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RULEMAKING HEARING

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THURSDAY,
MAY 1, 2003

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The hearing was held at 2:00 p.m. in the hearing room of the Postal Rate Commission, 1333 H Street, NW, Washington, DC, Marybeth Peters, Register of Copyrights, presiding.

PRESENT:

MARYBETH PETERS	Register of Copyrights
DAVID CARSON	General Counsel of Copyright
CHARLOTTE DOUGLASS	Principal Legal Advisor
ROBERT KASUNIC	Senior Attorney of Copyright
STEVEN TEPP	Policy Planning Advisor

WITNESSES:

ALLAN ADLER	Association of American Publishers
JONATHAN BAND	Various Library Associations
ROBERT BOLICK	
McGraw-Hill	
PAUL SCHROEDER	American Foundation for the Blind

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A-G-E-N-D-A

**EXEMPTION FOR LITERARY WORKS/eBOOKS FOR
PERSONS WITH DISABILITIES**

PAUL SCHROEDER, American Foundation for the Blind	7
JONATHAN BAND, American Association of Law Libraries, ALA, ARL, MLA, and the SLA	12
ROBERT BOLICK, McGraw-Hill Professional	16
ALLAN ADLER, Association of American Publishers	20
Questions	26

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

2:01 p.m.

MS. PETERS: Good afternoon.

I'm Marybeth Peters, the Register of Copyrights. And I would like to welcome everyone to the second of four days of hearings in Washington in this second anti-circumvention rulemaking.

The agenda for the next two hearings in Washington, which will take place here at the Postal Rate Commission, beginning tomorrow at 9:30 and next Friday, May 2nd, and for two additional days of hearings in Los Angeles on the 14th and 15th are available on our website.

Before going through further, let me introduce the rest of the panel. To my immediate left is David Carson, general counsel of the Copyright Office. To my immediate right is Rob Kasunic, who is senior attorney and advisor in the Office of the General Counsel. To his right is Charlotte Douglass, who is principal legal advisor to the General Counsel. And to David's left is Steve Tepp, who is a policy planning advisor in the Office of Policy and International Affairs.

I think most of you know the purpose of this rulemaking proceeding is to determine whether

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1 there are any particular classes of works as to
2 which uses are or are likely to be adversely
3 effected in their ability to make noninfringing uses
4 if they are prohibited from circumventing the
5 technology access control measures.

6 The Copyright Office will be posting the
7 transcripts of all hearings approximately one week
8 after each hearing. These transcripts will be
9 posted on the website as originally transcribed, but
10 the Copyright Office will give everyone testifying
11 an opportunity to correct any errors in these
12 transcripts.

13 The transcript from April 11th are
14 available on our 1201 page.

15 The comments, the reply comments, the
16 hearing testimonies will form the basis of evidence
17 in this rulemaking which, in consultation with the
18 Assistant Secretary for Communications and
19 Information of the Department of Commerce will
20 result in my recommendation to the Librarian of
21 Congress. The Librarian will make a determination
22 by October 28, 2003 -- actually, hopefully before --
23 on whether or not exemptions to the prohibition
24 should be instituted during this 3 year period.

25 The format of each hearing will be

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1 divided into 3 parts. First, the witnesses will
2 present their testimony. This is your chance to
3 make your case to us in person explaining the facts
4 and making the legal and policy arguments that
5 support your claim that there should or should not
6 be a particular exemption.

7 The statements of the witnesses will be
8 followed by questions from the members of the
9 panels. The panels may ask tough questions of the
10 participants in an effort to define issues. We
11 stress, however, that on each side both sides are
12 likely to receive difficult questions and none of
13 the questions should be seen as expressing a
14 particular view by the members of the panel.

15 This is an ongoing proceedings. No
16 decisions have been made as to any critical issues
17 in this rulemaking.

18 The purpose of these hearings is to
19 further refine the issues and the evidence presented
20 by both sides. In an effort to obtain relevant
21 evidence, the Copyright Office reserves the right to
22 ask questions in writing of any participant in these
23 proceedings after the close of the hearings. Any
24 such written question asked and answers received
25 will be posted on the Office's website.

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1 After the panel has asked its questions
2 of the witnesses if time permits, we intend to give
3 the witnesses the opportunity to ask questions of
4 each other. If we have not managed to come up with
5 all of the tough questions that should be asked of
6 each of you, I'm confident that your fellow
7 witnesses will do the job for us.

8 So, let's begin. And I'm going to begin
9 in the order that is listed on our website.

10 What we're looking at today is
11 exemptions for literary works with respect
12 especially to e-Books and persons with disabilities.

13 The first witness will be Paul Schroeder
14 of the American Foundation for the Blind.

15 Will be followed by Jonathan Band
16 representing a variety of library associations; the
17 American Association of Law Libraries, American
18 Library Association, Association of Research
19 Libraries, Medical Library Association and the
20 Special Libraries Association.

21 He will be followed by Robert Bolick of
22 McGraw-Hill Professional.

23 And last, but certainly not least, is
24 Allan Adler from the Association of American
25 Publishers.

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1 So let's begin with you, Mr. Schroeder.

2 MR. SCHROEDER: Thank you very much.

3 What are the time constraints and is
4 there a system you will be using for a time warning?

5 MS. PETERS: No. We didn't set time
6 limits. We wanted to give you the opportunity -- we
7 don't want it to go too long, but we wanted to give
8 you the opportunity to present your case.

9 MR. SCHROEDER: Thank you. I'll do my
10 best to be relatively brief.

11 My name is Paul Schroeder, I am Vice
12 President of Governmental Relations for the American
13 Foundation for the Blind.

14 AFB has filed written comments in this
15 proceeding urging that literary works be considered
16 an exempt class. Our concern is that technological
17 controls that are being employed to protect a number
18 of categories of literary works from piracy and
19 other forms of illegal use are, in fact, also
20 interfering with fair use by individuals who are
21 blind or visually impaired.

22 Let me stress a couple of points at the
23 outset.

24 First of all, it's worth noting that the
25 American Foundation for the Blind has a long track

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1 record in history, both of advocacy on behalf of
2 people who are blind or visually impaired in access
3 to information and in creating opportunities for
4 accessing information such as in recording of audio
5 material, the pioneer in fact of the Talking Book
6 Program now run through the Library of Congress.

7 We also are a producer of published
8 materials. And so in that regard we, of course, are
9 very interested in insuring that copyright
10 protection is insured and that technological
11 measures in fact can be deployed to insure copyright
12 protection. However, we have determined, and our
13 testimony did in fact include examples, the
14 technological measures are being deployed in a way
15 that defeats access for people who are blind or
16 visually impaired to electronic material.

17 Digital information or electronic
18 information cannot be understated the importance of
19 access to material in that form for people who are
20 blind or visually impaired. We are at the dawn, we
21 believe, of an opportunity for people who are blind
22 for the first time have access to the wealth of
23 material that sighted people have had for years in a
24 timely fashion. This has not been traditionally
25 true for people who are blind or visually impaired.

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1 We have had to wait for formats to be made
2 accessible through Braille, audiotape or large
3 print, reconvertng if you will material from the
4 printed page into another form.

5 The advent of digital text or electronic
6 text offers the scintillating opportunity for those
7 of us who are blind or visually impaired to have
8 access at the outset in the same fashion and in the
9 same time as our sighted peers. Unfortunately, the
10 deployment of measures to provide for protection of
11 material in electronic text, though we grant the
12 importance of those measures, has also in fact
13 interfered with our ability to use that material.

14 For people who are blind or visually
15 impaired it should be noted we require the use of
16 special technologies to convert digital text into
17 some other form. Typically, this takes the form of
18 a screen reader, a piece of software that resides in
19 a computer and converts digital text into speech,
20 into Braille or into larger characters on the
21 screen. This facilitates the use of the material for
22 people who are blind or visually impaired in a way
23 that allows them to have full access to the digital
24 text.

25 Obviously, this requires an ability for

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1 our software systems to be able to interact with the
2 digital text and any software or hardware
3 requirements for the production of that digital
4 text. In other words, our software has to be able to
5 get to and convert the digital material into speech,
6 into Braille or into larger print on the screen.

7 Unfortunately, many of the technological
8 schemes that have been put forward to date have, in
9 fact, interfered with our ability in many ways to
10 convert this material into accessible text. It
11 could be at the control level, it could be at the
12 level of the software actually being able to convert
13 text; and we have provided in our written testimony
14 some of the examples that come to mind.

15 I want to suggest that there is a long
16 history of fair use being protected for people who
17 are blind or visually impaired in the 1976
18 amendments and in the Chafee amendments to the
19 Copyright most notably. We are concerned that the
20 DMCA has tilted the balance in a way that could
21 interfere with the fair use opportunities for people
22 who are blind or visually impaired to access
23 copyrighted material in digital form.

24 We have presented examples that showcase
25 common e-text systems such as Microsoft Reader and

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1 PDF, not to suggest that those are the only problems
2 or to suggest that those companies in fact are not
3 aware of or taking action with respect to
4 accessibility, but to suggest that the common forms
5 that are now being used to provide e-text and
6 therefore to ensure copyright protection for e-text,
7 are also thwarting access for people who are blind
8 or visually impaired. We presented some examples of
9 titles drawn from amazon.com with two problems; one
10 being the titles themselves that we could not access
11 and the second being that there was no indication
12 for the consumer prior to purchase of those titles
13 that in fact an individual who is blind or visually
14 impaired would not be able to use their screen
15 reading software to have access to those titles.

16 We do, in fact, hope and are certainly
17 trying to work with industry, both the publishing
18 industry and the technology industry, to develop
19 protection schemes that will in fact allow our
20 screen readers to have access to this material in a
21 way that ensures fair use rights for people who are
22 blind or visually impaired but also allows for
23 appropriate copyright protection.

24 I think I'll leave it at that, and we
25 can delve into some more of this during question

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1 period.

2 MS. PETERS: Thank you very much, Mr.
3 Schroeder.

4 Mr. Band?

5 MR. BAND: Thank you very much.

6 Fewer than 10 percent of the books
7 published each year in the United States are ever
8 made accessible in audio or Braille formats.
9 Moreover, as we've heard, often it takes months or
10 even years for a work to be made available in one of
11 these formats. This delay presents particular
12 difficulty for students who are trying to read
13 required readings for courses.

14 E-book technology presents a unique
15 opportunity for the visually disabled community.
16 Text-to-speech synthesizers make these works
17 accessible quickly and efficiently. However, as
18 we've heard, many publishers use technological
19 barriers to frustrate the operation of screen
20 readers.

21 The library associations support an
22 exemption to Section 1201(a) (1) with respect to
23 technologically protected literary works in e-book
24 form to permit access via a screen reader by an
25 otherwise authorized person with a visual or print

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1 disability.

2 What we propose is an extremely narrow
3 exemption. It would only be available with respect
4 to lawfully obtained e-books. Screen readers do not
5 compete with books on tape because of the synthetic
6 quality of the sound, thus an exemption would not
7 harm the interests of copyright holders.

8 Other approaches for increasing access
9 by the visually impaired are under discussion at
10 venues such as the Open Electronic Book Forum. But
11 the solutions are a long way off. The exemption
12 would provide an immediate solution to an existing
13 problem.

14 Opponents of the exemption make a series
15 of curious arguments that completely miss the mark.
16 They observe that most e-books also appear in print
17 form and then perceptively note that neither Section
18 1201 nor technological barriers prevent access to
19 these works in print form. They overlook the fact
20 that for visually impaired people the availability
21 of books in print form is meaningless unless it is
22 also available in Braille or audio. And, as noted,
23 90 percent of the books are never available in
24 either of these formats.

25 The opponents state that many of the e-

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1 books do not block screen readers, and therefore an
2 exemption is not necessary for those e-books to do.
3 With all due respect, this is a truly ridiculous
4 argument. Are the publishers suggesting that all e-
5 books are fungible? That just because an e-book
6 edition of *Harry Potter*, for example, is screen
7 reader accessible, that a blind student has no need
8 to access a quantum physics book assigned in a
9 college course?

10 Opponents also suggest that by
11 distributing literary works in e-book form they are
12 doing consumers a great favor and that they
13 shouldn't be penalized by having to permit the use
14 of screen readers. These opponents demonstrate a
15 fundamental misunderstanding of the bargain they
16 struck when they asked Congress to enact the DMCA.

17 The content providers came to Congress
18 and stated that they needed help in developing the
19 market for digital works. Congress agreed to help by
20 prohibiting the circumvention of technological
21 measures, but conditioned that help on the granting
22 of exemptions when users of certain class of works
23 are likely to be adversely effected in their ability
24 to make noninfringing uses of the works. The
25 publishers have decided to exploit the market

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1 opportunity in e-books. They're doing this not out
2 of the goodness of their hearts, but because they
3 see a potential for profits.

4 The DMCA is part of the legal framework
5 that enables this profit. But the price of this
6 added element of protection is exemptions in certain
7 special cases. The publishers were given a benefit
8 with a few very thin strings attached. Having taken
9 advantage of the benefit, they can hardly complain
10 about the strings.

11 The opponents argue at great length that
12 proponents of the exemption have not met their
13 evidentiary burden. I submit that we have. The
14 testimony of the American Foundation for the Blind
15 contains examples of e-books that block screen
16 readers and are not, I believe, available in Braille
17 or audio format. A blind person who cannot read
18 even one of these books is adversely effected by
19 Section 1201(a)(1).

20 Obviously this exemption will not give
21 the visually impaired access to all the books in the
22 Library of Congress or even all the books at the
23 neighborhood Barnes & Noble. But it will give them
24 access to e-books which over time will represent a
25 growing share of the collections at the Library of

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1 Congress and in Barnes and Noble.

2 The Librarian should not deny the
3 visually impaired this unique opportunity.

4 Thank you very much.

5 MS. PETERS: Thank you, Mr. Band.

6 Mr. Bolick?

7 MR. BOLICK: Thank you for the
8 opportunity to appear and testify at this rulemaking
9 proceeding.

10 I'll have to restrict my comments to
11 literary works distributed as e-books, because that
12 is the only class of work about which I know
13 anything that might be worth saying.

14 I am particularly interested in
15 conveying to the panel the fact that the e-book
16 industry is still in its infancy. The e-book is
17 still at the stage of incunabula. We now even have
18 tablets to which we have to scroll and tap and read
19 them; so one wonders whether they're going backwards
20 in time sometimes.

21 It's better to think of e-books as e-
22 cunabula. There are fewer than 100,000 copyright
23 literary works available as e-books in the market
24 today. Not counting the multiple formats, the
25 number is probably closer to 50,000 than 100,000.

