
7 Something -- that sort of hamstringing effect that
8 you're talking about. Is that primarily, in your
9 experience, the result of just sort of the specter
10 that someone could come forward and bring an
11 enforcement action under Section 1201? I'd like
12 others' views on this as well because it sort of goes
13 to the question of how commonplace are efforts to
14 enforce 1201 by copyright holders? I mean, I think we
15 had some divergence in the comments. Are these types
16 of actions relatively common? Are they relatively
17 rare? And apart from litigated cases are you
18 experiencing cease and desist letters, that sort of
19 thing, or is it more just the existence of this law
20 that you find is inhibiting the types of uses that you
21 would like to make?

22 MR. LERNER: Well, there have been

1 enforcement actions against film makers but it's not
2 that we don't see this as much as you'd see a cease
3 and desist letter for example a regular fair use that
4 deals with the straight up copyright infringement or
5 accusations of that. But I think the bigger question
6 is can you read the law and can you read the
7 Register's interpretation of the law? And that
8 clearly says for example that merged access and use
9 controls should be treated functionally like an access
10 control which means that even though you've bought the
11 material you have bought the player for the material,
12 you have gotten counsel as to whether something is
13 fair use. It's a slam dunk fair use. Then you're
14 told, yeah, but you can't rip it from Blu-Ray. You
15 can't rip it from a DVD. You can't take it from an
16 online stream.

17 And I have to tell you that I've been
18 personally working with this on behalf of this
19 community for nearly eight years and I can't tell you
20 the number of times where I've explained this law and
21 how it's been interpreted to people and I've been
22 greeted with laughter. And it's not --

1 MS. SMITH: Are you speaking outside of the
2 documentary community or to the documentary community
3 since the exemption --

4 MR. LERNER: Both documentary community as
5 well as the larger independent filmmaking community
6 that also includes internet films and also just
7 speaking with lawyers, doing CLEs. I was at one
8 recently and this has happened with lay people, with
9 students. Often the reaction is laughter. It's
10 incredulity that something that's clearly lawful could
11 still be illegal. And so I don't think -- I mean, I
12 think there's a legitimate fear here and I think
13 that's why we care so much is because there is a
14 legitimate fear here.

15 People spend a lot of time advocating for
16 these exemptions and people spend a lot of time
17 advocating against them because the law is real and
18 the interpretation is in many cases very clear.

19 MR. AMER: Mr. Riley.

20 MR. RILEY: Thanks. I'll save for later
21 questions of my commentary on the impact of this on
22 open source software development, and I'll try to

1 stick to what I think is the theme of this question.

2 I think we can all agree or at least to one
3 degree or another that the emergence of these legal
4 businesses to sell licensed content to users that this
5 is a good thing. Certainly users want that and that's
6 why although we have some strong objections to digital
7 rights management and technologies in other ways we
8 work to enable its integration into Firefox because
9 our users want it.

10 I do want to second Jack's comments about
11 questioning the relationship between this legal and
12 technology framework and the emergence of these
13 business models and I'll cite back to the music
14 industry where over time user frustration with DRM led
15 to more and more non-DRM, non-encrypted downloads
16 being made available subject to the same legal
17 prohibitions on redistribution, but I think it's a
18 little bit more complicated than a simple picture
19 would say.

20 To the question of how effective is this?
21 We are not in as good a position as others to speak to
22 this but I was at the 512 roundtables where the theme

1 of the day is, piracy is out of control and we can't
2 stop illegal copies of our full length feature films
3 and other works from being downloaded. So I question
4 how effective this can be when I just returned from a
5 roundtable where all of these problems are being
6 pointed to.

7 And finally I want to second the notion from
8 Cathy and Jack that separate from the question of how
9 is it working to control piracy and infringement we
10 can't look at this in isolation from the purpose of
11 copyright law as a whole. And so the effect that this
12 has on fair use is not something that I think we can
13 set aside and I think that it's something that needs
14 to be considered deeply in evaluating the impact of
15 this.

16 On your follow-up question, Kevin, I do
17 think there is a deep fear within many software
18 developers about tinkering with code because of this.
19 We see it in some of the stuff that we get into later
20 I'm sure about the permanent exemptions in a later
21 roundtable and maybe to some degree later in this
22 comment. But there is a significant chilling effect

1 on tinkering with technology as a result of this law
2 and that's something I think although difficult to
3 quantify that we need to keep in mind.

4 MS. SMITH: In your experience with the
5 Firefox product do you think, you know, say just get
6 rid of the law but still have these technological
7 protects would people still sort of follow the roads
8 of the DRM? I mean, consumers generally want to go
9 the right way is something we've heard. So if you're
10 asked for a password you're not going to try to get
11 around it.

12 MR. RILEY: I think that's right by and
13 large. I think that what would change is that there
14 would be a greater ability to use open source software
15 of other forms in conjunction with this and to
16 innovate and explore other ways of interacting with
17 the content that now people are afraid to do with this
18 legal and technical framework.

19 MR. AMER: Professor Samuelson.

20 MS. SAMUELSON: Hi. So I think the thing
21 that 1201 has done most effectively is kill any market
22 for circumvention tools. I think that's -- that was

1 actually the primary motivation for enacting it in the
2 first place, and, while I've criticized that law on a
3 number of occasions, I have to say, boy, that one was
4 really effective.

5 I think the main purpose for my being here
6 today and to talk with you is really about
7 1201(a)(1)(A) and the scope of 1201(a)(1)(A) which I
8 think is deeply troubling for many people, especially
9 people who tinker with technologies.

10 Much user innovation actually comes out of
11 tinkering with technologies. I was at an all day
12 workshop with computer security researchers back in
13 November of this year and for those people 1201 is --
14 1201(a)(1)(A) is a real, serious concern. And so the,
15 you know, they made an effort this year to get
16 exemptions and I think the -- we were all happy, those
17 of us who care about cyber security, to see that the
18 Office did recognize that there are some legitimate
19 reasons to circumvent that the Office might recognize.

20 And I think that's something that we commend
21 the Office really for identifying a number of respects
22 in which circumventions actually are being done for

1 lawful purposes and that if the anti-circumvention
2 laws are thwarting that that's actually something that
3 we should do something about. But I think that the
4 main thing I wanted to try to say today is that the
5 credibility of copyright and the credibility of the
6 Copyright Office is partly on the line here because of
7 the breadth of 1201(a)(1)(A) as it has sometimes been
8 interpreted because we do see tractors and cars, and
9 next time it's not going to just be medical devices.
10 It'll be refrigerators and it'll be everything that's
11 connected to the internet.

12 And so my concern, and I think the Office
13 shares this, is how can we interpret 1201, especially
14 (a)(1)(A) in a way that essentially limits its scope
15 so that it does the job in protecting copyright
16 content that it was intended to do rather than
17 essentially regulating the entire economy.

18 MS. SMITH: I mean, I do want to give
19 everyone else a chance to speak, too, but just very
20 briefly on the last thing you said, do you think it's
21 giving the chance to interpret the existing statute or
22 do you think it's more of a call for necessarily

1 statutory reform for 1201(a)(1)(A)?

2 MS. SAMUELSON: Well, I would love to see
3 some statutory reform because I think that it could be
4 made -- it could be made more precise. Right now it
5 is ambiguous in ways that I think we would not want
6 it. I think that in terms of the rulemaking that
7 there are some factors that you'd want to put in the
8 statute today because back in 1998 and the like we
9 weren't anticipating a lot of the things that have
10 happened. So if there is statutory reform, I think
11 that's a constructive thing, but I also think that
12 there are things the Office can do in terms of
13 interpreting Section 1201 that would mitigate against
14 some of these.

15 So for example, under the factors that can
16 be considered, I think the other factors doesn't
17 include everything in the world. It should be
18 copyright-related interest that would be affected, and
19 that copyright-related interest includes interest of
20 consumers of copyrighted content and not just of the
21 copyright industry.

22 MR. AMER: Thank you. And we definitely

1 are, I think in the next question, going to try to get
2 into some of these proposals that people have
3 suggested that might try to focus 1201 on what we call
4 core copyright concerns.

5 First, I want to get to Mr. Stoltz and Mr.
6 Golant, and I've seen some cards go up. I think I'm
7 going to move to the next question after that but
8 obviously feel free to incorporate your previous
9 points in responding to that question. So Mr. Stoltz.

10 MR. STOLTZ: Thanks. On this question of
11 the connection between Section 1201 and the current
12 marketplace for digital media, I don't think -- I
13 think we need to separate the use and, the various
14 uses of access controls of DRM from the prohibition on
15 circumvention. They're not the same thing. The
16 notion that we've heard, in comments and at the
17 rulemakings and whatnot, that Section 1201 led to the
18 current state of digital media confuses correlation
19 with causation.

20 Yes, both of those have happened in the past
21 18 years. The causal relationship I think has never
22 been shown. Of course, there is no but for world. I

1 suppose maybe we could look at countries that have
2 anti-circumvention, but I don't think there are too
3 many those in the developed world. There is one data
4 point that I could mention that I think disproves that
5 connection and that is this. The prohibition of
6 circumvention, when it is raised in actual litigation,
7 is almost always redundant.

8 We did last summer a survey of reported
9 cases in which 1201 claims were raised. We looked at
10 50 cases. You know, 48 of them there were other
11 claims raised. You know, across the board, almost
12 regardless of the subject matter there was -- in
13 addition to a circumvention claim -- there was
14 copyright infringement, secondary copyright
15 infringement or the Computer Fraud and Abuse Act or a
16 commercial tort or some combination of those.

17 In other words, where there is actual
18 harmful conduct going on, there's always another law
19 that covers it. And that's also why for that same
20 reason any deterrent effect of the prohibition on
21 circumvention is deterring law abiding people but
22 probably not deterring people who are essentially

1 willing to commit copyright infringement or illegal
2 unauthorized access to someone else's computer and so
3 on and so forth.

4 And the other data point I do give mention
5 is there is a great deal of media out there that is
6 sold successfully and profitably without DRM and that
7 includes film, includes music, includes video game.
8 We've listed some of those in our comments and that's,
9 you know, that's out there and I also think serves
10 essentially to break that link of causation.

11 And then finally on Kevin's question, and I
12 guess I think echoing what Jack said, we don't know
13 what gets said between counsel and independent film
14 makers, small software developers, we're not privy to
15 those conversations, but that is -- I have counseled
16 clients on this, particularly folks in software and I
17 would say sort of amateur and critical media and
18 absolutely I'll have to say, you know, did you
19 circumvent? You know, this is something you have to
20 keep in mind. Obviously these conversations are going
21 on all over the place.

22 So even where we're not seeing demand

1 letters or litigation there's an effect on these uses.
2 So either one of two things is happening. Either
3 people are being deterred even before they actually
4 receive the threat or they're violating the statute
5 unknowingly. That's a problem because essentially
6 laws that don't make sense, laws that seem odd to
7 people, laws that are beyond people's expectations
8 until they have that awkward conversation with their
9 lawyer are a problem because they -- I think they hurt
10 respect for the law in general when, you know, when
11 there are laws that are difficult for the public to
12 accept and that seem to bar and punish, good behavior.

13 MR. AMER: Mr. Golant.

14 MR. GOLANT: Well, thank you again for
15 letting me speak today, and I want to first echo my
16 strong support for both Ben and Susan's earlier
17 comments. I think and ESA thinks that 1201 has been a
18 tremendous success on many different levels both in
19 terms of allowing access to the marketplace, the
20 online marketplace as well as preventing piracy. And
21 in fact listening to the conversation that was going
22 on yesterday about software and what was talked about

1 in some respects with video games, I have to say that
2 if you take the current protections under the act for
3 software as a creative work, combine those with the
4 protections of 1201, you have a really strong package
5 that has allowed members Sony, Nintendo, Microsoft and
6 others to go forward and provide thousands of
7 different video games through several different
8 platforms, be it online, mobile, through consoles, et
9 cetera, and perhaps even with the new virtual reality
10 headsets that are coming out. You'll see a whole new
11 array of games to play on that.

12 And so anyone who says that the statute is
13 over-reaching, it certain is not for our industry.
14 It's important for it to be as it is as is the
15 protection for the software generally. The whole
16 package has allowed for not only for the benefit of
17 the members of ESA but also for the public. We love
18 our fans. Fans love video games. In fact, we'll have
19 E3 live for the very first time for consumers next
20 month and 20,000 people within hours got free tickets.
21 It's completely sold out. It just shows how the
22 entire ecosystem, that includes the DMCA provisions

1 and the provisions under Section 106, that it's led to
2 a tremendous success story for both industry and for
3 the public.

4 MS. SMITH: Mr. Golant, would you like to
5 speak to Mr. Riley's point that it may be the
6 existence of the, you know, the use of the
7 technological measures as opposed to the statute
8 backing that up in (a)(1)(A) specifically? Do your
9 members look to the statute as well as just employing
10 these technological measures into their product?

11 MR. GOLANT: I think that the statute has
12 allowed members to be creative in ways to protect its
13 content through DRM measures and then having 1201 on
14 top of that gives them a modicum of assurance that
15 they can go forward to create more and new things. In
16 fact the entire system as I said before leads not only
17 to the creation of innovative products but also
18 goodwill among our consumers.

19 MR. AMER: Thank you. So I wanted to turn
20 now to some of the proposals that have been made to
21 try to reform Section 1201. And really, one of the
22 fundamental points of disagreement I think that we saw

1 in the comments is the idea that there is or should be
2 a nexus between circumvention of TPMs and copyright
3 infringement. We had a lot of commenters express
4 support for example for the proposed Unlocking
5 Technology Act, which would require such a nexus, and
6 they cited a lot of the commonly cited examples of
7 1201 being applied against things like garage door
8 openers and so forth.

9 In response, we had a number of comments
10 saying that, well, you know, the entire, one of the
11 fundamental reasons for 1201 in the first place was to
12 protect against or to give rights holders the ability
13 to protect circumvention for the purpose of access and
14 for the purpose of just consuming a work. So we'd
15 like to hear your thoughts on that proposal, whether a
16 nexus requirement is a good idea. And for those who
17 think it is, I think it would be helpful for us if you
18 could respond to this idea, you know, if there were a
19 nexus requirement, would it cover access --
20 circumvention for the purpose of consuming a work, and
21 if it wouldn't, is it not a problem and is there
22 something else that would step in to cover that sort

1 of activity? That's a long question. Ms. Chertkof.

2 MS. CHERTKOF: Well, I'll start with the
3 nexus question that you've raised. You know, I read
4 the comments and a lot of the arguments in favor of a
5 nexus requirement with copyright infringement. But to
6 me it seems like once you have nexus requirement
7 you're just down to straight copyright infringement.
8 We already have prohibitions against copyright
9 infringement. That's already actionable. And so if
10 you're just going to merge 1201 into copyright
11 infringement it serves no purpose anymore, and the
12 whole thing that 1201 provides that wasn't already in
13 the copyright law is a prohibition against
14 circumventing access controls. And so the access
15 issue is a separable issue and you would do, you know,
16 are removed.

17 MS. SMITH: What about how Kevin suggested
18 at the end that it is access for the purpose of
19 consuming creative content? I mean does the RIAA
20 really have a dog in the fight as to whether or not
21 farmers are able to tinker with their tractors?

22 MS. CHERTKOF: No. I don't think we have a

1 dog in the fight on tractors. I guess where we do
2 have a dog in the fight is that when you start drawing
3 these lines they kind of sound easy in the abstract.
4 Oh, let's just divide it up. This is on this side of
5 the line and this is on the other side of the line but
6 when you really roll up your sleeves and try to figure
7 out well how's the line going to be defined, and how
8 are, you know, how are hard cases going to be -- how's
9 it going to be determined which side of the line
10 they're on. I think it just sounds -- it sounds
11 deceptively easy.

12 And so to the extent that the line would
13 impact our stuff, we have a dog in how that line might
14 be drawn. The other reason that I put my placard here
15 was I wanted to respond to some of the comments about
16 how, well, there's still piracy so that means 1201
17 hasn't worked. And I just don't think that's the
18 test. I mean, there's still shoplifting but that
19 doesn't mean most people don't pay when they leave a
20 store. And the fact that there's all these legal
21 services out there and that there's so much revenue
22 starting to be generated by them I think shows that

1 the legal services are drawing people in and drawing
2 them away from piracy.

3 Will there always be some background level
4 of piracy just like there'll always be some background
5 level of shoplifting? I think so. But I just don't
6 think has piracy been reduced to zero is really the
7 test for this.

8 MR. AMER: Ms. Gellis.

9 MS. GELLIS: I think I actually want to
10 agree with something Ms. Chertkof said, which is that
11 the point that if you strip away 1201 you are left
12 with the balance of copyright to enforce whatever
13 rights copyright was intended to enforce. Right now
14 the nexus of -- with copyright is that with Section
15 1201 people can't do things that they could do in a
16 1201-less -- that a 1201-less copyright would let them
17 do and that's a problem. I think that's a problem for
18 Bohr (sic) which requires some serious scrutiny about
19 what the goals and purpose and entitlement of 1201 is
20 to exist anyway and certainly to sit in the copyright
21 code. But if we're talking about mitigating the harm,
22 absolutely.

1 Just because there's some basis for the
2 Copyright Office to consider the question -- and this
3 is mostly due, I think, to a very expansive
4 interpretation of what a TPM may in fact be -- I don't
5 think it does not follow that the consideration for
6 granting the exemption should consider things that are
7 better left to other regulators that are positioned to
8 balance the pros and cons, harms or even just have the
9 expertise to know how to measure the pros and cons and
10 harms of a potential follow on. This showed up on the
11 last 1201 rulemaking when there were questions about,
12 well, if people could get hurt if we let this
13 modification of this device happen, is that a
14 consideration? And that may be a consideration for
15 some regulator, but it's not a consideration that we
16 have.

17 MR. AMER: That's -- we're going to talk
18 about that in the next panel.

19 MS. GELLIS: Okay.

20 MR. AMER: But, just --

21 MS. GELLIS: And I don't know if I have a
22 comment on your last question but I wanted to get a

1 clarification when you're talking about the access.
2 The language of consuming access to a copyright work,
3 I think that's something that colloquially may illicit
4 one sort of answer, but I think that's going to be
5 something that the devil is going to be in the details
6 and specific language of exactly what we're talking
7 about. I think some of maybe what we're living with
8 1201 is there was some approximation language guessing
9 with a crystal ball what the world would look like 20
10 years from then, and I think some of the problems
11 we're confronting is that the nature of the business
12 and how it's evolved doesn't necessarily match the
13 statutory language.

14 MS. SMITH: I think everyone on the
15 Copyright Office side of it thinks that copyright
16 lawyers will not immediately agree on where to draw
17 the line. But I think Kevin's question is sort of
18 directed at, should we make this attempt?

19 MS. GELLIS: Make the attempt in terms of
20 the copyright interest or the non-copyrighted
21 interest?

22 MR. AMER: Well, for example circumventing

1 the TPM that's protecting a film so that someone can
2 watch it. I mean, I think most people -- well, I
3 think there's an argument certainly that we've seen
4 that that would potentially -- if that were permitted,
5 that would be quite harmful to the copyright owner's
6 market even if it doesn't implicate necessarily one of
7 the exclusive rights under 106.

8 MS. GELLIS: I think that's an extra level
9 of answering. And it's interesting. I think there's
10 three levels here. There's a whole set of
11 considerations that don't touch copyright at all. The
12 example being like what if somebody modifies their car
13 and it causes a car accident and that's something that
14 doesn't touch on copyright. In terms of the second
15 question in terms of the access, within the scope of
16 are you interacting with a copyrighted work in some
17 way, now I think the second part of the question is
18 interacting with a copyrighted work, is that enough to
19 create a copyright nexus or does the nexus necessarily
20 need to be something that touches on one of the
21 exclusive rights? And I think that's a different
22 questions and maybe that's an important question as

1 part of the consideration to realize is the question
2 there.

3 MR. AMER: Okay. Mr. Lerner.

4 MR. LERNER: So these comments, I think
5 there's one great value that the study has already
6 yielded is these comments have clarified that for
7 folks like -- the folks that Mr. Sheffner and Ms.
8 Chertkof represent and Mr. Golant as well, 1201(a) is
9 really about effectively an access right that's
10 separate and distinct from the Section 106 rights.
11 But that's not how 1201 is really being used. It's
12 being used to control aftermarket uses, prevent
13 competition, and from my client's perspective as
14 creators and people who are trying to go out there and
15 talk about culture, comment about cultures being used
16 to stifle fair use and, more broadly, freedom of
17 speech.

18 So I think that if you're objection to the
19 nexus requirement is, well yes, we have this access
20 right that is separate and distinct from the 106
21 rights and that's really what 1201(a) has done for us,
22 make an exception to the nexus requirement. We'll

1 have a nexus requirement like what's in the Unlocking
2 Technology Act except when the circumvention is
3 accomplished in order to obtain consumer perceived
4 copyrighted material without authorization and no non-
5 infringing use is present, because to me really the
6 problem is that Congress' intent was when it comes to
7 obtaining, consuming or perceiving copyrighted
8 material getting to view or access that material
9 without permission that was something that Congress
10 was concerned about.

11 Congress was also very concerned that people
12 could still make copies in order to make fair use of
13 them or make copies in order to study the work or make
14 copies in order to create some kind interoperability.
15 And if you look at a statement from Marybeth Peters
16 from 1997 that we cite in our comments, she talks
17 about his distinction and I think that the problem is
18 that distinction has kind of been lost in the way that
19 1201 has been implemented because Congress
20 unfortunately didn't really anticipate that encrypted
21 works were really both access and use controls that
22 were merged together and the idea was that we would

1 have access over here and copying over here.

2 But in effect, so much of copying has been
3 lumped into so much of access because one of the
4 primary or maybe the primary access control is
5 encryption. I also want to --

6 MR. AMER: Oh, sorry. So that language that
7 you read, as I understand it -- so you would have a
8 nexus requirement as sort of the baseline rule that
9 said if you circumvent for purposes of infringement
10 that is a violation, but then you would carve out of
11 that another exception that would say except where the
12 purpose is to -- I forget the language you used.

13 MR. LERNER: Well, for -- and this is just
14 for trial. I'm not suggesting exact language but
15 because that should be up to the legislative drafters
16 and so on, but something like, basically, okay, if
17 you're really worried about access and access is the
18 big concern then why not carve out something for what
19 Congress actually intended originally and I think
20 maybe still intends which is obtain, consume or
21 perceiving copyrighted material without authorization.
22 That's really what the big concern is. The big

1 concern shouldn't be that people might make an
2 aftermarket use of this product or that people might
3 be able to tinker with this product or, in my view for
4 my client's concern is, people might be able to
5 comment on criticize this product or make a study of
6 this product.

7 And so, I would say think about carving that
8 out and I think also if you do that you should say,
9 well, also is there also no non-infringing use
10 present. So if there's a non-infringing use present,
11 that's different. But what we've seen is, almost all
12 of these exemptions that people have bought the
13 product. They've paid for the product. They've paid
14 for the delivery devices and it's clear that Congress
15 intended for those people to be able to make those
16 uses. And also I just want to respond to the
17 shoplifting example.

18 MR. AMER: Okay. Just very quickly because
19 we have other people.

20 MR. LERNER: Okay, very quickly. You know,
21 my clients are not shoplifters. People trying to make
22 fair use are not petty criminals. You know, and if

1 you want to take the shoplifting example, the effect
2 of 1201 is that someone could be arrested or sued for
3 reviewing a product and that's the ultimate effect of
4 1201. So I think if you're going to use a shoplifting
5 example you should use that example and thank you for
6 indulging me on that.

7 MR. AMER: Okay. Mr. Riley.

8 MR. RILEY: So I'll start by saying as sort
9 of a pure policy matter, if we're looking at the use
10 of 1201 for purposes that are not about protecting
11 copyright exclusionary rights, then that does
12 absolutely seem like a problem. It seems like
13 something that is used in practice for anti-
14 competitive purposes or to restrict expression.
15 Certainly have a concern with that. I do -- I get the
16 theory that Susan and Cathy said that if you do tie
17 this nexus too closely it ends up sort of boiling it
18 down to the same bucket of rights in copyright law
19 itself. I don't think it's actually the same in
20 practice because I do think that there is this extra
21 layer of restrictive effects viewed by some as good
22 and others as bad in terms of what you do with

1 technology in this space. So I don't think that a
2 nexus would eliminate the purpose of 1201 as it's
3 understood to be.

4 So but I want to get back to that theory a
5 little bit because I think that it's really
6 interesting to look at the difference between the sort
7 of blacklist style approach of copyright law in that
8 things are allowed unless they are prohibited versus
9 the access control mechanisms that are put in practice
10 by the combination of technology and law here which is
11 a very different approach. It is a whitelist model
12 designed to say to the user and to other developers of
13 technology that would intersect with it you are only
14 allowed to do those things that we specify you can do.

15 That is not inherently a bad thing but I'd
16 like to be able to talk about it at that level, at the
17 fact that this is no longer in line with the balance
18 of interests that are part of copyright law, that this
19 is a different model for how you would interact with
20 content and with technology, and I question whether
21 that is what the original authors of Section 1201
22 intended by it or whether that's the policy we want

1 going forward.

2 MR. AMER: Professor Samuelson.

3 MS. SAMUELSON: So I think that 1201 makes a
4 lot more sense when there's some nexus to
5 infringement. I think that if you kind of look at
6 what kinds of enforcement actions have been brought
7 that's actually what is at play. I think that a nexus
8 to infringement would be a great thing for the Office
9 because then when the car and refrigerator people come
10 at you, you can say sorry there's no nexus for
11 infringement so 1201(a)(1)(A) just doesn't apply and
12 that would actually relieve you of a pretty big
13 burden, and I think that's really a good thing.

14 But I think that there are a number of ways
15 to try to think about how to approach 1201 without
16 saying formally that there is a nexus, a requirement.
17 I would favor that. But short of that it seems to me
18 that you can take into consideration whether non-
19 copyright interests are in fact motivating and
20 therefore that it's -- you can say it's beyond the
21 scope of 1201. You don't need an exemption because
22 this is not the kind of interest that copyright

1 protects. I do think that also the structure of the
2 statute has not gotten as much attention as I think it
3 should have.

4 So the reason that there is an (a)(1)(A) and
5 then an (a)(2) and a (b)(1) is that the circumventing
6 use controls or copy controls that are not access
7 controls was actually, as I understand the history,
8 and I was part of that conversation too, was that if
9 you were -- that if you owned a copy and you wanted to
10 circumvent it for whatever reason other than
11 infringement, that you wanted to make a fair use of
12 something, that was actually supposed to be permitted.
13 And I think that by the way the industry has reacted
14 we see everything being treated as an access control.

15 And so one way that the Office again could
16 try to limit the extent to which it impedes fair use
17 is just really to recognize that access controls and
18 use controls or copy controls are being, as Jack's
19 submission suggests, merged. And so you can take into
20 account other factors like whether or not you have
21 purchased a copy and you own a copy, and even if
22 access is important these days. I'm sorry, I still

1 own a lot of real physical content. And so if I own
2 it, I want to be able to tinker with it. That's
3 another way of trying to accommodate some of those
4 fair uses and stop the sort of the concerns of some of
5 the filmmakers and the like who -- I bought this DVD,
6 I want to take this clip because I'm going to
7 criticize it in my film.

8 I think that's another way that you can try
9 to accommodate it. And I do think that the Office
10 will have more credibility with members of the public
11 and with the tech press in particular if the -- if
12 sort of recognizing and being willing to say that
13 circumventing for fair use purposes when it's not in
14 fact bypassing to get unauthorized access to consume
15 content, would actually be a step in the right
16 direction.

17 MR. AMER: Mr. Sheffner.

18 MR. SHEFFNER: So I'll get to the question
19 about nexus to infringement of the 106 rights in a
20 minute, but I first just wanted to address the
21 argument that I think I heard from Professor Lerner
22 and Professor Samuelson, I'm sorry, from Mr. Riley and

1 Mr. Stoltz that, well, yes, the law was passed back in
2 -- DMCA passed back in 1998 and we've had this great
3 rise in the number of authorized online services but
4 that's purely coincidental. The law has a very
5 significant impact on companies' decisions about
6 whether to go into certain business models.

7 I'm not personally involved in advising
8 companies on whether they should engage in these
9 business models, but you've heard last week in
10 Washington D.C. from Troy Dow of the Walt Disney
11 company who is personally involved in that, in those
12 kinds of decisions, and he testified that indeed when
13 his company is deciding to go to enter into these
14 business models the important -- the protections
15 afforded by Section 1201 of the DMCA are part of the
16 discussion and have an impact about whether or not to
17 enter into these business models.

18 That's not to say that 1201 is perfect.
19 Just like any law, any prohibition on any sort of
20 activity, there is leakage. There are people who
21 break the law. But as someone said last week, again,
22 it keeps honest people honest and the technology

1 backed up by the law and, especially as Professor
2 Samuelson correctly said, the great success that the
3 law has had in keeping circumvention tools and
4 services outside of the mainstream, as we talked about
5 last week, you're not going to find them on the shelf
6 at Best Buy or Target or available through Amazon.com.
7 It has kept, that kind of activity, toward the
8 fringes. Doesn't mean that people can't access that
9 if they really try hard, and some people do, but,
10 again, kept it out of the mainstream.

11 MR. AMER: Well, what about the other
12 concerns about overbreadth? I mean, the tractors and
13 the printer cartridges and so forth. I mean, I guess
14 my next question is, is there some sort of middle
15 ground then? I mean, if we -- if a nexus requirement
16 some argue would sweep too broadly because it would
17 sweep in breaking, circumventing a password to watch
18 movies, is there something short of that that would
19 exclude embedded software and devices and so forth or
20 repairing an engine? Is there a way to sort of split
21 the -- to strike the (inaudible - off mic)?

22 MR. SHEFFNER: Sure, I will get to that in a

1 second, but let me just state really clearly our
2 position on the nexus requirement. Our position is
3 that we are strongly opposed to the imposition of any
4 sort of requirement that, sort of, the prohibitions
5 only apply when they're done to infringe one of the
6 exclusive rights under Section 106.

7 And let me just give a really concrete
8 example of why that's so important and why the access
9 is sort of separate from the 106 rights. And there was
10 an example given last week but let me just slightly
11 tweak it.