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1 The reasons for this are: Concern about
2 the easy dissemination of digital content; Concern
3 about the strength of consumer demand for which e-
4 books require a change in consumer behavior to buy
5 digital instead or as well as print; Concern about
6 our mastery of digital literacy, by which I mean
7 having the same mastery and facility in publishing
8 and consuming e-books as we have with print books.
9 And finally, concern over the additional costs in
10 delivering e-books to this market.

11 The norm in the e-book industry today is
12 change and experimentation. Businesses choosing
13 multiple formats in which to issue their e-books is
14 the norm. We are groping towards the right offer to
15 consumers and end users. That's why the AAP and the
16 American Library Association recently joined forces
17 and commissioned a white paper review of the
18 libraries and their patrons' experience with e-book
19 and DRM. The title of that white paper, "What
20 Consumers Want in Digital Rights Management: Making
21 Content As Widely Available as Possible in Ways that
22 Satisfy Consumer Preferences."

23 Publishers, librarians and other
24 stakeholders have also recently commissioned another
25 survey of the experience of e-books, and that one

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1 came through the Open E-Book Forum. It can be found
2 at their website.

3 Both studies found the primary
4 dissatisfaction with e-books is not with limitations
5 imposed by DRM, but those imposed by form factor
6 limitations; readability, battery life, etcetera,
7 and the paucity of available e-books.

8 Publishers only have an influence on
9 form factors, we don't control it. We do have a
10 control over the number of e-books we place in the
11 market. But as I have noted, we have felt
12 constrained by a combination of factors. Making e-
13 books a class of work exempt from the DMCA's
14 prohibition on circumvention of access control
15 measures is not likely to make publishers feel less
16 constrained.

17 Digital piracy is real. Misunderstanding
18 of copyright and fair use is real. My experience
19 with e-book vendors, customers, pirates and
20 stakeholders in the standards organizations leads me
21 to believe that we still have work to do to generate
22 a market in which all of the participants are
23 digitally literate and satisfied with what they
24 receive from the e-book bargain.

25 Many, if not all, of the

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1 dissatisfactions expressed in the commentary are
2 being addressed by the publishing and technology
3 companies response to market demand and tackled in
4 standards-making organizations like the Open E-Book
5 Forum. The AAP and its members have contributed to
6 the OEBS recently accepted coordinated requirements
7 statement on DRM, which can be found at the OEBS
8 website. That work involved the careful analysis and
9 normalization of statements of need and requirements
10 from a broad range of stakeholders. The results are
11 being taken to the next stage of standards making by
12 this group, which is to agree a rights grammar for
13 expressing conditions of permissions in a rights
14 expression language.

15 Publishers are also attending to other
16 standards necessary to facilitate a robust e-book
17 market. Standards such as the digital object
18 identifier, ONEX for Online Exchange of trading
19 information and the Digital Sales Report format.

20 Again, these efforts are not taking
21 place in a vacuum, but involve representatives from
22 key stakeholders in the community.

23 I hope that the panel will take these
24 points into consideration when weighing whether e-
25 books as a class of work should be exempt from the

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1 prohibition on circumvention of access control and
2 accept that far from having a substantial adverse
3 impact on society, publishers' efforts with e-books
4 and DRM are having a positive impact.

5 MS. PETERS: Thank you very much.

6 Mr. Adler?

7 MR. ADLER: Thank you for the
8 opportunity to appear here today on behalf of the
9 Association of American Publishers.

10 Very often we hear people talk about the
11 Digital Millennium Copyright Act and the Copyright
12 Act itself as if they were two different statutory
13 regimes. And the fact of the matter is the Digital
14 Millennium Copyright Act was a series of amendments
15 to the Copyright Act which were carefully considered
16 by Congress with respect to how those amendments
17 would integrate with existing provisions of the
18 Copyright Act, both those providing for the rights
19 of copyright owners as well as the limitations on
20 those rights.

21 I think one of the problems with the
22 issue that we're discussing on this panel is a
23 misunderstanding about the way in which
24 accessibility in terms of the needs of people who
25 are blind or otherwise have print disabilities meets

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1 up with the term access and the issue of
2 accessibility as it was addressed by Congress in the
3 DMCA under Section 1201(a).

4 Accessibility in terms of individuals
5 who have particularized needs because of
6 disabilities is something that is provided for by
7 Congress in the context of the Copyright Act
8 specifically and was provided for by Congress
9 several years before the enactment of the DMCA.
10 Section 121 of the Copyright Act, which is popularly
11 known as the Chafee Amendment, was specifically
12 designed by Congress as a limitation on the right of
13 copyright owners in order to meet the perceived
14 needs of persons who are blind or otherwise have
15 print disabilities in order to provide them with
16 access in the context of those disabilities to print
17 materials.

18 When Congress enacted the DMCA and
19 addressed the question of a copyright owner's right
20 to use technological protection measures to control
21 access to a copyrighted work and gave the ability of
22 the law to help the copyright owner enforce the use
23 of such technological measures, it could have at
24 that time if it had thought it necessary address the
25 issue of accessibility with respect to individuals

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1 who have print disabilities. But it didn't, because
2 it didn't believe that such an accommodation was
3 specifically necessary with respect to access
4 controls. Because the access issue that is dealt
5 with in Section 1201 is not the same as the
6 accessibility issue that is dealt with under the
7 Chafee Amendment.

8 Now, the Chafee Amendment has been, I
9 think, a fairly successful piece of legislation by
10 Congress, particularly with respect to its designed
11 aim, which is to expand the ability of persons who
12 are blind or have print disabilities to be able to
13 access print materials in specialized formats that
14 will allow them to use those works in the same way
15 that individuals can who do not have such
16 disabilities. The result of which has been that the
17 National Library Service, for example, no longer has
18 to depend upon the cooperation of authors and
19 publishers in granting permission to reproduce
20 copyrighted works. The American Printing House for
21 the Blind has been able to increase its production
22 of materials that are in specialized formats,
23 including Braille, audio cassette talking books and
24 software to allow for the translation of text-to-
25 speech, the recording for the blind and dyslexic

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1 organization has been able to build upon its record
2 in expanding the availability of talking books to
3 this books. And AAP worked with a new organized
4 called Benetec to create a website known as
5 Bookshare, which allows for the scanning of books to
6 be provided into digital texts so that they could be
7 made available in specialized formats to people with
8 such disabilities.

9 But in noting all of these successes,
10 it's important also to note what Congress didn't do
11 in the Chafee Amendment. And what I mean by that,
12 it's specifically talking about a kind of limitation
13 that Congress placed in the Chafee Amendment as it
14 was engaging in the balance of the rights of
15 copyright owners with the needs of persons with
16 these special disabilities.

17 The Chafee Amendment authorizes certain
18 entities to reproduce or distribute certain literary
19 works in specially formatted copies without
20 permission from or payment to the copyright owner,
21 but nothing in the Chafee Amendment requires the
22 publisher of a copyrighted literary work to insure
23 that the published format chosen by the publisher
24 for the distribution of that work meets the
25 accessibility needs of persons with print

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1 disabilities.

2 I would suggest to you that if the
3 exemption that has been proposed is granted, we
4 would be seeing this body engage in a limitation on
5 the rights of copyright owners that Congress
6 deliberately chose not to enact in the process of
7 enacting the Chafee Amendment. And the reason
8 Congress, I believe, chose not to enact such a
9 limitation was because it was consistent with
10 something that we have argued over a great deal in
11 proceedings before the Copyright Office, and that is
12 the question of whether or not there is a right of
13 access to works, literary works that are protected
14 under the Copyright Act that is provided by the Act
15 itself. And as this body has said, and as a number
16 of federal courts have said, there is no unqualified
17 right of access to works on any particular machine
18 or device, or in any particular format of
19 availability. And the fact of the matter is if the
20 exemption being sought today was granted, the
21 Copyright Office would, I believe, be creating
22 essentially a right of access in a particular format
23 of availability. Something that hasn't existed
24 before.

25 Now, the danger there, of course, is not

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1 only in the precedent that that would set, but it
2 more practical terms what it would mean for the
3 distributors of e-books. We had already seen with
4 the Elcom Soft case, for example, what happens when
5 somebody purports to simply facilitate fair use of
6 an e-book literary work by being able to disable
7 digital rights management technological safeguards
8 simply to facilitate what they would consider to be
9 fair use. The fact of the matter is, is that in the
10 way people construe this is general parlance they
11 would believe that they have an exemption to do away
12 with whatever digital rights management technology
13 was protecting the rights of copyright owners. I
14 don't imagine that in the marketplace today it would
15 be possible for this body to create a meaningful
16 exemption that would not essentially swallow up the
17 limitations that the body sought to include with it.

18 You've already heard that e-books is a
19 format for distribution of literary works that
20 probably would not even exist in today's marketplace
21 without the fact that Congress recognized the
22 ability of copyright owners to be able to use access
23 controls and other technological safeguards to
24 protect their interests in the digital environment.
25 And the fact is, is that to create an exemption of

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1 this kind I think would begin to open up a wedge
2 within that careful scheme that Congress created
3 that ultimately going down the road would create a
4 great deal of misunderstanding and probably clamor
5 for further widening of it based upon the precedent
6 that would be established.

7 Thank you.

8 MS. PETERS: Thank you very much.

9 I'm going to start the questioning,
10 there's actually, like, two separate two proposed
11 exemptions that you're looking at. One has to do
12 with the people who are very upset about "tethering"
13 or limiting an e-book to a particular machine and
14 then there's the separate one that deals with those
15 who are visually impaired, blind or visually
16 impaired. And I'm looking at the publishers because
17 my guess is there are two different things for you,
18 too. And could you comment specifically on the
19 proposal with regard to those who are blind and
20 visually impaired, what is the issue on whether or
21 not a publisher chooses to actually make the screen
22 reader available and what's the downside to making
23 it available?

24 MR. ADLER: Well, I'll defer to a
25 publisher in a moment.

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1 MS. PETERS: Okay.

2 MR. ADLER: But let me just say because
3 I represent an organization that represents a number
4 of publishers --

5 MS. PETERS: Right.

6 MR. ADLER: -- they have diverse views
7 about that. There are some publishers who very
8 strongly believe that there is a performance right
9 issue and there's a question about competition with
10 respect to commercially produced audio versions of
11 literary works and the enabling of that audio
12 capacity either in a e-book format or as an audio
13 book. There are other publishers who are members of
14 AAP, however, who don't have that view. And that's
15 precisely why we believe that this is a marketplace
16 issue and it allows for competition between
17 publishers in the making available of works with
18 greater or lesser functionality.

19 MS. PETERS: Okay. Mr. Bolick?

20 MR. BOLICK: At McGraw-Hill when we
21 publish e-books, we publish in multiple formats. One
22 of the formats is PDF, and we always turn on the
23 text-to-speech permission within the e-book format.
24 Other publishers do not.

25 I can understand their perspective, a

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1 bit. As you hear over the phone actresses and so
2 forth answering the phone for you or actors
3 answering the phone for you, it's very easy to do a
4 text-to-speech or a digital interpretation using an
5 actor or an actresses' voice. That sounds an awful
6 lot like a performance. So that technology can just
7 as easily be applied to a book and have Leonard
8 Nimoy read your novel as having a voice that sounds
9 like Stephen Hawking.

10 But at McGraw-Hill and at other
11 publishers the text-to-speech switch is turned on.
12 If there were an exemption that said get rid of the
13 circumvention or the prohibition to circumvention,
14 then it seems to me that we are throwing out the
15 baby with the bath water, because there are an awful
16 lot of other elements of protection that go with it.
17 So we'd be concerned to see an exemption in this
18 particular area.

19 The marketplace will rule. The formats
20 are going to get better. And one of the reasons that
21 we publish in so many formats is that some formats
22 suit some consumers better than others.

23 MS. PETERS: Mr. Schroeder, you're
24 seeking the exemption. My question is are people
25 actually able to circumvent today to turn on the

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1 screen reader? Maybe that's not a good question to
2 ask. What I was actually trying to get at was even
3 if there's an exemption, you still have to be able
4 to make the work available. I mean, so you've got to
5 figure out how to circumvent. So I was wondering
6 about the efficacy of such an exemption?

7 MR. SCHROEDER: I'll acknowledge that I
8 think we have a somewhat difficult case to make in
9 this environment. Certainly this would better have
10 been put to Congress at the time of framing DMCA
11 because what should have happened is an assurance
12 that technological schemes could not, in fact, be
13 put into place unless accessibility for people with
14 disabilities had been considered and insured with,
15 perhaps, some exemption which would be typical from
16 other laws such as undue burden where it simply
17 could not be done.

18 In this case, I think we're trying to do
19 the best we can with what the Librarian of Congress
20 has in front of them to make a determination about.
21 The fact is that people are not able to circumvent
22 some of the security systems, and it's at least
23 ambiguous as to whether in fact our technology
24 developers, screen reader developers in a highly
25 specialized market should in fact even be providing

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1 any assistance or any means of doing so. I think
2 you could probably mount an argument that in fact in
3 doing so they really are insuring fair use, the
4 Elcom Soft case notwithstanding.

5 So I don't know how to answer the rest
6 of your question in the context of their
7 environment.

8 I do want to make one other point,
9 though, which is that the argument about text-to-
10 speech being the same as commercial audio is absurd.
11 It may be, and there may come a time when in fact we
12 have a sophisticated enough technological
13 environment when it's not just the sound of the
14 speech, but all of the other things that go into a
15 audio performance; the timing, the inflection, are
16 in fact able to be duplicated or in fact able to be
17 put forward in such a fashion that a true synthetic
18 speech performance would come close to a human audio
19 performance in a way that it would be difficult to
20 tell the difference. But I can assure you, and AFB
21 as a producer of high quality audio material for the
22 Library of Congress under the Talking Book Program
23 we know a little bit about human recorded audio and
24 high performance audio material. They are not even
25 close to being the same.

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1 So to argue that text-to-speech offers
2 any kind of conflict or any kind of commercial harm
3 to a producer of audio material is absurd.

4 MS. PETERS: Do you want to say
5 anything?

6 MR. ADLER: Well, you know, it's a
7 question I think, first of all, of who gets to make
8 the judgment about whether or not someone who is
9 considering offering as a commercial product an
10 audio reading of a literary work would find that
11 they would have to be competing with a synthetic
12 reading of that same literary work. It may well be
13 the case that in terms of Mr. Schroeder's experience
14 he views the things as apple and oranges, but at the
15 moment we're experiencing advances in technology
16 where synthetic speech, particularly for example in
17 the digital talking books produced by Recordings for
18 the Blind and Dyslexic is beginning to become very
19 sophisticated and sounding more and more like human
20 voices being read.