12 There are lots of business models enabled by
13 DRM, backed up by Section 1201 that are you pay one
14 amount for a limited access and you pay more for more
15 access. For example, you might rent a movie online
16 through iTunes for say 5.99 and you get to keep it for
17 48 hours or you pay more, say \$15, and you get to keep
18 it permanently.

19 That's enabled by DRM. That system only
20 works because of DRM. Now, if somebody evaded the
21 access controls that would let you access it past the
22 48-hour period, there's going to be a tough argument

1 about whether that's an actual violation of one of the
2 106 rights. I'm sure there's plenty of lawyers on
3 this panel that would argue, no, it's not because look
4 at you already have the download, you're not making
5 and additional copy. You're just streaming it to
6 yourself, et cetera.

7 So assume for the sake of argument that
8 keeping movie longer than the 48-hour period is not
9 actually a violation of the 106 right. Again it's
10 very important that the act of accessing it past the
11 48-hour period be prohibited as well as trafficking in
12 devices or services that would enable you to do so.

13 MS. SMITH: Well, then building off on what
14 Kevin said, could you draw the line between access to
15 watching a movie for longer than a subscription based
16 versus access to the data that's being gathered by
17 your medical device to see how your blood pressure is
18 changing? And to me that function or that purpose
19 versus consuming expressive content is a pretty, you
20 know, that's a line one can draw. There might be
21 problems at the edges, but.

22 MR. SHEFFNER: Yeah, as Ms. Chertkof said,

1 it's not our places as -- not my place as a
2 representative of the motion picture industry to make
3 the arguments on behalf of the tractor people or the
4 refrigerator people. I would just say this. I mean,
5 as Ms. Chertkof said, the lines are difficult and I
6 would just make -- I would just urge the Office that
7 as you are trying to draw these lines, which I
8 recognize are difficult, that you be aware of the
9 impact that they may have on the more traditional
10 copyright intensive industries.

11 And just in closing, one last thing that I
12 would say is that when we have seen the use of DRM in
13 areas that are far afield from protecting access to
14 traditional expressive works, the courts and frankly
15 the Copyright Office have looked askance at this. I
16 mean, the fact, yes, we hear about printer cartridges
17 and we hear about garage door opener, they didn't
18 succeed in those efforts ultimately, and we can
19 disagree a bit about the way that the courts got to
20 that result. But again, they haven't succeeded and my
21 understanding, my recollection is that in this last
22 round of rulemaking basically the -- those who were

1 seeking to circumvent for the purpose of getting
2 access to the software in cars and tractors, et
3 cetera, were successful in obtaining exemptions.

4 MR. AMER: Thank you. And I think we do
5 want -- we're going to come back to this, the last
6 point you made about the concern, the current state of
7 the market with respect to some of these anti-
8 competitive concerns.

9 Mr. Stoltz, in your last comment I think you
10 had mentioned that in your experience 1201 claims are
11 almost always redundant. So is the answer to this
12 concern about access, the role of other laws? Is that
13 what you see potentially covering that sort of
14 activity if there were to be a nexus requirement?

15 MR. STOLTZ: Largely yes. Largely I think
16 the vast majority of circumventions that we -- I think
17 could think of as legitimately harmful are going to be
18 a violation of other laws. Now, there are edge cases
19 and that's why after I -- I thank you for asking this
20 question about the nexus requirement and how it might
21 be framed because I think that's the right question.
22 It's a good question.

1 I want to push back strongly on this notion
2 of, well, that line drawing is too hard, that we
3 shouldn't even try to draw that line for fear that it
4 might end up including some of those edge cases. I
5 mean, really if that's going to be the position then
6 we should probably all go home and it's not worth
7 talking about.

8 The -- we all want to try to draw that line
9 based on first principles. I think the principles we
10 should look to are the ones from various Supreme Court
11 decisions about copyright law. Both before and after
12 the enactment of the DMCA, and I'm thinking mainly
13 hear about the Betamax case, Universal versus Sony but
14 also even some cases where the Supreme Court found for
15 the copyright holder. I'm thinking of Grokster and
16 Aereo where they really evinced a very strong concern
17 for not encroaching on independent technology
18 development and to allow space for technology to be
19 developed by people independent of major media
20 companies and those of institutional copyright owners
21 to build products that touch creative work or that
22 touch information, basically data and not have the --

1 by and large not have that work be under a cloud of
2 legal uncertainty from copyright because the effect of
3 that legal uncertainty is to put all of those into
4 panic, is to essentially destroy that independent
5 innovation and to put it under the control of major
6 media companies and their chosen partners.

7 That's the backdrop and I think that should
8 be the backdrop for and a guide for thinking about the
9 nexus requirement because that really gets at also all
10 of the concerns that were raised in the last
11 rulemaking, many of the concerns that were raised in
12 the last rulemaking speaking of the impacts on repair,
13 the impacts on auto safety research, the impacts on
14 medical device safety. All of these things that
15 obviously were not discussed one bit back in 1998 when
16 the DMCA was enacted there. There were absolutely
17 unintended consequences.

18 That's the right guideline and frankly I
19 think we can do it. I think -- but applying the
20 lessons of the Betamax case and -- and so on, I think
21 the default should be that independent technology
22 development should be protected and preserved and

1 independent really use and modification, and ownership
2 of electronic devices should also be preserved.

3 That kind needs to be the default assumption
4 and we work from there. I wanted to also respond
5 very, very briefly on --

6 MR. AMER: Quickly if you would.

7 MR. STOLTZ: Yes, and I'll make this very
8 brief. Again to say, well, this notion of we don't
9 intend to eliminate all infringement, so maybe we
10 still need DRM for that purpose, I think we're still
11 confusing the use of DRM and access controls with
12 anti-circumvention. Access controls, one could posit
13 access controls to keep honest people honest, but
14 Section 1201 keeps honest technologies and uses of
15 technology illegal. That's the distinction I think we
16 need to draw there.

17 MR. AMER: Thank you. Mr. Golant.

18 MR. GOLANT: I'll just add a few very quick
19 points and that is, one, is we believe that Section
20 1201 has worked as Congress intend and we suggest to
21 the Office that it recommend that no statutory changes
22 be had.

1 In terms of your question about line drawing
2 I was thinking, you know, being involved on the other
3 side and understanding how this whole process works
4 couldn't it be said that the Office itself has done
5 that exact same exercise in line drawing through the
6 1201 rulemaking process by showing the public what is
7 or isn't permitted under these exemptions? Isn't this
8 already something that's baked into the process?
9 That's just a rhetorical question for you to consider.
10 Thank you.

11 MS. MOSHEIM: Actually, I have a question.
12 You say that there are other laws that cover harmful
13 conduct, but in the scenario that Mr. Sheffner gave of
14 someone circumventing to keep access beyond 48 hours
15 to a work, what would cover that?

16 MR. STOLTZ: So I question why someone would
17 rent a movie for \$4.99 and go through the work of
18 circumventing an access control in order to watch it
19 for days longer or to keep a copy of it.

20 MS. MOSHEIM: But Mr. Stoltz --

21 MR. STOLTZ: And not, and not then
22 essentially share it on the internet or distribute it

1 unlawfully to others. That edge case I don't think is
2 very meaningful.

3 MS. SMITH: You don't think someone might if
4 able to save the 10 bucks to extend the 48 hours
5 rather than purchasing in full? You think that's an
6 edge case?

7 MS. SAMUELSON: I think his point is partly
8 that it actually takes a lot of work to circumvent.
9 It's not necessarily an easy thing to do because DRM
10 can be hard to break. But I know that Mr. Sheffner
11 would argue, if it ever came to it, that the extra
12 days that you got beyond the 48 in fact are
13 infringement. So I think there is actually a nexus to
14 infringement there. So I think that while it's a nice
15 example, I don't think -- I would be shocked if he
16 showed up in court saying, oh, that's not copyright
17 infringement. If I don't have 1201(a)(1)(A) I'm
18 screwed. I think I know you better than that, Ben.

19 MR. SHEFFNER: Of course, you'd be arguing
20 the opposite and who knows how it would come out.

21 MR. STOLTZ: Well, that's why we have court.
22 That would also, you know, especially in this scenario

1 where there's a remote server involved that you're
2 going to have Computer Fraud and Abuse Act questions
3 which, you know, again it's true. I might defend
4 those and say they're not. I might argue differently,
5 but there is governing law there.

6 MR. AMER: Okay.

7 MR. SHEFFNER: Can I just respond right --

8 MR. AMER: You could respond then I'm going
9 to go to Mr. Lerner.

10 MR. SHEFFNER: Yes. Just really briefly on
11 this point that, well there's other laws that cover it
12 and that Mr. Stoltz's research has shown that in all
13 of these DMCA 1201 cases there's also -- you also have
14 all these other claims. I mean that's just a common
15 feature of litigation when you have a plaintiff you
16 rarely look at a complaint that only has one cause of
17 action. I mean any plaintiff in any area of law is
18 going to essentially throw in the kitchen sink. Any
19 claim that they can plausibly make they will list and
20 you never know what's going to come out through
21 discovery, which claim seems weaker or stronger
22 throughout the litigation. So the fact that there may

1 be overlap between Section 1201 and other statutes I
2 don't think argues against the importance of Section
3 1201.

4 MR. STOLTZ: I think my point was there's
5 almost always overlap.

6 MR. AMER: Mr. Lerner.

7 MR. LERNER: Thank you. Well I think this
8 this dialogue raises an important additional concern
9 that hasn't yet been raised in this session is
10 probably going to come up in the next session so I'll
11 be brief but that is that 1201 and a little bit the
12 way it's been interpreted and implemented but I think
13 also the language of 1201 has effectively prevented
14 the courts from hearing and letting, hearing disputes
15 and letting the law evolve. This is something that
16 the record, with respect to fair use certainly but I
17 think with respect to other areas the record, is
18 pretty extensive in the legislative history that
19 Congress wanted the courts to continue to develop the
20 law in terms of interpreting the copyright law in
21 various parts of Title 17 and of course also let fair
22 use evolve in the courts.

1 And one of the effects, broad effects that
2 we've seen is that a lot of uses simply aren't done in
3 the concept of technological innovation. I'm sure
4 that some of the other panelists would argue that a
5 lot of innovation hasn't been done. It might have
6 been tested by the courts and we think this is a
7 serious problem with the section.

8 MR. AMER: Thank you. I wanted to give
9 others a chance to weigh in on the question I posed to
10 Mr. Sheffner earlier, which is sort of coming at the
11 issue from the other direction. So, short of what
12 we're calling a nexus requirement, some commenters
13 suggested well, Congress could adopt a permanent
14 exemption for circumvention of TPMs on software
15 essential to operation of hardware. So I think the
16 theory with that would be to exclude device repair and
17 so forth but still leave in the statute the sort of
18 paradigm case of access for the purposes of
19 consumption.

20 Now we've heard the concerns about the
21 difficulty of line drawing but as sort of a general
22 matter, is that a model that you think might be worth

1 pursuing? Mr. Golant.

2 MR. GOLANT: I would add that again to the
3 line drawing it would be incredibly difficult to
4 determine what software fits on one side or the other
5 because all software has a function. It all works
6 together in a series of subsequent steps and to say
7 that one is different from the other would make it
8 pretty hard for the law to take a practical effect.
9 It just would seem to be very difficult to parse out
10 and it would be left perhaps to the Office to make
11 that decision. A decision that could be looked at as
12 precedent and perhaps a bit dangerous because it'll
13 just give software developers a pause for concern so I
14 don't think I would advocate for anything along those
15 lines.

16 MR. AMER: Mr. Stoltz.

17 MR. STOLTZ: Yes, actually you know what?
18 I'm going to pass on this.

19 MR. AMER: Okay. Ms. Gellis.

20 MS. GELLIS: I think I'm actually agreeing
21 with Mr. Golant again. Colloquially that sounds like
22 we're on the right track because I've, particularly

1 with some of my participation, these studies in the
2 last rulemaking I was pointing out particularly when
3 you've got, 1201 is messing with issues and uses of
4 computing technology that have nothing to do with
5 copyright at all. That's extremely problematic. So
6 to see some sense of okay we should get those purposes
7 out of the way I think is a good thing and I don't
8 want to derail that instinct.

9 But I think transaction costs become their
10 own barriers and when the lines can't be easily and
11 readily and clearly be drawn I think we run into, that
12 would be problematic. I think we need clarity. We
13 already have enough problems with even just litigating
14 fair use and how debilitating that can be a
15 legitimately fair use to ultimately have to be
16 vindicated and I don't think we'd be doing a service
17 to the interest we're trying to protect by essentially
18 throwing them to, we've just changed the character of
19 the litigation they're going to face not necessarily
20 getting them out of this problem entirely.

21 MR. AMER: Ms. Chertkof.

22 MS. CHERTKOF: I just had a couple of brief

1 comments on it. I know that you're having a panel on
2 permanent exemptions later today but relevant to that
3 I just think I don't see permanent exemptions as being
4 a great solution here. There's permanent exemptions
5 in the law now and nobody likes them. Everyone keeps
6 saying the need to be revised, or expanded, or redone,
7 and I think that's kind of the nature of permanent
8 exemptions. They're kind of frozen in time and we're
9 in an area of technology innovation and time marches
10 on and I think the rulemaking which happens every
11 three years, is much more nimble, and can adjust to
12 changing technology, changing business climate. All
13 that sort of thing.

14 And then the other thing I want to say is
15 that I just want to note that neither of the major
16 software associations are here to really answer this
17 question and I think they're the ones that are
18 squarely involved in how you deal with software as its
19 own expressive work.

20 MS. SMITH: Yes and we were, you know, we
21 benefited from their counsel in D.C. where they did
22 participate so we'll be looking at the record

1 holistically and the next session will be covering the
2 rulemaking, including renewal of presumption. So I
3 think that's a great point but also one we'll talk in
4 more detail there. I wanted to follow up with you and
5 then Professor Samuelson. Do you agree with Mr.
6 Sheffner that the courts are solving some of this
7 problem through perhaps the Chamberlain case or the
8 Lexmark case in recognizing some things are outside of
9 1201, or MDY? Maybe you don't have but --

10 MS. CHERTKOF: Yes, I would agree that so
11 far it seems like the courts have gotten it right and
12 so a lot of the worry of the over-reaching seems a
13 little bit like a solution in search of a problem
14 because the courts are coming to the right answers so
15 far.

16 MS. SAMUELSON: I think permanent exemptions
17 are something the Office should pursue. And I think
18 that when it comes with trying to deal with the kind
19 of embedded software device problem, that it would be
20 great to actually formulate three or four different
21 ways of expressing that and then giving -- putting
22 that out as part of the notice of inquiry and then

1 getting people's feedback on, this one would be the
2 most precise, this one would deal with the problem.

3 I think that I'm not prepared right now as I
4 say this is the right solution, but I think that the
5 Office has recognized that the kind of the car safety
6 and medical device issues are really not ones that
7 copyright is going to be the right solution. But I do
8 think that getting feedback from people about what a
9 permanent exemption for that kind of problem would be
10 is a really good idea. I do think that there are
11 other permanent exemptions that we'll talk about a
12 little bit later.

13 Again, from my experience with computer
14 security researchers, I was in a room with about 30 of
15 them and for them the computer security research
16 exemption that's in the statute now is just not even
17 close to being something that would allow good faith,
18 legitimate computer researchers who are trying to
19 solve problems and keep our cyber security intact.
20 That's not good enough yet and so I'm glad you're
21 focused a little bit on the kind of the tractor
22 problem. I think that others of the exemptions need

1 some refinement and this kind of have to go through it
2 every three years is really burdensome. Of course
3 we're going to talk about that too.

4 MR. AMER: Thank you. We're going to go to
5 Mr. Stoltz and then we're going to have I think one
6 more question that everyone can weigh in on.

7 MR. STOLTZ: Just very briefly I'm hearing
8 folks say that they point here to the Chamberlain case
9 and I suppose also the Lexmark case and saying that
10 the courts are getting this right but I also heard Mr.
11 Sheffner say they're unsure of the reasoning of the
12 Chamberlain case and certainly there's attention
13 between the reasoning of the Chamberlain case and of
14 the Blizzard versus MDY case. So I guess I don't
15 share this confidence that the courts will always get
16 it right and actually I do think a legislative change
17 and I think if we all make a good faith attempt at
18 this sort of line drawing that that might send the
19 right signal that we'll deal with these issues
20 surrounding embedded software, consumer devices,
21 automobiles, and so on, you know, which otherwise
22 those problems will linger.

1 MR. AMER: Thank you and I think that
2 anticipated the next question that I had. Which, I
3 just wanted to allow others to weigh in on this point
4 that Mr. Sheffner and Mr. Stoltz and others have made
5 about, you know, we've heard that, although we have
6 cases like Chamberlain and Lexmark, those cases are
7 now more than a decade old and in any event, the
8 courts in those cases rejected the plaintiffs' claims.
9 And as Mr. Golant noted, we have the rulemaking, and
10 so the argument goes, I think, between the courts sort
11 of quote, unquote, getting it right and the
12 rulemaking, this concern about the use of 1201 for
13 anti-competitive purposes is maybe overstated. On the
14 other hand, we've heard discussion about a chilling
15 effect that's maybe created by Section 1201. So those
16 who haven't responded to that issue yet, I think we'd
17 be interested in your views about the extent to which
18 in the marketplace in your experience you're seeing
19 efforts to use 1201 for purposes that you might
20 consider anti-competitive or for -- against consumer
21 products that you might regard as outside core
22 copyright concerns. That's another long question.

1 Ms. Gellis.

2 MS. GELLIS: I think in the R Street comment
3 we actually pointed to that. 1201 first of all, with
4 respect to the first question you asked, doesn't
5 guarantee that a business is going to exist or be able
6 to function. It also doesn't prevent market failure,
7 including self-induced market failure of the copyright
8 holder not competing because they can sit on their
9 rights and now there's other things to backup that
10 they don't have to put their product out on the market
11 for a competitive price, but I think particularly as
12 we start to look in the embedded software realm we may
13 not have seen the abuse yet but there is absolutely no
14 reason to believe that the abuse won't happen if 1201
15 can still be a barrier.

16 People can stop and to reflect on the record
17 -- I made similar comments in the embedded software
18 study yesterday -- but when we're talking about things
19 and where the value for what the manufacturer puts in
20 the market is something that has a value for its
21 utility value. It isn't something that's the creative
22 expression. It is a toaster with embedded software.

1 It is a car, it is sneakers that have embedded
2 software on it and all of a sudden if 1201 can
3 interact with what users can do with these objects or
4 what competitors can do with these objects where you
5 can buttress a monopoly control for the copyright
6 owner that they don't need because they are perfectly
7 capable of competing in the market for the thing that
8 does what the user wants it to do.

9 They can produce a better shoe. They can
10 produce a better car. 1201 takes away that incentive
11 to produce because it ends up deterring the
12 competition and users from adapting or using these
13 products as they want.

14 MS. SMITH: And do you have any specific
15 examples?

16 MS. GELLIS: Well I don't know, well I'm not
17 comfortable with the Blizzard case where that was,
18 there was a follow on industry that produced something
19 that worked with a product that was put in the market,
20 now they can't do it because 1201 stood in the way.
21 That's not an embedded software problem but that is a
22 form of the anti-competitive effect that you're

1 talking about. I don't necessarily know off the top
2 of my head although there may be examples where in the
3 physical good realm there has been this anti-
4 competitive effect but I think if something doesn't
5 change we're at the beginning of that wave because I
6 think more and more manufacturers, as more and more
7 will embed their software will start to recognize the
8 full scope of what they're able to do to lock out
9 competition.

10 And we do know actually and I believe
11 actually we may hear testimony later. Secondary
12 markets have been chilled. I'm not the person to give
13 the best examples on that but I think other people
14 here today may be able to do that.

15 MR. AMER: Mr. Lerner.

16 MR. LERNER: So for independent film makers
17 the concern isn't so much that actual physical
18 products that have embedded software on them will be
19 used to stifle competition but I think that it's worth
20 pointing out that competing, that 1201 for film makers
21 has actually worked to stifle competing speech. And
22 so the idea that there might be speech that could

1 criticize or comment or additional speech that in the
2 language of the Supreme Court would add new meaning or
3 expression has actually been stifled by Section 1201.
4 So I would encourage you to conceive of even the non-
5 embedded products type of problems in that context.

6 MR. AMER: Mr. Riley.

7 MR. RILEY: So I hope you don't mind that I
8 would like to politely challenge your framing. You
9 framed to the question as looking at the use of
10 Section 1201 and I think it's better to look at the
11 impact. It's a slightly broader conversation but it's
12 one where there's sort of three categories of parties
13 that we've talked about a lot, users, businesses, and
14 researchers. That's where you see the impact of this
15 and that's a broad thing. Right? I mean we want to
16 look at users as both consumers and creators, look at
17 businesses including the members of RIAA and MPAA as
18 well as the documentary film makers so "business" does
19 not necessarily need to mean for profit.

20 I should know especially as a non-profit
21 organization and the security researchers that
22 Professor Samuelson mentioned. From Mozilla's point,

1 when you look at that the secret sauce of the internet
2 and the root of its socio-economic benefits is the way
3 that it creates an ability to innovate without
4 permission. And fundamentally to us the impact of
5 this framework as it is today is to require
6 permission.

7 MR. AMER: Thank you. Professor Samuelson.

8 MS. SAMUELSON: So I'm just going to repeat
9 that the computer security researchers are actually
10 chilled. They are really feeling at risk and they
11 feel a lot better now, but I'll tell you that by
12 delaying the implementation of their exemption it
13 didn't make them feel any more reassured frankly. So
14 I think you need to rethink. If you're going to grant
15 an exemption because the use is not infringing, then
16 the exemption is granted. And the delay in
17 implementation I think was something that, okay I've
18 made my case but now I can't do it for a year, seemed
19 something that the -- so now I have to say unless the
20 exemption applies I'm now in a situation where I have
21 to violate the law in order to do the activity that I
22 think in fact is legitimate.

1 So I have a real problem with that but
2 that's the most specific chilling effect I can show
3 you. But the other thing is there is a chilling
4 effect because if people are in fact circumventing and
5 they're circumventing for what they think is a
6 legitimate reason, they don't want to come forward and
7 so to say, gee I've been violating the law for the
8 last three years, now I want an exemption for it
9 because in fact what I'm doing is just fine.

10 That's actually a -- you see that's a
11 chilling effect by itself. Right? The chilling
12 effect isn't just that I know I could be liable if I
13 do it. It's like, I think I should be able to do this
14 but I don't want to come forward and ask for an
15 exemption because that by itself would be saying, oh
16 well I'm doing this thing that's a little bit --

17 MS. SMITH: But I want to push back a second
18 and perhaps get Mr. Stoltz's views because in the case
19 of the remix video petitioners who participated in
20 multiple rulemaking cycles that's exactly what they
21 say. "We've been violating it" or "we're aware of it.
22 We're going to make our remix videos no matter what.

1 We need this exemption," and so I think I question
2 whether there needs to always be a chilling effect if
3 someone thinks they have a non-infringing use that
4 1201(a)(1)(A) is preventing them from doing.

5 MS. SAMUELSON: Well I think people are
6 different in terms of their risk profiles.

7 MS. SMITH: Sure.

8 MS. SAMUELSON: And so I think that
9 especially if you're a small technology innovator and
10 you want to do something clever --

11 MS. SMITH: You need a capital loan to take
12 the risk out of it.

13 MS. SAMUELSON: Yes. I think risk profile
14 is an issue here.

15 MR. AMER: Let me just say so we're going to
16 go down the line and we're running just a little bit
17 over time so I invite all of you to be brief.

18 MR. SHEFFNER: Sure. I just want to address
19 this question about whether anti-competitive uses of
20 DRM and relying on Section 1201 in the background
21 enable all these anti-competitive uses in areas that
22 have little to do as protecting access or to

1 traditional copyrighted works. Talk about chilling
2 effect, I think cases like Lexmark and Chamberlain and
3 MDY versus Blizzard have a chilling effect on those
4 who would seek to use Section 1201 in ways far afield
5 from its -- I was just thinking of an example here.

6 I mean if I'm a lawyer and the president of
7 a plumbing company comes to me and says, you know, I
8 have this great idea. I want people to use only my
9 brand of plumbing valves and pipes, and faucets, and
10 I'm going to put a little chip on each one and it's
11 going to have some DRM and you're going to have to get
12 my permission to access. And I could do all the legal
13 analysis in the world and tell him well you know what,
14 technically that might be a violation of 1201, but I
15 say, you know what, any court in the country is going
16 to find a way to rule against you because courts
17 recognize that this is not what Section 1201 is
18 intended for.

19 I mean, I'm glad Mr. Stoltz is listening to
20 me carefully and hedged, heard my hedge on the
21 endorsement of the result if not the entire reasoning
22 especially the Chamberlain case, Lexmark as well but

1 again yet in, one last thing. It's possibly the case
2 law that chills these arguably improper uses of 1201.
3 It's also public scrutiny and outcry. I mean this is
4 an example that came up in D.C. -- Keurig the coffee
5 manufacturer recently tried to announce they were
6 putting DRM in the machines. They would hook with DRM
7 and try to communicate with DRM in the pods so that
8 you couldn't use competitor's pods. There was no
9 court case but there was an outcry. There was almost
10 universal condemnation of this use of DRM and they
11 quickly withdrew it in the face of consumer complaints
12 and press scrutiny.

13 You know that's entirely proper. I mean
14 ultimately the market is going to determine whether
15 these business models work or don't work for consumers
16 and if people try to use Section 1201 and DRM in ways
17 that consumers don't like they're going to go to
18 alternatives.

19 MR. AMER: Thank you. And now Mr. Stoltz.

20 MR. STOLTZ: Yes. So you guys for examples
21 of anti-competitive uses there were a number of them
22 highlighted in the recent rulemaking and the clearest

1 one of them all was in the comments of the Auto
2 Alliance. Unfortunately, I don't have the quote in
3 front of me but it is cited in our comments in this
4 inquiry and that is essentially if an exemption to
5 1201 for auto repair and maintenance is granted then,
6 and again I'm trying to recall the phrasing,
7 independent repair shops will take advantage of it and
8 competitors to the auto manufacturers will take
9 advantage of it.

10 That to me is lawful and important
11 competition that the law needs to promote and not
12 suppress. So right there in the comments there they
13 are calling for and defending an anti-competitive
14 effect. Similar thing with that we're seeing with
15 auto emissions and auto safety research. Again some
16 of this was presented in the rulemaking last year.
17 Researchers whom we quoted in one of our exemption
18 proposals had discovered a serious security
19 vulnerability in Jeeps which affected hundreds of
20 thousands of vehicles. They reported that to the
21 company. The company did nothing about it for six
22 months while all those owners of those hundreds of

1 thousands of vehicles remained vulnerable to it. You
2 know that's an effect certainly the possibility of
3 legal uncertainty, legal threats under the DMCA is one
4 of the things that suppresses that kind of disclosure.

5 So that's another one although not a direct
6 example, there was a very close connection to the
7 Volkswagen emission scandal from last year because
8 that was discovered using digital technology by an
9 independent research lab at the University of West
10 Virginia. You know I don't know that circumvention
11 was involved but in similar circumstances
12 circumvention could very well be involved though,
13 those are the examples that I think of.

14 And the honest question whether the --
15 whether the rulemaking is adequate safety against
16 those abuses, I would point out that all of that
17 research is not today protected by an exemption and
18 that's because of the one-year delay which by the way
19 is not authorized in the statute in any place.

20 MR. AMER: Thank you. Sorry, but we're
21 going to have to go Mr. Golant and then wrap up.

22 MR. GOLANT: Sure. Thank you. At the

1 hearing the concerns expressed by some of the members
2 of this panel here. I would advocate to the Office
3 perhaps the very first step in your report to Congress
4 should be to look at extant laws outside of copyright
5 and those agencies that have the jurisdiction over
6 some of these particular concerns. Before even
7 reaching to 1201 and you may even find that you don't,
8 you may recommend to Congress that 1201 need not be
9 amended at all because there may be solutions to the
10 particular problems expressed here outside the
11 concerns of Title 17.

12 MR. AMER: Thank you. Thank you all very
13 much. That concludes the first panel. We've run over
14 time. We need a 10 minute? So if we could ask people
15 be back for session two by 10:50? So we'll do a 10
16 minute break. Thank you.

17 (Break)

18 MS. SMITH: Okay, we are going to start the
19 next panel, which is about the rulemaking process.
20 Both the evidentiary and procedural issues with a
21 specific focus on renewing previously granted
22 exemptions and I'd like to begin by introducing us

1 from the Copyright Office and having everyone else go
2 around quickly. State your name and any affiliation.
3 So I'm Regan Smith.

4 MS. MOSHEIM: I'm Abi Mosheim.

5 MR. AMER: Kevin Amer.

6 MS. SMITH: We start with you Mr. Wolfe.

7 MR. WOLFE: I'm Michael Wolfe. I'm the
8 Executive Director at Authors Alliance.

9 MS. GELLIS: I'm Cathy Gellis. I'm an
10 attorney in private practice working on issues
11 surrounding innovation policy. I participated in this
12 study on behalf of the R Street Institute but I'm not
13 representing them now.

14 MR. LERNER: I'm Jack Lerner. I'm here on
15 behalf of the International Documentary Association,
16 Film Independent, and Kartemquin Educational Films.

17 MR. METALITZ: I'm Steve Metalitz. I'm a
18 lawyer with the MSK Law Firm and I'm here representing
19 the Association of American Publishers, the Motion
20 Picture Association of America, and the Recording
21 Industry Association of America.

22 MS. SAMUELSON: I'm Pam Samuelson. I teach

1 at UC Berkeley and 1201 is one of my beefs.

2 MR. REED: Chris Reed. Senior Counsel for
3 Content Protection Policy, Fox Entertainment Group.

4 MR. WIENS: Kyle Wiens. I'm a CEO of iFixit
5 and representing Repair.org.

6 MR. MCCLURE: Sam McClure with the Stanford
7 IP Clinic representing the American Foundation for the
8 Blind.

9 MR. LABARRE: I'm Scott LaBarre, President
10 of the National Association of Blind Lawyers, a
11 division of the National Federation of the Blind, and
12 I'm here on behalf of the National Federation of the
13 Blind.