21 MR. BOLICK: It's also the case that
22 that in negotiations with agents that these are
23 rights that are on the table for trade publishers in
24 particular. And it is more on the trade publishing
25 side where this is an issue.

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1 McGraw-Hill doesn't pretend to be a
2 large trade publisher comparable to Simon & Shuster,
3 Random House and so forth publishing novels and
4 textbooks. And it would be far easier to find your
5 quantum physics book read to you aloud than it would
6 be your *Harry Potter*, I suspect.

7 But in the trade negotiations those are
8 rights that are on the table. And if the publisher
9 has a practice of wanting to, as we do, offer text-
10 to-speech automatically, that's just what we do.
11 It's who we are. It's what we stand for. It puts
12 us at a competitive disadvantage with those
13 publishers who do not view it that way.

14 MS. PETERS: Okay. Yes?

15 MR. BAND: If I could back to actually
16 that point, but also the question that you asked Mr.
17 Schroeder.

18 I think you hit the nail on the head;
19 that is to say an exemption does not mean that a
20 publisher is prohibited from using a technological
21 measure. I mean, if they want to still distribute
22 the work with the screen reader access turned off,
23 they're certainly perfectly free to continue doing
24 that. What we're looking at here is if,
25 notwithstanding their choice to continue to use the

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1 technological protection, the user has the ability
2 to circumvent that protection? No one's forcing the
3 publisher to do anything. The publisher can do
4 whatever it wants. The only question is what is the
5 user able to do and is the user able to circumvent
6 the technological protection.

7 And then you asked a very interesting
8 question to Mr. Schroeder, which is okay, how likely
9 is it that a user will circumvent a technological
10 protection? And there are two levels to that
11 question, or two ways of answering it.

12 You could certainly ask what is the
13 likelihood of people generally and then, perhaps all
14 the more so, visually impaired people to have the
15 technological sophistication themselves to
16 reconfigure their computer or reconfigure the
17 software so that they are able to circumvent the
18 technological protection; that is a fair question.
19 But, of course, that question can be asked with
20 respect to every exemption. And if we get into that
21 discussion, then perhaps this whole rulemaking is
22 ridiculous because no exemption will ever meet that
23 standard.

24 But it also leads to a second conundrum
25 or a second solution, which is perhaps the user

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1 himself will not have the technological
2 sophistication to develop the software to circumvent
3 the technological protection, but could someone else
4 provide it? For example, Mr. Schroeder's
5 organization, would they be able to provide it? But,
6 of course, that leads to another problem.

7 MS. PETERS: Yes.

8 MR. BAND: The exemption is only for, at
9 least it appears to be on its surface, only for uses
10 for the act of circumvention and not circumvention
11 devices. And that's a whole other problem. But,
12 again, that issue also goes to the entire nature of
13 the proceeding as opposed to the specific exemption.

14 MR. ADLER: But it's not an irrelevant
15 issue because the fact of the matter is if the
16 burden of proof that is a the core of this
17 proceeding is that the proponents of an exemption
18 first have to demonstrate that there is substantial
19 adverse effect on specific uses of a particular
20 class of works, I would assume that any proposed
21 exemption that would be adopted by such a rulemaking
22 would have to be able to demonstrably alleviate that
23 particular substantial adverse effect. And if by
24 adopting the exemption, in fact as a practical
25 matter you can't alleviate the substantial adverse

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1 effect, then there's no justification in adopting
2 the exemption.

3 MR. BAND: But, of course, the statute
4 does not use the word substantial adverse effect.
5 The statute, which the Copyright Office kindly has
6 given us a copy of, says adversely affect and not
7 substantially or severely adversely affected. But,
8 again, that point gets to the entire proceeding that
9 you're asking for a level of proof that is circular
10 and no exemption would ever be granted. And surely
11 Congress did not intend to set up a rulemaking
12 proceeding that was illusory.

13 MS. PETERS: One last quick question.
14 Mr. Schroeder, Bookshare. I think in your comments
15 you said a lot of stuff doesn't really work for you.
16 But I know the intent of that organization is to
17 basically have more and more material available for
18 those who are blind or visually impaired. And I just
19 wondered if your view may be based on an experience
20 you have today but may not be there in a not too
21 distant future?

22 MR. SCHROEDER: Bookshare and Web Brow,
23 which is through the Library of Congress, are two
24 excellent examples of how digital information is
25 being made available to people who are blind or

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1 visually impaired taking advantage of the Chafee
2 Amendments in particular. And I, in fact, applaud
3 and have said in many places that I applaud the
4 publishers working with Bookshare to ensure that
5 that web based delivery system and distribution
6 system could go forward to provide accessible
7 materials. However, it depends on a world, and this
8 is important because it's important in understanding
9 what Mr. Adler was saying about the Chafee
10 Amendment. It depends on a world in which you could
11 not reasonably be expected that publishers could
12 provide material easily in an accessible form for
13 people who are blind or visually impaired. It
14 depends on a world in which still people have to
15 convert a printed page into some other form of
16 access. And even under Bookshare, and certainly
17 under Web Brow, in both instances, a significant
18 amount of work has to be done to transform printed
19 material, or in some instances digital material,
20 into a form that is accessible and useable for
21 people who are blind or visually impaired.

22 That's a world in which blind people
23 still don't have access to very much material. In a
24 world in which people regularly trade and distribute
25 and deal in e-text test, that's a world in which

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1 properly configured people who are blind or visually
2 impaired have nearly full access to information,
3 commercial and otherwise. That's the world that
4 we're certainly trying to strive toward. And that
5 will be at least assisted in insuring that: (a)
6 organizations like ours and others and developers of
7 assisted technology in fact are not committing
8 violations of the MCA or the entire Copyright Act if
9 they provide individuals with a means to make fair
10 use of material that they have a right to. And if
11 that means cracking an encryption system, then
12 that's what it means. Because that, of course,
13 should not be a violation if your intent is to read
14 and to utilize the materials. If it becomes a
15 violation, then you intend to have unlawful uses for
16 that material.

17 MR. BAND: And let me just add a
18 critical point. We're always talking about accessing
19 material that the user has paid for. I mean, that
20 he has lawfully obtained. We're not talking about
21 breaking into a secure website and getting something
22 without permission. We're only talking about a
23 situation where, you know, as in the AFB testimony
24 where, you know, you go to amazon.com, you download
25 and then you need to circumvent it because it's not

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1 screen reader enabled. So you've paid for it. We're
2 only talking about a situation where you have paid
3 for access but notwithstanding the fact that you
4 have paid good money for the access, you aren't able
5 to use it.

6 MS. PETERS: Okay. I need to let the
7 other panel members -- I could go on further.

8 So, David?

9 MR. CARSON: I've got a couple of basic
10 questions I think, both of them are grounded in the
11 text of Section 1201.

12 This first one is for any and all of you
13 who have any views on it. We've been talking about
14 situation, I guess the easiest example is where a
15 screen reader which would convert text to speech
16 doesn't work and you want to do it in order to
17 convert the text to speech so that someone who can't
18 see the text because of visual impairment can hear
19 it.

20 So the question is, is the act of doing
21 that a noninfringing act. And if so, why? If not,
22 why not?

23 MR. SCHROEDER: I think our view would
24 be that the act of doing that according to the
25 reading of the statute and the accompanying

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1 committee report, the act of using a screen reader
2 to convert text into speech or some other form for a
3 blind or visually impaired person would not be
4 infringing. Would not infringe the copyright.

5 MR. CARSON: If you can elaborate. I
6 don't know if you're a lawyer, but legal analyses is
7 always helpful when you're trying to explain whether
8 something is infringing or not.

9 MR. BAND: Well, if I could add, I mean
10 under Section 106 it would have to be a public
11 performance. But we're talking about -- I mean, you
12 have a public performance right but not a private
13 performance right. And so that's the first level of
14 analysis, that this would -- what we're talking
15 about is something that someone would be doing at
16 home. And certainly if they were to do it in a
17 broader context where it would be a public
18 performance, then that could conceivably could be
19 infringing. But then you would get to the second
20 tier, which would of course be fair use. And it
21 could be that under certain circumstances that kind
22 of public performance might be permissible under
23 Section 107 or might be permissible under Section
24 110, but I would imagine in most cases what we're
25 really talking about is something that is a private

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1 performance and therefore not implicated by the
2 Copyright Act.

3 MR. ADLER: I think if you look at the
4 Chafee Amendment, the Chafee Amendment explicitly
5 says that digital text is one of the specialized
6 formats in which an authorized entity as defined in
7 that exemption is permitted to reproduce and
8 distribute certain copyrighted works without
9 obtaining the permission of the copyright on it.

10 Now, that doesn't ultimately resolve the
11 issue as to whether or not taking that digital text
12 and using it with text-to-speech software to
13 translate it into an audio version is or is not a
14 performance. The simple fact of the matter is, is
15 the Chafee Amendment only dealt with two rights that
16 are among the exclusive rights enumerated in the
17 Copyright Act. It only dealt with reproduction and
18 distribution. It did not deal with the question of
19 performance at all.

20 But I think more importantly to the
21 analysis, while Congress designated digital text as
22 one of the permissible specialized formats, it
23 didn't in any way provide any special right of
24 access to digital text. It didn't guarantee that a
25 person would be able to translate a particular work

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1 into digital text or to be able to demand that
2 digital text be available for purpose of using it
3 with text-to-speech translation software.

4 Congress assumed that if it had among
5 various types of specialized formats digital text to
6 the extent that digital text could be used to make
7 the work accessible to a person who was blind or
8 otherwise has print disabilities, it would be all
9 right to do so without having to engage the
10 permission of the copyright owner. What Congress did
11 not do was to say that a work could be translated
12 into digital text specifically so that it would be
13 capable of being used with text-to-speech
14 translation software.

15 And the fact of the matter is, is one
16 can see that even certain specialized formats that
17 are widely used in this community to meet the needs
18 of print disabilities, one was specifically excluded
19 from the Chafee Amendment, and that was large print.
20 The reason it was specifically excluded was because
21 it was recognized by the Copyright Office in
22 testimony before Congress and ultimately by Congress
23 that large print was already a viable commercial
24 marketplace. And what Congress was trying to get at
25 with the Chafee Amendment was the recognition of the

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1 fact that servicing the needs of people who are
2 blind or otherwise have print disabilities, the
3 sheer volume of people involved, the incentives for
4 commercial producers to be able to meet the needs of
5 those people, was not likely to occur. And
6 therefore, Congress stepped in and through
7 regulation decided to meet those needs.

8 But with respect to the issue of access
9 to a work under 1201, Congress is deliberately
10 recognizing that these are works put into the
11 commercial marketplace where they are subject to
12 competition. Congress didn't have to mandate either
13 the right of a copyright owner to use a
14 technological measure or determine in anyway under
15 what circumstances a particular technological
16 measure controlling access to a work could be used.
17 Congress recognized that whether or not particular
18 copyright owners would use access controls with
19 respect to particular works would be part of their
20 calculation of how to put that work into
21 distribution in a competitive marketplace.

22 So, it really still is a marketplace
23 issue.

24 MR. CARSON: All right. But back to my
25 question, and if Mr. Band responds in particular. I

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1 think he articulated what might be the right of the
2 copyright owner under Section 106 that would be
3 implicated, and his theory is it's a performance
4 right but not a public performance, so it's a
5 noninfringing use. Do you have a response to that?
6 What right would be violated simply by taking that
7 digital text and converting it to speech so that I
8 can hear it? What rights of the copyright am I
9 violating when I do that?

10 MR. ADLER: Well, again, as I said,
11 within the membership of AAP at least there is some
12 diversity of opinion as to whether or not there is a
13 specific right. And I assume from the discussions,
14 it would be the performance right that is being
15 discussed.

16 There is no uniform view on that as far
17 as I know. And Congress, simply, has been
18 absolutely silent with respect to that issue.

19 MR. CARSON: So at least some publishers
20 -- oh, I'm sorry, Mr. Bolick, I don't mean to --

21 MR. BOLICK: Well, for some publishers
22 they might view it this way: That a text-to-speech
23 version of an e-book could be separately saleable
24 item and considered a derivative work. We have a
25 work that is non-text-to-speech, we have one that is

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1 text-to-speech, we have one that is print, we have
2 one that's large print. All of these go into the
3 market commercially.

4 We're looking at an interesting case
5 right now of a gentleman in Pennsylvania who is
6 offering his services to anybody, not just the
7 disabled, to send your book to me and I'll convert
8 it and send it back to you on a CD in a MP3 file.
9 This is very interesting to us. We don't know what
10 the implications of this are. For some publishers,
11 I'm sure they're having cows. For others, we think
12 oh, good right on. There's a wide church within the
13 publishing community. But I could say for those who
14 are on the side of not looking for this particular
15 exemption to go forward, they would fear that
16 there's a market here in the future for text-to-
17 speech. We could have some converted text-to-speech
18 in one tone, some converted text-to-speech with your
19 favorite voice for this actress, that actor, and so
20 on. They will view this as something that they
21 could put into the market competitively.

22 So, it may be the derivative work issue
23 that they would view as being infringed.

24 MR. SCHROEDER: If I could add, while
25 the Committee, the House Commerce Committee didn't,

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1 obviously, directly address this topic, it did in
2 its report accompanying the copyright amendments
3 that include the MCA speak to the issue of
4 manufacturing and distributing products whose design
5 is to craft technology. And it says the Committee
6 believes it is very important to emphasize that
7 Section 102(a)(2) is aimed fundamentally at
8 outlawing so called black boxes which are expressly
9 intended to facilitate circumvention of
10 technological protection measures for purposes of
11 gaining access to a work. It goes on to say the
12 provision is not aimed at products that are capable
13 of commercially significant noninfringing uses.
14 Parenthetically I would add screen readers would
15 certainly, I would think, fall into that category.
16 Consumer electronics and then it lists several
17 categories. And then ends by talking about used by
18 businesses and consumers for perfectly legitimate
19 purposes.

20 If I as a blind person use a screen
21 reader, which of course has a variety of
22 noninfringing uses attached to it, to turn text into
23 synthetic speech or large print on my screen, Allan,
24 or Braille, I would argue that I'm hard pressed to
25 see how anyone could see that as a violation of the

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1 copyright owner in allowing that access.

2 If my friend reads me printed material
3 from a book in the privacy of an office or home, I
4 don't think anyone has ever considered that to be a
5 violation of copyright, although one could certainly
6 argue that that's an audio performance of that
7 material.

8 If, however, I make a tape of my friend
9 doing that and start selling that book, clearly I've
10 done an infringement of copyright. And I would think
11 that in that case, just as in many other
12 infringements, of course one could take legal
13 action. But the mere act of using a screen reader
14 for a noninfringing use, that is to gain access to
15 and use the material for appropriate personal uses
16 as a consumer, would certainly seem -- I would have
17 a hard time seeing where that could be a violation
18 of the Act.