14 MS. SMITH: Okay thank you and before we get
15 into the discussion I just want to remind everyone if
16 you can to tip your placards up if you wish to speak
17 and try to limit comments to about two minutes, and
18 I'm going to try to move past the written comments to
19 get us to really debate some of the specific proposals
20 that came out in those comments. I'd like to tee up
21 with the same question we started up in D.C. and this
22 is about perhaps the way to enable the renewals of

1 previously granted exemptions. This is an issue that
2 more or less, people more or less agreed about might
3 be a good thing which was, you know, is not always the
4 case in these types of discussions.

5 And so one model that we had discussed in
6 D.C. was perhaps a way to -- I guess I don't know
7 whether we want to call it streamlined renewal or
8 somehow automatic had renewal but if someone who was
9 granted an exemption through the 1201 rulemaking
10 process, they could file a short form saying yes I
11 would like to have this renewed. Do it again and
12 someone would have an opportunity to oppose hearing on
13 it would be renewed. Would anyone like to comment
14 upon that model? Mr. Reed.

15 MR. REED: Thank you. Yes. So we're
16 actually very supportive of a framework like that.
17 We're not in support of an outright burden shifting
18 but do think there's a lot of room to play without
19 changing the statute to allow the Copyright Office to
20 do something as you just described where somebody
21 could file, as you put it, a short form or a short
22 statement starting with facts are substantially

1 similar to the way they were during the prior
2 rulemaking enabling the Office to review that and then
3 issue the exemption absent meaningful opposition.

4 I think our support of that is contingent on
5 a process as you described where we would have an
6 opportunity to meaningfully oppose and to the extent
7 that there were any distinctions in the newly proposed
8 exemption if they, you know, what they were requesting
9 was not identical to the prior exemption then we would
10 need to proceed with the normal rulemaking process
11 with respect to the difference within that. But
12 otherwise I think we, we're actually in agreement with
13 many of the people on the panel today.

14 MS. SMITH: Thank you. Professor Samuelson.

15 MS. SAMUELSON: So I think it's very
16 constructive for the Office and for many of us who
17 have filed some of these 1201 exemption requests, so
18 saving everybody a lot of time and effort I think is a
19 very good reason to do. But more substantively, if
20 the facts on the ground haven't changed, then a light
21 renewal I think is a good idea, and I think there's no
22 reason not to have an opportunity for people to say

1 changed circumstances now have -- no longer justify
2 it.

3 I do think that it should be a burden on the
4 person who is opposing actually to come forth with the
5 credible evidence about why its circumstances have
6 changed. So I do think that that's an important part
7 of it. But I also think the question is sort of what
8 kind of opposition should there be? So, I think
9 sometimes what's been talked about is meaningful
10 opposition. I would say credible opposition. Just
11 because somebody says, well I really object to this
12 shouldn't be enough by itself. It should really -- it
13 should be credible. I think that's the standard I
14 would want the Office to think about.

15 MS. SMITH: Thank you and then to back up a
16 little bit -- the statute requires the Librarian to
17 base the rule, and the Register her recommendation, on
18 some showing that, you know, what's going to happen in
19 the next three years and so perhaps looking at whether
20 circumstances are changed or unchanged circumstance
21 could provide this credible, meaningful whatever we're
22 going to call opposition. Would you agree? Okay.

1 Mr. Lerner, as someone who might potentially
2 participate or benefit or represent those who would,
3 what are your thoughts?

4 MR. LERNER: Well we welcome this
5 initiative. I think this is a great idea and a good
6 way to reduce the burden on everyone involved and that
7 certainly includes the Copyright Office who are well
8 aware of how much time and effort it takes the
9 Office's staff to do these and we're very grateful for
10 the time and effort that the Office spends. To me the
11 best opposition is evidence submission is sufficient
12 to overcome the presumption. Right? And so just a
13 simple declaration of an opposition would really kind
14 of obviate, it really wouldn't be a presumption.

15 Maybe you could call it an automatic renewal
16 without opposition but if you're going to say it's a
17 presumption, the term presumption comes from
18 litigation or adjudication and they're usually
19 opposed. That means that somebody else has the burden
20 to overcome and so if we're going to talk about a
21 presumption I think that the presumption should only
22 be able to be overcome with clear or credible or

1 concrete evidence more than what Mr. Golant called in
2 the last session fear of, kind of modicum of
3 assurance.

4 Something more than a fear or a concern but
5 some concrete evidence that there would be some harm
6 to continuing the exemption would be I think
7 necessary. That's, that's what we would urge but we,
8 I also want to say this is only a partial solution
9 because technology develops quite rapidly and one of
10 the reasons why these exemptions' renewal has not been
11 opposed is because the TPMs at issue or the technology
12 at issue have become obsolete or begun to become
13 obsolete, and we see this in the last couple of
14 rulemakings where DVDs and in that case the film
15 makers were really already obsolete. So there was
16 really no harm in approving the DMCA, the DVD based
17 exemption and we're probably going to see something
18 similar to that in the next rulemaking or the next
19 rulemaking after that.

20 MS. SMITH: Thank you. Mr. Metalitz do you
21 want to comment on including Mr. Lerner's question of
22 emerging technologies, how -- treating expansions

1 differently from a straight renewal of an exemption?

2 MR. METALITZ: Yes, thank you. I would

3 treat the expansion differently than a straight

4 renewal. I agree with a lot of what Professor

5 Samuelson said and really in what was in Mr.

6 McClure's, the comments Mr. McClure filed I think give

7 a pretty good indication of what the opponents would

8 have to come forward with in order to get this issue

9 back onto the docket if you will. I do want to point

10 out at least for my clients in the last couple of

11 cycles this hasn't arisen -- the question of what

12 level of meaningful opposition would you have to have

13 in order to get it back on the other track -- because

14 we basically have agreed to these.

15 MS. SMITH: Right. It hasn't been a

16 problem.

17 MR. METALITZ: And that's the norm in many

18 cases. So we do need to prepare for the case in which

19 the facts have changed, the law has changed, or

20 technology has changed, and if you can come forward

21 with some concrete statement of that. I think where I

22 disagree with Professor Lerner is that I don't think

1 that then shifts the burden to the opponents. I think
2 the burden should remain on the proponents but this
3 would at least put it back on the table and so you
4 have to come forward with enough evidence to burst the
5 bubble. I think this is not really a new type of
6 concept.

7 And then, which I think the statute requires
8 that the -- and the legislative history require that
9 the burdens remain on the proponents but in order to
10 get to that in the case of renewal of an existing
11 exemption I think the opponents definitely have to
12 come forward with a principled rationale for non-
13 renewal, which I think is how Mr. McClure's filing put
14 it.

15 MR. AMER: So that's helpful. So to just
16 focus the distinction I think, so you would say that
17 there would need to be a statement? Not necessarily a
18 burden of production that would require an evidentiary
19 showing but it would need to satisfy some level of
20 credibility or substantiality, whereas Mr. Lerner
21 would require at that stage a burden of production?

22 MR. METALITZ: I think the burden of coming

1 forward with evidence would be on the opponents in
2 that case but that doesn't mean that they have to
3 persuade with that evidence like that.

4 MR. AMER: It would have to be something
5 more than statement?

6 MR. METALITZ: When the persuasion would
7 then remain on the --

8 MR. AMER: So at that preliminary stage it
9 would be an evidentiary burden? It just wouldn't be -
10 -

11 MR. METALITZ: Yes. Well, I know there's
12 strict rules of evidence don't apply in the
13 proceedings but again --

14 MR. AMER: But something more than a
15 statement I guess.

16 MR. METALITZ: Evidence that things have
17 changed in the market, in the technology, or in the
18 law that the findings that you made last time, that
19 the Office made last time shouldn't be carried forward
20 this time because something has changed.

21 MS. SMITH: Thank you. I think there's more
22 to be said about whether we're flipping the burdens

1 for presumption of renewal versus a streamline so I'm
2 going to put a pin into that and we're going to come
3 back to it but I think we're past the morning, so I'm
4 going to keep jumping around a little bit and let Mr.
5 McClure speak to his writing and his view.

6 MR. MCCLURE: Thank you. Thank you for
7 considering the issue too. As a clinical student just
8 want to reiterate that it's clinical students that are
9 often doing the work and that it is a lot of work. I
10 think we tallied up, the Cyber Law tallied up it's
11 hundreds of hours, maybe up to thousands of hours and
12 that's not really sustainable from a process
13 standpoint, especially as this process gets bigger and
14 more exemptions are sought, if that is the trend going
15 forward.

16 To me the whole discussion sort of hinges
17 on, as I stated in D.C., is what is the understanding
18 of de novo? What is the evidence that was established
19 before and what of that is getting pulled into this
20 new process? So one point that I didn't think was
21 made that I just wanted to make here is that if there
22 is a really clear understanding that the evidence that

1 you bring forward in previous rulemaking procedures
2 will be carried forward throughout, proponents of
3 exemptions are going to try a heck of a lot harder to
4 establish really evidence, which I know has been a
5 shortcoming in the eyes of the Copyright Office in the
6 past. So thank you.

7 MS. SMITH: Thank you. Mr. LaBarre.

8 MR. LABARRE: I think that this process for
9 those of us who are blind or otherwise print disabled
10 has been a lot like a member of the House of
11 Representatives running for Congress. You're always
12 running for re-election and so we are always running
13 to have access. And what we are talking here is
14 simply getting fundamental access to whatever it is.
15 We might have the tools that provide access, screen
16 reading software or whatever but then when mated with
17 certain types of technology and software they don't
18 work because of digital rights management.

19 So we can't even get at the table to discuss
20 this and we're talking about organizations that are
21 non-profit or governmental that are mostly involved in
22 this and the burdens on us have been tremendous. I

1 think the process has been broken and I think that I
2 agree that in effect the burden has to be on the
3 industry, on the rights holder to show that they are
4 in fact producing something that is accessible and
5 compatible because the guidelines to do that are out
6 there, are well-known and they know best. They have
7 the most direct information about whether or not their
8 product is going to be accessible or not.

9 MS. SMITH: So to push on that a little bit,
10 do you agree that they would do that or may do that by
11 opposing it and saying, you know, the market has
12 really turned? We have met these standards. We don't
13 think it should be renewed? Would that be a workable
14 framework or structure or do you think statutory
15 reform or something larger is necessary?

16 MR. LABARRE: Well I think there are a
17 couple of different categories here with respect to
18 being able to break digital locks, to make software
19 accessible. That's a different kind of category as
20 opposed to gaining access to digitally locked
21 materials for the purpose of producing accessible
22 formats. So I draw distinctions there.

1 In the first case, yes. I think this may be
2 a workable solution because no one has ever
3 meaningfully opposed the exemptions that have been
4 requested on behalf of the blind and print disabled
5 because the industry knows that largely and mostly the
6 software et cetera is inaccessible. And so we would
7 love for the case to be that every piece of software
8 were compatible or every device coming out worked on a
9 non-visual level. That would be a wonderful thing but
10 we're not anywhere close to that so I think it would
11 be effective to be able to have the industry show that
12 hey, yes, we have incorporated accessibility and it is
13 different now, but the burden or at least the first
14 level of showing that the case has changed has to be
15 on the rights holders.

16 MS. SMITH: Okay. Thank you. I think we'll
17 go back to Mr. Lerner and we can probe into this issue
18 a little bit more. I mean is it enough to say if you
19 want to renew the same exemption you'll do it unless
20 there's some evidence of changed circumstances?
21 Assuming you still want it or does there need to be
22 what may be a stronger case for statutory reform or at

1 least test the limits of what the Office might be
2 empowered to do to actually say there's a presumption?

3 Like maybe if IDA didn't even request it.
4 There's just a presumption is going to be renewed.
5 What are your thoughts on that?

6 MR. LERNER: Well I think that would depend
7 on what would be required to get into the presumption
8 or get into the automatic renewal. So I think that
9 folks coming forward saying, okay here's a statement
10 or a claim, or testimony, or whatever kind of evidence
11 would be submitted to say that conditions are the
12 same, adverse effects would result if this part of the
13 exemption were not renewed. That should be enough.

14 You know your question really goes to a
15 bigger problem with the triennial rulemaking, which it
16 is very difficult. There is a high evidentiary
17 burden, there are multiple rounds of comments,
18 hearings, letters, and as result very few people can
19 take part and that's one of the problems. So if it
20 weren't automatically renewed and that party went away
21 or something like that happened, you know, I'm not, I
22 want to a little bit challenge the idea that there

1 should be a burden on one or another party or on any
2 one commenter. This is a rulemaking and as we said in
3 our comments we think it should be treated as a
4 rulemaking.

5 And so the burden perhaps should be on the
6 Copyright Office to consider all of the evidence and
7 maybe an existing exemption should be considered as
8 some type of evidence or some type of state and maybe
9 the Copyright Office could say, well we're going to
10 presume to renew it and every third round we're going
11 to re-examine this from the top down and put out a
12 call and say it looks like this is no longer relevant.
13 If anyone disagrees they can come forward and let us
14 know, otherwise we're going to withdraw this exemption
15 that's now been on the books for three rounds or
16 whatever.

17 And Congress gave the Copyright Office wide
18 latitude to do this by calling it a rulemaking and so
19 I would challenge the idea that one party or another
20 should have a burden. I also want to say one quick
21 thing about changing exemptions from one round to
22 another. And for example, maybe you would say, okay

1 well DVD was in 2009 and '10 we did DVD and then it,
2 there was the discussion with DVD plus digitally
3 transmitted video plus Blu-Ray and so on and so forth.

4 We don't see a change from one to another as
5 an expansion of the exemption. What it is is a
6 modification to account for changed circumstances. So
7 when you have a larger group of materials that are
8 locked behind encryption and fewer people, and so your
9 ability to exercise your lawful rights are to fair use
10 and to other forms of non-infringing uses are more
11 constrained. It's not really fair to call that an
12 expansion, so I would invite the Office and the
13 participants here, and the participants in future
14 rulemakings to think of them the way we think of them
15 which is more as modifications than expansions. And I
16 think that's really kind of an important conceptual
17 point.

18 MR. AMER: May I -- I just want to follow up
19 on your point about structuring a proceeding more as a
20 rulemaking rather than an adjudication and I know that
21 was in your comments. I was wondering if you could
22 sort of sketch out what that might look like. I

1 assume that might involve independent factfinding
2 authority for the Office? If you could just -- and
3 you did this I realize to some extent -- but if you
4 could just elaborate what that process might involve
5 and how it might differ from the current proceeding,
6 and is that something that we have some latitude to do
7 under the current statute or would that require a
8 statutory change?

9 MR. LERNER: I do think that the Copyright
10 Office has wide latitude to set this rulemaking up
11 under the APA the way that, in various different ways.
12 And so if you wanted to bring in adjudication-like
13 procedures, there's probably some latitude for that.
14 At the same time a more generalized rulemaking process
15 with independent fact finding, as you put it, would be
16 appropriate.

17 I think the Copyright Office has already
18 done a lot of that independent factfinding and
19 reaching out to people and saying, is this something
20 that you think works? The dialogue that the Copyright
21 Office has through hearings and letter writing, the
22 other proceedings, so some of that independent

1 factfinding is already being done. I'm not sure it
2 would look that different but I think the big problem
3 is that is unfair and not really what Congress
4 intended is to say we're going to have strict, we're
5 going to divide commenters into proponents and
6 opponents and we're going this strict divide and it's
7 going to be run like a litigation.

8 But it shouldn't be run like a litigation
9 because these are rules that affect everyone in the
10 country and it's not just the proponents and the
11 people. I mean, a huge number of film makers and film
12 maker organizations sought to join our comment because
13 they thought it's important. I can't claim to
14 represent every film maker in the world or in the
15 country and neither can Steve claim to speak on behalf
16 of all film producers.

17 And so to me, it's, there are various
18 factors which include a rule of general applicability.
19 And the ability to consider policy is another thing
20 warranting rulemaking. I'm sorry.

21 MS. SMITH: Yeah, so the last rulemaking had
22 some changes in structure, which was arguably more

1 adjudicatory, and we heard that it was pretty time
2 consuming for both legal clinics for -- you know, many
3 people participated. We also heard at the hearings
4 though, from the proponent side, that they absolutely
5 did not want less opportunities to speak, so it was a
6 little perplexing aside from renewal of, you know,
7 streamline the renewal process, how we might alleviate
8 that burden.

9 Would you recommend going back to prior
10 structures, which I know you've participated in those
11 as well?

12 MR. LERNER: Thank you for that question. I
13 think that's a great question. So nuts and bolts, how
14 should this look? I think that it could look similar
15 to previous ones without -- and possibly if you change
16 the burdens around might make it less difficult for
17 the parties involved. I think you could have two or
18 three rounds of comments, and they could be open ended
19 comments. That would give plenty of opportunity for
20 people to respond to each other without sort saying
21 this formalistic, you have the burden of proof and so
22 on.

1 The petition really ended up being a huge
2 amount of work because people essentially had to stake
3 out. You know, you can't file the petition without
4 really doing a huge amount of the work that led up to
5 what will end up being filed in the mail comments
6 months later. And so that ended up being, from our
7 view, totally counterproductive in terms of saving
8 time.

9 And I also think that it doesn't -- people
10 obviously can petition for rulemaking, but usually
11 that's when the agency decides or has declined to do
12 rulemaking or has not said we're going to do
13 rulemaking. And so I don't think a petition is really
14 necessary. I think you could have three comments.

15 I would also recommend that you do recognize
16 that law clinics represent a lot of the people who are
17 advocating for exemptions. And the thing with that,
18 that I think is important is the reason so many law
19 clinics, and we looked at the numbers and the majority
20 of the substantive comments that were, you know, that
21 were filed by counsel, for example, that were in favor
22 of exemptions were by law clinics.

1 The reason for that is because of the nature
2 of the system when you have user groups, they're
3 atomized. They're not as well funded. There's not
4 necessarily as much capital behind them as there are
5 with other groups, and so really what it comes down to
6 is no one else can afford to -- or very few people can
7 afford to participate in a proceeding without this
8 unique animal called law clinics that have students
9 that can donate their time.

10 And in our case, it was nearing on a couple
11 thousand hours and because there was just so much
12 evidence that we felt we needed to collect, yet that
13 still was not enough for everything that we thought
14 was appropriate.

15 MS. SMITH: Thank you. Mr. Metalitz?

16 MR. METALITZ: Yes, thank you. I think our
17 groups would have a lot of sympathy with a lot of what
18 Jack was just saying, not all of it, but we'd
19 certainly be -- there are some changes that could be
20 made. I do want to say, just to back up for a second,
21 and having participated in all six of the triennial
22 rulemakings, I think that basically the system is

1 working. That's not to say that we're happy with all
2 of the outcomes. We're not, but basically, I think
3 it's kind of come around to a system where people do
4 have their say. All the issues do get ventilated and
5 placed before the Office, and you can make a reasoned
6 recommendation.

7 So we don't think anything is fundamentally
8 broken, and we don't think any fundamental change is
9 needed. And the basic approach you followed,
10 including on issues like burden of proof and so forth,
11 we think is essentially right. That said, I think
12 there are some things that could be done to make it
13 run more smoothly and more efficiently, even apart of
14 the renewal of existing exemptions, which we've
15 already talked about.

16 One is the suggestion to have the rounds
17 open to all. It isn't just a proponents' round or an
18 opponents' round. I think there was a lot of
19 unhappiness from our side, if you will, that in the
20 last round the proponents had three bites at the
21 apple, and we had one. And they got the last word.
22 You could probably reduce that problem by having the

1 rounds open to all, so neither side necessarily --

2 MS. SMITH: Can I ask you a question that we
3 also asked I think some of your -- the people that
4 you're representing in D.C.? I mean was there
5 something that was left unsaid from your perspective?

6 MR. METALITZ: Well, the issue arose -- I
7 think in the hearings there were questions about
8 whether information to rebut that last word that had
9 been given to the proponents could even be brought
10 forward. So yes, I think there were some things that
11 was a little questionable on how to get them into the
12 record.

13 Second, the idea of conforming to the
14 academic calendar, I think you're right. This -- one
15 thing that has made this process work over the years
16 is the role of the law clinics. They have contributed
17 immensely to this rulemaking process. I think they
18 really raise the caliber of advocacy on both sides,
19 again, compared to what was the case in 2000 and 2003.
20 So I think that ought to be encouraged, and there
21 might be some ways to do that.

22 One way might be to, if we can, let's not

1 run the next rulemaking right up to the statutory
2 deadline as is usually the case, and in one or two
3 unfortunate cases, beyond the statutory deadline. And
4 so that might allow for the hearings to be concluded
5 by May and then there might be some follow up there.

6 But it would also allow for one reform that
7 we've suggested, which is that a draft recommendation
8 be made available so that the parties could take a
9 look at it and perhaps give some suggestions because
10 there are simply drafting issues and clarifications
11 that as it comes out now, on the day that the rule
12 comes into force is the first time we've seen the
13 rule. And there usually isn't any path that we know
14 of to seek clarification. At least it's not clear
15 what that would be, and just as a matter of
16 governance, I'm not sure that's the best situation
17 where a rule takes effect that day and henceforth the
18 legal status of what you're doing might change.

19 So being able to back up the process so that
20 a draft recommendation is produced in, let's say,
21 September after hearings have concluded in May and
22 then allowing some opportunity, not for re-litigating

1 it, but simply for clarification and drafting issues.
2 And that would also give the beneficiaries of the
3 exemptions a little more time to understand what it
4 means to them and how they might be able to change
5 their behavior and the same with those who have
6 opposed it.

7 So those are just some -- I think those are
8 consistent basically with what Jack has been
9 suggesting, and I would hope those would be changes
10 that might be considered.

11 MR. LERNER: Very quickly.

12 MS. SMITH: Okay. So the Copyright Office
13 is certainly considering a lot of these changes. I
14 mean we are stuck with, unless we change the statute,
15 that it needs to be tracked in months, so there's only
16 so much time. And so that's something that we are
17 taking into account when we consider all these.

18 I think Mr. Wiens has been waiting for a
19 while. So you participated the first time in the last
20 rulemaking cycle and so I invite you to comment on two
21 issues. One, how much would it help if there was some
22 streamlining of renewal of the exemptions that were

1 granted, such as automobiles or tractors, et cetera?

2 And two, what was your experience like, do you have
3 suggestions how it might go better or what worked or
4 what didn't?

5 MR. WIENS: Sure. Yes, so we, when we
6 started the process a few years ago planning what we
7 were going to do, we had a list of about 50 exemptions
8 that we wanted to file. And we whittled that down to
9 about the six that we were able to work on and file
10 because that was the number of clinics that we had.

11 The fundamental underlying problem is the
12 narrowness of these exemptions in terms of types of
13 devices. So we have an exemption for wearables right
14 now, but yesterday Pebble announced a new smartwatch,
15 so that would fall under the wearables category. But
16 they have a version of the smartwatch that doesn't
17 actually attach to you. It's a watch without a band.
18 It's just a separate device, and it's not a general
19 purpose computing device. It's not a tablet, doesn't
20 have a -- so I don't even know what that --

21 MS. SMITH: But how it is a watch? Is it a
22 clock?

1 MR. WIENS: It's the same exact hardware as
2 the watch, just without a band, so you can like clip
3 it on yourself while you're running. Is that a
4 wearable? I don't know.

5 MS. SMITH: I think that's wearable.

6 MR. WIENS: But you can use it without
7 wearing it. Yeah, sure. I mean this categorization
8 of products becomes incredibly challenging. And there
9 -- one exemption that wasn't one of the 50 that we
10 were thinking about was for refrigerators. Samsung
11 has a smart refrigerator with what's effectively a
12 touch screen built into it, and there's a bug in it
13 where it tied into a specific Google API for using
14 calendar so you could show events on the screen. And
15 Google deprecated the API, and Samsung decided not to
16 update the software. And so everybody's refrigerators
17 are now bricked and don't have this calendar
18 functionality.

19 So you have to go in and jailbreak the
20 refrigerator in order to make your calendar work
21 again, and nobody even thought about filing for an
22 exemption for this. So to think about, okay, in three

1 years, we're going to file this, I would guess that if
2 we started now and we said we're going to file for an
3 exemption, probably in five years there won't be
4 tablets on refrigerators. There will be something
5 else.

6 So the sweeping pace of the industry is,
7 yeah, out of whack with the cycle. So what I would be
8 interested in is broadening the scope of types of
9 uses, you know, looking at something -- repair across
10 all products rather than on specific types of
11 products. The amount of energy that we put into the
12 last few years I don't think is sustainable for us or
13 anybody else. And if we hadn't kind of decided to
14 draw a line in the sand, this rulemaking on file for
15 as many exemptions as we had and bring all the public
16 attention to it, we wouldn't see the kinds of freedoms
17 that we have. And it's absolutely critical for the
18 future of the economy that we have these freedoms.

19 I realize you're striking a balance with
20 protecting rights holders and incentivizing
21 innovation. The repair and manufacturing sectors
22 represent about 35 percent of the American GDP. The

1 entertainment industry is about 4 to 5 percent, so we
2 risk threatening -- by having this process, we so dial
3 it down and restrict it, we risk threatening huge
4 swaths of innovation.

5 MS. SMITH: Thank you. I'm going to go to
6 Mr. Reed next and just tee up the next question, which
7 is building on things we've been talking about, which
8 is how should we treat modifications, whether it's a
9 product that we didn't think about -- the
10 refrigerator. Which one is the same type of software
11 that was the watch or the watch that's not a watch as
12 well it's renewal of what has specifically been
13 considered before? And I guess I'll try and do that,
14 something that came up in D.C. If we do move to a
15 more rulemaking, less adjudicatory model, does that
16 create a problem in saying everyone's in agreement; no
17 one's opposing what happened in the past, but this is
18 how we treat the future?

19 So I know that's sort of a new question.
20 You say what you were going to say, and others can go
21 to that one or you can speak to that issue.

22 MR. REED: Okay. Thank you. So actually

1 what I was going to say was related to modification.

2 I just wanted to respond to what Professor Lerner said

3 a minute ago when he referenced the DVDs to Blu-ray.

4 It's not so much an expansion as it is a modification

5 or an update of that exemption, and I think he's

6 exactly right.

7 And I just wanted to caution the Office when

8 we're thinking about how to structure any kind of a

9 "renewal process" that we keep in mind that just as

10 the technology advances, so do the distribution

11 mechanisms and the market around that content, which

12 is one of the things that 1201 is designed -- the

13 rulemaking process -- is designed to take into

14 account.

15 With respect to your broader question of

16 just how the Office should think about modifications,

17 I think that's -- I acknowledge it's tricky,

18 particularly in some of these hardware cases. I think

19 in some of our industry, with the content industry

20 specifically, I think it's a little more

21 straightforward in that we're still dealing with

22 copyrighted content and the distribution mechanism has

1 changed. The way you may want to consume it or use it
2 has perhaps changed but a little less to think about,
3 I think. I'm not sure I have a great response to your
4 broader question, how to handle the watch situation,
5 for example, which I agree is legitimate.

6 While I have the floor, I did want to
7 respond to one other thing, which is to echo Mr.
8 Metalitz's point earlier about having an opportunity
9 to look at a proposed final rule. This is a very odd
10 rulemaking in that there is no "proposed rule" phase.
11 We do a lot of work obviously with the Federal
12 Communications Commission, other regulatory agencies
13 where there's a very well-worn path where they issue a
14 notice, they get a bunch of comments, and they come up
15 with a proposed rule. People issue a bunch of
16 comments.

17 I take the point that it's a three-year
18 rulemaking, and it's hard to cram all that in. And I
19 also think one of the commenters made a -- in their
20 written submission made a comment about it being like
21 an exemption treadmill and a process where you push it
22 --

1 MS. SMITH: Right. You want to have some
2 time where you can just actually use it and take a
3 break.

4 MR. REED: Exactly, and that's true I think
5 for both sides, people that want these exemptions and
6 those that oppose them. So I'm sensitive to that
7 issue, but at the same time, I think it's a real -- it
8 would add to the rulemaking pretty dramatically if we
9 had an opportunity -- both sides had an opportunity to
10 look at the actual language before it goes into
11 effect. And again, as Mr. Metalitz said, it's very
12 odd to have some pronouncement of government effective
13 on the day that it's been first publicly released.

14 MS. SMITH: Thank you. Professor Samuelson?

15 MS. SAMUELSON: So I think there are lots of
16 ways to try to streamline the process. So I like the
17 way that things are being talked about now, which is
18 sort renewal of the same treated this way,
19 modification, which can be just a new device or a new
20 type of --

21 MS. SMITH: Platform.

22 MS. SAMUELSON: And then kind of new

1 exemptions, and I think treating them in three buckets
2 actually would be a nice advance. And I think that
3 you could streamline obviously the renewal especially
4 that's unopposed. That's easy, maybe not quite so
5 heavy a burden for the modification of an existing
6 exemption.

7 And then from my standpoint, the burden
8 right now is a little too heavy for the brand new
9 exemptions. I think that the Cyber Law Clinic's
10 submission I think did a very nice job explaining that
11 the burdens don't have to be quite as heavy. And I
12 think part of the reason it took 572 hours for the
13 Cyber Law Clinic to put together their exemption was
14 because the burden is higher than necessarily it needs
15 to be.

16 And that's, I think, an important thing,
17 too. And there may be actually a way to do a little
18 bit of tinkering within the rules that get
19 promulgated, so other analogous devices would be a
20 kind of, or other analogous uses would be something
21 that would give you a little bit of flexibility within
22 the rules so that the watch comes along and it's an

1 analogous device. So I think that those kinds of
2 approaches would really be helpful to the Office and I
3 think also to the people who are putting forward
4 exemption requests.

5 MS. SMITH: Thank you. Mr. Wolfe?

6 MR. WOLFE: I want to respond to something
7 that was said a little bit ago. As preceding, I'll
8 note that it's great to see broad consensus around a
9 lot of these issues. I think that some of the
10 frustrations we're all feeling are mutual, and
11 hopefully, this will result in smoothing the
12 procedures out considerably.

13 But Mr. Metalitz did note earlier that he
14 found that the system was, on the whole, working. And
15 I want to push back with regard to something that's
16 been on one score, which is that the system is, and
17 we've noted this in the last several comments, but
18 it's by statute necessarily under-inclusive of
19 protecting the non-infringing uses that organizations
20 like my own care about.