19 MR. ADLER: I don't think that the issue
20 here is primarily whether or not the use of text-to-
21 speech translation software is an infringing use. I
22 think, for one thing, I think Paul's analysis slides
23 dangerously into the broader question of a fair use
24 exception, which is already being addressed I think
25 in other comments and in another panel. And no one

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1 in this proceeding, I think, is talking about
2 banning from the marketplace any particular type of
3 software that would have the capability of doing
4 that.

5 What we're discussing is whether or not
6 there should be as a matter of the rulemaking
7 authorized to the Copyright Office and the Librarian
8 of Congress a new exemption adopted that would allow
9 for the ability to circumvent specific access
10 controls that are used in the context of e-book
11 simply because those access controls do not enable
12 the use of text-to-speech software. And I think
13 this gets us into broader questions about whether in
14 fact we are within the scope of this rulemaking
15 talking about a particular class of copyrighted
16 works, and even addressing the issue of whether or
17 not e-books should be the gravamen of such an
18 exemption.

19 MR. CARSON: But I think, Allan, I think
20 you are making a concession that not all copyright
21 owners make with respect to both classes we're
22 hearing. Because I think what I'm hearing you say
23 is that at the very least here what is behind the
24 proposal is an attempt to permit people to make what
25 everyone agrees is noninfringing uses. Is that

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1 true?

2 Q What I'm saying is that the position
3 with AAP is somewhat limited because there's a
4 disagreement among members with respect to which
5 particular rights are implicated by the use of this
6 type of software and whether, in fact, there would
7 be an actionable infringement involved. But I think
8 ultimately we could posit for the purposes of
9 addressing the proposal exemption that even if it
10 were considered to be noninfringing use, I don't
11 think that the exemption that is being requested and
12 has been proposed, is justified under the terms of
13 the rulemaking.

14 MR. CARSON: My second question is base
15 don the statute also, and I think it's been assumed
16 in all the comments and in the testimony, but I just
17 haven't heard much explicitly about it and I want to
18 make sure I've got it right here.

19 Everyone agrees that what we're talking
20 about here, the circumstances when you're not able
21 to use that screen reader to convert text-to-speech,
22 for example, the reason you can't do it is because
23 in fact there is a technological measure that is
24 controlling access. Is that the problem? Because of
25 isn't, of course, there's no reason to talking to

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1 it. I just want to make sure it's understood.

2 MR. SCHROEDER: That is in fact correct
3 for the arguments that we're making here. There may
4 be other reasons. There may be certain forms of text
5 -- of painting text to the screen, putting text on a
6 screen that in fact would not be capturable through
7 software that is not so much a security measure, but
8 a particular implementation measure. But,
9 obviously, we are arguing here that there are
10 technological security measures that they themselves
11 interfere with use of a screen reader.

12 MR. CARSON: I'd like to know a little
13 more about -- I mean, I've seen the ascertain, but I
14 haven't really seen any concrete description of what
15 they are and how they're doing what you say they're
16 doing.

17 MR. ADLER: Particularly, to amplify
18 that with respect to Jonathan's comment that he's
19 only talking about lawfully obtained e-books. Now, I
20 assume that lawfully obtained means something beyond
21 purchased e-books, but certainly to the extent that
22 we're talking about e-books that are purchased in
23 the commercial marketplace, there's an obvious issue
24 of consumer choice. And there's also a series of
25 options among which consumers can choose with

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1 respect to whether or not they get e-books that are
2 published by a publisher who has enabled or has not
3 enabled text-to-speech software translation.

4 MR. BOLICK: Also, just to deal with
5 perhaps a little bit of the technical aspect of
6 this. It differs from format to format.

7 If you look at the Acrobat approach, you
8 set the permissions in advance and one of the
9 permissions is text-to-speech. Then the encryption
10 of DRM is applied and wraps the package.

11 Obviously, if the publisher has set the
12 text-to-speech at no not permitted then applies the
13 DRM, then the situation that you're looking to
14 understand exists.

15 Microsoft's DRM works a little bit
16 differently and will work considerably differently 3
17 months or 4 months or 6 months from now, so it's
18 really hard -- we're looking at a moving target,
19 especially with that particular reader.

20 It's only at the highest level of
21 encryption that the text-to-speech does not work. At
22 lower levels it does work, although at those lower
23 levels they plant your credit card number on the
24 screen of the book. So you paid your money, takes
25 your choice, I suppose.

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1 The reason I'm mentioning both of these
2 semi-technical explanations of those two situations
3 is that's one of the reasons that McGraw-Hill
4 publishes a book in both formats. The consumer may
5 choose to deal with one. IF they want text-to-
6 speech, then they will not pick the -- from us, they
7 will not pick the Microsoft reader version, which is
8 set at the highest level of technology because it
9 doesn't -- we can't put text-to-speech capability
10 into it. It just doesn't work. We can do it with
11 the PDF in the Acrobat format. So buy the Acrobat
12 version.

13 MR. CARSON: If I understand your answer
14 correctly, in either case, even to the two cases
15 you're giving us here, the inability to convert
16 text-to-speech is because of a technological measure
17 that's controlling access. Is that a fair
18 statement?

19 MR. BOLICK: Yes.

20 MR. CARSON: Okay.

21 MR. SCHROEDER: And it's important to
22 add it's a technological measure under the control
23 of the publisher that can be chosen, at least in
24 those two instances. We have not done a thorough
25 review of all technological measures to determine

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1 where accessibility barriers lie in each of them.
2 It's something we could certainly do, but it's not
3 something that we have done. But in those two
4 instances, and in fact the examples we've included
5 in our written testimony, reflect reader and PDF,
6 Acrobat -- it is important to note that it is the
7 choice. And I would say to Allan that, you know,
8 would that we did have a choice as McGraw-Hill is
9 suggesting, that's commendable. Would that we did
10 have a choice among books that did in fact include
11 in a text-to-speech capability and those that were
12 in other format that did not; that is simply not the
13 case.

14 MR. ADLER: Well, you do. You may not
15 necessarily have the choice among e-books, but you
16 certainly do have the choice --

17 MR. SCHROEDER: We can choose no access,
18 I suppose. I mean it is, of course, always a choice.

19 MR. ADLER: No. Or you could, of
20 course, choose access through Bookshare or through
21 any other avenue that is authorized under the --

22 MR. SCHROEDER: If the material is
23 available there. And, of course, as we know the vast
24 percentage of material is not available through
25 those sources.

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1 MR. ADLER: The vast amount of material
2 is available as print material, which is
3 translatable under the Chafee Amendment through a
4 number of organizations and a number of different
5 means to be capable of being used with text-to-
6 speech translation software. The problem you have is
7 that you're insisting that something that is
8 published as an e-book, that is published in a
9 digital form that comes with certain controls that
10 limit certain uses of that digital text is not
11 completely open to be used with text-to-speech
12 translation software whether or not the publisher
13 chooses to make it so. And we feel much more secure
14 going down the 120 -- sorry, the 121 Chafee
15 Amendment route to deal with this issue than to
16 start trying to throw the switches on technology
17 that's changing under our fingers every 3 months.

18 MR. BAND: Right. But, again, I guess
19 that gets to the point that I was making that, you
20 know, you ask for the DMCA, you wanted the
21 technological -- you wanted the prohibition on
22 technological protections, you wanted the
23 prohibition of the circumvention of technological
24 protections. You got that, but Congress said in
25 certain cases, you know, the price of that is that

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1 in certain cases people are going to be allowed to
2 circumvent that. And that's why we're here.

3 MR. ADLER: Yes. But, okay. If we're
4 going to get to that question, then it said that
5 they would be able to do that with respect to access
6 controls that adversely affect the ability to make
7 noninfringing uses of a particular class of
8 copyrighted works. Now, Congress could have said of
9 a particular class of copyrighted works in a
10 particular medium or in a particular format. But it
11 didn't say that. And it could have chosen to say
12 that. It talked only about the class of copyrighted
13 works, and that has been, I think, quite reasonably
14 interpreted by the Copyright Office based on both
15 the language of the statute and the legislative
16 history to refer to the nature of the works as works
17 of authorship under the Copyright Act.

18 If you interpret this to be a particular
19 class of copyrighted works depending upon the format
20 in which they are distributed, that's an entirely
21 different interpretation and one that Congress
22 didn't enact.

23 MR. BAND: Well, we're trying to make
24 the exemption narrower. If you want to make it as
25 broad as that, well sure -- you know, I'm happy to

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1 take an exemption for all literary works. I don't
2 think they'll give it to me, though.

3 MS. PETERS: Okay. Rob?

4 MR. KASUNIC: Well, I'm still hearing
5 after David's questions some conflicting views of
6 whether this is a use or an access control. I think
7 I heard that turning off the e-book read aloud
8 feature, for instance on the Adobe Acrobat or the
9 Microsoft Reader version was an access control.
10 Then Allen, you just said if certain uses are
11 limited, so we're talking on the other hand about
12 uses.

13 Just assuming that this is an access
14 control, if it isn't then there would be no
15 prohibition, right? We can agree on that, that you
16 could circumvent. Assuming that there is an access
17 control that shuts off the read aloud function of an
18 e-book reader, isn't it turning off the read aloud
19 function always, even by circumvention, going to be
20 noninfringing use separate and distinct from what
21 was addressed in the Chafee Amendment dealing with
22 the specific 106 rights of reproduction and
23 distribution. The Chafee Amendment didn't address
24 public performance, and more particularly didn't
25 address private performance because it's not covered

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1 by Title 17. So didn't since reading aloud would
2 always be a private performance in this context,
3 wouldn't this always be a noninfringing use?

4 MR. ADLER: It may well be the case, and
5 that's why if you look at the reply comments that
6 AAP submitted specifically addressing the proponents
7 of this exemption, we didn't rest our argument on
8 the question of whether in fact it would or would
9 not be an infringing use. We talked in terms of
10 whether in fact the class of works that they were
11 proposing as the body for the exemption was a class
12 of copyrighted works within the meaning of the
13 statute. And we believe it is not.

14 We focused on the fact that the
15 availability of e-books with access controls that
16 protect the interests of the publishers was
17 fulfilling the purpose that Congress had in enacting
18 the DMCA to encourage copyright owners to make their
19 works available in the marketplace through digital
20 distribution and through other forms of digital
21 media, which is what has occurred. E-books would
22 have existed without the DMCA.

23 And the fact of the matter is that that
24 has vastly increased the amount of material that's
25 available in the marketplace. Now the fact that it

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1 hasn't specifically addressed the accessibility
2 needs with respect to people who have print
3 disabilities was something that Congress could
4 readily have addressed, knowing that just two years
5 prior to the enactment of the DMCA Congress had
6 specifically addressed the needs of that community
7 through the enactment of Section 121, the Chafee
8 Amendment. But what it did not do in the Chafee
9 Amendment, and what it did not do in the DMCA was to
10 give that particular community, more so than any
11 other community, the right to choose what format,
12 what medium they accessed a copyrightable work in.

13 If a publisher decides not to make works
14 available in an electronic medium at all, if
15 publishers decide to simply eliminate e-books,
16 there's absolutely nothing in the copyright law that
17 would require them to do so either for the ordinary
18 user under the guise of fair use or for users within
19 Paul's community who do have special accessibility
20 needs because they have print disabilities.

21 MR. BAND: But it seems to me that
22 Allan's argument goes too far. The fact that
23 Congress did not give an exemption can be used with
24 respect to absolutely every exemption that anyone
25 ever comes before the Copyright Office in this

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1 rulemaking procedure. You're always saying look,
2 Congress could have done that but it didn't, and
3 therefore, you don't qualify.

4 MR. ADLER: No, but there's a very real
5 argument, Jonathan, which is that I have heard you
6 argue in other context and you argue in this context
7 essentially that Section 1201 and the entire anti-
8 circumvention scheme have had an adverse effect on
9 the rights of users of copyrighted works, in part
10 because they don't provide for the limitations that
11 the Copyright Act provides on the rights of
12 copyright owners, for example under Section 107 fair
13 use or for that matter, under 108 the libraries, or
14 Section 110 for educational institutions. You
15 believe that the anti-circumvention provisions have
16 been detrimental because Congress did not look at
17 those provisions and say we need to provide specific
18 exemptions in order to make these other limitations
19 function properly.

20 The fact is Congress didn't do that
21 because it didn't think it was necessary to do that.

22 MR. KASUNIC: Well, looking in terms of
23 these noninfringing uses, there is a balancing that
24 has to take place and some statutory factors in this
25 rulemaking that have to be considered. But I do

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1 want to look at the -- so this balance will be part
2 of this process of whether an exemption is
3 appropriate.

4 But I want to focus for a second on my
5 handout, subsection 1201(a)(1)(D) which deals with
6 the particular class that can be exempted. And I
7 want to find out your understanding of this
8 provision. Is it your understanding -- and let me, I
9 guess, read this -- the subsection is the "The
10 librarian shall publish any class of copyrighted
11 works for which the librarian has determined
12 personal and to the rulemaking conducted under
13 subparagraph (c) that noninfringing uses by persons
14 who are users of a copyrighted work are or are
15 likely to be adversely affected and the prohibition
16 contained in subparagraph (a) shall not apply to
17 such users with respect to such class of works for
18 the ensuing 3 year period.

19 Is it your understanding of this
20 subsection that any noninfringing use -- that if any
21 noninfringing use is found to be adversely affected
22 -- and again this will be based on the balancing
23 that has to take place -- if any noninfringing use
24 is adversely affected by the prohibition on
25 circumvention, then all noninfringing uses will be

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1 permitted by an exemption? For instance, if e-books
2 is the appropriate class, will that allow all
3 noninfringing uses of e-books to -- in order to
4 circumvent for a noninfringing use, but will not
5 allow circumvention for infringing purposes??

6 MR. ADLER: E-books is a particular form
7 in which works of authorship can be made available
8 to and distributed to the public. The fact is, as I
9 said before, there is nothing in the copyright law
10 that requires a publisher to make a work available
11 in digital form.

12 To the extent that the publisher chooses
13 to make a work available in digital form, Congress
14 recognized the ability and the right of the
15 copyright owner to use certain technological
16 measures to restrict both access to the work and
17 certain uses of the work. So by definition Congress
18 must have understood that there would be
19 noninfringing uses that could be made of that work
20 which could not be made because the work was subject
21 to access controls or use controls.

22 The notion that simply asserting that a
23 noninfringing use, somebody's intended noninfringing
24 use, would be adversely affected because they can't
25 engage in the use because of the use of an access

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1 control or a use control by the copyright owner,
2 that can't be the end of the analysis. If that were
3 so, then it would mean that any of the uses that a
4 user intended to make which were noninfringing would
5 necessarily trump the ability of the copyright owner
6 to use an access control or a use control. And
7 that's something that Congress clearly couldn't have
8 intended.

9 MR. SCHROEDER: But we have shown that
10 there is certainly harm to individual who are blind
11 or visually impaired who require the use of a screen
12 reader to access material whether or not the
13 publisher is free to provide any book or not. There
14 is no doubt that that is a freedom available. But
15 what we've attempted to argue is that there is a
16 specific group of people, people who are blind or
17 visually impaired, and there may be others but
18 there's a specific group of people who are harmed by
19 virtue of their disability and by virtue of the
20 technology they are required to use to access this
21 material.

22 It's hard for us to understand what else
23 Congress could have intended. Yes, it would have
24 been better if they had said in Section 1201 that
25 these access controls shall not be put into place

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1 without considerations of accessibility. But, of
2 course, they didn't. And Mr. Adler's quite right.
3 But it does say -- it does deal with the fact that
4 people or persons shall have an opportunity to
5 circumvent for fair use purposes or should at least
6 be able to petition for an exemption. And it seems
7 to me that that's all we're trying to argue, is that
8 there is a group of people who are harmed by the use
9 of certain access controls and they should be able
10 to have the opportunity to make use of the material;
11 that is to say to get around those controls.

12 It is quite likely that, in fact, our
13 developers of screen readers are not in fact going
14 to be able to do that in all cases. But that doesn't
15 really speak to issue under the purview of the
16 Librarian of Congress. All we're looking for is an
17 exemption to take away the ambiguity so that in fact
18 it's clear that people who are blind or visually
19 impaired relying on specific technologies have a
20 right to fair use of material protected by those
21 technologies.

22 MR. BAND: But getting to your very
23 specific question about 1201(a)(1)(D) and exactly
24 what it means. I think the term any class of
25 copyrighted works is a very elastic term. I mean,

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1 the Congress could have again chosen different
2 terms, but the term "class" is undefined in the
3 statute. I don't believe it appears any -- I don't
4 know, it might be used somewhere else in the
5 Copyright Act. It doesn't leap to mind anywhere
6 that it is in fact used.

7 So it's an elastic term.

8 And I think it can be viewed as broadly
9 or narrowly as one chooses in terms of or, you know,
10 as the Librarian chooses when formulating an
11 exemption. And I think that the phrase "class of
12 works" could be fashioned in such a way that it
13 really does apply to literary works in e-book form
14 where the screen reader function has been turned
15 off, or whatever the appropriate technical term is.
16 I think that that does define a class of works,
17 because again the term class is a very elastic term
18 that can be used as broadly or narrowly as the
19 Librarian wishes. And I think used in that manner I
20 think that that gives the Librarian a great deal of
21 flexibility to fashion an exemption that does
22 capture, that does reflect the balancing of those
23 five factors that does enable a noninfringing use
24 but at the same time does not compromise or
25 unreasonably compromise the copyright holder's

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1 rights.

2 MR. ADLER: But, Jonathan, if the
3 premise of your argument is accepted, why stop
4 there? How does that differ from your proposing
5 that e-books that are subject to any access controls
6 which take the works embodied or the work
7 distributed thereby in anyway out of the clear
8 should be subject to an exemption for purposes of
9 circumvention?

10 MR. BAND: Because I think at that point
11 the Librarian would have to weigh the factors and
12 may determine that that class is too broad and would
13 have, you know, an adverse effect not so much on the
14 user, but would have an adverse effect on the
15 copyright holder. I don't see the term "class of
16 works" as being handcuffs on the Librarian.

17 MS. PETERS: Going to Charlotte.

18 MS. DOUGLASS: Okay. Following up on
19 class of works --

20 MS. PETERS: Your microphone.

21 MS. DOUGLASS: Oh, sorry. Just maybe
22 can speak louder, I probably can be heard.

23 Following up on the class of works, I
24 would like to know whether you, Ms. Schroeder, agree
25 to the narrowing description of what your exemption

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1 -- the exemption that you're seeking. Would you
2 agree to Mr. Band's description of the exemption
3 that you're seeking? In other words, not all
4 literary works but literary works that don't permit
5 screen readers to be used? Very loosely, of course.

6 MR. SCHROEDER: Yes. I don't know. WE
7 haven't contemplated that. It might be a reasonable
8 approach.

9 MS. DOUGLASS: I see. If that were the
10 exemption, if that narrow description were the
11 exemption sought, how would you feel about it?

12 MR. ADLER: I think we would still feel
13 it was unjustified in large part because it would
14 open the door, I think, to the next request that
15 would follow.

16 We've been talking about this, and in
17 part I guess it's because the DMCA begins with the
18 word "digital." But the fact of the matter is when
19 you look at Section 1201 and the discussion about
20 technological measures that control access or
21 effectively control access to a copyrighted work,
22 there's nothing that limits those to the digital
23 context. And so if you read this literally as
24 applying in the analog context as well, the argument
25 would be that anything that controls access to a

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1 copyrighted work that adversely affects the ability
2 of a user to make noninfringing uses of those works
3 would be subject to an exemption allowing its
4 circumvention. And I think that's an extremely broad
5 premise.

6 MS. DOUGLASS: But if it were narrowed
7 to only digital works, you'd still --

8 MR. BOLICK: Well, the only thing that
9 stands between this and a digital version of it is a
10 box scanning this into a digital file. And I guess
11 I would also wonder if screen reading technology is
12 okay, what about just simply reading directly off of
13 a disk? There are additional technologies that can
14 be used to convert print into speech. So, again,
15 it's the opening the door issue that I think is of
16 current concern.

17 MS. DOUGLASS: So you would object as
18 well?

19 MR. BOLICK: I think so.

20 MR. ADLER: And, again, I would point
21 out to you that in the Chafee Amendment it's
22 important to recognize that Congress didn't
23 authorize any user to be able to reproduce and
24 distribute a work in a specialized format. They only
25 authorized entities. And the reason they did that

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1 was because if they had authorized the users who
2 were in fact the beneficiaries of that exemption, it
3 would be almost impossible to police and it would
4 effectively mean that they have allowed people
5 generally to be able to claim that they have a
6 legitimate reason for doing so and that they are
7 able to reproduce and distribute these works without
8 having to worry about permission from the copyright
9 owner if they could make a claim that they were
10 either blind or subject to other print disabilities.
11 But Congress didn't say the users themselves could
12 do that. In trying to create a balance where there
13 was going to be some limitation on that authority,
14 it limited the authority of the exemption only to
15 certain authorized entities.

16 MR. BAND: But, of course, in the Chafee
17 Amendment they were looking at the distribution
18 right and they were contemplating people making
19 something -- you know, certain entities making it
20 broadly available. Here, of course, we're talking
21 about something that someone's going to do in the
22 privacy of their own home.

23 It seems to me, again, that the
24 Copyright Office and Librarian have the ability to
25 craft the term "class of works" as broadly or

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1 narrowly as they want, and they can -- you know,
2 there are very able lawyers in the Copyright Office.
3 I'm sure they're going to be able to come up with
4 the proper terminology that would not lead to the
5 parade of horrors that Allan has suggested. And
6 then also the notion of sort of a "slippery slope,"
7 we allow one exemption and that inevitably allows
8 for other exemptions.

9 Well, again, that's your job. It's your
10 job to prevent the slippery slope and to draw the
11 line and to say, you know, this yes, this no. And I
12 have confidence that you'll be able to do that.

13 MR. ADLER: But, Jonathan, I would
14 suggest that able lawyers though they are, they
15 would recognize that they're prohibited from
16 establishing one definition of a particular class of
17 copyrighted works for purposes of one kind of
18 exemption and then having a different definition of
19 that term for another. So if they were to read from
20 a particular class of copyrighted works in the way
21 that you would prefer for purposes of this
22 exemption, they would also have to read it in that
23 way for purposes of all other proposed exemptions,
24 meaning that the class of copyrighted works could be
25 read not in terms of the actual works of authorship,

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1 but based upon the intended users or the particular
2 medium or format in which the work is distributed.

3 MR. BAND: And that would be fine with
4 me. I don't know if it would fine with them. But I
5 think that that would be the appropriate definition
6 of class of works. And, again, I think that they
7 would be able to, in the balancing, make sure
8 they're sound.

9 MR. BOLICK: But given that the
10 definition is certainly going to involve whatever
11 the technology stands as today, how will you keep up
12 with your definition as technology changes tomorrow?
13 When the Microsoft DRM changes in just such a manner
14 that I put my biometric recognition over the screen
15 and it knows that I am a member of the AFB so text-
16 to-speech is turned on?

17 MR. BAND: But I think the answer to
18 that is that in the rulemaking proceeding, any
19 exemption you grant has to be renewed every 3 years.
20 It doesn't last automatically. Again, that's not a
21 feature I necessarily like, but in this context it's
22 helpful to me. So, yes, I like it in this context.

23 You know, if every 3 years, technology
24 changes, there's, in essence, an automatic sunset
25 and in that sense that should add a level of comfort

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1 with respect to an exemption here that you frankly
2 don't have almost in any other area of the law.
3 That automatic sunset feature.

4 MS. DOUGLASS: Okay. I have an
5 unrelated question to what we were just talking
6 about, and that is could you tell us approximately -
7 - this is very specific. What percentage of e-books
8 don't have the option for conversion to special
9 formats? Do you have any idea about, you know,
10 numbers or anything generally?

11 MR. SCHROEDER: Are you directing that
12 to me?

13 We have not done that review. I don't
14 have an answer for you.

15 MS. DOUGLASS: Okay.

16 MR. BOLICK: I don't have a statistical
17 answer to that, but I would say that compared to the
18 year 2000, today there are many more e-books
19 available on the market in which text-to-speech is
20 available than there were in the year 2000.

21 MS. DOUGLASS: Okay.

22 MR. CARSON: Can you tell us, is it more
23 do than don't permitted?

24 MR. BOLICK: Personally, I believe more
25 do than don't. But I'd have no statistical measure

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1 on that issue. We'd have to check with all of the
2 distributors such as Lightning Source and Overdrive.
3 They could begin to tell us that.

4 MR. ADLER: But, again, as we pointed
5 out in the reply comments that we had submitted, if
6 you go to the website of any major publisher that
7 offers e-books, typically you're going to find the
8 same array of services offered which is they will
9 not only provide you with a chart that typically
10 distinguishes among the characteristics of the DRM
11 views by the different vendors of e-book software
12 and hardware, but they will in fact provide you with
13 the ability to download the different versions of e-
14 book software offered by Adobe or by Microsoft or by
15 Gemstar or any of the others.

16 So there is a choice in the marketplace
17 that even today in what is still very much an
18 nascent market is extant and it's only going to
19 continue to grow.

20 MS. DOUGLASS: Okay.

21 MS. PETERS: Steve?

22 MR. TEPP: Thank you.

23 Correct me if I'm wrong, but I'm
24 proceeding on the assumption that the reason
25 technological protection measures were attached to

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1 e-books in the first place were generally concerns
2 about piracy. And so the question I'm getting at is
3 to what extent over the number of years now that e-
4 books have been out there has piracy been a problem
5 and to what extent is that piracy a problem?

6 MR. BOLICK: Well, there is an
7 interesting phenomenon going on out there. There
8 are a lot of digitally pirated books, books that
9 have gone through the scanner that are placed into
10 ASCII text format and then placed on peer-to-peer
11 servers out there. And there are tens of thousands
12 of them. These were not hacked e-books. These were
13 books that were physically painfully, manually
14 transferred over into dot-txt files.

15 Within a very short period of time, a
16 year, the percentage of txt files fell and the
17 number of PDF files and lit files, the Microsoft
18 Reader files, rose. Again, those were not hacked e-
19 books. These were books that were being scanned,
20 digitized and then dubbed into the PDF format and
21 the lit reader.

22 A few books are creeping from the
23 formerly published e-books into that market or into
24 that black market, if you will. But clearly the
25 digital format is the pirate's format of choice as

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1 opposed to printing a ton of printed books and
2 shipping them around, although we have that problem
3 still as well.

4 MR. ADLER: I would also just be careful
5 about the use of the word "piracy." Because that
6 tends to have the loaded definition for some people
7 of people who are deliberately engaged in stealing
8 another's property to engage in commercial
9 competition with them. But one of the problems that
10 the use of access controls was designed to address
11 is remember, many people get their e-book text
12 delivered to them via the Internet. They download
13 them. And one of the problems there was raised by
14 the First Sale Doctrine as some people believe it
15 should apply to transmitted works in digital
16 formats.

17 This office took the position that that
18 was not what the intention of the First Sale
19 Doctrine was. But the fact of the matter is without
20 having certain technological controls, in reality
21 the practice would be that people would be able to
22 not pass on their e-book device with the text in it,
23 but would be able to freely pass on the e-book text
24 while still retaining their own copy, and it would
25 reproduce. And that, of course, would mean the

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1 possibility that other potential sales that might
2 occur simply won't occur because people will be able
3 to acquire copies of their e-books text for free.

4 MR. TEPP: Mr. Bolick's response
5 triggers a question, and I can't remember if this
6 was in any of the submissions, so I apologize if I'm
7 asking something that's in the written submission.
8 And for anyone on the panel, to what extent are e-
9 books out there in completely unprotected format?

10 MR. BOLICK: There are tens of thousands
11 of public domain works available at the University
12 of Virginia's E-Text Library. Project Gutenberg has
13 many thousands.

14 So the numbers that I gave before where
15 I said 50 to 100,000, that's copyrighted works.

16 MR. TEPP: I meant with regard to
17 copyrighted works.

18 MR. BOLICK: With regard to copyrighted
19 works, there are a handful of publishers who will
20 put the books up with no protection whatsoever.

21 MR. TEPP: Okay. Thanks.

22 If I can jump in with one other
23 question, switching over to the tethering issue
24 which we've not spent as much time on yet this
25 afternoon.

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1 A general question for anyone at the
2 table who wants to address it. Are tethering
3 restrictions access controls or copy controls?

4 MR. ADLER: Well, for purposes of this
5 proceeding I would say they're access controls.
6 Since this proceeding doesn't reach the other kinds
7 of controls, and therefore would not have to make a
8 decision regarding --

9 MR. BAND: I would agree as a general
10 matter that the tethering seems to be more of an
11 access control issue rather than a copy control
12 issue.

13 MR. BOLICK: Well, I get to be the odd
14 man out; it's a little bit of both. One of the
15 reasons that an e-book would be tethered to a
16 particular software application or to a particular
17 device, more particular to the software application,
18 is that we would be concerned as publishers that it
19 could be easily moved from one device to the next
20 device, to the next device because it is a perfect
21 copy.