21 Only those people -- only those non-
22 infringing uses that are impacted that have

1 proponents, that have the energy, that know about the
2 procedures, that have connections to the law clinics,
3 only those particular use cases are going to be the
4 ones that eventually end up securing exemptions. And
5 as a number of the public interest and nonprofit
6 organizations probably that are -- that have been
7 acting as proponents have noted, it's not terribly
8 sustainable.

9 So to the extent the system is working now,
10 its footing might be a little bit tenuous, the ability
11 to continue to rely on law clinics, as my organization
12 has done, is certainly something that we're concerned
13 about. And the other movement is to one where
14 increasingly, especially in the world of content, more
15 and more content is formed digital first and perhaps
16 digital only. For our organization, we secured a
17 relatively modest exemption to enable fair use of
18 certain kinds of digital media, namely video.

19 As more and more text, imagery, et cetera
20 becomes digital first, digital only, more and more
21 impacted by technical protection measures, we, too,
22 could be in a situation where we would want to file

1 six or seven of these incredibly narrow petitions
2 rather than just the single one that we feel we
3 presently need given the current media landscape.

4 And with that on the future, I really --
5 Pam's three-part way of looking at things struck me as
6 being sensible to renewal modification, new exemption.
7 I think it may be even a four-part system. Pam
8 mentioned analogous reasoning as being something that
9 could be incorporated within the rule. It could also
10 be, I think, for future rules and for new rules that
11 are analogous to existing rules. And for us, it would
12 probably be around the quotation of digital media
13 generally, even if it's a new rulemaking process,
14 having some evidentiary weight accorded to those
15 analogous cases would be a substantial lessening of
16 the burden.

17 MS. SMITH: That could be limited to sort
18 legal findings as opposed to factfinding if we're
19 talking about different products or devices or
20 platforms, given the statutory requirement to make
21 some determination of what is or is likely to happen
22 on the ground in the next three years.

1 MR. WOLFE: To some degree, I think it's
2 predicated on the facts being different, so yes, that
3 sounds right that it would be, in that case, the legal
4 reasoning could be done by analogy. But the factual
5 burden would still be on the proponent. That makes
6 some sense.

7 MS. SMITH: Okay. One more just more
8 specific question about renewals. It's sort of a
9 minor question, but some things suggested at the D.C.
10 hearing was perhaps like a trademark renewal form.
11 You can have set up an automatic email address that
12 this is where you can find the law clinic. I mean it
13 was raised before that the same proponent may not
14 always be there. They may not know to request it, or
15 perhaps the Office could publish something saying, you
16 know, get ready. Would that give enough notice to
17 solve this problem of legal clinics having a lot of
18 different turnover? Mr. Lerner.

19 MR. LERNER: I'm not sure I understand the
20 question.

21 MS. SMITH: Well, Mr. Butler in D.C.
22 suggested just like if our form or if the Copyright

1 Office called for, you know, have an email address I
2 guess of where he was at UVA, for example, that would
3 be useful. That wouldn't go to a single person, but
4 it just would go to, I guess, somebody they assigned
5 it to. That would be helpful to then not worry about
6 missing the deadline for submitting something to
7 renew, or perhaps we'd also -- we do that in
8 combination of publishing it. You know, alert the
9 people who had previously benefited for an exemption
10 that, hey, now it's time to consider whether you want
11 to renew it or not.

12 MR. LERNER: Well, I think that would be a
13 great improvement over simply saying if you don't show
14 up, no renewal, right? So I think that would be a
15 great improvement over that. I still think it would
16 be better for the Copyright Office to sort of say,
17 let's take a look ourselves at the conditions even if
18 people don't show up. And the reality is probably a
19 lot of people will show up, and we all know that, but
20 not necessarily every time. So I think it would be
21 certainly an improvement over simply saying, you know,
22 if you don't show up, you could make it.

1 MS. SMITH: Do you think the Office would
2 have an affirmative duty to investigate if nobody
3 cared one way or the other, or could we say, you know,
4 no one cares; I guess it goes away?

5 MR. LERNER: Well --

6 MS. SMITH: It doesn't seem under the
7 current statute -- I don't see that we would have an
8 obligation.

9 MR. LERNER: Well, I think that if you're
10 going to conduct a rulemaking and ask this open ended
11 question, then yes, you would want to take a look. It
12 might be that the look does not -- where does that
13 end, and where does that begin. You know, you have a
14 lot of discretion. You know, the Copyright Office has
15 a lot of discretion to make that determination. But I
16 think that there could be either an obligation or an
17 initiative to take that approach.

18 I also want to say, if I may, I haven't
19 heard anything that folks have discussed in this
20 particular -- in this session that would not -- that
21 would require a statutory amendment. I think all of
22 this is well within the Office's discretion, and the

1 Supreme Court has said in Chevron and all these other
2 cases that there's lots of independence and discretion
3 to do this.

4 MR. AMER: Does everyone agree with that?
5 Is there any sort of disagreement that under the
6 current statute we would have the authority?

7 I mean just to look at the language, it
8 says, "the Librarian . . . upon the recommendation of
9 the Register of Copyrights . . . shall make the
10 determination in a rulemaking proceeding," and then in
11 paragraph (D) it says, "The Librarian shall publish
12 any class of copyrighted works for which the Librarian
13 has determined, pursuant to the rulemaking conducted
14 under subparagraph (C)." Is there any concern that
15 the farther we get away from looking at newly
16 submitted evidence that we're sort of getting far
17 afield from what was intended by Congress by
18 prescribing a rulemaking proceeding? Mr. Metalitz?

19 MR. METALITZ: I think most of the things
20 that are talked about here probably could fit well
21 within the discretion that you have, and I think
22 making use of concepts like taking the administrative

1 notice of what went on in the earlier proceeding, what
2 was in the earlier record, there's probably more that
3 could be done for that. That's kind of what we're
4 talking about with this renewal idea.

5 I do want to push back a little bit on the
6 three tier and now four tier idea that's come forward,
7 and that may create some --

8 MS. SMITH: It does seem a bit complicated
9 from this side of the table.

10 MR. METALITZ: It gets complicated, and it
11 also may create some questions of compliance with the
12 statute because I think it is important that, as the
13 Office has amply documented over the years there is a
14 sense of who has a burden here or what happens if the
15 evidence is in equipoise, I guess is the way you would
16 put it. And what are you having to show and what kind
17 of adverse impacts are we talking about?

18 I think a lot of what we're talking about
19 here could be done entirely without changing that
20 framework. You know, the modification versus
21 expansion, I mean we could get kind of semantic about
22 it here. An expansion is a modification, but in some

1 cases, there may be some important factual questions
2 about the new use or the new user or whatever it is
3 that's involved in the modification.

4 You can kind of build on the record you made
5 before, for example, in the educational sphere on
6 audiovisual. There's a record that's been made, but
7 if you want to expand it to other types of technology
8 and to other types of educational settings, then I
9 think you have to fulfill that burden of showing, you
10 know, of meeting the statutory requirements. It's a
11 little different when it's brand new and you haven't
12 ever had an exemption in a particular area. Obviously
13 then, there's not much administrative record that you
14 can rely on. But I think in general, most of this
15 could be done in the confines of the statute.

16 MS. SMITH: Thank you. We have a lot of
17 cards up, so I'm going to try to get to everyone now.
18 If you can keep it sort of quick, and then we'll get
19 to a new question. So Ms. Gellis?

20 MS. GELLIS: Well, I wanted to pick up on
21 some of the discussion for burdens, and this has come
22 up in the context of renewal. But there's burdens all

1 the way around, and I think some of these answers have
2 talked about even just getting in the door sometime is
3 incredibly burdensome. I wanted to sort of amplify
4 some other things that I heard, particularly from Mr.
5 Wiens and Mr. Wolfe, about the effort and the role of
6 pro bono counsel and the role of clinics and think
7 about the numbers that are involved in terms of the
8 cost, that is. And who is bearing this cost?

9 We have issues where the public has some
10 non-infringing uses they want to make. And right now,
11 they're running into a statutory bar that unless they
12 get the exemption, they pursue those uses with
13 tremendous legal risk. Even to get in the door, you
14 think about who's here and who's not here. So I'm a
15 lawyer in private practice, and perhaps I can get a
16 paying client in industry that wants to go develop in
17 some area. And they think they're facing some legal
18 risk with 1201, so maybe they will pay me and hire me.
19 And I can get a paying client and lots of billable
20 hours pursuing this petition all the way through.

21 That doesn't necessarily happen that much.
22 If we look at who was even at the table in this last

1 round, there were some industry players, but there
2 were an awful lot of non-industry players, a lot of
3 proponents either represented by public interest
4 organizations, pro bono counsel or clinics.

5 And if you think about where that manpower
6 is getting paid for, this is starting to look like a
7 tax on the public to make sure that the public gets
8 access to uses that it's supposed to be able to do.
9 Where do pro bono counsel -- that's a huge subsidy.
10 If I wanted to take on one of those petitions myself,
11 I would have to have a tremendous amount of buffer in
12 my schedule for how many hours that's going to swallow
13 that I'll not be able to bill for.

14 Public interest organizations might prefer
15 to use some of the manpower for other causes, and the
16 clinics, these are students generally paying for the
17 privilege of protecting the public. And the money in
18 what we're looking to law schools to subsidize, and
19 law schools have their own economic tensions that may
20 not be particularly healthy right now. I don't think
21 we can look past this. It is worth thinking about
22 these numbers, particularly when we think about

1 burdens because the burden is more substantial than
2 just who's doing the work.

3 Whether it's sustainable and the type of
4 interest that's being vindicated, somebody's paying
5 for it, and it's not the industry that's necessarily
6 benefitting from having these barriers to access.

7 MS. SMITH: Thank you. Mr. LaBarre?

8 MR. LABARRE: Yeah. I guess I want to push
9 back just a little bit on the concept that the process
10 has been working. I don't think we can say it has
11 when, with respect to the exemption for the blind and
12 print disabled, it had -- it has never had any
13 meaningful opposition. Nevertheless, it took the
14 intervention of the Librarian of Congress to prevent
15 the exemption being rejected six years ago or whenever
16 that occurred.

17 So I think that's a sign that there is
18 something wrong with the process, and I think some of
19 the reforms that we've been talking about will go a
20 great way to addressing what's wrong with the process.
21 I also want to echo that I think the idea of having
22 some kind of draft rule would be very helpful because

1 with respect to our exemption, if I may call it that,
2 one time it was 100 words. Another time, it was 752
3 words, and trying to get an understanding after the
4 fact about okay, how does it apply now, is a little
5 difficult. So I think that idea that was raised is an
6 excellent one.

7 Finally, at least in our universe with
8 respect to this kind of exemption, the universe is
9 rather limited. So I think the Copyright Office could
10 establish a list of go-to organizations and send out
11 appropriate requests for information or just a general
12 heads-up that something is going to be occurring. So
13 I think that would be very helpful.

14 MS. SMITH: Thank you. Mr. McClure?

15 MR. MCCLURE: Just to build off what Mr.
16 LaBarre was saying and I think Mr. Lerner a long time
17 ago, we actually believe that the presumptive renewal
18 doesn't necessarily even need the box checking form to
19 be filled out. And we think that would be the best
20 case scenarios if it's just presumptively renewed.
21 Going back to -- I think you had asked a question
22 about statutory authority for presumptive renewal, and

1 then also possibly somebody brought up policy
2 considerations.

3 And we believe that there's basis in the
4 statute under the factor 5, such other factors as the
5 Librarian considers appropriate, so to consider some
6 of these procedural factors perhaps, that that's where
7 the presumptive could come in. Look, we've granted it
8 before, you know, this is a factor in granting it
9 again.

10 With regard to the academic calendar, I
11 think Stanford and maybe UChicago are the only schools
12 that are still in session, which is why I'm here, but
13 late April to maybe the 1st week of May, I think, is
14 the sweet spot for all law programs. I just wanted to
15 have that on --

16 MS. SMITH: When you say sweet spot, you
17 mean --

18 MR. MCCLURE: I mean like end of the term
19 for spring term, so if this testimony were happening
20 sometime between mid-April and early May, you might
21 see students from a bunch of different schools here
22 other than just the quarter system because Stanford

1 gets out late.

2 MS. SMITH: Right, and then what about in
3 terms of starting the process? I mean we -- I think
4 the Office had intended the petition would actually be
5 easier for law clinics, and we did try to make it so
6 that it would jibe as well as we could with some of
7 the school schedules. Even the ones that are not on
8 the quarter system will have their own different
9 schedule, but if you have thoughts about that, we
10 would be appreciative.

11 MR. MCCLURE: I don't have anything off the
12 top of my head. It's hard to say because the clinics,
13 Stanford's for example, we do a winter and spring
14 term. Some other clinics do a fall and spring, so it
15 kind of switches around. But I think at least if this
16 testimony were a little bit earlier, that would be --
17 we would be able to figure it out with our calendar.

18 MS. SMITH: Yeah. We also -- sometimes we
19 get in trouble finding the space because when class is
20 in session, you know, we're able to be at Hastings
21 because they're not in session, which is ironic
22 because it's hard to get student participation. So

1 maybe Professor Samuelson has thoughts on that.

2 MR. MCCLURE: Could I bring up one more
3 point that I just wanted to say with regard to this
4 theme of more process and how the burden shifting and
5 how people are crying for more process? I think it's
6 because this process has been so uncertain in the
7 past, and certain exemptions that haven't necessarily
8 been granted that perhaps should have been granted.
9 And proponents of these exemptions see more process as
10 leading to more certainty, which perhaps isn't the
11 case. I think that's probably misplaced.

12 If there were a sense that once you got this
13 exemption, you know, that was sort of the big fight.
14 And going forward, it was -- unless there was some
15 great change to the marketplace or a great change in
16 circumstances, you would have that exemption going
17 forward, I think less process would perhaps be
18 acceptable.

19 MS. SMITH: Okay. Thanks. So Professor
20 Samuelson, and then we'll go to Mr. Wolfe.

21 MS. SAMUELSON: So one point that came up a
22 little bit earlier and no one else has commented on, I

1 do want to talk about. And that is the non-infringing
2 use. So as I read the legislative history and the
3 statute, I think that the rulemaking is really about
4 ensuring that that failsafe for non-infringing uses is
5 actually the focus of this process. And so, while I
6 completely understand why the entertainment industry
7 and other copyright industry groups want to have a say
8 about this, I think that thinking about it more from
9 the standpoint of, we are here to fulfill Congress's
10 intent that non-infringing uses are actually able to
11 be exercised, would be a kind of mindset approach that
12 I would like to see the Office adopt a little bit
13 more.

14 And then what -- how certain do you have to
15 be that something is a non-infringing use, I think, is
16 another issue that I've seen come up. And I want to
17 put on the table that I think that there shouldn't
18 have to be case law that supports a particular thing
19 being a non-infringing use. I think if it's a
20 plausible non-infringing use, and you can say this is
21 kind of like this particular situation, that should be
22 enough.

1 If it's a plausible, non-infringing use, I
2 think many of the types of things that you've seen
3 people come forward with are pretty clearly non-
4 infringing uses. So I want to make plausible non-
5 infringing uses something that the Office really takes
6 into account.

7 And from my standpoint, if it ever came up,
8 which it probably won't, I'm going to say that if film
9 studies professors get a chance to do a circumvention
10 to make clips for their classes, then if I'm teaching
11 evidence and I want to take some clips for teaching my
12 evidence class from movies about trials, then I want
13 to say that still is a fair use.

14 And even though I don't have an exemption,
15 I'm going to say it's enough like the exemption so
16 that I'm going to still say fair use circumventions
17 can still be justified, and I'm going to try to make
18 1201(a)(1) actually do some work for us. And I'll
19 point out that even Jane Ginsburg, who usually takes a
20 very narrow view of fair use, thinks that there's got
21 to be some room for fair use circumventions outside of
22 the rulemaking process.

1 The rulemaking process is invaluable because
2 if you get the exemption, then it's failsafe, right?
3 My evidence example is something where you might have
4 to actually go to court and justify it as a fair use,
5 but I think that thinking about it from that
6 standpoint would be helpful.

7 MR. AMER: I think from -- to follow up on
8 your point about there not needing to be a case on
9 point, I think the challenge from our perspective may
10 be, you know, the fact that the statute says likely
11 non-infringing. And --

12 MS. SAMUELSON: I think non-infringing is
13 plausible.

14 MR. AMER: Yeah, I think this was raised in
15 one of the -- it may have been the Cyber Law comments.
16 I mean, that's sort of a legal question, and to map on
17 this more-likely-than-not standard to a legal
18 question, I think, can be a challenge.

19 MS. SAMUELSON: You can do it.

20 MR. LERNER: That is what the statute
21 requires, and Congress clearly intended that fair use
22 and other non-infringing uses be given to the courts

1 and allowed to evolve. And the thing is, with what --
2 with a sort of plausibility standard or some
3 likelihood standard for whether it is likely a non-
4 infringing use or not, there's a built in remedy.
5 There's built in backstop if the Copyright Office were
6 to get it wrong and turn it over to the court and say,
7 this isn't a non-infringing use. This is an
8 infringing use and that is, you have a copyright
9 remedy in that situation. Right?

10 So there's almost no downside, in
11 particular, to having a more reasonable, we think,
12 non-infringing use standard as part of the standards
13 for -- that you're looking at in this proceeding. You
14 know, the other thing to think about is I can't think
15 -- I don't know of any exemption that has resulted in
16 any kind of adverse effects, increasing infringement,
17 any misuse, right?

18 And so -- and maybe that's because the
19 Copyright Office has been, you know, I think that
20 probably my friend Steve would argue that that's
21 because the Copyright Office was inappropriately
22 conservative, but I would actually argue that even if

1 the Copyright Office wasn't as conservative, there
2 would still be a lot of exemptions granted, and they
3 would not lead to -- I mean there's just really no
4 connection between any infringement or risk of an
5 infringement or risk of market harm in any of these
6 exemptions. And I think the Copyright Office should
7 consider that a little bit more strongly.

8 I want to make one other point if -- yes?

9 MS. SMITH: I mean you're talking about the
10 exemptions that had been granted?

11 MR. LERNER: I am, but I'm also saying that
12 if you looked at another exemption that, for example,
13 narrative filmmaking is one that we sought, but there
14 are others that were denied where the Copyright Office
15 said there's not sufficient evidence or likelihood of
16 -- that this is actually a non-infringing use. You
17 know, I don't think that if that had been -- that
18 really any infringement or misuse would have resulted,
19 if that had been granted.

20 MS. SMITH: I think that has to be a case-
21 by-case determination. I've been trying to think
22 about, and to some of the other points, too, an

1 example where broadening the scope of the exemption or
2 the modification might really result in a different
3 outcome. And one example that occurred me is some of
4 the petitions we did. It's rulemaking for video
5 games, right, because the uses or the way, you know,
6 what the TPM is, some of that, I think, might have
7 more of the devices included, more of a direct link to
8 piracy as opposed to what some of the uses.

9 You know, so we sort of looked at that on a
10 more granular level. I don't know if you can speak
11 how that might go to some of this -- the streamlining
12 we're talking about or your concerns about applying
13 it.

14 MR. LERNER: Well, I mean I think we'll
15 never know because that exemption wasn't granted. And
16 I can't speak to the specific evidence that was at
17 issue there and whether that was sufficient. I'm not
18 sure that in a lot of the cases there is any kind of
19 real evidence other than just simply someone saying,
20 hey, I -- this is going to -- we're going to be very
21 worried about this, or we won't have the assurances
22 that we need or something like that, so it should be

1 denied on that basis.

2 The question is, has there been any evidence
3 that there really would -- that this really would
4 happen and again, unfortunately I can't speak to the
5 video game. One, I didn't work on it.

6 MS. SMITH: Yeah. I mean I just think it
7 might go to likely non-infringing, so this isn't --
8 jailbreaking video games specifically was the one that
9 was denied. Okay. We'll move to Mr. Wolfe.

10 MR. WOLFE: I'm not sure I have a response
11 directly on point. I just wanted to echo some of the
12 comments about the statute. In our read, the statute
13 is fairly protective of non-infringing use and that
14 the more procedure is rooted in the statute, in our
15 view, the better. So very -- just very quickly on
16 that point.

17 And beyond that, and this maybe just shades
18 a little bit into the next session, but it's important
19 to remember throughout the rulemaking process who the
20 beneficiaries of the exemptions are. In our case,
21 we're a community of creative individuals. And then
22 for many of the exemptions sought, the beneficiaries

1 are individuals. And echoing Mr. LaBarre a little
2 bit, if the exemptions are not readable or
3 understandable or usable by individuals, it not only
4 makes the process difficult to take away as a win for
5 us, but I think it also creates -- we've heard some
6 mention that communities popularly disregard 1201 or
7 are unaware of it, or if they are aware of it,
8 struggle to understand and make use of it.

9 Creating usable exemptions with the end
10 users in mind is important to making the system work
11 as a whole. And I think some of that shades back into
12 issues of breadth. And from our perspective,
13 allowance for slightly broader exemptions can also
14 make for more usable exemptions, which will make the
15 exemption process more respected by our community and
16 by others.

17 MS. SMITH: Okay. Mr. Metalitz?

18 MR. METALITZ: Yes, thank you. I just have
19 to push back on a few of the points that Professor
20 Samuelson made about how you treat fair use or non-
21 infringing use. Plausible is not likely, not the same
22 thing. It's plausible that Golden State will come

1 back from three to one and win, but it's not likely.

2 It's not more likely than not if that will happen, and

3 we can all have our rooting views about that. But

4 anyway, it's not the same thing.

5 Likely, of course, also doesn't mean you

6 have to have a case directly on point because we

7 understand that fair use is fact-specific, and if you

8 find a case that's sufficiently close to the facts

9 that you're talking about, I think you can make a good

10 argument that it's likely that would be non-

11 infringing.

12 But the other point to remember is non-

13 infringing use, first of all, is not synonymous with

14 fair use. It also includes things like licensed use,

15 which is non-infringing. But the proceeding is not

16 just about non-infringing use. It's one aspect. You

17 have to show that the use that you want to make is

18 likely to be non-infringing.

19 But you also, there are other factors that

20 are involved here, and the example that you gave about

21 the different types of classes, that wasn't about

22 whether one was fair use and the other one wasn't fair

1 use. It was about whether there were alternatives and
2 whether that could be achieved without circumvention,
3 and therefore, whether as Mitch Stoltz reminded us
4 this morning, the test is whether the prohibition on
5 circumvention is inhibiting -- has a substantial
6 adverse impact on those non-infringing uses. So that
7 was the question about the different kinds of classes.

8 The argument was, which we lost in the past,
9 was that, you know, you didn't have to necessarily
10 have the same quality of copying for one class as for
11 another class, for another subject matter. It wasn't
12 that one was fair use and the other one wasn't fair
13 use. But it was really going to that other factor and
14 looking at whether the facts showed that there were no
15 alternatives or that the prohibition on circumvention
16 was having this adverse impact.

17 Of course, we will always repeat that fair
18 use does not mean that you have access to a particular
19 work in your preferred format. And I know we've said
20 that many times, but it happens to be the law. And so
21 I think that's something that you would be taking into
22 account.

1 MS. SMITH: Thank you. Mr. Wiens, did you
2 want to jump in?

3 MR. WIENS: I'll let Mr. Wolfe respond.

4 MS. SMITH: Mr. Wolfe?

5 MR. WOLFE: I just wanted to make a quick
6 clarification. As long as we're being very nitty
7 about the statutory language, it isn't a substantial
8 adverse impact. It's an adverse impact, and I think
9 the distinction is important. And I just wanted to
10 flag it.

11 MS. SMITH: Thank you. Mr. Lerner, I think,
12 or --

13 MR. LERNER: I believe Ms. Gellis was before
14 me, but --

15 MS. SMITH: Whoever was before. So whoever
16 was --

17 MS. GELLIS: I was, but I'll follow up.

18 MS. SMITH: Okay.

19 MR. LERNER: You know, I think we've talked
20 about -- a lot about the burden, how difficult it is.
21 There's a lot to think about here. It's quite a high
22 burden for the Copyright Office. You know, the

1 Copyright Office has a lot to deal with in the
2 statute. And we're aware of that. I think it's in
3 two ways that the Copyright Office -- and we've talked
4 about one of them. We haven't talked about the other
5 in this session -- two ways that the Copyright Office
6 can really make this more simple is by not having such
7 a high burden and not having such a rigorous, you
8 know, anywhere from four to ten step set of inquiries.

9 And so we've recommended a set of more
10 streamlined factors that we think the Copyright Office
11 should say that are pretty straightforward and others
12 have, so I would encourage you to think about that.
13 And that might be a way to reduce the work on
14 everyone.

15 The other one is, again, the merged access
16 and use controls issue, right? And you know, if you
17 look back to what Marybeth Peters said in 1997, I
18 think it's a perfect articulation of the statutory
19 intent. And you know, she said we're going to have
20 access, people trying to get the material. Then we're
21 going to have people that want to circumvent
22 infringement protections in order to make fair use.

1 And we think that the statute is nicely
2 bifurcated to avoid that. The fact that encryption
3 and those things --

4 MS. SMITH: So I think you've shared that's
5 something to obviously consider under other factors --

6 MR. LERNER: Okay. Yes.

7 MS. SMITH: -- with something towards
8 granting.

9 MR. LERNER: Right. So just to cut to the
10 chase, I think that could be an overwhelmingly more
11 important -- that could be a factor that's almost
12 determinative. And I think that's well within your
13 discretion.

14 MS. SMITH: Okay. Thank you. Ms. Gellis?

15 MS. GELLIS: With the plausible and likely
16 issue, I think likely is easy to meet because I think
17 basically if the fair use can be -- or the non-
18 infringing use can be imagined, then it is likely to
19 occur. And that completes the threshold. And then I
20 think also in terms of -- we've also been discussing
21 burdens. If one of these uses can be imagined, it is
22 very hard to understand how the answer to that could

1 be no, given that if we did not have 1201 there would
2 be no issue with anybody making these sorts of lawful
3 uses.

4 The obstruction of something that would have
5 been lawful under the statute is a pretty tremendous
6 thing, and I think absolutely the burden should be on
7 the party who says yes, I know you could have done it,
8 but the sky is going to fall if you do it because
9 having the law tell users no is -- has such a
10 tremendous impact. So I want to make that two point,
11 just to button that up.

12 MS. SMITH: Do you think there should be
13 statutory reform?

14 MS. GELLIS: Yes, but I'm not entirely sure
15 that necessarily has to happen for there to be some
16 fixes because I think one of the things that we think
17 about is what sort of presumptions the Copyright
18 Office is making and one of them can be that basically
19 if the use was imagined. I think that starts to clear
20 the hurdles for likeliness. I think it starts to
21 clear the hurdles for likely adverse impact, and that
22 ultimately I think it is a reasonable thing for the

1 Copyright Office to do to not just adjudicate the
2 needs of the interests that want to say but to also
3 stand for the public who wants --

4 MS. SMITH: I mean the rulemaking is
5 intended to --

6 MS. GELLIS: -- to be able to feel safe,
7 right?

8 MS. SMITH: It's intended to be an
9 exception. So I think that some of that might suggest
10 that you need to show if you want to do it that it is
11 likely not.

12 MS. GELLIS: I think the fact that it's a
13 failsafe is we've also discussed how difficult it is
14 to even raise the question to the Copyright Office in
15 the first place and ask for the exemption. That's
16 pretty extreme, and I think we're already seeing that.
17 An awful lot of non-infringing or fair uses are not
18 even getting to the table and not being considered as
19 -- they don't even get to the exemption level.

20 If it can actually percolate up and be
21 brought to your attention, I think there's -- it
22 exemplifies how right the need is to have this help to

1 say that there is a use that has been recognized and
2 it's running into a wall. And we need the exemption
3 so we can stop running into the wall because it's not
4 a hypothetical need at that point. If it could
5 percolate up, it's already got a -- it exists in
6 reality by the time it gets to your attention as part
7 of this process, however the process is defined.

8 And I think having some presumptions that
9 you look presumptively in favor of these exemptions, I
10 think, is -- why we have the failsafe, to make sure
11 that the exemption's reasonable uses, non-infringing
12 uses don't keep running into this barrier.

13 MS. SMITH: Okay. Thank you. I think Mr.
14 Metalitz is next, and I'll tee up the next question
15 which is should we also consider having some sort of
16 streamlined process for rejection or some showing that
17 there's a changed circumstance in order, for example,
18 the next time around someone petitions to jailbreak
19 video games or something else. You don't have to
20 answer that question though, but I'll throw that out
21 for people to comment on.

22 MR. METALITZ: Thank you. I'll just respond

1 briefly on a couple of the points that have been
2 raised. First on the merger of access and copy
3 control, I think to adopt Jack's viewpoint would be to
4 say that Congress really instituted a tech mandate
5 here and said if your access control is freestanding
6 from your copy control, yes, we will privilege that.
7 But if it's merged, we will presume that it can be
8 circumvented.

9 I don't see any basis in the statute for
10 that. Just because an access control may have aspects
11 of copy control merged with it doesn't make it any
12 less of an access control. So I just don't see that
13 that's -- as you said, I think if your view were
14 adopted it would have a huge impact on this
15 rulemaking, but I don't think it has any basis in the
16 statute or the legislative history.

17 Second, on the point of some non-infringing
18 uses circumvention not even getting to the table, yes,
19 that's probably true, but I think in most areas of law
20 there are people out there in the world doing things,
21 and some of them might be legal or not or might be
22 illegal. The enforcement is not happening against

1 them, and therefore, do they feel a compelling need to
2 come and initiate or get involved in a process based
3 in Washington, D.C. that, whether burdensome or not,
4 is -- the burden is more than zero and therefore, why
5 should they bother.

6 So I think we do have to look at the
7 realities of how 1201(a)(1) is being enforced. We had
8 a little bit of discussion of that in the first panel,
9 and maybe we'll have some more later. But I think
10 that's a relevant consideration, and just because you
11 can imagine there might be people who haven't stepped
12 forward, I don't think that necessarily a criticism of
13 the system that we have now. If they do step forward,
14 yes, we want to make sure it's not unduly burdensome
15 for them to do that and then of course that their
16 issues will be fully ventilated.