22 Usually the DRM that ties the e-book to
23 the application on your device holds it there. Now,
24 you may have multiple applications of the
25 application, multiple activations of the

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1 applications such that you can have your Microsoft
2 Reader on 3, 4 up to 8 devices, in fact. And you
3 can for your purposes have 8 copies of the work on
4 your 8 different devices. But it really doesn't
5 work that way in the real world because people move
6 computers and then their hard drives die or
7 whatever, so they have to get a new copy of
8 Microsoft Reader that takes up another activation,
9 because it's reading an ID off of the device.

10 So there is a copy element that is of
11 concern in tethering.

12 MR. TEPP: Thanks.

13 MS. PETERS: Okay. I think I'll go to
14 Rob again.

15 MR. KASUNIC: I just have two real short
16 questions. One was --

17 MS. PETERS: Mike.

18 MR. KASUNIC: Oh, I'm sorry. Mr. Bolick,
19 you had mentioned about the Microsoft Reader and
20 that only at the highest level is the text-to-speech
21 function turned off, highest level protection, isn't
22 that right?

23 MR. BOLICK: That's what I understand,
24 yes.

25 MR. BOLICK: In the Adobe Reader do you

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1 know whether the default is on or off in that? Do
2 you have to turn it on or is --

3 MR. BOLICK: I'm sorry, I don't recall.
4 There are a number -- there are about 4 switches
5 that you have to throw. One for printing, one for
6 copy/paste, one for text-to-speech. I can't
7 remember whether they're switched to yes or off.

8 MR. SCHROEDER: I believe they're
9 switched off, but we could check. But we could
10 check that.

11 MR. BOLICK: Right.

12 MR. KASUNIC: That would be helpful,
13 too.

14 MR. BOLICK: When we transmit the meta-
15 data and the information about our files to our
16 distributors, we have to tell them because they
17 handle the final packaging. We tell them what
18 permissions to set. So presumably -- something has
19 to be done.

20 MR. KASUNIC: I'm curious if you don't
21 tell them anything, where it does it end up? So
22 what's the default?

23 MR. BAND: Well, just regardless of
24 whether it's on or off, I'd like to join Mr.
25 Schroeder and commend McGraw-Hill for making sure

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1 that it's set on "on" so that the screen readers
2 work with the McGraw-Hill e-books.

3 MR. KASUNIC: The other thing I'd just
4 like to find out is how -- in talking about e-books,
5 how other formats fit into this situation? For
6 instance, when we're talking about text readers and
7 the availability of hearing the text, how do we fit
8 into this analysis, for instance, I know there are a
9 lot of other commercial companies out there that
10 provide books in audio format. I subscribed for my
11 commute for a long time to one that could download
12 the books and could download them onto a MP3 player
13 and play them in the car or radio. How do we in
14 terms of talking about e-books in a broader sense,
15 how do we consider all the other formats available
16 on the market?

17 MR. ADLER: In all honesty, it's not an
18 issue I've gotten very far into, in part because
19 there is a separate trade association to which the
20 divisions of AAP members that publish audio books
21 that belong that deals with specifically with the
22 issue of audio books. And so we did not address
23 that issue at all in our reply comments in this
24 proceeding. And I don't know that AAP actually has
25 given much thought to that question.

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1 MR. BOLICK: Could you elaborate on the
2 question a little? I'm not sure where you're going
3 with it.

4 MR. KASUNIC: Well, in terms of talking
5 about the balance on the market and what the effect
6 of the prohibition is, part of what we would be
7 looking at is what is available on the market.

8 MR. BOLICK: Now I understand.

9 MR. KASUNIC: And I wonder what we
10 should be considering in terms of -- we've been
11 talking a lot about e-books, but not as much about
12 these other formats that are available that may
13 provide the same benefit as a read-aloud function
14 but that would be available through another source.

15 MR. BOLICK: Well, I can't provide you
16 with a statistic, but I hope you will ask for them
17 afterwards and we can supply it. But the size of the
18 audio book market has been growing rapidly over the
19 past 3 to 5 years. And we do have statistics at the
20 AAP that indicate what it's been for 2000, 2001 and
21 on to the present.

22 It's a very vibrant market. And even
23 online with a company like audible.com where you can
24 download MP3s to a specific device that is promoted
25 by audible.com. And, again, it's going to be

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1 tethered to that particular device. They seem to be
2 doing well.

3 MR. SCHROEDER: The only point I would
4 add to that is that we have not done an
5 investigation either of the market size or of the
6 following, and that is the controls that are put on
7 those materials either that would be controls that
8 one would have to get through, the hurdles one would
9 have to get through in order to actually download
10 the material or the controls that one would have to
11 invoke in order to actually read the material;
12 whether that's on a specific hardware device or
13 whether in fact the user has some control over it.

14 My suspicion would be, and it's only a
15 suspicion, that some of the producers of audio
16 materials would have their books controlled in such
17 a way that, again, a blind user relying on a screen
18 reader to navigate around a screen to find boxes
19 that need to be checked would, in fact, not be able
20 to do it because it's pretty common practice that
21 those kinds of systems are often designed without
22 the appropriate controls that would allow a screen
23 reader user to get at them.

24 So I suspect, although I don't know,
25 that that could be a problem. I do know that in the

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1 case of a major producer there have been
2 accessibility issues related to the players that
3 they provide. But that, I would agree is probably
4 outside the scope of what we're looking at.

5 MR. KASUNIC: Thank you.

6 MS. PETERS: Mr. Schroeder, are you
7 saying that blind and visually impaired really
8 cannot use the audio books that are on the market,
9 that you really do need a different format?

10 MR. SCHROEDER: No. I'm not saying
11 that. I'm saying that my suspicion would be material
12 provided via an electronic distribution through the
13 Internet could likely be controlled in such a way
14 that a blind user would not be able to access the
15 controls in order to fill in boxes, check boxes,
16 etcetera, and put in passwords and those sorts of
17 things that would give them the access to the
18 material. We haven't done an investigation of audio
19 producer's sites to determine whether in fact it's
20 true. I'm simply arguing that that would not be
21 surprising, it would not be unusual to find sites
22 that would in fact thwart use by someone using the
23 screen reader.

24 MS. PETERS: Okay. So you're really
25 only talking about when you would get the material

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1 through the Internet and therefore, you anticipate
2 that there would be a password or something else
3 that would be required?

4 MR. SCHROEDER: Well, it would also be
5 true if it were distributed in a DVD or CD and again
6 required the use of the navigation through a screen,
7 a menu of any sort. There is no -- let me put it
8 this way: There's certainly no guarantee, there's
9 certainly no requirement on the producer of that
10 material that it be accessible to users making use
11 of a screen reader or any other kind of technology
12 to access their computer, their hardware. And so
13 there's no reason to believe that there wouldn't be
14 accessibility challenges.

15 There are plenty of blind users using at
16 least one of the producers mentioned a few minutes
17 ago.

18 MS. PETERS: Okay. Thank you.

19 David?

20 MR. CARSON: Okay. A question for Mr.
21 Adler or Mr. Bolick. Let's assume that on October
22 28th the Librarian of Congress issues regulations
23 which include an exempted class along the lines of
24 that which is being sought by Mr. Schroeder and Mr.
25 Band. How are you harmed? What's the harm in that?

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1 MR. ADLER: Well, I would assume one of
2 two things would happen, which would be that
3 probably many more publishers rather than risking
4 having their digital rights, management technologies
5 that they use circumvented by people who believe
6 they have a right to do so beyond what the scope of
7 the exemption says would probably enable text-to-
8 speech translation software if they don't already do
9 so now.

10 MR. CARSON: You're trying to tell us
11 about the --

12 MR. ADLER: Or they would simply produce
13 works that don't have that capability at all.

14 It isn't really the question of harm.
15 It's a question of whether or not this is a
16 legitimate circumstance for the government to have
17 to step in to regulate what is clearly a competitive
18 marketplace with respect to the offering of this
19 particular product. Where the product is offered,
20 and I think that neither Jonathan nor Paul has
21 disputed this, by some publishers with text-to-
22 speech translation capability fully enabled and by
23 others with it not fully enabled. And as long as the
24 marketplace has that kind of competitive capability,
25 the question is whether or not this is an

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1 appropriate circumstance for the government to
2 intervene with regulation to require it one way or
3 the other.

4 MR. CARSON: But it's not -- I mean, the
5 government has already intervened with regulation.
6 The regulation is called the DMCA. What we're
7 seeking is a reduction in the regulation. But,
8 again, it wouldn't require the publisher to do
9 anything. It would simply be a matter of what the
10 user is able to do without violating the law.

11 MR. BOLICK: Well, our concern would be
12 that with that chink in the armor of the DRM
13 technology, then some publishers will, as Allan was
14 suggesting, will back off. So what would the harm
15 be? Fewer e-books.

16 MR. CARSON: How realistic is -- let's
17 assume for the moment that the chink is a chink that
18 simply relates to that aspect of the technology that
19 might prevent someone from using the text-to-speech
20 feature. Is that such a chink that a publisher
21 would be so concerned that oh my God, we're going to
22 lose all our protection and we're going to have to
23 stop producing this stuff?

24 MR. BOLICK: If you tackle the problem
25 by hitting at the anti-circumvention, okay. If you

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1 tackle the problem at the DRM level, then yes it's
2 oh boy, now it's more thing I've got to think about.
3 If you tackle it at the issue of setting the
4 permission, well McGraw-Hill has no problem. We
5 already do it. But as Allan is pointing out, it's a
6 marketplace issue.

7 Some publishers, you know, would object
8 to being forced or required to turn that on because
9 it denies them a market otherwise that they would
10 want to exploit.

11 MR. ADLER: As we've pointed out, e-
12 books, unlike the situation with certain
13 transitional -- with the advent of certain
14 technologies in other industries dealing with the
15 distribution of copyrighted works, e-books are not a
16 good place to supplant print material. It's quite
17 clear to the publishers that that is a circumstance
18 that even if they desired it, would not occur based
19 upon the rate of penetration that e-books have made
20 in the marketplace.

21 So what you have is e-books introduced
22 in the marketplace as an alternative product for
23 consumers which have certain capabilities and
24 functionalities that they could enjoy that they're
25 unable to enjoy using the exact same literary work

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1 in a print format. If it becomes too difficult or
2 too problematic to introduce that format in the
3 marketplace, it simply won't be expanded and, in
4 fact, it might disappear.

5 MR. SCHROEDER: Needless to say, we fail
6 to see that there's any real harm to the publishing
7 industry. We certainly believe there's harm to users
8 who are blind or visually impaired in not having
9 access to material. And I guess I would want to
10 know, you know, why hasn't the publication of
11 printed books declined with the advent of the
12 optical character scanner. Certainly that's commonly
13 available. And, in fact, we're not even asking for
14 anything remotely like that kind of openness and
15 availability. We're simply asking for a removal of
16 the ambiguity. And I think it is an ambiguous
17 situation facing blind users, because again I would
18 argue that we do have a fair use right to circumvent
19 technological protections in order to access
20 material for fair use purposes. It hasn't, to my
21 knowledge, been tested in a direct way and an
22 appropriate way. And certainly that might be the
23 way to do it. But it seems to me that in this
24 instance we know that there's a class of users
25 that's going to be harmed, it seems unlikely that

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1 there's going to be any real harm to the publishing
2 industry anymore than the advent of scanners really
3 did harm to the printed publishing industry.

4 MR. BAND: In fact, I think an argument
5 could be made that it would benefit the publishers
6 of e-books. The example that was given by the AFB,
7 they suggest that a lot of times when a person's
8 looking at e-books it's hard to know when you see
9 it, let's say on amazon.com, you don't know whether
10 or not it is screen reader enabled or not. And that
11 ambiguity, that uncertainty might deter some segment
12 of the visually impaired people from buying that
13 product. But once they know that if they buy it,
14 either it will be enabled or if it's not enabled,
15 that they might be able to enable it on their own,
16 that could eliminate a barrier that now exists to
17 their buying that product.

18 MR. ADLER: Well, let me just make two
19 comments in response.

20 I think what you've heard Paul is
21 precisely the problem. Despite the fact that they
22 have couched this in terms of the needs of the print
23 disabilities community, in essence this is another
24 guise of the claim that fair use needs to be enabled
25 with an exemption to --

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1 MS. PETERS: To an access --

2 MR. ADLER: -- 1201. And the fact of
3 the matter is I think it's quite predictable that if
4 the Copyright Office were to endorse this proposed
5 exemption and the Librarian were to adopt it, that
6 the argument would be made that it is very difficult
7 to make a distinction between why this particular
8 use, noninfringing use, should be accorded an
9 exemption and other noninfringing uses that could be
10 couched as fair use would not have such an
11 exemption.

12 I assume you have asked the question
13 about what harm this would bring to publishers as
14 part of a balance of this, because of course the way
15 the regulation -- the rulemaking proceeding actually
16 works, the burden is not on the publishers in this
17 instance to argue why they wouldn't be harmed. The
18 burden is on the proponents of the exemption to
19 demonstrate why they are harmed in the absence of an
20 exemption.

21 MR. CARSON: But I also assume you'd be
22 the last to tell us we shouldn't be concerned if
23 you'd showed us all sorts of harms that would ensue
24 to you if we --

25 MR. ADLER: Absolutely. Yes, correct.

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1 MR. CARSON: Let me sort of rehearse an
2 analysis of this thing and see how far any and all
3 of you are willing to go along with me in it.

4 I think we have, I won't use the word
5 consensus, but at least a willingness on this side
6 of the table to accept the argument and a total
7 endorsement of the argument over there that what
8 we're talking about, certainly what Mr. Schroeder
9 and Mr. Band are talking about, is a noninfringing
10 use. Do we have a consensus? Do we have an
11 understanding that that particular noninfringing use
12 in fact is being -- people who want to make that
13 infringing use is, in fact, being adversely affected
14 by technological measures that are controlling
15 access to these works or is that not the case?

16 I think I know where you are in that.

17 MR. ADLER: I think that primarily the
18 issue is the question of the extent to which the
19 adverse affect can be characterized. Because we
20 have all agreed that there are e-books in the
21 marketplace that are offered clearly enabling the
22 use of text-to-speech software. The question really
23 is just how serious is the adverse impact in terms
24 of how many of those e-books offerings don't permit
25 it and do we have any real number to point to.

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1 MR. CARSON: Okay. So you're pointing
2 they haven't made that case?