17 And then finally on this whole issue of
18 burden, I get it that it takes time and energy and you
19 have to have -- it helps to have a good lawyer or good
20 law clinic with some good sharp law students in them
21 in order to get this. But look at the bottom line; 27
22 exemptions were sought last time, 22 were granted, not

1 obviously in exactly the form that the proponents
2 wanted but they were exemptions granted on 22 of these
3 topics.

4 That's not a bad batting average. That
5 doesn't suggest that the burden is insuperable. And
6 what we've been talking about here, to make it a
7 little bit, you know, to really make it lightweight if
8 you're just trying to renew an existing exemption and
9 perhaps other reforms that would help reduce the
10 burden, I think those are all worth looking at. But
11 the concept that we have this incredibly burdensome
12 process and no one can get an exemption, I just don't
13 think the facts bear that out.

14 MS. SMITH: Would you at least agree with
15 Mr. Lerner that we should do away with the petition
16 requirement as far as lessening the burden on --

17 MR. METALITZ: Well, I think we need to have
18 some way of finding out which proposed exemptions will
19 be on the table. Whether that has to be a petition
20 requirement or just a first round and there be
21 subsequent rounds, I'm agnostic about that. We -- but
22 just as entities that are going to be looking at

1 whether we want to contest a particular proposed
2 exemption, we kind of need to know what the universe
3 is going to be for that rulemaking.

4 MS. SMITH: Professor Samuelson?

5 MS. SAMUELSON: So I'm noticing that we're
6 getting close to lunch, and I'm sure we're all looking
7 forward to that. But there are a couple of things on
8 evidentiary issues that I wanted to get on the table.
9 So insofar as there doesn't turn out to be a way to
10 get rid of the tractors, I think one of the things
11 that you could do in the other factors is basically
12 say, where the TPM was adopted for non-copyright
13 reasons or the risk of infringement as well, those
14 could be other factors that you could take into
15 account.

16 For things like the film studies professors
17 and the like, I think one of the things that's
18 important is the reliance interest, right? So if
19 they're, in fact, have an exemption and gosh, having
20 gotten my exemption I've now made this investment in
21 doing this kind of thing and I want to continue to be
22 able to do that, I think reliance interest of the

1 beneficiary of the exemption should be another factor
2 to consider.

3 And while I disagree with Mr. Metalitz about
4 how much hardship should you have to do in order to
5 have that alternative, if I already own the DVD and I
6 can use something to kind of do a clip out of that, I
7 don't see why I have to go do something else to try to
8 get that. It seems to me that the hardship of the
9 alternatives is another factor that should be taken
10 into account because again, this is supposed to be the
11 failsafe, right, for the non-infringing uses. And so
12 I think that's important to take into account.

13 So if it's like \$0.30 to do something, maybe
14 that's one thing. If it's like \$500 for a film
15 studies professor, that's actually a different thing.
16 So those are just a couple of additional thoughts that
17 I wanted to share with you.

18 MS. SMITH: Okay. Thank you. So we are
19 nearing lunch. I think for everyone else we'll open
20 it up to be sort of a similar lightning round to
21 comment on anything that's happened before or if you
22 want to comment upon pending bills, engagement with

1 other agencies or other proposals we have for reform,
2 now is the time to get it out. So Mr. Wiens?

3 MR. WIENS: Sure. The world has changed
4 dramatically in the last three years. There are a lot
5 more products out there with software in them than
6 ever before. You can buy a 32-bit microcontroller for
7 \$0.05, which means you can have a retail product that
8 contains a micro controller, which contains a
9 copyrighted work, for less than \$1.00. That added or
10 that incremental cost that's basically zero means that
11 every single product out there is going to have
12 software in them.

13 And the idea that for every class of thing
14 we're going to have to file an exemption, go through
15 the process, it's a huge hill. You basically have all
16 of the types of things out there, and you have to
17 amass enough traction around one of them to get the
18 \$100,000 in legal fees to pay for an exemption. We
19 had thousands of comments from the public saying that
20 they wanted to be able to repair their game console,
21 but we weren't able to pool enough money together or
22 get a legal clinic to argue that.

1 And so you said we didn't have sufficient
2 evidence, and so now we can't -- I have a PlayStation
3 2 right here, and repairing this PlayStation is far
4 more expensive than it needs to be. And so, most of
5 these things are ending up in landfills or on e-Bay so
6 they're exported out around the world. This is
7 causing real harm on the ground, and you know, I'm the
8 canary in the coal mine. The internet of everything
9 is coming, and copyright is a major, major problem.

10 I have two HVAC systems in our office. One
11 is made by Mitsubishi. One is made by another
12 manufacturer. Mitsubishi has a proprietary protocol
13 that they use. In order to be able to connect the two
14 HVAC systems together to use our automation system,
15 you have to basically reverse engineer and break
16 through their protocol to just hook the things up.

17 And as we add electronics into everything,
18 there's the need to develop interoperability
19 protocols. There's the need to give in and figure out
20 what is the error code that this thing's spitting out
21 so that I can repair it. We need to be able to modify
22 everything out there, and that's always been the case.

1 That's how the physical real world works.

2 In the world of novels, it's a bit of a
3 fringe use to be modifying a novel and creating a
4 transformative work where in the world of physical
5 things, it's just the default case that every single
6 HVAC system that's made is going to get repaired
7 several times in its life.

8 MS. SMITH: Okay. Thank you. I think
9 because we're running out of time, I think some of
10 this we can also talk about in the last panel, but I
11 appreciate that. Mr. McClure?

12 MR. MCCLURE: All I want to do is correct
13 the sports metaphor that Mr. Metalitz brought up for
14 the record. It's true, 22 for 27 you'd be player of
15 the week if you were playing baseball, but I think
16 this is more akin to shooting free throws. Not every
17 single one is going to go in, but if you've taken all
18 the time and effort and punishment to get to the line
19 just north of 81 percent isn't that great a
20 percentage. Thank you.

21 MS. SMITH: I have no comment on that. Mr.
22 Lerner?

1 MR. LERNER: I just want to say that you
2 were talking about scheduling. You know, if you
3 wanted to come to the University of California at
4 Irvine, I can guarantee you that you would have a room
5 any day of the year that you would like, and extending
6 an open invitation to the Copyright Office.

7 It's only an hour from L.A. or less,
8 depending on the time of day, and there's a really
9 wonderful airport ten minutes away called Santa Ana.
10 So thank you very much for allowing us to comment and
11 for exploring some of the points that we made in our
12 comments. We really appreciate it.

13 MR. AMER: Thank you.

14 MS. SMITH: Thank you.

15 MR. METALITZ: In the interest of time,
16 okay, because I know we're running out of it, I'll
17 pass. Thank you.

18 MS. SMITH: Mr. LaBarre?

19 MR. LABARRE: Real briefly, first of all, I
20 do want to thank the Copyright Office for holding
21 these proceedings, but with respect to our exemptions
22 that we've been seeking, it really doesn't even have

1 anything to do with making copies in a lot of cases,
2 except for what I'll be talking about later in terms
3 of a permanent exemption that we would propose.

4 But with respect to just getting access to
5 the information, and it would seem crazy to me, for
6 example, are we going to have to apply for an
7 exemption every time an inaccessible refrigerator
8 comes out on the market with a touch screen on it and
9 I can't operate it? I need to be able to break those
10 digital locks so I can do something to it to make it
11 work, but are we going to have to apply for an
12 exemption every time we want to do something like
13 that?

14 MS. SMITH: Thank you. All right. I think
15 we will break for lunch, and the next session is 1:30.
16 So thank you all.

17 (Break)

18 MS. SMITH: Okay. I think we're going to
19 get started.

20 Welcome back, everyone, and again, thank you
21 for attending. This is session four of the Copyright
22 Office's Section 1201 roundtable, and this topic

1 concerns anti-trafficking prohibitions and the ability
2 of the rulemaking to account for cases where third-
3 party assistance may be necessary or desirable to make
4 use of an exemption to Section 1201. Under the
5 statute currently, the Librarian may -- pursuant to
6 1201(a)(1)(C) grant exemption to the circumvention of
7 access controls, the Librarian may not grant
8 exemptions to either of the anti-trafficking
9 prohibitions on access or so-called copy controls,
10 whether they are devices, services, or whatever else
11 people could think of.

12 During the last rulemaking, issues arose,
13 for example, in proposals to allow circumvention on
14 behalf of vehicle owners to facilitate repairs or for
15 patients to get access to their medical data. The
16 Register's recommendation to the Librarian
17 acknowledged that difficulty and suggested that
18 Congress may consider clarifications to 1201 to ensure
19 that the beneficiaries of the exemptions are able to
20 take full advantage of them, even if they need
21 assistance from third parties. On the other hand, she
22 also acknowledged that the anti-trafficking provisions

1 could be useful to curtail bad actors seeking to
2 profit from circumvention by others.

3 One thought I had about how to structure
4 this discussion is we could focus on what is working,
5 then what's not, and then address reform. So I think
6 the first broad question to tee up occurred in the
7 first panel, that 1201 has been successful in getting
8 anti-trafficking or circumvention products off the
9 market. And if you'd like to comment on how well have
10 anti-traffic provisions worked in this current system?
11 Mr. Stoltz?

12 MR. STOLTZ: I think the primary example --
13 and there's good evidence for this -- the primary
14 effect of the anti-trafficking provision is not at all
15 related to infringement. And I would say that it's
16 not related to the ability to create digital media
17 products. The primary effect is that it gives -- it's
18 sort of second-order effect, but the connection is
19 pretty tight. It gives major copyright holders,
20 primarily the entertainment industry is, but we're
21 also now seeing this with vehicle manufacturers, auto
22 manufacturers, medical device manufacturers, and so

1 on. It gives them an effective veto over the design
2 and functionality of information technology. I'll
3 draw that connection.

4 You know, all of these things have software
5 in them, as various people mentioned this morning, and
6 any time you apply something that could even plausibly
7 be considered a technological measure that effectively
8 controls access to that software, then at that point
9 any modification to that device as well as often
10 repair of the device, sometimes transfer of the
11 device, you know, all of those things begin to raise
12 questions. And then the design of the device starts
13 to raise the question whether it is a circumvention
14 device, whether it requires the authorization of
15 rights holder. That authorization then is, as a
16 regular practice, conditioned on restrictions on the
17 functionality of the device. So this is where we get,
18 primarily, requirements that devices be built so as to
19 resist modification, so as to resist repair even, to
20 drive people to authorize repair services, which is a
21 big problem for vehicle owners. And those are all
22 very strong, very close effects of the anti-

1 trafficking provisions.

2 MS. SMITH: I mean, do you favor the repeal?
3 Where does that lead? Where's your endpoint on that?

4 MR. STOLTZ: The anti-trafficking provisions
5 should include a nexus to infringement requirement, as
6 we were discussing this morning.

7 MS. SMITH: Okay. So it says that you
8 should not "manufacture, import, offer to the public,
9 provide, or otherwise traffic in any technology
10 product, service, device, component, or part thereof,
11 that is primarily designed for the purpose of
12 circumventing a technological measure that effectively
13 controls access to a work protected under" Title 17.
14 So where would you put that nexus to infringement?

15 MR. STOLTZ: I'll admit I haven't sat down
16 to draft an amendment to the statute, but --

17 MS. SMITH: So then, I mean, and then do you
18 see the copy control? It seems like there may be a
19 nexus to infringement there. Would you not -- have
20 you thought about that? Do you have an opinion?

21 MR. STOLTZ: I suppose so. I've been
22 thinking more about access controls.

1 MS. SMITH: Okay. Mr. Reed?

2 MR. STOLTZ: I actually don't know if
3 there's a case on point with respect to copy controls,
4 because most of the litigation has involved access
5 controls.

6 MS. SMITH: Or a merged case, yeah. Okay.
7 Thank you. Mr. Reed?

8 MR. REED: Thank you. Yeah, so from our
9 perspective, the anti-trafficking provisions are one
10 of the big successes of Section 1201, largely because
11 it's helped reduce piracy, keeping it out of the
12 mainstream. Obviously, piracy's still a problem. We
13 heard a lot about that this morning. But the anti-
14 trafficking provisions have prevented the tools to
15 engage in that piracy from becoming mainstream in a
16 way that we think is beneficial ultimately to
17 maintaining a robust market for creative content. And
18 I think we're concerned that if the Office were to
19 have the ability to grant exemptions with anti-
20 trafficking alongside the (a)(1) exemptions that you
21 would start to see a market develop for those, for
22 legitimate purposes of engaging in the exemption,

1 exempted conduct. But that that would then become
2 kind of a standard, and it would create a consumer
3 expectation that would end up leading to people using
4 that technology for infringing purposes and purposes
5 for which they do not have an exception or an
6 exemption.

7 MS. SMITH: And specifically -- you are with
8 Fox. Are you thinking of something like HandBrake we
9 had heard mentioned in D.C.?

10 MR. REED: Yeah. So that's exactly right.
11 So the issue for us is we know those tools exist.
12 We're well aware of them, that they're in the
13 marketplace. And I think it came up in D.C., was this
14 idea of what you could buy at Best Buy, and that's
15 exactly the case.

16 MS. SMITH: Yeah. Just to be clear, the
17 memes for this study are what you can buy at Best Buy
18 and what you can do with a smart refrigerator.

19 MR. REED: Well, I'll carry on with the Best
20 Buy meme, because that's exactly right. So you can't
21 buy these tools as a general matter at a place like
22 Best Buy, and so consumers think twice when they

1 engage in that sort of conduct that those tools
2 enable. And that's exactly, I think, the world that
3 Congress envisioned when it passed the anti-
4 trafficking provisions in the DMCA.

5 MS. SMITH: Just to -- I meant to open it
6 broad, but just in general, do you feel quite the same
7 about services versus what you can buy?

8 MR. REED: Yeah, and for the same reason.
9 Having said that, I am sensitive to the concerns of
10 particularly the print-disabled community that I know
11 has raised this issue. You know, it's difficult to
12 speculate in the abstract under what circumstances a
13 service might be appropriate or where one might not
14 be. But if the Office heads down that path, I would
15 encourage it be very narrowly focused, similar to the
16 kind of restrictions we saw on the cell phone
17 unlocking bill that became law last year. Very
18 narrowly focused. Focused on particular conduct, but
19 not granting broad exemptions to go to the anti-
20 trafficking provisions, to be consistent with the
21 (a) (1) exemptions.

22 MS. SMITH: Thank you. Mr. Quinn?

1 MR. QUINN: Yeah, so I just wanted to take
2 on. We actually support allowing the Office to grant
3 an exemption to third parties who may be assisting, in
4 our example, someone's who blind or print disabled.
5 And it's kind of our opinion that the exemption is
6 almost meaningless for people -- for who it was
7 intended, because for most blind individuals or print-
8 disabled individuals, they aren't going to be able to
9 unlock the particular e-book or the particular tech on
10 their own.

11 MS. SMITH: So can I ask, what do you think
12 is happening now? Or is there just a tacit
13 understanding that they can get some help, or --

14 MR. QUINN: What I think is happening now is
15 two potential things. There are certain entities
16 under Chafee that are authorized to help blind and
17 print-disabled individuals get access to those books.
18 So Benetech is one example of kind of an authorized
19 entity that can unlock the books legally, and then
20 provide them to blind individuals.

21 But I think for a second group of people who
22 don't have the help of a Benetech or a third-party

1 assistor who's authorized under Chafee, I think a lot
2 of those people just don't get access to the books
3 that they have legally acquired, that they legally can
4 access. You know, they're locked. They can't use
5 screen reading technology to access those books. And
6 so I think despite the fact that they have this
7 exemption, they are functionally unable to use it,
8 because they don't have someone who is technologically
9 savvy enough to unlock the product for them.

10 And it's not just for blind individuals
11 either. We think that this is kind of true across the
12 board. You know, a lot of people aren't going to have
13 the technical skills to unlock a DRM or a TPM product,
14 and so we think that there's got to be some middle
15 ground third-party assistance kind of solution, such
16 that people can exercise their rights to the
17 exemptions that they've gotten for the process.

18 MS. SMITH: Thank you. Mr. Wolfe?

19 MR. WOLFE: So as a community of rights'
20 holders ourselves, we are sensitive to piracy concerns
21 and to the fact that the anti-trafficking provisions
22 have at least had some measure of success in keeping

1 the tools out of end user hands that can enable those
2 kinds of infringements. At the same time, we're also
3 the beneficiaries of an exemption, and this is where
4 the case -- where it tends to be most problematic,
5 where the beneficiaries are individuals, as they're
6 our members. For us, the exemption is fundamentally
7 unrealized or unavailable in a world without the tools
8 or perhaps the services in order to enable these
9 authors to take advantage of them. So there's no
10 question that we would like to see some sort of reform
11 in this space or perhaps a clarification regarding
12 that the provision of services to people who enjoy an
13 exemption is not an infringement of the anti-
14 trafficking provisions. But one way or another,
15 something has to give. Right now, it doesn't work.

16 MS. SMITH: I mean, do you find that your
17 members are unable to make use of the exemptions?
18 Because I think during the rulemakings, a lot of what
19 we hear is, somehow they find a way.

20 MR. WOLFE: I think it's a mixed bag, and
21 for many people, at the end of the day, assistance is
22 required and, frankly, from what I've heard, in many

1 cases third-party assistance is available in some
2 venues. Now, whether or not the provision of those
3 services is strictly above board seems to be an open
4 question. So for those members of ours who are
5 currently enjoying exemptions by way of third parties,
6 it would be great if that were something that we could
7 help with, and assist, and promote, but at the current
8 point, we don't feel comfortable.

9 MS. SMITH: Are you thinking of tools, or
10 are you thinking of services? I mean, I --

11 MR. WOLFE: Well, it's a combination of
12 both.

13 MS. SMITH: Do you need to be able to
14 purchase something in Best Buy?

15 MR. WOLFE: Perhaps somebody needs to be
16 able to purchase a tool. Maybe not the end user, but
17 perhaps a trusted intermediary probably needs to be
18 able to purchase a tool somewhere, whether or not it's
19 Best Buy. At the end of the day, the development of
20 in-house technologies to break fairly sophisticated
21 technological protection measures just isn't going to
22 happen for most cases.

1 MS. SMITH: Thank you. Mr. Riley?

2 MR. RILEY: There are two spectrum-based
3 questions that are lingering beneath the surface here.
4 One of them is, what is the nature of the use that the
5 third-party assistance or tool is being provided for?
6 Is it to help an individual to help with disabilities
7 or some other purpose, or is to facilitate
8 infringement in the sense that some of my colleagues
9 here are primarily concerned about? The other is,
10 what is the nature of the assistance being provided?
11 Is it "I'm handing my phone to a friend to unlock it"?
12 Or is it "I'm putting something on a shelf at Best
13 Buy"? So just laying out these two dimensions. And
14 you teed up at the beginning, there are two possible
15 kinds of reforms we could be talking about. Statutory
16 reform, which, in my mind, doesn't -- because it would
17 be statutory reform categorically, is more tailored to
18 that second category, what is the nature of the
19 assistance being provided, than it is to the use
20 itself. Where you would get a way to fine-tune the
21 way the statute regulates these itself is in the
22 individual exemptions. Sorry, this is a very

1 roundabout way of saying where we get to in our filing
2 was to say, when an exemption is given, then we have
3 come down to the point where this is not for piracy of
4 full-length content, because you're never going to
5 give an exception for somebody to engage in outright
6 piracy. So in that space, we called for extending
7 that as well to include third-party assistance, in the
8 belief that the use that is being done here is a thing
9 that we have decided we want to permit, and that
10 extending that exception to third-party assistance and
11 tools is necessary, as my colleague here just said, to
12 realize the full benefits of that.

13 If I may, I'd like to ask a question, and
14 this question is mostly, I think, for my fellow
15 panelists, and it's one where I just don't have the
16 professional experience to understand. What's the
17 delta between anti-trafficking in the context raised
18 by I think it was Chris Reed at Fox over there and the
19 scope of secondary liabilities? When we're looking at
20 the Best Buy case, that somebody who would have a
21 product on the shelf, there are other ways in which
22 they could be found liable for offering that kind of

1 assistance? And I just genuinely do not know if there
2 is a legal or practical delta there, and I'm curious.

3 MS. SMITH: Mr. Metalitz, do you want to
4 answer that, or also comment on earlier?

5 MR. METALITZ: Well, I'll answer that
6 briefly, which is that's one reason we have 1201, is
7 because there is not a sure basis for secondary
8 copyright infringement liability there. And secondly,
9 we were talking here about circumstances in which
10 there might not be copyright infringement. So I think
11 the anti-trafficking provisions have been a success,
12 and I think Pam Samuelson stated what that success is
13 quite well this morning, that they have kept these
14 tools out of the mainstream. I think it's also clear
15 that this is not something, if the policy -- this is
16 part of the architecture of 1201, to have -- the anti-
17 trafficking provisions are extremely important and
18 necessary in order to fulfill the purpose for which
19 this was enacted, which was we should always remind
20 ourselves to bring U.S. into compliance with the WIPO
21 Copyright Treaty and Performances and Phonograms
22 Treaty. So we're following the lead of all the

1 countries that got together 20 years ago and decided
2 this has to be part of the bundle of how copyright
3 owners can exploit their works and protect themselves
4 in the digital environment.

5 So it's not something that can be changed
6 unilaterally by interpretation by the Copyright
7 Office, at least that's my strong belief. So it would
8 take legislation. And if you looked at that
9 legislation, you would confront this problem of how to
10 ensure that it does not lead to widespread abuse. The
11 problem is that we don't have any, and we can't
12 credibly say that we will have, tools that conform to
13 the scope of either the statutory exemptions or the
14 administrative exemptions to (a)(1), that the Office
15 is -- or that the Librarian has recognized, and we
16 can't -- the tools can't make that discrimination.
17 And even in provision of services, if you were going
18 to try to limit it just to the scope of the
19 exemptions, it would create an intrusive regime of
20 some kind of oversight to make sure that that
21 occurred. The alternative, of course, is kind of an
22 unbridled market. It's the Best Buy, you know,

1 shorthanded. It's kind of an unbridled market. It
2 needs work.

3 So, I understand that people have a concern,
4 and it's a legitimate concern, about the fact that you
5 have an exemption to (a)(1) but not to the provision
6 of the tools. And it kind of reminds me of something
7 that a mentor of mine in the copyright law used to say
8 many years ago. He'd say, "Well, your solution really
9 works well in practice, but it's terrible in theory.
10 So we can't have it." I think we really have reached
11 a point here where we've got a practical solution that
12 is working, that is keeping these tools and services
13 on the margins, that the enforcement is being done, I
14 think, judiciously by copyright owners and others with
15 the right to enforce under 1201(a)(2). And the
16 alternative, it just seems much worse, which would be
17 that you would be running the risk of this unbridled
18 marketplace, or else you would have to have some kind
19 of very intrusive regime to make sure that services --
20 tools only do certain things, and services only are
21 provided for certain purposes. So that's kind of my
22 summary of where I think we are now.

1 UNIDENTIFIED MALE SPEAKER: Well, but I
2 think that -- oh, sorry.

3 MS. MOSHEIM: Sorry. I was just going to
4 mention that someone in D.C. said that the locksmith
5 model might work, instead of it being intrusive or
6 unbridled, that you would have these people who are
7 highly regulated available to --

8 MR. METALITZ: Well, something that's highly
9 regulated, that may be intrusive, is what I'm saying.

10 MS. MOSHEIM: I mean the locksmiths
11 themselves would be vetted and -- would that be an
12 alternative, another --

13 MR. METALITZ: Yeah. I mean, that's a
14 conceivable alternative. But the question is whether
15 that would be an improvement over the status quo,
16 where people -- in most cases, it seems that people do
17 find a way to exercise the exemption. I will point
18 out that it is not a violation of (a)(1) to obtain the
19 tool, and if you have the (a)(1) exemption, you can
20 use the tool.

21 MR. AMER: Well, but --

22 MR. METALITZ: So the problem is that it

1 extends to people that are in the business of
2 providing it. So that's why I'm not saying what you
3 suggest is not theoretically possible. It is. But I
4 think you'd have to weigh the cost that that brings
5 against the status quo.

6 MR. AMER: Well, but I -- and this point was
7 raised in D.C. too, and I think that rationale is --
8 some people find that sort of unsatisfactory, because
9 it -- well, I'll ask the question. I mean, does it
10 sort of assume, if people are finding a way to use the
11 exemption, that somewhere in the chain of events that
12 are necessary for that to occur, someone is breaking
13 the law? You know, whether it's someone who is
14 providing a service to them or whether they are
15 downloading software from the internet that was
16 created and distributed unlawfully. I mean, is it --
17 and, you know, and we talked about respect for the law
18 and whether 1201 is sort of counterintuitive to
19 people. I just wonder if this solution inclusively
20 relies for its existence on the fact that someone in
21 the chain of commerce is breaking the law.

22 MR. METALITZ: Well, sometimes -- yeah,

1 sometimes that may be the case, and that's why I say
2 it's -- there's a problem in theory with this solution
3 that we've reached. But in practice, if we keep out
4 of the channels of commerce, if we don't normalize
5 this type of behavior, if we don't give this
6 government sanction, actually, to providing tools and
7 services that can really go right to the heart of
8 integrity of these systems, that may be a satisfactory
9 place to end up, even though it creates that
10 theoretical problem.

11 MS. SMITH: Mr. Stoltz has been waiting for
12 a while, had a lot to be said. You can jump in at any
13 point.

14 MR. STOLTZ: Thank you. First of all, that
15 problem is not theoretical, especially with regard to
16 the maintenance, repair, research, and testing of all
17 sorts of products with embedded software. The very
18 real problems that are caused by that were fully on
19 display in the past rulemaking.

20 One of the -- speak to this notion that Mr.
21 Reed mentioned, that there is now a consumer
22 expectation that should not be changed. I think

1 that's a really important point. Where we are headed
2 right now and where the DMCA -- and particularly, like
3 I said, these second-order effects of the anti-
4 trafficking provision that I mentioned are leading us
5 to -- is a consumer expectation that the devices we
6 buy, the devices we put our bodies in to hurdle down
7 the freeway, the devices we put inside our bodies to
8 keep us alive, and the devices to which we entrust all
9 of our private information, do not obey us. They obey
10 a group of copyright holders, and that is the
11 expectation that needs to change. And I do think
12 that, in the broad sense, that's going to require a
13 statutory change.

14 However, and this really needs to be
15 mentioned in this panel, we -- I think it was a common
16 understanding up until last year that -- I mean, I'm
17 not aware of a court case on this, but that people
18 were receiving assistance to do circumvention under
19 one of the -- of any of the triennial or the permanent
20 exemptions, and that was, frankly, uncontroversial.
21 So we were surprised to see that struck out of our
22 proposal on auto repair and maintenance last year.

1 It's, frankly, we think inconsistent with the statute,
2 because while -- because, frankly, assistance is not
3 trafficking. This isn't -- one can come up with --
4 one can posit scenarios, and assistance would be
5 trafficking. But for the most part, taking your car
6 to the mechanic and getting it fixed, or having
7 someone help you download the data from your insulin
8 pump, and many other things, those are not activities
9 that are primarily designed for the purpose of
10 circumvention. They're primarily designed for the
11 purpose of getting your car working. They're not
12 marketed as circumvention. They're marketed as I will
13 fix your car. Those are not circumvention. Or,
14 excuse me, those are not trafficking as defined in the
15 statute.

16 So for the Copyright Office to flatly refuse
17 to grant exemptions means that the prohibition is
18 greatly expanded, and it also means that the courts
19 will never be able to decide that question, because it
20 will always be a circumvention, and the courts will
21 never get to the question of whether or not that's
22 trafficking.

1 MS. SMITH: So I'm going to pause you right
2 there, because I think then we can broaden out this
3 discussion to move into third-party exemptions, and
4 you can have a chance to follow up, and I think I'm
5 going to draw others into this conversation. And to
6 make sure we're on the same page, I think prior
7 exemptions did not specify that third-party assistance
8 was permissible or was not. I guess we were silent on
9 it. But the Unlocking Act, which happened in between
10 the fifth and sixth rulemaking, extended unlocking,
11 and it's allowed circumvention of a technological
12 protection measure, initiated by the owner of any such
13 device or by another person at the direction of the
14 owner. And so, looking at that, in the last
15 rulemaking the Copyright Office said that -- it
16 concluded it was unable to grant similar or such
17 language to the auto repair exemption in particular,
18 and it sounds like you may disagree with the
19 Register's ultimate recommendation.

20 So what was the service? Was the service
21 the circumvention the service, the general, broader
22 repair service? But another more specific question

1 is, should something like the Unlocking Act be
2 extended to other exemptions? Should the Copyright
3 Office have the ability to grant exemptions of the
4 language of the Unlocking Act, or do we prefer
5 different language? So that's sort of a general
6 topic. But, Mr. Wolfe.

7 MR. WOLFE: We have spoken a lot today about
8 how the narrowness of the exemptions can introduce
9 problems down the line, and it seems natural that,
10 when exemptions are drawn more broadly, and not every
11 exemption will be drawn broadly but some, so does the
12 unlocking apply to consumers generally? And when you
13 have an exemption that applies to either consumers
14 generally or to a broad enough portion of the
15 population, it seems to make sense that the tools
16 there can be made available without too much
17 difficulty. It's -- there isn't as much of a chance
18 that you're going to be providing people the right
19 tool for the wrong purpose. So perhaps there's --

20 MS. SMITH: Can I just -- but in the case
21 of, for example, an e-book, you represent authors, and
22 you've also sought petitions. If you have an ability

1 to unlock an e-book for a fair use-type purpose or for
2 just in general, that seems like it could open up some
3 harm to the market for your authors. No?

4 MR. WOLFE: In the instance of an electronic
5 book, I agree that there are problems potentially.
6 There are generally, and the exemptions that have been
7 granted to date have been to a narrow -- to a more
8 narrow category of authors. We would like to see
9 further exemptions applied to broader categories of
10 authors and would-be fair users, and maybe there is a
11 tipping point there, where maybe the size of the
12 creative economy that wants to engage in these things
13 is enough that we can say that the exemption justifies
14 the broad provision of the necessary tool.