3 MR. ADLER: Right. And I think that
4 once you take that situation where we don't have a
5 specific set of percentages to assign one way or the
6 other, the next important thing to look at is are
7 there alternative sources of access to the same
8 identical literary works? And the answer to that,
9 clearly, is yes. And not only are those same
10 literary works made available in print form, but
11 Congress has explicitly provided for this community
12 to be able to have access to those works at the cost
13 of the rights of copyright owners through Section
14 121.

15 MR. CARSON: So if I were to tell you if
16 everyone were to stipulate here, which no one will,
17 that 50 percent of all e-books have the ability to
18 convert from text-to-speech disabled, and if we were
19 all to tell you right now if it were 50 percent
20 that's good enough for us, there's a problem there.
21 What would be the next step in the analysis? Do we
22 have an exemption now or what else would be there to
23 stop us from getting to the exemption?

24 MR. ADLER: Well, the first step would
25 be to argue that e-books are not the only source of

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1 the literary works that they wish to access.

2 MR. CARSON: Okay. There's hard copy.
3 What else is there?

4 MR. ADLER: Well, there's print --

5 MR. CARSON: Right. Okay.

6 MR. ADLER: Print is available in a
7 variety of ways.

8 MR. CARSON: Okay. So part of our
9 balance is the availability of print and what can be
10 done with that.

11 MR. ADLER: The point isn't that it's
12 just available as print. The point is that the
13 Chafee Amendment makes it possible for that print to
14 be available in a number of different ways. It can
15 be available as Braille. It can be available as
16 digital text. It can be used with text-to-speech
17 software. It can be available, in some cases, in
18 terms of large print, although not specifically
19 under the Chafee Amendment.

20 MR. SCHROEDER: I don't see how you can
21 use the Chafee Amendment as a sort of defense here.
22 Because the Chafee Amendment is in lieu of actually
23 requiring publishers to make their material
24 available to some form of the marketplace. In other
25 words, publishers are freely allowed to place their

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1 products in the marketplace knowing full well that
2 it completely denies access to a whole group of
3 people. And so you have the Chafee Amendment, and it
4 was a good balance of allowing -- the cost of rights
5 owners I think is a little bit of a stretch, Allan.
6 But, okay. Allowing access to --

7 MR. ADLER: The Chafee Amendment says
8 that --

9 MR. ADLER: Allowing access to materials
10 by a third party producer in order to put in the
11 specialized format, knowing full well that the
12 publisher's not losing anything because it's
13 recognized that they weren't making it available.
14 And so I don't see that as a defense. To say that
15 there's e-books in the marketplace, some of which
16 have text-to-speech turned on and some don't, I
17 guess if we were to do that analysis and come up
18 with a 50/50 ratio, I would certainly say that
19 there's a vast degree of harm there. But even if
20 it's only -- even if the degree is 80 to 20 of text-
21 to-speech enabled and not, it doesn't really matter
22 in the end because the exemption still should be
23 available because that 80/20 could reverse to 20/80
24 at the stroke of a button on the part of a publisher
25 with absolutely no ability on the part of the

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1 consumer to have a say or a voice, or any control of
2 the marketplace. And all we're saying is that the
3 individual ought to be able to thwart those access
4 measures when they're inappropriately denying access
5 to an individual simply because of visual
6 impairment. And that's really what this is based on.

7 MR. BAND: But I'll go maybe a step
8 further. Let's say we were only talking about 5
9 percent. You know, this is sort of like Abraham
10 bargaining with God with the number of righteous
11 people in Sodom, but maybe that analogy isn't
12 completely fitting here.

13 MR. BOLICK: The movie industry.

14 MR. BAND: That's right.

15 But let's say it turns out that right
16 now 95 percent of e-books are screen reader enabled.
17 Then we're basically saying that the exemption we
18 want is only applying as a practical matter--it
19 could be that you'll draft it in a careful way that
20 it only applied to that universe of 5 percent.
21 Right? And I think the way we've formulated it, it
22 would only apply to that 5 percent. We're really
23 talking about a very, very narrow exemption that the
24 likelihood of it harming the publishers is truly
25 infinitesimal. But it seems to me that if it is

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1 only that 5 percent you're still talking about, for
2 a blind college student who needs one of those books
3 in that 5 percent, that's a very severe problem for
4 him and he is adversely affected in a very
5 meaningful way.

6 So I don't think we need to quantify it.
7 And, indeed, if we quantify it, the smaller the
8 universe makes it even more compelling to have the
9 exemption because the adverse impact on the
10 publishers will be smaller.

11 MR. ADLER: But that's not true.
12 Because, first of all, the fact of the matter is, is
13 that we already have provided ways for which
14 instructional materials that are needed in
15 specialized formats can be provided to the students
16 who need them. And, again, that is done without them
17 having to pay for them.

18 But when you talk about this as being
19 something that can be done in a fairly surgical
20 fashion, the reality as we all know is that if you
21 in fact -- right now there is no exemption that
22 justifies circumventing access controls with respect
23 to e-books. If you create an exemption we're then
24 going to be dealing with the problem that people are
25 going to be developing the means in which to

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1 implement that exemption. And the fact of the matter
2 is we keep hearing Paul go back and forth talking
3 about this as fair use on one hand, and on the other
4 hand talking about this as the special needs of a
5 very limited and definable community. The fact of
6 the matter is if this type of exemption is adopted,
7 the way it's going to play in the marketplace is, is
8 that the tools will become available to circumvent
9 DRM, DRM will be circumvented to do more things than
10 simply enable text-to-speech translation software to
11 be used.

12 And part of the balance that the
13 Copyright Office and the Librarian have to consider,
14 and the reason why they have to look so closely at
15 the degree of harm, the degree of adverse impact,
16 the degree of need for the exemption is because of
17 the recognition that the adoption of any exemption
18 is going to justify the creation and the
19 distribution of tools to implement that exemption.
20 And once that happens, it's impossible to control.

21 Now you said before correctly that if
22 you took that argument too far, there would never be
23 any exemption. That's the reason why the Copyright
24 Office has to consider very, very carefully whether
25 in fact the exemption is needed or whether the

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1 marketplace has the capability of dealing with the
2 problem that the exemption is supposed to address,
3 whether there are alternatives in terms of the
4 sources of materials that people can turn to so that
5 they don't need the exemption to be adopted and
6 implemented.

7 MR. BOLICK: Well, could I add --

8 MR. CARSON: Well, you're talking about
9 -- go ahead.

10 MR. BOLICK: Could I add a positive
11 point related to the question of what the
12 alternatives are that you asked. What are the
13 alternatives?

14 And e-books have been demonstratively
15 effective in providing a new alternative. I agree
16 with the AFB that we, you know, this is a dawn. And
17 one of the outputs of the e-book industry has been
18 the Open E-Book specification and the adoption of
19 XML across the publishing industry. It's a spinoff
20 of what we're doing to get e-books into the market.

21 We use those same formats to make them
22 available to the disabled community whenever we give
23 to Bookshare files. IF we give them the files, we
24 try to give it to them in the OEB format or the XML
25 format. So this is a net benefit that has come

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1 across the disabled community simply because e-books
2 have been going into the market.

3 I think we can address the needs without
4 an exemption.

5 MR. CARSON: Allan, a moment ago you
6 were talking about if there were an exemption, how
7 the marketplace would respond. And I want to make
8 sure I understand what you were saying. If your
9 concern basically that if there were an exemption,
10 no matter what it really meant, people would
11 perceive it very broadly and react as such?

12 MR. ADLER: Well, we're going to be here
13 I think arguing over whether or not a particular
14 software that is designed to essentially pierce the
15 DRM technology is software that is being marketed
16 primarily for the purpose of addressing the needs of
17 the communities with print disabilities. The fact of
18 the matter is once that software is available and
19 the justification is going to be based upon this
20 type of an exemption, it's going to be very
21 difficult to see as a practical matter how anyone is
22 going to be able to police use of that software or
23 the distribution of that software to simply crack e-
24 book DRM for whatever purpose.

25 MR. CARSON: Well, are you suggesting

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1 then that if there is an exemption issued in October
2 along the lines of that which is being requested, it
3 would be legitimate for people to market and
4 distribute that software to people who want to use
5 it for purposes of engaging in the conduct that is
6 being exempted?

7 MR. ADLER: I would suggest to you that
8 the very next step of the proponents of the
9 exemption would be to ask for the tools necessary to
10 make that exemption meaningful.

11 MR. CARSON: And who would they have to
12 ask for that?

13 MR. ADLER: Well, the question I guess
14 they would have to ask Congress for that.

15 MR. CARSON: So is that our concern?

16 MR. ADLER: I think it should be your
17 concern, because again as I said, I think Congress
18 has spoken on the issue specifically of how to
19 address the accessibility needs of people with print
20 disabilities. They did so 2 years -- just 2 years
21 prior to the enactment of the DMCA through enactment
22 of the Chafee Amendment. And when they enacted the
23 DMCA, surely Congress was aware of what it had done
24 just two years previously, but it didn't see the
25 need to create any special exemptions at that time.

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1 It created this rulemaking procedure which,
2 obviously, requires very careful and precise
3 calculations, including as to where the burden of
4 persuasion for the need for exemption should lie and
5 whether in fact there are other considerations that
6 should be weighed as counter balancing the arguments
7 made in favor of an exemption. What we've suggested
8 to you is, is that the arguments made in support of
9 such an exemption we believe are outweighed by the
10 fact that these materials are available in the
11 marketplace through alternative sources, and
12 specifically that those alternative sources have
13 been enabled by the action of Congress itself in the
14 copyright context. And technology hasn't really
15 made much of an impact on that, or at least they
16 can't quantify in any meaningful way to justify the
17 risk that would flow from adoption of an exemption
18 the nature of the harm that they claim is resulting.

19 MR. CARSON: Okay. One last issue I
20 want to raise. Allan, you were talking about the
21 class of works and how you define it. And if I
22 understand correctly, but I want to make sure I
23 understand your position correctly, you were saying
24 that in determining what a class of works is, it's
25 not legitimate to include reference to the format in

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1 which a work may be marketed? Is that accurate?

2 MR. ADLER: I don't think -- I mean, in
3 my view I don't think that the rulemaking proceeding
4 created by Congress given the statutory standard
5 provided and the words that they chose to use would
6 allow you to differentiate between exactly the same
7 kind of works based on solely on the medium or
8 format in which they're distributed.

9 MR. CARSON: Okay. You have a comment,
10 Mr. Bolick?

11 MR. BOLICK: I would sympathize with
12 these comments, because having gone through one of
13 the working groups at the AAP trying to come up with
14 identifier schemes for e-books, the first task we
15 had was what is an e-book. And we literally spent
16 hours and days trying to come up with a proper
17 definition of what is an e-book. Some folks think
18 it's actually a Rocket e-book, others think that it
19 is a website, others think that it is actually a
20 downloadable static item. I happen to think that it
21 is what we produce with Harrison's On-Hand, which
22 connects with a website; that's an e-book.

23 I don't envy you if you are going to try
24 to create a class of works around the definition of
25 an e-book.

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1 MR. CARSON: Okay. Going back to what
2 Allan was talking about. I mean, one approach that
3 was suggested was that in classifying a class of
4 works for purposes of this particular rulemaking,
5 the classification would begin with reference to
6 attributes of the works themselves but could then be
7 narrowed by reference to the medium on which the
8 works are distributed or even to the access control
9 measures applied to them. I gather you're saying
10 that's much too liberal an application?

11 MR. ADLER: I think it's too broad
12 because the result would be it's almost, I think,
13 inevitable that the kinds of classes of works
14 defined by medium would be those involving digital
15 medium. And it seems that that would be directly
16 counter to the purpose of Congress in enacting this
17 section of the DMCA in the first place.

18 Congress was seeking to encourage the
19 distribution of copyrighted works in digital
20 formats. If in fact you're going to be able to
21 argue that only those classes of certain types of
22 works of authorship that are distributed in digital
23 formats are the ones that should be subject to the
24 exemptions, it seems to run directly counter to
25 Congress' intention. And based upon what we've seen

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1 of the comments that have been filed and the
2 exemptions that have been proposed, in terms it's
3 all of the digital media; it's DVDs, it's e-books.

4 MR. CARSON: Well, the words I read to
5 you were taken out of our decision two years.

6 MR. ADLER: Right.

7 MR. CARSON: So I gather you're telling
8 us we need to be narrower or more constricted in our
9 definition of what a class of work is than they
10 were.

11 MR. ADLER: I thought the results you
12 reached, perhaps, may have been a little narrower
13 than the scope of your standard there. I was
14 satisfied with the results based upon the analysis
15 you gave for rejecting certain specific types of
16 proposed exemptions. For example, the ones that
17 basically said works that are going to be used for
18 fair use purposes.

19 I think that same kind of analysis
20 applies here, because I've heard Paul repeatedly
21 interchangeably argue that it's not just the needs
22 of what otherwise would be considered a very highly
23 definable limited community. But in fact they see
24 this as part and parcel of fair use. And so the
25 arguments would become almost indistinguishable.

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1 MS. PETERS: Let me ask one last
2 question. It actually comes from the comment that
3 was made by, I guess, they're called the joint reply
4 comments. And it's the point where the advocate
5 here says that what we're supposed to be looking at
6 is whether implementation of technological
7 protection measures has caused adverse impact on the
8 ability of users to make lawful uses. So you were
9 looking at a cause factor. And this comment seems
10 to suggest that in fact there weren't very many e-
11 books, there were more e-book so in fact you've got
12 more access and some of those do in fact have the
13 text-to-speech enabled, so really aren't you better
14 of than you were before e-books started to grow and
15 make this available?

16 So my comment, Mr. Schroeder, is if
17 that's the test, aren't you better off than you
18 were?

19 MR. SCHROEDER: A market -- publishers
20 get to define the market. And I don't think Allan's
21 right in the comment about fair use and my use of it
22 with respect to people who are blind or visually
23 impaired. So let me come to the answer to your
24 question.

25 If, in fact, e-books are widely

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1 available in a form that can be readily accessed by
2 people who are blind or visually impaired, we're
3 much better off. And that's really the whole point
4 that we're trying to make. We're not very well off,
5 the Chafee Amendment and Bookshare and the wonderful
6 work of the National Library Service, all those
7 things notwithstanding, we're not all that well off
8 when it comes to access to commercially published
9 material. The vast -- vast majority is not
10 available through any of those means, and we're
11 throw in commercial audio, abridged and even
12 unabridged for heaven's sake. We're not particular
13 well off when it comes to access to commercial
14 material.

15 The market tends to make its decisions,
16 and I am sure that there are other user groups
17 probably of specific kinds of computer technologies,
18 for example, who are shutout of the e-book
19 marketplace. And I understand, I think, Allan's
20 thing about the genie out of the bottle, and I
21 suppose those groups might make an argument that
22 there should be an exemption for their needs as
23 well.