15 But speaking more generally at a higher
16 level of abstraction, where you are dealing with whole
17 market or all consumer type exemptions, it stands to
18 reason that the tool should, without too much
19 difficulty, be available. And maybe where you're
20 dealing with smaller communities and, for instance, in
21 our own exemption, maybe that's an instance where
22 limiting to a service might make more sense. Don't

1 hold me to that, but that sounds more reasonable to
2 me.

3 And I do want to trickle back to something
4 Mr. Metalitz said about having the disjunct between
5 theory and practice when it comes to the law. I do
6 feel strongly that it sends the wrong signal to people
7 who are doing their best, and many users of exemptions
8 are going out of their way to be in compliance with
9 the law. Even for them to have to cross the hurdle of
10 downloading software or tools that are sort of known
11 to be unlawful and are -- that's a pretty extreme
12 state of almost doublethink that we're asking people
13 to go through in order to achieve the exemption that
14 they've lawfully sought. And I would prefer not to
15 settle on a solution that relies on that disconnect.

16 MS. SMITH: Thank you. Mr. Quinn.

17 MR. QUINN: Yeah, we tend to agree with that
18 sentiment and with the point that Mr. Amer identified,
19 is that there shouldn't have to be at some point in
20 the chain of exercising your exemption someone having
21 to break the law. We don't think that the Office
22 should be satisfied with any result that produces an

1 outcome like that. It is not just a problem in
2 theory. It's a problem in practice as well for many
3 blind individuals.

4 And with regard to services, I think you
5 mentioned the Unlocking Act. We think that's a great
6 example of a targeted assistance, targeted service to
7 an identified exemption. We think that the Office
8 should support that more broadly, maybe in something
9 like the Unlocking Technology Act, so that
10 individuals, like blind individuals, but anybody else
11 who has an exemption and who intends to make fair use
12 can have a person who is able to access and unlock
13 that technology for them. And we don't think it's
14 going to create an onerous new regime. It's --
15 there's certain things that are illegal right now and
16 certain things that would be illegal even under such a
17 regime. So it's not -- the enforcement problems
18 aren't as steep as some would suggest.

19 MS. SMITH: Mr. Reed?

20 MR. REED: I just wanted to clarify my
21 earlier comment about consumer expectations and the
22 idea that people should obey their copyright owner

1 overlords. That's not what I meant. What I meant to
2 say was that the legitimization of trafficking tools
3 in the open marketplace could lead to a consumer
4 expectation that that sort of conduct is universally
5 accepted, when in fact everybody at this table would
6 certainly understand that it's only -- those products
7 are only legal to be used in the context of an (a)(1)
8 exemption. The general public will not understand
9 that. There's already a lot of consumer confusion
10 around a lot of these issues, and I think creating
11 exemptions to anti-trafficking would only make that
12 worse.

13 MS. SMITH: And do you see a difference
14 between either tools, or services, or the locksmith
15 model, or the specific language of the Unlocking Act
16 applied to different types of media or format?

17 MR. REED: I think the locksmith model is
18 interesting. I think it raises real challenges about
19 who's going to administer the licensing piece of that.
20 It creates an entirely new regulatory regime that, you
21 know -- I don't mean to make it sound bigger than it
22 might be, it might be very small -- but it is,

1 nonetheless, a new regime that then those same people
2 who are confused now need to wrap their heads around.
3 And I also think there's bits and pieces of that in
4 the current law, Section 121, the Chafee Amendment,
5 which my colleague here referenced, has -- which has
6 existed -- or those concepts have existed before these
7 present issues have been raised within the digital
8 context of having authorized entities engage in
9 certain conduct for very specific purposes or
10 populations. I think that might be a useful model.
11 Whether -- it's always difficult for us to make a
12 determination about what we would or wouldn't support
13 in the abstract, but I think anything broader than
14 that would be very difficult to get behind, because of
15 the mainstreaming issue

16 MR. AMER: Can I just ask -- and I think
17 there's been some concern expressed today, and there
18 was some also in D.C., about how feasible it is for
19 the law to distinguish between services and devices.
20 You know, there seems to be at least some sympathy for
21 the idea that third-party assistance under certain
22 circumstances might be appropriate or something to

1 think about in terms of allowing people to practically
2 make use of an exemption. But is there a concern that
3 that -- and I suppose if you were to allow exemptions
4 for services, does that increase the market for
5 devices in such a way that it would give rise to some
6 of the concerns about devices being available for --
7 not just for exempted purposes but for infringing
8 purposes as well? What are your thoughts about the
9 feasibility of distinguishing between those two
10 concepts in the law? Mr. Stoltz?

11 MR. STOLTZ: I'd actually caution against
12 trying to draw a distinction between services and
13 devices, because I think in the model world, really
14 most of these things are going to involve both.

15 MS. SMITH: What about the language of the
16 Unlocking Act, where you just say "third-party
17 assistance," and I guess keep it a little loose
18 whether it's a device, a component, a service,
19 etcetera.

20 MR. STOLTZ: I think that's a step in the
21 right direction. Again, I think there is nothing
22 right now stopping the Copyright Office from granting

1 exemptions relating to circumvention. That is,
2 (a)(1)(A) exemptions that encompass third-party
3 assistance. Some such acts may also be trafficking,
4 in which case, those would be violations of (a)(2).
5 But I would propose that those are few and that the
6 courts can handle them.

7 MS. SMITH: Mr. Metalitz?

8 MR. METALITZ: Yes, thank you. I think
9 there is something standing in the way of the Office
10 doing this now. Actually, there are three things.
11 There are three little words in the statute, which is
12 "or part thereof." So it applies to a service that
13 has no commercially significant use other than to
14 circumvent, or a part of the service that has that
15 significant -- has no commercial use, other than to
16 circumvent. So I'm not sure you can solve this
17 problem by just saying, "Well, circumvention's not the
18 only thing we do. We actually fix your car as well."
19 Second, the Unlocking Act, I think, that's something
20 that definitely should be examined. But you also left
21 me to think about the factual circumstances in which
22 that was enacted, and which was basically where things

1 had evolved to the point that most of the
2 circumvention that was legitimized or immunized by the
3 Unlocking Act was being done with the consent of the
4 copyright owners. Because most -- all the major
5 carriers had agreed to, under many circumstances, not
6 all the time, to unlock. And so we were -- the delta
7 of unconsented circumvention had actually gotten quite
8 small at that point.

9 The third point I would make, just to
10 respond Mr. Wolfe, is I'm not sure I would agree that
11 if everybody can exercise an (a)(1) exemption, and
12 then there's less risk of abuse if you allow people to
13 provide devices and services to do that. It would
14 almost seem the opposite, that if every -- you could
15 basically -- if you could serve a mass market with
16 your services or your tools, I would think that
17 increases the risk that some people won't have gotten
18 the message about what you're allowed to do and what
19 you're not allowed to do, whereas if it's a very small
20 group if it's the educators or the university
21 professors say that they have an exemption to do
22 certain things, maybe that would be more feasible.

1 And the final point -- I hope I haven't
2 gotten into too much difficulty by talking about
3 things that work in practice but not in theory. But
4 let me just say it, give you a practice suggestion
5 here, which is that if you want to have a bigger, and
6 more contentious, and more complicated rulemaking with
7 a lot more people clamoring at your door to give their
8 views, then -- if you want that, then the Librarian
9 should have the authority to authorize third-party
10 assistance, because you will have just raised the
11 stakes dramatically for copyright owners of all kinds,
12 who are going to try to present their views on whether
13 there should be an (a)(1) exemption. But when you get
14 into an (a)(2) exemption, and the trafficking part,
15 which is, again, where most of the enforcement is
16 taking place.

17 MS. SMITH: Do you see any -- just to jump
18 in, do you see any distinction between recommending to
19 Congress reform the statute to allow the Copyright
20 Office to give an (a)(2) exemption, or just extend the
21 same type of language that was in the Unlocking Act
22 for third-party assistance? Do you see any difference

1 between the two, or you see it as the same?

2 MR. METALITZ: Well, that -- I guess the
3 point that Mr. Stoltz was making, that he says these
4 aren't (a)(2) violations, what we're talking about
5 here. And Congress did say, "We're not changing
6 (a)(2); (a)(2) isn't affected." So it would probably
7 require getting a lot more specific about what can or
8 can't be done. And it might, in a particular case,
9 yes. There might be a regime that a copyright owner
10 would be comfortable with. But I think because of the
11 importance of trying to prevent there from becoming a
12 marketplace in these tools and services. And I agree,
13 it's sometimes hard to draw the line between those
14 two. I think you would just raise the stakes and
15 increase the incentives for a lot more people to get
16 involved a lot more fully than they are now.

17 MS. SMITH: Well, I like engagement, but I
18 think I'm thinking of a way that maybe the Office
19 could make very clear -- obviously, the power is only
20 to recommend the Librarian to adopt an exemption to
21 (a)(1), and do you know that we're not intending to go
22 beyond that. Mr. Wolfe, you've been waiting.

1 MR. WOLFE: I think it would be helpful to
2 circle back to the secondary liability questions,
3 because it seems like a lot of this does turn on a
4 when, where, and whether a third-party service
5 provider or trafficker can be held or, in a
6 theoretical regime, would be able to be held liable
7 for the behavior of their users. It seems like if the
8 proper secondary liability principles were in place,
9 the liability structure could just help the problem
10 resolve itself. A service provider who is worried
11 about being held liable for their user's behavior is
12 going to be, I would imagine, pretty good about being
13 sure their users aren't straying too far from the text
14 of the exemption. And frankly, given how difficult
15 some of the present exemptions are for end users to
16 understand, having a trusted third-party be a part of
17 the process actually seems like it might benefit the
18 ultimate level of compliance.

19 MS. SMITH: Mr. Riley.

20 MR. RILEY: I'm up to four, but I think
21 they're brief things. In the cell phone unlocking
22 context, I think the number of stakeholders that have

1 some piece of copyrightable intellectual property
2 that's part of that device is far broader than just
3 the carriers. It's a very, very large number of
4 people, so -- although I do note the carriers did all
5 get onboard with that. That itself was a long,
6 complicated process, but I also don't think that
7 resolves the full question or made this is a situation
8 where everybody was agreed.

9 On engagement with the three-year process,
10 we have on the one hand this understanding that if you
11 get the exemption you will find a way to get
12 assistance if you need it, and on the other, if that
13 exemption is something that's a little bit broader and
14 includes third-party assistance with the provision of
15 tools, then somehow that will change the stakes
16 dramatically. I see a lack of consistency there, and
17 I'm not sure whether I'm misunderstanding something,
18 but I just wanted to tee that up. I feel like these
19 exemptions are sufficiently cabined that there isn't
20 going to be that much variability if this change is
21 made as we requested.

22 The third piece, I just want to bring this

1 back to the core concern and the place where I think
2 we all have the same desired outcome, in that we do
3 not want to see the legitimization on the Best Buy
4 shelf of a product that circumvents the kinds of
5 protection measures that protect full-length
6 copyrighted content. Like, we don't want to see the
7 DVD unlocking thing on the shelf at this point in
8 time. I feel like we're generally on the same page
9 there. This is one piece of this, and much of what --
10 most of what we're talking about is not that piece of
11 it. And the reason I want to emphasize that
12 distinction is that in this piece of it, in the Best
13 Buy model, that's where secondary liability is the
14 easiest to tap into. It's where there's a business
15 that is selling it, that is paying taxes on the sales
16 of it and where there are lots of hooks to tap into
17 theories of secondary liability if they are engaging
18 in a way that facilitates lots of infringement.

19 Whereas the situation we have now, where the
20 way in which you rely on third-party assistance or
21 tools is effectively through some degree of
22 prosecutorial discretion, and that's the kind of

1 framework that leads to the good guys not being able
2 to do what they should be able to do and the bad guys
3 getting away with it anyway.

4 MS. SMITH: Mr. Metalitz, did you want to
5 respond?

6 MR. METALITZ: Yeah, I think the last two
7 comments, I have -- kind of raise a question in my
8 mind. When we're talking about secondary liability,
9 secondary liability for what? Is it secondary
10 liability for copyright infringement, or is it
11 secondary liability for a 1201 violation?

12 MR. WOLFE: In this case, it could be
13 secondary liability for a 1201(a)(1) violation. I'm
14 not on the face of the statute, that doesn't
15 necessarily -- it isn't -- doesn't plainly exist, but
16 --

17 MR. METALITZ: Right.

18 MR. WOLFE: -- that's what --

19 MR. METALITZ: Yeah, that would be one thing
20 you would need to clarify, is that it's not clear that
21 there is secondary liability for a 1201(a)(1)
22 violation. And for secondary liability for

1 infringement you're -- I think, Chris, maybe you're
2 assuming that this comes in along with a nexus to
3 infringement standard. We're talking about
4 circumvention that may not be identical to
5 infringement but that is still necessary for copyright
6 owners to build the -- that they have built to make a
7 lot of this material available to the unprecedented
8 extent that they have, and undermining that market may
9 not be copyright infringement in some cases. So the
10 fact that there is -- so it's just not that helpful to
11 say, well, you can't provide the tools, because you'll
12 have secondary liability for copyright infringement,
13 because you always have to prove primary infringement
14 in order to make that out.

15 I think on the 1201 secondary liability
16 issue, it's worth looking into, because I know there
17 have been some cases about whether there is this
18 liability. My impression is it's not clear that the
19 courts have agreed on that, so that's probably worth
20 checking.

21 MS. SMITH: Mr. Riley.

22 MR. RILEY: Just a quick -- and maybe we can

1 get a little bit of a dialogue going here. I'd love
2 to unpack a little bit more what the non-infringing
3 activity looks like that you want to see a continued
4 1201 anti-trafficking protection on. I mean, we
5 talked a little bit in the first session that I was on
6 about this idea of having a 48-hour rental that you
7 then unlock in order to turn into a purchased copy of
8 the movie, because you already have the digital
9 content. I mean, I guess there may not be a case law
10 that's on point, but you are getting that content
11 under a certain copyright license, and you are
12 engaging in infringement by not following the terms of
13 the license under which you acquired that content. Am
14 I incorrect on that? Maybe that's the wrong example,
15 but I would love to hear a little bit more of what
16 non-infringing content looks like that you are seeking
17 to continue to protect.

18 And I will also, if I may, reprise my point
19 from the first panel, that this is, in practice,
20 implementing a different balance of interests than the
21 copyright law set out to design, and that seems to be
22 intentional and desired by some people. To me, that

1 seems like a policy problem that we need to take into
2 account.

3 MR. METALITZ: I would just respond to that,
4 I think it was discussed in the first panel, and
5 examples were given. That was one example. But the
6 whole -- all of these services that depend on access
7 controls, as Susan Chertkof said, what the recording
8 industry is selling now is access, much more than it
9 is selling physical product or downloads. And some of
10 that access is receiving a stream, which may or may
11 not be infringing. You get into all these questions
12 about buffer copies, and so on and so forth. It's not
13 going to -- that all that is non-infringing, but it's
14 certainly a lot less clear than in other contexts,
15 where you're actually making a full copy and walking
16 away with it.

17 So I think that's what's being talked about,
18 that there's so much of this big and very consumer-
19 friendly market that's developed doesn't necessarily
20 have that link to copyright infringement. So to rely
21 on secondary liability for copyright infringement to
22 resolve concerns about the anti-trafficking

1 provisions, I think, is not very viable.

2 MS. SMITH: Yeah, I'll comment, so just want
3 to raise the question, is it a good thing, from your
4 point of view, Mr. Riley and also Mr. Stoltz, to rely
5 on the secondary liability, because that might imply,
6 for example, a primary liability in the case of access
7 to music or something and different enforcement way
8 that just getting these tools off the market at Best
9 Buy. Is that not a better way to deal with it?

10 MR. STOLTZ: Well, so I mentioned this this
11 morning, but just to reiterate, access may also
12 implicate the Computer Fraud and Abuse Act in addition
13 to --

14 MS. SMITH: Sure.

15 MR. STOLTZ: -- liability. And it was
16 widely maintained. Again, I would maintain that we
17 can sit here and probably come up with some examples
18 that are not copyright infringements --

19 MS. SMITH: I think --

20 MR. STOLTZ: -- but we would -- you know,
21 this is a question of scope. This question is a
22 question of scope and size.

1 MS. SMITH: Right. But for this panel, as
2 opposed to the first panel, if one is looking to stop
3 some tool to change the 48-hour access to an owned
4 copy, is it helpful to have the anti-trafficking
5 prohibition, so you can go after the manufacturer of
6 that, rather than the user of the music, for example?
7 I mean, would that -- would it be more desirable to
8 have to go after individual users? I'm not sure, from
9 anybody's perspective, whether shifting it towards
10 that level of enforcement model as opposed to just
11 stopping getting this off Best Buy is advisable.

12 MR. STOLTZ: I don't think you would have to
13 go after individuals.

14 (Crosstalk).

15 MR. STOLTZ: You may have to prove that
16 individuals are infringing, but that doesn't mean you
17 have to sue them.

18 MS. MOSHEIM: Also, what if you're breaking
19 it to access it for more than 48 hours, not because
20 you want to keep a copy, but you rented it for your
21 family on Friday, and you didn't get a chance to watch
22 it all weekend? So rather than pay again, you're

1 going to try to keep it around for another week, or --
2 there's an infringement there, if you're circumventing
3 to just keep it longer, even though you don't want to
4 keep a copy.

5 MR. STOLTZ: Well, Mr. Riley mentioned
6 there's probably generally going to be a license
7 violation at that point. But beyond that, again,
8 weighing costs versus benefits, is if the point of --
9 if the purpose of the anti-trafficking provision is to
10 keep people from extending their two-day rental to
11 three, then I would submit it's not worth the cost to
12 the innovation economy.

13 MS. SMITH: Mr. Reed?

14 MR. REED: So, yeah, the 48-hour window
15 extension is an interesting and somewhat trite
16 example. And I just -- I sort of wanted to echo what
17 Mr. Metalitz said about -- and come back to something
18 that came up in one of the earlier panels this morning
19 about the idea of whether it's the law that is causing
20 these business models to evolve in the way they have,
21 or whether it's the technology itself. It's both, and
22 it's very -- the law is very much a major

1 consideration here. Anti-trafficking is very much a
2 major consideration. When we make decisions about
3 what products to make available in the marketplace,
4 either in the United States or in foreign countries,
5 we're looking at not only the technology that's
6 available to provide that content in a way that
7 consumers want it in that market, but also the
8 efficacy of the legal regime in that space as well.

9 And I just wanted -- I know it's not
10 directly on point to your question, but it came up
11 this morning. I know in D.C. you heard from Troy Dow
12 that this is true. It's true at Fox, and I just
13 wanted to echo it here, since it's come up again in
14 this context.

15 MS. SMITH: In your experience, do you rely
16 on enforcement efforts for anti-trafficking?

17 MR. REED: I'm not aware of any enforcement
18 for anti-trafficking that we've undertaken since I've
19 been with Fox, which is only a couple of years, but
20 the fact that there is a regime in place to protect
21 the TPMs that we use is a relevant consideration. And
22 I can't say one way or the other whether the absence

1 of an anti-trafficking regime would affect our
2 decision to go into a market, but it is certainly a
3 relevant data point.

4 MS. SMITH: Okay. I think the next two
5 placards were a tie, so I'll go for Mr. Metalitz,
6 since we just heard from Mr. Stoltz.

7 MR. METALITZ: Yeah, just on this
8 enforcement point, which came up in the first panel.
9 You know, there's only so much you can tell from the
10 enforcement patterns, in terms of the lawsuits that
11 are filed. Someone used to say that's like studying
12 ornithology by looking at the carcasses of the birds
13 that crashed into the lighthouse. But I think if you
14 do look at those carcasses, you would find --

15 MS. SMITH: That will be our third meme.

16 MR. METALITZ: I think you would find that
17 the vast majority of enforcement that does take place
18 is (a)(2). I mean, is anti-trafficking, maybe (b)(1),
19 also. There have been very, very few, at least from
20 our sector, very, very few -- I can't really think of
21 any (a)(1) cases. I'm sure there might have been
22 some, but they're very few and far between, and it's

1 really for the reason that you've intimated here,
2 which is the real concern is we want to go -- make
3 sure that people don't create a business of either
4 providing tools or services to a mass market. That's
5 the top priority, I would think. And the fact that a
6 person may be committing an act of circumvention that
7 only affects their access to particular copyrighted
8 work, it's got to be a much lower priority.

9 MR. AMER: Can I ask -- this question, I
10 think, is going to highlight my technological
11 ignorance, so forgive me. But going back to this
12 point about whether there's a distinction between
13 services and devices, to what extent are services
14 necessarily reliant on devices? In other words, if I
15 take something to someone for third-party assistance
16 and ask them to assist me in circumventing a TPM, will
17 that person inevitably need to use something that
18 would qualify as a device under the statute?

19 And I think that's relevant because, are we
20 just -- if we were to sort of provide a mechanism for
21 allowing exemption for third-party assistance, would
22 that really adequately address this concern we have

1 about illegality happening somewhere in the system,
2 because it's going to require the manufacture of
3 devices that the person providing the assistance would
4 need to use?

5 MR. STOLTZ: I could respond to that.

6 MR. AMER: Sure.

7 MR. STOLTZ: It is a concern because of
8 pretty much all the cases that I'm aware of have
9 interpreted software to be a circumvention device, and
10 almost every -- not every, but almost every
11 significant and important act of circumvention is
12 going to require software. But -- there's been really
13 (inaudible) if I could jump back, some of it this
14 morning, and Mr. Reed just echoed this and said the
15 law has a significant impact on a company's decision
16 to go into certain business models. That's true
17 equally outside the ranks of major media and
18 entertainment companies. That is true for technology
19 startups. That's true for, really, just a really wide
20 range of companies looking to do things really far
21 field from copyright infringement or, really, from
22 anything to do with the markets for entertainment that

1 this law is looming large in those boardrooms, in
2 those investor discussions.

3 MS. SMITH: Are you able to give any
4 specific example of a business that went in a
5 different direction? Because if you're the 1201, I
6 mean, security research was certainly thrown out in
7 the first panel, but --

8 MR. STOLTZ: Security research is one of
9 similar things related to repair. I know Mr. Wiens
10 mentioned some of that on the last panel. Those are
11 the ones I know of. Ultimately, again, these
12 decisions are made in boardrooms and investor
13 meetings. They are not public.

14 What we do know is this, right. The major
15 media and entertainment companies have given us
16 wonderful creativity and innovation, but that will
17 always only be half of a story, because they have
18 smart people, but they don't have all the people. And
19 so, for example, the major media companies didn't
20 invent the VCR, and yet the VCR I think more than
21 doubled the market for filmed entertainment. In fact,
22 they tried to suppress it. It is those sorts of

1 things, the openness to independent outside innovation
2 that creates markets both for technology and for
3 creative work.

4 MS. SMITH: Mr. Quinn.

5 MR. QUINN: I just wanted to circle back to
6 your question again. I think to the extent that you
7 agree that there are certain people who have certain
8 exemptions that are going to need assistance, I think
9 that you also have to agree that the people who
10 provide assistance in those circumstances are going to
11 develop tools. I just wanted to give a concrete
12 example. Bookshare is a program that people use to
13 help individuals who are blind or have print
14 disabilities. They unlock the books. Obviously, they
15 have to write software to do this.

16 So to the extent that you think it's a good
17 thing that a program like Bookshare does this and
18 provides this service, third-party assistance, to
19 individuals who are blind, but I think we also have to
20 have some leeway for those individuals who develop
21 tools as well. And I know I can't really wrap my mind
22 around differentiating legitimate tools from

1 illegitimate tools, but I think you probably have to
2 go in with the understanding that people need some
3 leeway to develop tools to help people take full
4 advantage of the exemption.

5 MS. SMITH: So we have about five more
6 minutes, so I'm going to call on anyone with their
7 placard up but also just to invite a last call on
8 comments. One final question I wanted to get out
9 there is, bringing it back to the third-party
10 exemption, is it the right way to think of the statute
11 the way Mr. Metalitz suggested - "or part thereof"?

12 When you look at the House committee
13 suggested the anti-trafficking prohibitions were
14 designed to carefully target black boxes and not
15 prohibit legitimate multipurpose devices. I'm
16 wondering if that sort of metaphor provides any --
17 sheds any light on the auto repair example that we
18 were presented with in the last rulemaking. So I'll
19 start with Mr. Wolfe.

20 MR. WOLFE: Great. I was actually looking
21 to make just a final comment, in any event. So it
22 seems to me that, at the very least, there wouldn't be

1 any harm in giving the Office the discretion to, where
2 appropriate, allow exemptions to the third-party
3 trafficking provisions, particularly -- and my
4 suggestion would be that, at a minimum, the Office be
5 able to make such an exemption, but with an eye on
6 both the impact on both the market for the copyrighted
7 works issue and with an eye on the impact on the
8 feasibility of the exemption and whether or not it can
9 be fully realized.

10 And taking those two things together, I
11 think there are going to be cases, and I think a
12 number of the instances which for the blind are
13 standouts, but many others, where the impact on the
14 market will not be so great, and the impact for the
15 beneficiaries of the exemption could be substantial.
16 So where those things line up, the Office should be
17 able to craft an exemption to those provisions.

18 MS. SMITH: Thank you. Mr. Riley.

19 MR. RILEY: So our general take is, at the
20 end of the day, similar to Mr. Wolfe's -- and I remain
21 sort of struggling in my mind to understand the scope
22 of non-infringing activities that this limits in

1 practice. And if that is a small scope, then we're
2 talking about relatively minimal harm, even if it is
3 broader than Mr. Wolfe suggests.

4 If that is a large scope, then I think we
5 should have a serious discussion about the policy
6 implications of framework that allows for such a wide
7 swath of restrictions on activities that are not in
8 contravention of copyright policy. On your final
9 question, the general purpose tools point, I wouldn't
10 -- I personally don't read too much into that. I
11 think that's meant to make sure that this doesn't get
12 crazily over read, in order to prohibit trafficking in
13 computers, for example, and that computers can be used
14 at the end of the day for this sort of thing.

15 MS. SMITH: Thank you. Mr. Metalitz?

16 MR. METALITZ: Yes, I think in response -- I
17 would agree with the last two speakers who I think are
18 saying that if there is going to be a change here,
19 it's going to have to come through an act of Congress
20 giving the Office more authority than it currently has
21 in this area. And of course our clients are not
22 supporting that kind of change to the law, but will

1 obviously have to -- when specific proposals come up
2 we will have to take a very close look at them.

3 The reason I put my card up was really just
4 to -- I was thinking about what Mr. Stoltz just said
5 and he's absolutely right that 1201 has an impact not
6 just on the business decisions of content companies or
7 entertainment media companies or publishers but also
8 other players. But I don't think it's really quite as
9 much of an us versus them situation as perhaps some
10 might read into his comments.

11 I think if you look at the DMCA in a broader
12 -- with broader lens, one of the things Congress
13 wanted to do was encourage cooperation between
14 Copyright owners and other players in this area,
15 whether it was internet intermediaries in Section 512
16 or device manufacturers, consumer electronic companies
17 in the 1201 setting.

18 Now, the players may have changed but the
19 fact that many of our systems for implementing access
20 controls are really the result of very extensive
21 negotiations and discussions among content companies
22 and technology companies. And Bruce Turnbull was the

1 witness who testified about this in Washington and he
2 was much more knowledgeable about this than I am.

3 But I think it's a good thing and not a bad
4 thing. I think Congress would have thought it --
5 thinks it's a good thing and not a bad thing that
6 these companies are getting together to try to figure
7 out how they can bring these devices to consumers
8 without threatening the integrity of the system and
9 the values that underlie Section 1201 which are
10 important to encourage greater dissemination of
11 copyrighted work.

12 So I think that that's worked well, but
13 obviously it means that both sides in the discussion
14 have to take 1201 into account.

15 MS. SMITH: Thank you. Mr. Stoltz, I think
16 you're the last word on this.

17 MR. STOLTZ: Sure, and briefly on this "or
18 part thereof" language, sounds to me like Mr. Metalitz
19 is essentially reading the "primarily designed for"
20 "primarily marketed" -- the three qualifications on
21 trafficking out of the statute. Frankly, whatever
22 Congress had in mind in 1998, and we can debate that,

1 they did not have in mind automakers locking out
2 independent repair.

3 It's interesting talking about the
4 coalitions that Mr. Metalitz mentioned because those
5 are again private arrangements among a very small
6 number of large commercial actors and civil society is
7 not at those meetings. Start-ups, frankly, are not at
8 those meetings. New entrants in the market are not at
9 those meetings and don't have a say and the effect of
10 1201 on those meetings.

11 MS. SMITH: I just want to provide a little
12 bit of background just to what Mr. Turnbull said in
13 D.C. that Mr. Metalitz is talking about. And he said
14 we welcome voluntary initiatives. If anyone wants to
15 talk to us, we will work with them, blah, blah, blah.

16 So he was intimating him more at -- just
17 slightly more open although you have to deal with his
18 AACS for DVD. That was the context I think that your
19 speech was -- your point was.

20 MR. STOLTZ: Well, okay. But for example
21 AACS litigated against and ultimately shut down a
22 company that was making DVD jukeboxes, a device from

1 which it was impossible to extract the video.

2 But nonetheless, the companies that may have
3 AACIS or DVD CCA, I forget which, didn't like the
4 design of that device even though that device was
5 extremely hardened against infringement, and they
6 successfully shut it down. That is -- that was a
7 contract case, but that is the direct effect of the
8 anti-trafficking.

9 MS. SMITH: Thank you. All right. We will
10 take a break and we will come back at 12:45 for the
11 final sessions until 2:45, so an 11-minute break.
12 Thank you.

13 (Break)

14 MR. AMER: Okay. Welcome back everyone.
15 This will be our final session of the day. It
16 involves permanent exemptions. This session will
17 explore the necessity, relevance, and sufficiency of
18 the permanent exemptions to the prohibition on
19 circumvention and will consider whether amendments or
20 additional exemption categories may be advisable.

21 And again if I could just ask -- well, I
22 think it's all familiar faces, but just for the record

1 if everyone could please introduce themselves and
2 state their affiliation.

3 MR. WOLFE: I'm Michael Wolfe. I'm the
4 Executive Director at Authors Alliance.

5 MR. RILEY: Chris Riley, Head of Public
6 Policy at Mozilla.

7 MR. METALITZ: Steve Metalitz from the MSK
8 law firm for the Association for American Publishers,
9 Motion Picture Association of America, and the
10 Recording Industry Association of America.

11 MR. STOLTZ: Mitch Stoltz, I'm the Senior
12 Staff Attorney at the Electronic Frontier Foundation.

13 MR. WIENS: Kyle Wiens with iFixit and
14 Repair.org.

15 MS. SAMUELSON: Pam Samuelson, UC Berkeley
16 Law School.

17 MR. AMER: Mr. LaBarre?

18 MR. LABARRE: And I'm Scott LaBarre,
19 President of the National Association of Blind Lawyers
20 and a division of the National Federation for the
21 Blind.

22 MR. AMER: Thank you. So in D.C. this

1 session proceeded a little bit differently than the
2 others in that certain exemptions are more
3 specifically relevant to particular panelists. So we
4 may have more of a colloquy as opposed to going around
5 the table to the extent that certain of the exemptions
6 are more relevant to your particular organization.

7 I wanted to start by talking about the
8 current exemptions and how effective they are, what
9 are some proposals for reform, and then move into
10 possible new categories of exemptions. So in the
11 first category I wanted to start with Sections
12 1201(f), (g) and (j), which have to do with reverse
13 engineering, encryption research, and security
14 testing.

15 In the 2015 recommendation the Office found
16 a compelling case that these sections are inadequate
17 to accommodate their intended purposes. So to start I
18 just would like to ask a general question and ask how
19 these provisions can be amended to more effectively
20 facilitate legitimate reverse engineering activities
21 and security research. Professor Samuelson.

22 MS. SAMUELSON: So I think of the ones that

1 we're focused on right now, the one that is the least
2 satisfactory is actually the computer security
3 testing. I think that that's the one that needs the
4 most attention.

5 And there was a workshop, as I mentioned,
6 back in November at Berkeley. And we came out of that
7 with actually a paper that talked about the kinds of
8 concerns that the computer security researchers had
9 about 1201 and about how they thought that 1201 might
10 be reformed to better reflect the kind of the good-
11 faith security testing procedures that they think are
12 important.

13 So I don't have that with me so I can't read
14 you the specific things, but I'd be happy to send you
15 a link to the site where that information can be
16 found. Because especially in this era of people being
17 very concerned about cyber security, I think the
18 security testing issue was viewed I think more
19 skeptically back in 1998, but then we were worried
20 about cyber security a lot less then and partly it's
21 we're a much more internetworked world. And so the
22 cyber security risks are much greater now than they

1 were back in 1998.

2 MS. SMITH: Do you want to highlight some of
3 the conclusions in the paper? Because one of the
4 things interesting to me is there is such tremendous
5 interest in the security testing exemption and the
6 limit today or whatever and the last rulemaking, but
7 less attention on this study are written comments
8 received targeting that.

9 MS. SAMUELSON: So one thing that I recall
10 from the discussion and from the paper was the sort of
11 need to get advance permission to do the security
12 testing. There are security researchers who are
13 people of good faith who are really trying to make
14 systems more secure. And there are times when they
15 will let people know that they're doing some testing
16 because they think that the thing is insecure.

17 But there are other times where the firm
18 whose software is being tested is somebody that has
19 reason to not want you to do it. So the e-voting
20 technologies for example, they don't want you to find
21 security vulnerabilities.

22 So the chance of getting advance permission

1 to do that, I think, is really a problem. So I think
2 there was -- I think at the time that that particular
3 exception was adopted, a sense that only, you know,
4 this is just a way to try to add people to do bad
5 things.

6 And I think that number one, the practice of
7 computer security testing and the norms in that
8 community have evolved considerably since then. And I
9 think that an exemption that more closely aligns with
10 the kind of the norms of that community would be
11 something that should be taken into account as the
12 research exception -- that particular testing
13 exception.

14 Now, when it comes to encryption research,
15 one thing that actually has made me sort of aware of
16 its limitations is that when Edward Felten and some of
17 his students did their SDMI hack research years ago, I
18 talked to Ed about, you know, well what -- can't you
19 just say that this is -- falls within the encryption
20 research exemption, and he said no. The particular
21 type of technology, the TPM that was involved in the
22 SDMI was actually not encryption.

1 And so I think that -- I think that the
2 people who are drafting this actually thought that
3 they were enabling the kind of research that needed to
4 be done. So I would say that that's another exemption
5 that needs to be addressed.

6 Another thing that actually is limiting
7 about I think those two and not so much about the
8 reverse engineering one, is that the reverse
9 engineering one has a tools exception for both (a)(2)
10 and (b)(1). And as I recall, the other sort of the
11 encryption research and the security testing don't
12 have both tools.

13 And when I talked to Ed Felten about the
14 SDMI hack, one of the things that he said was, I can't
15 tell whether this is an access control or a use
16 control. And so even if I could say I'm within that
17 particular exception for the act of circumvention, I'm
18 not sure that my tool that I'm using is going to
19 comply with that.

20 So I think that was drafted kind of in a
21 rush and so they weren't really thinking about why did
22 they put both tools rules exceptions in the

1 interoperability part and not in the computer security
2 testing and not in the encryption research.

3 So that's a place where I think a little bit
4 more care could be done and I know that the Wyden bill
5 also recommends some change to the interoperability
6 provision.

7 I forgot what that is, but I think that he
8 was getting advice from people who actually do real
9 reverse engineering and interoperability purposes. So
10 I would think that that probably needs a little
11 attention, too. Thank you.

12 MR. AMER: Thank you very much. Mr. Stoltz?

13 MR. STOLTZ: Thank you. The -- on the just
14 -- to start out on the subject of permanent
15 exemptions, the most effective permanent exemption
16 would be one that adds the requirement of nexus to
17 infringement for both, circumvention and trafficking.
18 That will address a lot of these problems.

19 Specifically on the three that you
20 mentioned, really Professor Samuelson said this
21 eloquently, but the Wyden-Polis bill is we believe a
22 good start on those things. And the idea behind that

1 I think was largely simply removing the caveats and
2 qualifications from those exemptions which in
3 practice, and I think the Copyright Office noted this
4 in the last rulemaking, in practice it's those caveats
5 and qualifications that render those exemptions pretty
6 much useless for those it was intended to benefit.

7 And those caveats and qualifications were
8 really not aimed at copyright interests in terms of
9 maintaining markets for creative work or, you know, or
10 even the preventing unlawful commercial exploitation
11 of someone else's software.

12 Even if they were directed at really more
13 sort of security harms and things like that, and that
14 shouldn't be a function of copyright law or the
15 Copyright Office. Others, you know, others address
16 that. Other areas of law, other bodies of government.

17 MS. SMITH: Well, the Copyright Office is
18 studying this but is not otherwise involved in the
19 permanent exemptions. And I will say, I was going to
20 read -- I have the Wyden law bill here and it's a bit
21 long, but if anyone wants to look at it I can hand it
22 over. So just raise your hand I guess.

1 MR. AMER: So just to follow up I think on a
2 point that Professor Samuelson made. You talked about
3 1201(g) and (j), security research and encryption
4 research. And one thing that those two provisions
5 have in common is they have this multi-factor
6 framework that gives courts I guess some fair amount
7 of discretion in determining whether a particular
8 activity is covered.

9 Just sort of in general, is that sort of
10 framework useful? Is it helpful in this context to
11 afford courts that sort of discretion under a multi-
12 factor framework? Or do you think that more certainty
13 is more valuable here?

14 MS. SAMUELSON: Well, I think that this has
15 not been much litigated and so we don't really have
16 any clarification about whether the multi-factor test
17 actually works in practice in the courtroom. What I
18 will say is that the encryption researchers that I
19 know, the security testing researchers that I know
20 find the factors a little bit confounding, and if
21 you're putting a paper up on the internet the bad guys
22 can get it as well as the good guys.

1 And so there has been I think some chilling
2 effect. I think it was -- there's less chilling
3 effect now than there was within the year or two after
4 the Reimerdes decision.

5 Part of what was bad about the Reimerdes
6 decision, from my standpoint, insofar as it
7 interpreted some of the exceptions, is that they -- it
8 said that, you know, that Reimerdes couldn't benefit.
9 Even if somebody else had reverse engineered for
10 interoperability or done encryption research, that he
11 couldn't publish that because he wasn't eligible for
12 the exemption himself.

13 And I know that IEEE Magazine, for a period
14 of time after the Reimerdes decision, was not willing
15 to publish certain things that would reveal security
16 weaknesses because of concern that it -- the magazine,
17 which was not doing the encryption research, was
18 actually engaged in unlawful behavior. And I think
19 that again the norms about computer security testing
20 and the norms about encryption research I think have
21 evolved since then.

22 And so I think that it would be possible for

1 the Office to work with some of the tech experts in,
2 for example, OSTP about what are the norms that
3 actually the tech side is respecting that might inform
4 how those particular exemptions might be refined in a
5 way that would make it less of a chilling effect and
6 more effective and where people would feel like that
7 the benefits of their bringing to the fore in terms of
8 making encryptions stronger, exposing weaknesses when
9 security is weak. Those things are a social benefit,
10 and so we need exemptions that actually provide
11 meaningful help to the people who are supposed to be
12 benefitting from it.

13 MS. SMITH: Yeah, I think we would be in a
14 strange situation here where these multi-factor tests
15 end up impeding some of these researchers, or perhaps
16 their lawyers end up impeding them by looking at it.

17 But on the other hand, the last rulemaking
18 was very educative about all the vulnerability
19 disclosure norms and as well as what OSTP is doing and
20 others. But in terms of statutory reform, how do you
21 reconcile that with First Amendment concerns to funnel
22 someone?

1 MS. SAMUELSON: Well, one of the things that
2 I did write about, for example, is the chilling effect
3 for computer security researchers after the RIAA was
4 threatening the lawsuit against not only him but the
5 program committee that had accepted it, the paper, and
6 were objecting to any of that information really
7 getting out. And I think that the idea that a
8 research paper is a circumvention tool is something
9 that it would be good if the Office would say, that
10 doesn't sound like a tool to us.

11 So I think that there are some things that
12 interpreting the statute as to what it covers and what
13 it doesn't cover I think would be important. But
14 there are First Amendment concerns.

15 I mean, IEEE should not have been afraid to
16 publish legitimate research by computer scientists at
17 major universities. It shouldn't -- they shouldn't be
18 deterred from that.

19 MR. AMER: Mr. Riley?

20 MR. RILEY: So I wanted to echo a couple of
21 the things that I heard in the vein of the statement
22 of the description of the problem here, the scale of

1 work and attention to security research is a lot
2 bigger now than it was when the statute was written.
3 And I think the sort of public perception of the
4 importance of promoting security research,
5 identification and resolution of vulnerabilities is
6 critical, absolutely critical.

7 And in practice this -- the limitations of
8 this permanent exemption, it is a very widely felt
9 issue. I think we're not maybe getting all of the
10 conversation here because in my second hand
11 understanding, many of the people who initiate
12 problems in this space are not the usual parties to
13 this conversation like we are.

14 Software companies who are using this to
15 make life difficult and because it doesn't align with
16 their philosophy of how to improve security by
17 allowing independent people to look for and try to
18 help understand and open up vulnerability.

19 So it's a very complex issue space. It's a
20 very important issue space. The security of the
21 internet does depend on it. And so to me my reaction
22 is that this shouldn't be your problem to solve.

1 This shouldn't be a thing for which
2 copyright law is the -- is such a significant factor.
3 And so to -- in my mind that points towards broadening
4 these exceptions to make sure that copyright law is
5 not interfering with legitimate security research, and
6 allow the tough fights to be fought over
7 interpretation of CFAA and other parts of law that are
8 more on point substantively.

9 MS. SMITH: And do you think something like
10 the Breaking Down Barriers Wyden-Polis bill would do
11 that? Or what would your --

12 MR. RILEY: You know, I haven't done a full
13 analysis of the bill. I was actually pulling it up on
14 my phone to remember exactly what details it went
15 into. Lack of prep on my part. It could. It
16 certainly could. I think that would certainly help.

17 MR. AMER: Mr. Metalitz?

18 MR. METALITZ: Yes, thank you. I want to
19 say at the outset that our associations don't have a
20 position on any changes to these exemptions. I'm kind
21 of offering an observation as an observer of this --
22 of the rulemaking process and 1201 in general.

1 I think having clearer -- I mean, it is
2 unfortunate from that perspective that there hasn't
3 been litigation to define the scope of these
4 exemptions. I think Professor Samuelson pointed that
5 out. And that is what it is, but there is very little
6 case law. You just have the text and legislative
7 history.

8 And in the case of the security testing,
9 since it was at the Conference Committee, if I recall
10 correctly, you have very little legislative history
11 either. So you really don't have much to go on.

12 But the reason that that's unfortunate, one
13 reason that that's unfortunate -- there's probably a
14 lot of reasons, but -- is that in the rulemaking,
15 which you are and will remain responsible for, this
16 issue comes up periodically.

17 And the question is, when someone is seeking
18 an exemption, shouldn't they have to demonstrate that
19 the activity they want to engage in doesn't already
20 fall within one of the permanent exemptions, because
21 if it does then they don't need an exemption from you.
22 They already got one from Congress.

1 And I think it's been somewhat difficult for
2 the Office to apply that partly because there's kind
3 of a mismatch between what people are doing and what
4 was written in the statute in 1998. But I think that
5 one goal of -- if there are to be changes in this, one
6 goal would be to have a standard that perhaps the
7 Office would find easier to apply in the rulemaking
8 because again, if Congress has already addressed this
9 topic then it's really not appropriate for, you know,
10 for the rulemaking.

11 And that, again, may help to narrow the
12 focus of the rulemaking a bit. But it's hard to do
13 now because there are these problems with the
14 exemptions and there haven't been any judicial
15 interpretations.

16 MR. AMER: Mr. Stoltz and then I think we're
17 going to move on to another provision.

18 MR. STOLTZ: Sure. I -- if our goal is to
19 craft permanent exemptions that work for security
20 researchers, encryption researchers, get people
21 engaged in reverse engineering, I don't think we can
22 do that without bringing some of the folks that are

1 actually engaged in that into the room.

2 So I just say that -- and that may actually
3 require being proactive, although we're standing ready
4 to help with that. But it goes -- those voices are
5 essential.

6 Very briefly, the argument that Steve just
7 made that the permanent exemptions have a negative
8 penumbra that would negate any triennial exemption
9 that falls near them is an argument that he has made
10 in every rulemaking I've participated in, and has been
11 four of the six -- probably all six. And it's one
12 that the Copyright Office has rightly rejected every
13 single time, it would simply throw an additional
14 hurdle on top of the nine hurdles that the Cyber Law
15 Clinic identified to the rulemaking process and would
16 serve no useful purpose. So you've gotten that one
17 right.

18 MR. AMER: Thank you. Would you like --

19 MR. METALITZ: I'm not going to prolong
20 this, but just -- I think Mitch was the one who said
21 this morning, remember we're not talking about TPMs
22 and their adverse impact. It's the prohibition and

1 its adverse impact. And if it falls within an
2 exemption, then a prohibition doesn't apply. So it's
3 a -- I think its common sense but I accept your
4 interpretation of events. I haven't been very
5 successful in selling that one.

6 MR. STOLTZ: I think you're six and 0 -- 0
7 and six.

8 MR. AMER: So is it plausible that you can
9 prevail next time? Not likely? So I'd like to turn
10 briefly to the library exemption, Section 1201(d).
11 You know, we talked about this D.C. and there was a
12 lot of discussion in the comments from library
13 associations that this provision really is not very
14 useful from their perspective.

15 I wonder if any -- well, I think there has
16 been -- we've heard that loud and clear that libraries
17 don't typically make use of that exemption and as an
18 alternative at least one library association in the
19 comments recommended a permanent exemption for -- that
20 would apply to circumvention for the purpose of
21 activities permitted under Section 108. I wonder if
22 any of you have views on the advisability of that

1 proposal. Mr. Metalitz?

2 MR. METALITZ: Well, as I said at the
3 outset, we're not supportive of amendments to the
4 statute on this topic. You know, obviously we'd have
5 to look at that.

6 There are some activities related to 108
7 that have been the subject of exemptions in the past
8 with the obsolete programs, obsolete materials, and so
9 forth. I mean, it's not a perfect fit, but it's --
10 there's at least some overlap there. But we would
11 have to look more closely.

12 I think when this came up in Washington, we
13 got into this -- there was a discussion about whether
14 108 needs to be updated for a lot of the activities
15 that we would be talking about here. And I don't know
16 what the proper order for looking at these issues is,
17 but it may make sense to first make sure that 108 has
18 got the right boundaries and conditions and then, you
19 know, then be looking at whether you could also
20 circumvent it to take -- undertake those activities.

21 MR. AMER: Thank you. Mr. Wolfe?

22 MR. WOLFE: Well, as an organization that's

1 founded to assist its members, with the -- in no small
2 part with having their work widely accessible and
3 preserved and made available for future generations, a
4 lot of the work that's envisioned by Section 108 is
5 something that we're deeply supportive of.

6 So as a creators organization we would stand
7 fully behind a permanent exemption that would help
8 facilitate 108 working in conjunction with 1201.

9 MR. AMER: Thank you. Professor Samuelson?

10 MS. SAMUELSON: So I think that one of the
11 things that we know about librarians is that they're
12 pretty careful, and they're pretty careful about
13 copyright, and they're pretty attentive to trying to
14 do the right things. So I think that to the extent
15 that the library communities are articulating a need
16 for a broader library exemption that would enable them
17 to engage in the privileged activities, right, in some
18 sense Congress has already said, this is privileged
19 activity. This is something that we think is good
20 public policy.

21 So because I think we were talking -- the
22 last session was talking -- are there trusted people

1 that might do some circumvention? I would say that
2 all the librarians I've ever met in my life are people
3 who are really careful about stuff like this. And I
4 just don't see them as posing a real risk of letting
5 loose lots of infringement if they circumvent to
6 achieve the public policy purposes that are already in
7 Section 108.

8 So while I didn't come here today prepared
9 to say exactly which ones, and I think I agree with
10 Steve that you'd want to look at this carefully and
11 not just say, oh well everything automatically. But I
12 think a reasonable conversation -- I think the issues
13 that the library was raising -- or the libraries were
14 raising back in the late '90s, were really about
15 concerns about fair use.

16 So if you give them the -- a broader
17 exemption that allows them to do 108 activities, I
18 don't know that they'll still have to ask for an
19 exemption to do fair use unless it gets broader than
20 that. But it does seem to me that it would be a
21 constructive thing if there was some reasonable
22 amendments to the exceptions to the anti-circumvention

1 rules.

2 I think that would be a constructive thing
3 to have on the table. So thank you for raising it and
4 giving us a chance to give you feedback.

5 MR. AMER: Thank you. Mr. Stoltz?

6 MR. STOLTZ: Yeah, I'd just like to point
7 out that whether it's libraries under 108 or users of
8 software under 117 or people who are blind or have
9 print disabilities under Chafee, or even people
10 looking to make a first sale under 109, all of those
11 rights have a tendency to get eaten up once access
12 controls are applied.

13 So it's certainly good that we're talking
14 about individual exemptions that in a sense track the
15 exemptions that, you know, that already exist in
16 copyright law. But, in a sense we're reinventing the
17 wheel.

18 MR. AMER: Thank you.

19 MS. SMITH: Okay. So this question I'll see
20 if I can get any takers because there were not very
21 many in D.C. and not much in the comments. But
22 1201(i) is an exemption for certain activities

1 involving privacy or protection of personally
2 identifying information.

3 And I just wonder if there's a way that this
4 can be relied upon more or should it be reformed to
5 become more useful. I sat in on the -- yesterday's
6 discussion on software and heard from multiple people
7 on one of the panels saying you should not -- you
8 should be able to stop your TV from sending your data
9 back to Korea and their sort of broadened agreement
10 from different stakeholders that copyright law should
11 not be used as a barrier to privacy.

12 So is 1201(i) working? Is it not working?
13 Does anyone want to comment on that?

14 MS. SAMUELSON: So I'll take a bite at that
15 one, too. So I think that at the time that I saw that
16 drafted, I couldn't actually make out what it was
17 about. I really, you know, I read it like six times
18 and I read pretty carefully and my brain works pretty
19 well, and I just can't figure out what it's really
20 about.

21 So I think that there was some legitimate
22 concern that was raised in one of the hearings about

1 circumventions that might be necessary in order to
2 protect your personal data. And whoever it was, the
3 drafter of that thing didn't exactly match up well
4 with what the concern really was.

5 So I think that, especially now, I -- two
6 things I think have happened since 1998. One is that
7 many more surveillance technologies are out there that
8 actually are risky for personal information. And
9 secondly, people are much more aware now about privacy
10 problems that can exist with information technologies.

11 So I think that, again, changes that have
12 happened in the technical landscape and in awareness
13 about the importance of privacy protections suggest to
14 me that it's time to look that one over again and try
15 to figure out what exactly is the right kind of way to
16 frame that exemption that will, again, enable that
17 legitimate interest to be protected without doing
18 violence to the rest of the statute. So I don't know
19 exactly what that would look like.

20 I do know that that was another thing that
21 was part of the Wyden bill, and so I think it is time
22 to rethink that one and see whether we can make it

1 something that's meaningful in this era when we're all
2 scared about our private information leaking out there
3 and we don't want people to have access to some of our
4 information and hide it behind some sort of encryption
5 wall that then means that we can't get our own
6 information.

7 MR. WIENS: From a technical perspective,
8 getting inside one of these devices and modifying it
9 and flipping off the part that phones home to Korea is
10 fairly technically challenging and it's going to be
11 device-specific. And if that's the only reason that
12 you would ever break into the device in order to do
13 that, there might just not be enough incentive for
14 people to get in and do it where if there was a more
15 of a culture of modifying the software for some other
16 exemptions, I think you would see more.

17 Just because it would technically be easier
18 because there is more to build up on. So kind of the
19 vacuum that 1201 has created around modifying these
20 products is creating some of the challenges because
21 there isn't the technical infrastructure.

22 MS. SMITH: We hear -- that's an interesting

1 point. The reason why I keep thinking about this is
2 we hear, why should 1201 stop me from having these
3 surveillance tools looking at me? And it seems like -
4 - I don't know if anyone ever intended that it would,
5 but it's a good point. Maybe it's just too difficult.

6 MR. WIENS: It's like 1984. You want to
7 turn the TV off and you can't.

8 MR. AMER: So I wanted to turn now to some
9 proposals that we received in the comments for some
10 additional exemption categories. And one that
11 received really a substantial amount of support across
12 a broad spectrum was an exemption -- to make permanent
13 an exemption for -- to facilitate access by persons
14 with print disabilities.

15 As you know, the current administrative
16 exemption protects literary works protected by TPMs
17 that prevent read-aloud functionality or screen
18 readers or other assistive technologies. So Mr.
19 LaBarre, if I could start with you and ask whether
20 that language is language that would be appropriate
21 for a permanent exemption or if you would like to see
22 particular changes made, if it extends widely enough

1 or if there are changes you would like to make if it
2 were to be made permanent.

3 MR. LABARRE: Sure. I think it's a good
4 start. Clearly in our view the problem that the
5 current administrative exemption addresses will not go
6 away entirely.

7 It's true that the advent of accessible
8 technology can alleviate the problem to some degree,
9 but there is always going to be some technology
10 created probably and we think very likely that will
11 not be out-of-the-box accessible. And we have to be
12 able to figure a way to get in there and make it
13 accessible.

14 So yes that's a good start. But I think it
15 needs to be broader than that in the sense that Chafee
16 was adopted as you know in 1996 before all of this.
17 And now of course we have the Marrakesh Treaty to
18 Facilitate Access to Published Works for Individuals
19 Who Are Blind, Visually Impaired, or Print Disabled.

20 I think in order to be fully consistent with
21 the intent of Chafee and Marrakesh, and I know we have
22 not ratified Marrakesh yet -- I am hopeful that that

1 will be something that happens yet this year, but if
2 not this year sometime soon. Seventeen countries have
3 now ratified or acceded to Marrakesh, which means it's
4 three away from being enforced internationally
5 speaking.

6 And there is Article 7 that talks about
7 technical protection measures and how contracting
8 parties need to be able to get around those measures
9 to provide the exceptions and limitations in the
10 Treaty. And so there will always, always be a need to
11 break digital locks to create accessible format
12 copies.

13 Some people like to say that, well, there
14 will be a day where every digital book is accessible
15 out of the box to a blind or print-disabled person
16 just as much as it is to somebody else. And I would
17 like to believe that is true.

18 I don't know that it will be, but even if
19 that were the case, there is always a need to create
20 other accessible formats, hardcopy Braille for
21 example, navigable audio and so on. And particularly
22 this is really the case in a lot of technical areas.

1 You know, making math books and science
2 books and other such topics fully accessible takes a
3 lot of work. So there's always going to be a need to
4 be able to create these accessible format copies and a
5 permanent exemption allowing us to comply fully with
6 the Marrakesh Treaty is we believe very much in order.

7 MR. AMER: Thank you very much. Mr.
8 Metalitz?

9 MR. METALITZ: Yes, thank you. I think Mr.
10 LaBarre makes some very good points there. I just
11 want to raise kind of two cautionary notes about
12 enacting permanent exemption in this area. And I
13 think they're both implicit in what he said.

14 First, this is a changing field and while I
15 can't be any more hopeful than he is about the problem
16 disappearing or being completely resolved, the fact is
17 that there is -- there are changes in terms of the
18 degree of accessibility and the ubiquity of accessible
19 formats. That, you know -- one of the problems people
20 have as we've just heard in the past hour with the
21 permanent exemptions is that they're kind of a
22 snapshot of how people saw things in 1998.

1 And things have changed a lot in security in
2 the computer security field and in the privacy policy
3 field. And the advantage of having a -- of dealing
4 with this primarily through the administrative process
5 is that you can make those adjustments if they're
6 needed more easily. And particularly if we do have a
7 more streamlined process so that the basic exemption
8 that's in place now can be -- with some lightweight
9 process can continue, it may provide greater
10 flexibility than a permanent exemption would.

11 The other point, which again Mr. LaBarre
12 brought up is that is -- we're now in the context of
13 implementation of the Marrakesh Treaty which all of
14 the associations that I represent definitely support.
15 And so there's some bigger questions about what does
16 need to be done or what is not necessary to implement
17 Marrakesh.

18 I guess the administration's position at
19 this point is it is not necessary to amend 1201 in
20 order to comply with Marrakesh, but I think that
21 debate -- that discussion is still ongoing. So that
22 would be my other cautionary note about moving at this

1 point to a permanent exemption in that area.

2 MR. AMER: Professor Samuelson?

3 MS. SAMUELSON: So I think that a permanent
4 exemption for assistive technologies for print
5 disabled people is something that's going to have legs
6 over time. So yeah, there are going to be some
7 changes in technology, but most of those are going to
8 be new types of devices or software that might not be
9 accessible.

10 And so it does seem to me that this is
11 actually one of the types of permanent exceptions that
12 to me seems like it will have continued utility over
13 time. And we've had 20 years of experience
14 practically under the current regime, and the
15 assistive technologies people or the print disabled
16 people keep telling us that's really a problem and we
17 perceive that it's going to be a problem going
18 forward.

19 So it does seem to me that it would actually
20 be my highest priority for a new permanent exemption.
21 Unless you decide that you still want to keep all the
22 tractors and the refrigerators in the -- within 1201

1 territory. In which case, that's then my number one
2 priority.

3 MR. AMER: Thank you. Mr. Wolfe was next.

4 MR. WOLFE: In some ways returning to panel
5 2 of this morning, I think that there is -- we've seen
6 that over time some exemptions can recur and even if
7 they are modified or changed that they have staying
8 power. And there has to be some point at which we
9 collectively acknowledge that there's something that -
10 - that there is something real there and something
11 that's going to persist.

12 And in those cases I -- speaking more
13 broadly, I think that in those cases that's where it
14 makes sense to start thinking about permanent
15 exemptions, at least as a baseline and -- well, as a
16 baseline and not as a permanent solution to the
17 problems that they might be made to address with the
18 awareness that further exemptions could be made using
19 the triennial process going forward. But removing the
20 administrative burden of having to see these perennial
21 exemptions sought after is a -- even the minimized
22 burdens that we discussed this morning, I think is a

1 completely unobjectionable and a smart move.

2 MR. AMER: Thank you. Mr. LaBarre?

3 MR. LABARRE: I think a couple of things
4 here. First of all, permanent exemptions aren't
5 really permanent in one sense. Obviously they can be
6 changed and it takes a little bit more to do that of
7 course, but it's more -- it's almost you could think
8 of a permanent exemption as a presumptive exemption on
9 steroids a little bit.

10 And I think if there ever was a case to
11 justify a presumptive exemption on steroids, this is
12 one of them. And I think you can draft the exemption
13 in a way that addresses the kind of flexibility that
14 Mr. Metalitz was talking about.

15 What do I mean? Well, the exceptions and
16 limitations provided in Marrakesh assume that you need
17 to do something to the work to make it accessible. So
18 it's an active step.

19 Marrakesh would not apply more Chafee if the
20 work or whether we're -- if we're talking about a
21 tractor let's say. If the tractor or the work or
22 whatever were accessible out of the box or out of the

1 publisher, you can't use an exception and limitation
2 in that case.

3 This could be done with respect to the
4 exemption. In other words, if a publisher comes out
5 with a book that truly is accessible, and it works out
6 of the box, then the exemption wouldn't apply. So
7 that's I think one thing that could be done to
8 alleviate the concerns raised.

9 Also, if this -- the Copyright Office and
10 the 1201 is still going to consider the whole purview
11 of all these devices, the internet of everything and
12 so on, again this would be a key permanent exemption
13 for those consumers who are blind and print disabled
14 because conceivably right now we can't tinker with
15 devices to make them accessible. And more and more
16 devices are coming out that aren't accessible.

17 It used to be that I could use a washer or
18 dryer very easily. You could figure it out. You
19 could put a braille label on it. You could do things
20 to make it work really easily.

21 Now, with these touch screens, forget it.
22 So it's a good excuse to get somebody else to do my

1 laundry, but it's -- and so anyways, those would be my
2 comments.

3 MR. AMER: Thank you very much. Anyone else
4 -- would anyone else like to weigh in on the permanent
5 exemption for print disabled users? Yes, Mr. Stoltz.

6 MR. STOLTZ: I just want to say this is an
7 example of what I had mentioned in the last panel that
8 the effect of 1201 and the anti-trafficking provisions
9 is to confine essentially the right to tinker to
10 particular companies and their chosen partners. So --
11 and this is an example of that because while a lot of
12 media may be put out in accessible formats, there's
13 always going to be some that isn't and an exemption to
14 1201 allows others to solve that problem even where
15 the publishers don't.

16 MR. AMER: Thank you. Okay. So yeah,
17 picking up on that theme about the right to repair or
18 tinker with devices, another proposal that we have
19 received for a permanent exemption has to do with a
20 possible exemption for device repair. And this sort
21 of overlaps with some of the discussion we had in the
22 first session this morning having to do with embedded

1 software that is essential to the operation of a
2 device.

3 And then we talked about some potential line
4 drawing problems, but I just would like to raise it in
5 the context of permanent exemptions here as well. To
6 the extent anyone didn't weigh in this morning, do you
7 have further views on -- I see Mr. Wiens may.

8 MS. SAMUELSON: I think he does.

9 MR. AMER: Please.

10 MR. WIENS: Okay. Yeah, I think back when
11 they were drafting the law they were thinking of TPMs
12 as something that would primarily be used to prevent
13 piracy. And these days we put digital locks on
14 everything for lots of reasons, everything from cyber
15 security to practical reasons.

16 Diesel engines have a lock on them and when
17 you buy a diesel engine you're given the code. And
18 the idea is that fleet owners, let's say that you have
19 a fleet of semi-trucks and you're going to put a speed
20 governor on it. You don't want your drivers to be
21 able to modify it to bypass that. So that's a lock.

22 Now, you could lose the code and then need

1 to bypass the lock. So there are -- and there are
2 10,000 examples like this where there are locks on
3 physical products that were not put on there for the
4 intent of protecting the intellectual property. It's
5 put on there because you need a lock.

6 So the question going forward is, I mean, I
7 think everybody here would be in favor of supporting
8 repair. Does anybody want to stop people repairing
9 their stuff? Does anybody want to stop people from
10 tinkering with their stuff?

11 Okay. So we got common ground here. We
12 just have to find a way to do it. And if we don't
13 solve it now, we're going to have this constant
14 incremental challenge where every three years we're
15 going to bring another 50 exemption requests and we're
16 -- I think Chris you put it really well this morning
17 when you said you can have a whitelist system or a
18 blacklist system. And right now we're on a whitelist
19 system and that is like the perfect recipe for the
20 Copyright Office getting completely overwhelmed.

21 So I feel bad for you guys trying to
22 maintain these whitelists because anytime you try to

1 maintain a whitelist, like if you talk to the spam
2 folks who maintain whitelists, like it's massive,
3 massive amounts of work to figure out every single
4 site that is sending emails legitimately. It's almost
5 an impossible problem.

6 And with electronics moving into everything
7 you guys are going to have to consider, what happens
8 when I put a five cent microcontroller in everything.
9 What are all the implications of this? So I think
10 that there's consensus that we have to get some kind
11 of permanent fix to people's need to maintain, repair,
12 and modify their products. The question is just how.

13 MR. AMER: Mr. Riley?

14 MR. RILEY: So just a very brief addition to
15 that. The -- in addition to the assertion that there
16 are lots and lots more locks than there were when this
17 law was adopted, there's a lot more copyright
18 protected code in everything. Everything, everything
19 is going to start involving software to one degree or
20 another.

21 This is the refrigerator example, right?
22 And it's beyond tractors. It's starting to be

1 everywhere. And so in addition to the scale
2 considerations, this further hammers home the, what is
3 the purpose of this legal framework question.

4 Is it meant to be part of copyright law and
5 to protect against copyright infringement? Or is it
6 meant to disempower the user from doing things that
7 aren't explicitly permitted? Maybe we should be
8 introducing the nexus to copyright infringement here
9 as well as in other contexts.

10 MR. AMER: Thank you. Mr. Metalitz?

11 MR. METALITZ: Yeah, I -- this does harken
12 back to the discussion on the first panel but -- and
13 in that context I just wanted to emphasize the
14 complexities of this. When we talk about in software
15 that it's embedded to operate a device, well a
16 refrigerator is a device and a tractor is a device.

17 But a videogame console is also a device and
18 a DVD or blu-ray player is also a device. And I don't
19 think the same sets of -- necessarily would apply to
20 those. So it's just to say that, you know, to sound a
21 cautionary note about how this is approached. Thanks.

22 MS. SMITH: Does anyone have any suggestions

1 as to if we were to drill down to this further how to
2 sort of draw that line? I mean, when we -- and I
3 think part of that goes into what do we mean when we
4 say tinker.

5 I think that it's not the intention maybe of
6 Mr. Wiens to say let me tinker with my gaming counsel
7 so that I can pirate music. But how would we phrase
8 that more eloquently than I just did?

9 MR. WIENS: Right. Well, it comes down to
10 what the intent -- what the purpose of what you're
11 doing is. And Lofgren's Unlocking Act I think it does
12 it really well. Just bring it -- why am I doing this?

13 I do need to be able to separate the blu-ray
14 drive from the main board in the game counsel in order
15 to be able to repair it. So -- but I'm not -- I have
16 no interest in weakening any of the protections on the
17 device.

18 MS. SMITH: Yeah, I mean, I hear you on
19 repair, but when you say tinker or modify to do
20 something else, how would you describe that or you can
21 let someone else answer too.

22 MS. SAMUELSON: So I've written a paper

1 called Freedom to Tinker, and I think that tinkering
2 is something that people have always done. Something
3 that people will always do.

4 I'm going to repeat something that I said in
5 the first session today, which is that some part of
6 what I think we're all grappling with is that we want
7 to achieve the kind of piracy prevention type of
8 purpose that underlay the desire to have this law in
9 the first place without having it kind of take over
10 all of the devices that we're doing -- that we're
11 using out in the world now. And partly this is a
12 matter of a kind of credibility, right?

13 So there were lots of articles in the
14 various websites and newspapers and so forth about the
15 tractor and next time it's going to be about the
16 refrigerators. Then next time it's going to be about
17 this, and next time it's going to be about that.

18 So as difficult as that line is going to be
19 to draw, I think that again part of what we have to do
20 is say, to the extent that the activity is not
21 infringing of copyright, that activity is not within
22 the purview of the legitimate purpose of 1201.

1 And so tools to allow people to do their
2 tinkering, whether it's repair or not, that's one --
3 that is an easy way to try to solve -- an easier way
4 to try to solve it than device-by-device, it seems to
5 me.

6 And as much as I want people to be able to
7 repair things, what does repair really mean, right?

8 Very often when people are engaged in an act
9 of reverse engineering -- another subject I've written
10 a lot about -- they're doing it in kind of a playful
11 way or, you know, I'm trying to do this thing and this
12 tool that I have gets me three quarters of the way
13 there but if I could add something else. Now, is that
14 repair?

15 I -- if it's, I'm trying to make this
16 device, whether it's software or an actual gadget, do
17 something that I want it to do better than the device
18 that I bought, is that repair? Is that tinkering?

19 It seems to me that the playfulness that
20 underlies a lot of the tinkering activity has led to a
21 lot of innovation -- a lot of user innovation has led
22 to a lot of people being able to be autonomous, right?

1 Some part of actually why some of the folks like
2 people you represent want to be able to repair things
3 is not just because they don't want to pay for whoever
4 the manufacturer or the developer of that device wants
5 to charge you this much money for.

6 But it's also about self-actualization,
7 right? People who reverse engineer, people who engage
8 in that kind of activity, they're engaged in creative
9 activity which actually for them is really meaningful
10 too.

11 So I mean, I appreciate that this is a very
12 complex thing for the Office to try to kind of develop
13 some guidelines about, but I think that what we've
14 done through this day and through some of the other
15 comments is kind of recognize that we've got to do
16 some boundary drawing. It's just really essential.

17 Or people will go ahead and tinker, and what
18 are we going to do? Throw everybody in jail who
19 tinkers? I just, you know, 1201 comes with criminal
20 penalties and it comes with statutory damages. And it
21 seems to me that we want the law to do the work that
22 it was intended to do and we've got to find some ways

1 to try to do that.

2 Now, I made the suggestion a little bit
3 earlier -- let's float three, or four, or five
4 different ways we can try to frame this and get
5 comments on some of those alternatives as a way of
6 helping the Office to refine it.

7 I think I hear folks here wanting to help to
8 make contributions to this. I don't -- now, I'm sure
9 there's some people in the room that would like the
10 repeal of 1201, but that's not the conversation that
11 we're having, and that's not something that I think is
12 going to happen. So let's try to make the law do the
13 work it was intended to do and not more work than it
14 should be doing. And that's, again, partly to save
15 you guys some really tough work, but also a way to try
16 to make copyright law respected, because I think that
17 when people hear the story about tractors, they just
18 kind of say --

19 MS. SMITH: Yeah, so, again, in your spirit
20 of let's work on it, the original question asked was
21 how can we draw that line. And you had suggested
22 nexus to infringement; we've seen that. I don't know

1 if, Mr. Riley, you wanted to endorse that or build
2 upon it in a different line.

3 MR. RILEY: I think I wanted to build upon
4 it, I would say, more than to endorse it because I
5 haven't thought fully about what that would look like.
6 We've talked a lot about infringement, and I wanted to
7 make explicit there were two other key societal pines
8 that are part of this, both of which we've talked a
9 little bit, but barely scratched the surface. And
10 those two are innovation and interoperability. These
11 are the guiding principles for Mozilla's engagement
12 with copyright policy whether here or in Europe.
13 These are the values that we seek to promote.

14 And I think that the use of independent
15 programs in the context of interoperability, and
16 repair tools, and others, innovation happens around
17 the edges of these copyright-protected components.
18 It's not part of the infringing problem that this law
19 was intended to manage. So in my view, 1201 today
20 stands in many cases as an impediment to innovation
21 and interoperability, and copyright law should be a
22

1 factor to promote them while also managing the
2 infringement line.

3 MR. AMER: Thank you. So I think we're
4 going to go to Mr. Metalitz, and then Mr. Wiens, and
5 then we're just about out of time. But I'd like to
6 just open the floor, before we go to the audience
7 participation, if anyone else has anything on
8 permanent exemptions they would like to say in the
9 rest of the time. So let's start with Mr. Metalitz.

10 MR. METALITZ: Yes, thank you. I think what
11 -- a lot of what Professor Samuelson said I think
12 makes sense in that it would be useful to -- if we all
13 agreed that the topic is line-drawing and not
14 something more drastic, and we all agree there are
15 many complexities to how this line would be drawn. It
16 would be interesting to look at some of the options
17 for how to do that. I don't think talking about
18 throwing everybody in jail is really that constructive
19 in this process, but I think we do recognize that it's
20 important to take a look at whether this needs to be
21 refocused.

22

1 I do not think that the nexus to
2 infringement approach is the way to go; I think it's -
3 - that's totally contrary to the approach that
4 Congress took in its architecture of 1201. And this
5 was all discussed in the morning, but the idea that
6 there is the ability to control access even in the
7 absence of a nexus -- direct nexus to infringement is
8 really fundamental for this statute.

9 And finally, I don't -- innovation is
10 extremely important, and my clients are innovators.
11 They've innovated in bringing to the public to a much
12 greater extent than ever before in a much greater
13 variety of channels and price points, and business
14 models, the fruit of American creativity. That is --
15 they are innovators in doing that, and 1201 has really
16 helped them to innovate. Without 1201, I think as we
17 heard from some of the company representatives here
18 and in Washington, there's a risk that we're going to
19 get a lot less of that type of innovation. So in that
20 sense, I think we're with you for promoting
21 innovation. We think 1201 has helped to do that. And
22

1 so that would be how I would kind of sum up where
2 we're coming from on this.

3 MR. AMER: Thank you. Mr. Wiens?

4 MR. WIENS: The -- these products are all
5 mass-manufactured, and the actual act of getting in
6 and doing a lot of any of these electronic repairs
7 involves a fair amount of work, R&D upfront, and so
8 all that gets packaged together into tools. In the
9 cell phone unlocking realm, there's a few people that
10 figure out how to do cell phone unlocking. I've seen,
11 in fact, there's one of them -- he writes the software
12 and then distributes the tools.

13 So if you think about how to structure a
14 permanent exemption, you have to factor in the folks
15 who are making these tools. Snap-on makes repair
16 tools. It's basically a big, honking tablet that you
17 plug into the car and it reads off diagnostics and
18 does things that the manufacturer's tools don't.
19 Mechanics pay a lot of money for these tools; they're
20 really important.

21 In the world of software tuning of cars, you
22 can pull the -- all of the configuration of the models

1 onto your computer and there's a huge amount of open
2 source software that people have built to be able to
3 modify the engine parameters for everything from
4 improving mileage to improving performance, to doing
5 repairs. So I don't think that you can really
6 separate the need of the act to do repair from
7 developing and selling tools.

8 And along those lines, incentivizing
9 development of that really requires something
10 permanent because a three-year process for an
11 exemption may go away in three years. It doesn't
12 allow the sort of upfront capital-heavy, intensive
13 development. I wouldn't be able to go to venture
14 capitalists and say I'm going to build this really
15 awesome car repair tool, but -- it's legal now, but it
16 might not be in three years; I have to apply for an
17 exemption that's going to be \$50,000 in legal fees a
18 year to try to make sure.

19 MR. AMER: Oh, Mr. Wolfe?

20 MR. WOLFE: So one recurring theme that
21 we've heard about today is centrality of access to --
22 or the access restriction models the way that

1 consumers in the future will have -- will enjoy the
2 fruits of the creative economy. So I think that trend
3 is absolutely correct, and I think we are looking at
4 many ways as that model being the future of how people
5 will enjoy the fruits of our copyright system. And
6 insomuch as this is a window into what more an
7 increasing amount of our future is going to look like,
8 it creates some concerns for our organization's
9 mission about long-term access and preservation.

10 I'll flag that many times when our works are
11 having technological protection measures on them, it's
12 not because of any action undertaken by the author or
13 even necessarily the copyright owner, but rather at
14 the insistence of a marketplace intermediary. And if
15 those technological protection measures result in
16 legal -- both legal and technological problems in the
17 preservation and access and our -- even our future of
18 these works, that's going to be -- maybe not today,
19 but down the road, as more of our economy looks this
20 way, perhaps a substantial problem for our members.

21 So, going forward, what's going to alleviate
22 that tension has to be the limitations and exceptions.

1 And historically, copyright fair use has been the
2 principle that allowed the kinds of important but
3 possibly facially infringing preservation actions to
4 be taken. So I want to be sure that, going forward,
5 that it's recognized that authors have a stake in how
6 others use their work, especially in the long term,
7 and that we need an exception scheme that recognizes
8 that need.

9 MR. AMER: Thank you. I think we'll wrap up
10 with Professor Samuelson and then open up to the
11 audience.

12 MS. SAMUELSON: So I just wanted to second
13 Kyle's point of view, which is that when it comes to
14 repair, if you can't figure out some way to just get
15 it out of the statute altogether and say those kind of
16 tractors and the refrigerator circumventions may be
17 somebody else's problem, but it's not copyright. So
18 that's my hope.

19 But if you decide that you're going to not
20 find that way -- that interpretive way of dealing with
21 this problem, then I think that we've got to have not
22 just an exemption from (a)(1)(A) but also a tools

1 exemption for repair purposes. It seems to me that
2 you can't require everybody to do it once themselves.
3 It's really -- especially with open-source sharing,
4 that people want to be able to do that.

5 And so it -- part of what I sort of think
6 about is, what is the risk of infringement? I know
7 that the nexus to infringement also helps to solve
8 this problem, but even so, I think that when you're
9 thinking about when should there be a tools exception,
10 not just an (a)(1)(A) exception, it seems to me that
11 where the risk of infringement is very low or
12 nonexistent, I think in the case of repair, then a
13 tools exception really should be part of it. And I
14 recognize that right now the Office may not have the
15 statutory authority to do that.

16 I think they do have some authority in
17 relation to assist. But I do think that if we were
18 looking over the statute again, that trying to sort of
19 figure out why is it that there's a (b)(1) exception
20 in this exception but not an (a)(2) exception,
21 especially since somebody might not be able to tell
22 when something's a use control or an access control,

1 it just -- we could do a better job if we went over it
2 again.

3 MR. AMER: Thank you very much, and thank
4 you all. We now are going to open it up to the
5 audience. We have a sign-up sheet, so I think we'll
6 start with those who signed up, but of course, anyone
7 else is welcome to come forward and make a comment
8 about any of the topics that have been discussed
9 today.

10 MS. SMITH: I think right now we have one
11 person who signed up, so Sina Khanifar.

12 MR. KHANIFAR: Thanks. So, yeah, I have a -
13 - a story, I guess, to do with 1201 and how it kind of
14 affected me relatively personally. And so back when I
15 -- in 2003, when I had just started college -- I'm a
16 computer programmer, so I come from a programming
17 background; it's my day job. I've started three
18 companies since then. But the very first company that
19 I started was the result of a really typical kind of
20 founder story.

21 I took a phone -- I grew up in England, did
22 a couple of years in high school in the U.S., and I

1 took a phone -- cell phone back with me from the U.S.
2 to the U.K. And it was a Motorola phone, and I was a
3 poor student because my parents weren't giving me very
4 much budget for school, and I wanted to use my same
5 cell phone when I was in college. And so, being a
6 programmer, I could tell that it wasn't working when I
7 plugged in my new SIM card. It was a phone log, and
8 being a programmer, my instinct was there's got to be
9 some way around this, right?

10 And so it took -- I stayed at college a few
11 extra weeks after the term end. I think it took about
12 four weeks, but I ended up getting it and unlocking
13 the phone. And I after I did I was like, well, surely
14 there's other people having this exact same problem,
15 right? They're bringing phones, and they bought them.
16 And this phone I'd had for a couple of years, as well,
17 so it was well out of contract.

18 But there's got to be other people in a
19 similar situation, and so I kind of packaged up the
20 thing that I'd done and released it as a piece of
21 software, and it was great. It was my first company;
22 it was really fun. And particularly, as a very poor

1 college student at the time, it was nice to have a
2 little bit of extra income coming in. And so it all
3 went well. Motorola released the RAZR phone, if you
4 guys remember that phone, so business got a little bit
5 better.

6 But about six months into it, my parents --
7 my mom actually gave me a call -- they live in
8 Southern California -- gave me a call and said, yeah,
9 there's a letter for you from Motorola, and it was a
10 cease and desist letter that said I was liable for
11 five years in jail and up to \$500,000 in fees per
12 incident, which at that point would probably put me
13 away for life, right, of -- for circumventing their
14 technological protection measure. And I was, what, 18
15 coming up on 19 at the time, and as a 19-year-old,
16 never having dealt with and not being a very legal
17 person myself in terms of having any sort of legal
18 background, I was terrified, right? And my mom -- my
19 parents weren't very happy either, right? They were
20 like, what the hell have you been doing at college,
21 right? So the letter came through, and I immediately
22 shut down the website where I was selling the

1 software, just completely closed up shop and dropped
2 them back a letter in my 19-year-old programmer -- I
3 had to write -- I just sent something back.

4 And then -- and I wasn't doing anything. It
5 seemed a little bit fishy to me. I didn't know
6 anything about the DMCA, right, but it seemed a little
7 bit fishy to me that I was being -- there was
8 literally no copyright infringement, right, I was
9 modifying the software on the phone, but I didn't copy
10 the firmware; there was no -- there was nothing even
11 vaguely close to being copyright infringement. And I
12 kind of started digging around and trying to
13 understand the DMCA, and why it would apply to this
14 kind of situation, and started writing to various
15 lawyers.

16 I think -- and somehow -- I think someone at
17 Cornell connected me with Jennifer Granick, who I
18 think is at Stanford now, but was here at EFF at the
19 time, and she kind of took an interest in it and kind
20 of helped me out, wrote a piece for Wired, I think,
21 about it back in 2003, 2004, and started writing
22 letters to -- well, helping me write letters to

1 Motorola. She wasn't formally counsel, but she helped
2 kind of write letters, and Motorola ended up kind of
3 basically -- through a series of letters, they just
4 ended up -- they stopped responding, right, and so I
5 ended up getting the website back up and ran that
6 business for a couple more years.

7 And then Jennifer went on to push for the
8 first exemption that kind of granted an exemption
9 specifically for cell phone unlocking. And then in
10 2012 I just raised funding for the last company that I
11 was working on, and that exemption expired. And so I
12 started the White House petition that was kind of
13 pushing for Congress and government in some way to
14 take action to make cell phone unlocking legal again.
15 And, mostly I don't do anything to do with unlocking
16 at this point -- with cell phone unlocking. But it
17 was mostly just because it affected me kind of
18 personally that I wanted to do it.

19 And I spent a good part of that last maybe
20 two years kind of flying to Congress and meeting with
21 the staffers and the Judiciary Committee, and running
22 various campaigns to kind of help push this through,

1 and the FCC took some action, and Congress took some
2 action. And it was a real shame at the end of that
3 process because we got a bill that -- there's this
4 idea of a third-party agent kind of vaguely helping
5 you out to unlock your phone. Let's say you're going
6 to the mall, and that supposedly that's like the
7 spirit of the law.

8 But it's crazy to me, and I still don't
9 understand it. This is partly politics, and partly
10 legal, and stuff that I don't understand, but the idea
11 that you've crafted out an exemption for this thing
12 and yet 99.9% of people are never going to have the
13 ability or the time and energy -- they're not all
14 college students with way too much time on their
15 hands, right -- to write their own software to unlock
16 their phones or whatever TPM it may be. And so it
17 just seems crazy to me that that isn't formally part
18 of the law.

19 And I can see now -- and this was part of
20 the conversation that I had with them when we were
21 crafting the law, and there was a lot of resistance
22 from various folks to actually changing the DMCA in

1 any meaningful way, which to me was -- it was mainly
2 perhaps partly cowardice because it's obvious that if
3 you want cell phone unlocking to be legal, if you're
4 going to pass a whole law to make cell phone unlocking
5 legal, then not really making it clear that the people
6 who develop those tools and services have to be exempt
7 is just -- seems a little bit crazy.

8 And, as kind of bringing a programming --
9 like a programmer's approach to this problem, it just
10 always felt to me -- I can understand in 1998 when the
11 DMCA was passed, right, it made sense that you were
12 going to release something like DVDs as a technology,
13 and you wrote crummy software to protect that -- to
14 protect access, right? But today in -- when we have
15 the majority of access is controlled via the internet
16 and via clients that are really highly controlled by
17 the -- whoever the publisher is, the idea that you
18 need legal protection to -- to protect your content
19 when you can just write software for it is, from a
20 programming engineering perspective, a little bit
21 crazy, right?

22

1 It's either your programmers are being super
2 lazy and telling you that they can't write a client
3 that updates often enough, right? I mean, you can see
4 it. The iPhone gets jailbroken every year, and Apple
5 realizes that there's a security flaw in their
6 software, and they patch it, right? And they don't go
7 after the people who are helping them figure out what
8 the problems are in that software. So there are
9 really good technical solutions to this problem of
10 protecting content, and any -- I think any software
11 engineer who sat here would tell you that there are
12 really good solutions for this problem. And using
13 this really blunt tool of a law that defines TPMs as
14 this very vague measure and then tries to lock them
15 down is just a really strange approach to it.

16 And the stuff that some of the folks on the
17 panel were saying about technology being inside every
18 device now, right -- I mean, we start with the Keurig
19 cups and that version of DRM. It's only going to
20 increase as time goes on. And the way the law is
21 structured, even if -- in a Motorola -- even in the
22 unlocking case, it's kind of a gray area, right, as to

1 whether that kind -- breaking that kind of a TPM is
2 actually illegal or not because there's no copyright
3 infringement. But it's -- the legal mechanism creates
4 this kind of loophole for manufacturers to add really
5 simple technological protection measures that are
6 technically trivial to break, right, and yet allows
7 them to bring the force of the law down on any kind of
8 innovator.

9 And so if you go now -- and this is totally
10 true -- if you go to a venture capitalist, or even if
11 you're a programmer thinking about spending a year of
12 your life building a piece of software that relies on
13 breaking -- circumventing a TPM, there's no way you're
14 going to do it if there's a chance that, after a year
15 of work, the software that you've put your heart and
16 soul into is going to be challenged, and you're going
17 to be sent a cease and desist, and there'll be a whole
18 legal case, right? I mean, there are literally dozens
19 of different ideas that I've had that rely on being
20 able to, for example, create alternative clients for
21 pieces of contents that people buy, right? And I can
22 tell that it's not that interesting, but for me,

1 they're kind of fun. And I'd love to be able to work
2 on those things. But when it involves in any way
3 touching a TPM, it just instantly becomes nonviable.
4 So that's kind of my personal experience with 1201.

5 MR. AMER: Thank you very much.

6 MS. SMITH: We have Professor Samuelson
7 signed up as well.

8 MR. SAMUELSON: I didn't get to speak on the
9 third -- on the assist and technology panel, so I
10 thought I'd -- I had a couple of things to add on
11 that. One thing to notice is the -- although, right
12 now, the rulemaking that the Office does doesn't
13 include tools or assist, I think it's important to
14 recognize that we do have some permanent exemptions
15 that do have exemptions for tools, as well as for the
16 act of circumvention. So there's precedent out there
17 for saying that the activities that -- is sort of --
18 the act of circumvention is legitimate, then the tool
19 to enable you to do that is also something that
20 effectuates that purpose.

21 And back in 1998, I wrote a paper about how
22 really any circumvention rules should be revised, so

1 I've been thinking about this for a long time. But
2 one of the things that I said in that paper is that
3 there's got to be a right -- if there is an exemption
4 in the statute where there is an exemption that the
5 Office has said is a legitimate reason to do an act of
6 circumvention, there's got to be an implied right to
7 make a tool to engage in that privileged
8 circumvention. Either that, or the exemption is
9 totally meaningless.

10 And I believe -- I mean, I think that there
11 were some people who were hoping that the lack of a
12 tool would mean that, in fact, it was symbolically
13 important but not actually important. But I think
14 that we've seen over time that people come to have an
15 expectation that, if I work so hard -- I put 572 hours
16 into drafting an exemption paper and engaging back-
17 and-forth with the Office -- that that should be
18 actually a meaningful thing. If I get the exemption,
19 then I should be able to effectuate it. And if it
20 takes making a tool, I'm not saying that once you put
21 that -- once you make that tool, if it's infringement
22 enabling, maybe you want to be a little more careful

1 about that. But it's got to be the case that if you -
2 - if the Office has said that the act is okay, then at
3 least somebody who is technically sophisticated has
4 got to be able to make the tool necessary in order to
5 effectuate that.

6 And I think we were talking earlier about
7 the assist issue, and I do think that relying on some
8 trusted third parties who will be careful about
9 infringement is something to -- again, short of a
10 tool, it does seem to me the best tip actually,
11 because you don't want to have a world in which only
12 the technically most sophisticated people are able to
13 engage in a legitimate activity. Once you kind of
14 decide that repairing your car is something you should
15 be able to do, then -- if I'm a really good farmer --
16 my technology skills are in the farming part; they're
17 not necessarily in the software part. So I hope
18 that's another little tidbit to add to the mix. Thank
19 you.

20 MS. SMITH: Thank you. Did you want to add
21 something, Mr. Riley?

22

1 MR. RILEY: Yeah, I thought that would be
2 more efficient than coming up to the --

3 MS. SMITH: Yeah, so keep it to a couple of
4 minutes, and then if anyone else wants to comment,
5 maybe come sign your name or RSVP.

6 MR. RILEY: I'll keep it brief. And I'll
7 try to avoid repeating what is already in the written
8 filing. I'm getting a strong sense here that the
9 center of the disagreement that persists is the scale
10 and the legitimacy of the use of Section 1201 to
11 prohibit acts that are not infringing under copyright
12 law. I'm going to propose a hypothesis, which is that
13 that universe -- the delta between what is protected
14 under copyright law and what's prohibited in practice
15 through the combination of law and technology under
16 1201 -- that delta was small in 1998, and is very,
17 very large now.

18 So I would love to see in the Copyright
19 Office's report an analysis of both the legislative
20 history and the policy repercussions of this question,
21 whether 1201 is meant to, under the law, or should,
22 focus on protecting infringement and that centerpiece

1 of copyright law or whether it is meant to, or should,
2 expand exclusionary rights given to copyright owners
3 in practice to include acts that aren't infringing
4 under copyright law. I believe what we're seeing is
5 the latter. And we don't know what the limits are on
6 that or what the full facts and repercussions of that
7 are.

8 MR. AMER: Anyone else from the audience?

9 MR. WIENS: Just to share the experience,
10 the reactions that we got from farmers when I went to
11 tell them about the exemption that we won for them,
12 was twofold. One, what do you mean it doesn't go into
13 effect until next October? They were just really
14 confused by that. And in all honesty, I have lost
15 some credibility when I was going and telling them,
16 yay, we got you an exemption; this won't go into
17 effect until next growing season. They don't care
18 that much. And then the second reaction was what do
19 you mean I can't have my mechanic do it because they
20 get busy? So the third parties really have to be able
21 to do this work. We have part of iFixIt, and we have
22

1 7,000 professional repair technicians, and of course
2 they're not repairing their own projects.

3 MR. AMER: Thank you all very much.

4 (Whereupon, the US Copyright Office Public
5 Roundtable Meeting ended.)

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CERTIFICATE OF NOTARY PUBLIC

I, Shanalee Gallagher, the officer before whom
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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 a relative or
employee of any counsel or attorney employed by the
parties hereto, nor financially or otherwise
interested in the outcome of this action.



Shanalee Gallagher

Notary Public in and for the State of CA

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I, William Jackson, do hereby certify that this transcript was prepared from audio to the best of my ability.

I am neither counsel for, related to, nor employed by any of the parties to this action, nor financially or otherwise interested in the outcome of this action.

A handwritten signature in black ink, appearing to be 'W. Jackson', written over lines 14 to 18.

06/06/2016

William Jackson

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