24 But the user group that I'm particularly
25 concerned about, and the user group that the

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1 publishing industry does not address to any great
2 degree is people who are blind or visually impaired,
3 whether it's in the production of e-books or any
4 other kind of commercial material.

5 We may or may not argue about whether they
6 should. They're not required to, and they don't.

7 And so the generation of e-books offers
8 us the most wonderful opportunity. It is a bit like
9 water in the desert. We are so close. We believe
10 it's there. We believe that we have the opportunity
11 to do what you all take for granted; to go to
12 Borders or Amazon, or Barnes & Noble and get
13 anything you want readily accessible to you in a
14 variety, usually, of forms.

15 MS. PETERS: Okay. I understand your
16 desire. But I do think you admitted that you are
17 better off than you were because of these e-books--

18 MR. SCHROEDER: We have the potential to
19 be better off than we are, but it's not clear to me
20 that the e-book industry is moving in the direction
21 that in fact is insuring any better degree of access
22 to people who are blind or visually impaired than
23 the hard copy printed book industry is.

24 MR. BOLICK: I would have to object to
25 that as publishers. Putting more and more of our

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1 books into the market as e-books as best we can,
2 affording as best we can and picking the
3 distribution channels through public libraries and
4 university libraries where we are using McGraw-Hill
5 the PDF format to do so with text-to-speech on;
6 those books are widely available to the patrons of
7 those institutions. That was not the case 3 years
8 ago.

9 MR. BAND: But I think the important
10 point is there is no question that e-books are a
11 great opportunity. No matter what percentage are
12 screen reader enabled, there is no question that e-
13 books present a great opportunity. And there is no
14 question that the ability to have technological
15 protections of those e-books has facilitated their
16 distribution. That has know, provided great comfort
17 to the publishers.

18 Now, to what extent the DMCA as a whole
19 has contributed to that, that's a complex causation
20 question. But even if for present purposes we agree
21 that the inability to circumvent the technological
22 protection as a general matter has facilitated the
23 distribution of e-books, the general provisions of
24 the DMCA don't speak to the significance of turning
25 the screen reader function on or off. And we're

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1 saying -- and I guess the point is this -- that I
2 think it would be hard to demonstrate, it would be
3 very hard for the publishers to demonstrate, that
4 the fact that they have been able to turn the screen
5 reader function off has facilitated the distribution
6 of the e-book. I don't think it has. And it's that
7 narrow aspect of the technological protection, it's
8 that narrow aspect of the DMCA protection that we
9 want an exemption from.

10 We're not saying that the visually
11 disabled people should be able to turn off all the
12 technological protections -- that they should be
13 able to circumvent all the technological protections
14 which, for present purposes, we're assuming have
15 facilitated the e-book market. We're only saying
16 that they should be able to circumvent one narrow
17 feature.

18 MS. PETERS: Could I ask a question
19 about circumventing one narrow feature? Can you
20 circumvent one narrow feature or do you circumvent
21 much more?

22 MR. BOLICK: Yes, you circumvent much
23 more. The text-to-speech isn't access control,
24 it's a permission set the meta-data describing what
25 can be done with a file.

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1 MS. PETERS: So it's X control, it's
2 DRM? It's digital --

3 MR. BOLICK: No. I'm sorry.

4 MS. PETERS: Okay.

5 MR. BOLICK: Access control, DRM, one in
6 the same.

7 MS. PETERS: Okay.

8 MR. BOLICK: The permission for the
9 application to work for text-to-speech in and of
10 itself, turning that flag one way or the other is
11 not access control in and of itself.

12 MS. PETERS: That piece?

13 MR. BOLICK: That piece.

14 MS. PETERS: You can't go after just
15 that piece?

16 MR. BOLICK: As the creator of the file
17 or the packager of the file, yes, I can go after
18 that one piece. I can turn text-to-speech on or off.
19 I can turn copy/paste on or off separately.

20 MS. PETERS: You can, but he can't? If
21 he couldn't go in and just do that?

22 MR. BOLICK: That's correct.

23 MR. BAND: But I guess the point is,
24 that if I were to circumvent the technological
25 protection, and again putting the specific

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1 technological details aside, once I were to break
2 open the DRM, all that I would be doing legally
3 would be using the text-to-speech function. If I
4 were to also at the same time circumvent the
5 protection on making a copy, and I then made a copy,
6 I would be violating the copyright law and you'd
7 have a way of getting at me.

8 MR. BOLICK: It doesn't work that way.

9 MS. PETERS: I hear you. Mr. Bolick,
10 you're shaking your head no.

11 MR. BOLICK: Technically it doesn't work
12 that way. Once you break the wrapper, then you have
13 access to all the permission settings.

14 MS. PETERS: I understand Steve has one
15 more question, is that right?

16 MR. TEPP: Yes.

17 MS. PETERS: Okay.

18 MR. TEPP: The proponents of the --

19 MS. PETERS: Your microphone.

20 MR. TEPP: Sorry. I must have turned it
21 off by accident.

22 The proponents of the exemption I have a
23 question for. Mr. Adler has made an argument based
24 on his application of Section 121 that you can take
25 a regular text publication and digitize it pursuant

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1 to that section, and that digitized copy would then
2 be available for use with a screen reader. Do you
3 agree with that?

4 MR. SCHROEDER: Yes. Well, here, hold
5 on a second. Section 121 doesn't really deal with
6 what I can do. I as an individual can scan a book
7 and turn it into text which can then be read with a
8 screen reader. It can also be read on several other
9 kinds of devices as well designed and used for
10 people who blind or visually impaired. That's
11 available tome without regard to the Chafee
12 Amendment Section 121.

13 The Chafee Amendment allows a third
14 party produce to the right to be able to make a
15 certain specialized format, copies of that material
16 and then make it available to an individual.

17 So, yes, if I'm willing to undergo the
18 burden of doing optical character recognition work
19 on a book that I've purchased in print, I have
20 access to. And, incidentally, if that book is only
21 sold as an e-book, I'm not sure that there's an easy
22 way around that one. I guess I could, you know, pay
23 somebody to print it for me, perhaps, and then if I
24 can break the DRM and then scan it, and then turn it
25 into -- so you understand that it is not exactly a

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1 trivial matter to scan a book and turn it into
2 accessible speech if a blind person even has an
3 access to that commercial product of an optical
4 character scanner.

5 As for Section 121, yes, a third
6 producer can do it. So in, fact, if you can find
7 someone who will take that book and produce it in a
8 specialized format for you as an individual, I
9 suppose, yes, you can argument that that's
10 available. I'm not sure how that really deals with
11 access to e-books themselves and getting around the
12 technological measures which, in themselves, limit
13 access for a particular user group, in this case
14 people who are blind.

15 MR. TEPP: I'm not sure how it doesn't.
16 I mean, if the text of a hard cover book is the same
17 as the subject matter and the text in an e-book, an
18 e-book is protected but through the application of
19 Section 121 a third party producer can give you the
20 same subject matter, the same copyrighted work in a
21 way that you can use it with a screen reader; do you
22 think that has implications for this rulemaking?

23 MR. SCHROEDER: No. (A) it assumes
24 there's a third party producer available to you to
25 do that; (B) it assumes you have the financial

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1 capability to pay that producer if the producer in
2 fact in requiring -- and many do because they have
3 to. You know, it's an expensive undertaking to put
4 a book into Braille or even to do the work of doing
5 optical character recognition scanning and then
6 cleaning up the scan into a form that's actually
7 meaningful.

8 I think anyone who has done a scan knows
9 that there's a lot of things that interfere with
10 making that a very readable and useable copy. And
11 so that deals with the third party producer. They've
12 got to be: (a) available to you; (b) that means you
13 may have to afford their rates for producing that
14 material, and; (c) you have to wait for them to do
15 it on their schedule.

16 With respect to the individual, you
17 either have to have access to a scanner yourself and
18 the ability and patience to convert that scan to
19 text into something that's actually meaningful
20 taking out columns and graphics, and dealing with
21 pagination that sometimes does or does not in fact
22 convert very well. All those things put up against
23 having an access to a clean well formatted e-book
24 copy, I don't see how those things are equivalent in
25 the slightest.

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1 MR. CARSON: In other words -- in other
2 words --

3 MR. ADLER: The processes that you
4 already have available, the bargain that Congress
5 already made specifically to address this particular
6 problems was one that has now fostered the creation
7 of Bookshare, it has advanced the work of groups
8 like the National Library Service and RFB. I mean,
9 the problem here is, and I find this somewhat
10 ironic, you seem to find the e-book to be something
11 that could create great opportunities except that
12 before it has acquired even the beginning of a
13 mainstream audience to be able to support continued
14 development of it, you want to bring in government
15 regulation in a way that publishers will find to be
16 the most particularly sensitive type of government
17 regulation telling them that they're not going to be
18 able to provide the kind of protection for works
19 that are distributed in digital format the Congress
20 basically said under the DMCA they were going to be
21 allowed to do in order to encourage them to release
22 the book in that format in the first place.

23 MR. SCHROEDER: We actually want to
24 remove government regulation that in fact interferes
25 with our opportunities to have access to e-books.

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1 But the fact is the market is not the same. Chafee
2 notwithstanding and Bookshare and all the other good
3 efforts, you cannot possibly argue here, I think.
4 Surely you're not arguing that in fact blind people
5 have access to the same -- even close to the same
6 level of commercially published material as people
7 who are not blind?

8 MR. ADLER: No, I'm not arguing that at
9 all. But I am arguing that that problem, which is a
10 very genuine and serious problem, cannot be in any
11 substantial way attributed to the impact of Section
12 1201 of the DMCA.

13 MR. SCHROEDER: Only because the e-book
14 market is a nascent market. I mean, heck if we'd
15 been there when Gutenberg invented the press, we
16 might have been having requirements in place for
17 Braille had it been invented at the time and, you
18 know, this argument would be somewhat mute.

19 MR. ADLER: But I'm suggesting --

20 MR. SCHROEDER: But here we are at a
21 nascent market saying blind people need access to
22 it. I mean, you're arguing, Chafee Amendment and the
23 other provisions based on sort of an old market, a
24 market that understood that in fact it was not
25 feasible to make printed material into accessible

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1 copies for blind people in the marketplace. It had
2 to be done in an after market specialized production
3 fashion.

4 We're not in that market anymore with e-
5 books. And, no, we would agree that it's a nascent
6 market today and by no means does it give us access
7 to the broadest variety of material. But we are
8 making the assumption, and hoping that e-books do
9 take off and that, in fact, when they take off or as
10 they take off people who are blind have full access
11 to this market right alongside their sighted their
12 peers and that there not be technological measures
13 in our way to the extent that we can work around
14 those measures to have access to material.
15 Hopefully, we don't have to.

16 I mean, I do commend McGraw-Hill, and
17 I'll take back part of what I said. I think McGraw-
18 Hill's books probably have afforded me a much better
19 market situation than was true 3 years ago, and I
20 appreciate that. And I'll be up on your website
21 very soon checking out what you've got available.

22 MR. BOLICK: That's good for a discount.

23 MR. ADLER: I would also urge you to
24 look at the websites of other major commercial
25 publishers. Because I think you'll find the same

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1 thing at many of them.

2 MR. BAND: But, Allan, I'd be willing to
3 stipulate that the Chafee Amendment should be the
4 only amendment or the only provision in the
5 Copyright law for visually impaired people for all
6 time if you're willing to stipulate that you're not
7 going to seek any amendment from now on to the
8 Copyright law. That you think that it is now in
9 perfect pristine form for all time going forward and
10 that you're not going to seek any kind of amendment
11 going forward.

12 MR. SCHROEDER: You can bargain somebody
13 else's rights away, not mine. Thank you.

14 MR. BAND: But it's an absurd bargain.
15 The fact that the fact that the Chafee Amendment
16 addressed one aspect of the community's needs should
17 in no way limit it. It wasn't as if Congress said
18 this is the only and exclusive remedy that will ever
19 be provided. They didn't say that. And to keep on
20 saying "Well, you know, there was an exemption given
21 and now you want more," I mean I could say that
22 about term extension, I could say that about a lot
23 of things.

24 MR. ADLER: Right. I understand that.
25 But what I'm arguing is, is that to take the

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1 position that a new product that has been offered
2 into the market that offers consumers a new kind of
3 choice that they've never been able to have before
4 simply because the technological capabilities didn't
5 exist before, and you want to impose regulation of
6 the most fearful kind because of the door that it
7 opens, not because of the specific nature of the
8 exemption itself as you propose it to be written.
9 But because of what's likely to happen in the
10 marketplace as well as in the political sphere. Can
11 you promise us by the same token that if you receive
12 this exemption, that you wouldn't be saying "Well,
13 you know what? Fair use can just sit off on the
14 side because now we've addressed this problem and we
15 don't need to argue anymore that fair use needs an
16 exemption to allow people to circumvent access
17 controls in order to implement a variety of other
18 noninfringing uses." Of you wouldn't say that.

19 You're going to continue to argue that.
20 And if the Copyright Office and the Librarian adopt
21 this exemption, that's going to be the first crack
22 that's going to say to e-book producers uh-oh, we
23 have a serious problem before we've even got a
24 market to justify the investment that we're
25 continuing to make.

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1 MS. PETERS: I think Charlotte will have
2 the final question.

3 MS. DOUGLASS: Well, this is just a
4 couple of clarifications for material that has been
5 touched on already.

6 You mentioned, Mr. Adler, that you
7 didn't want to see a government mandate for how e-
8 books were issued, and I assumed that you meant that
9 if there were an extension of the publishing
10 industry would do, would be to just turn off the --

11 MR. ADLER: Well, I think in some
12 respects you could look at the exemption and its
13 impact as being somewhat analogous to the notion of
14 affirmatively having the government require that any
15 e-books that be issued must be capable of being used
16 with text-to-speech translation software.

17 MS. DOUGLASS: I thought that's what you
18 meant. Okay. Thank you.

19 MR. BOLICK: But that is -- just to
20 clarify. The text-to-speech within most of the e-
21 book formats is a permissions flag inside the file.

22 MS. PETERS: Right.

23 MR. BOLICK: I thought that what you
24 were looking to grant an exemption on was an
25 exemption to cracking DRM to get at something.

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1 So --

2 MS. DOUGLASS: Right. But --

3 MR. BOLICK: -- the exemption that is
4 before you isn't on the flag, the exemption is
5 cracking something to get at the flag, correct?

6 MS. DOUGLASS: Right. But I thought Mr.
7 Adler was saying that that wouldn't be necessary
8 because if there were an exemption, it would be done
9 on the publisher side rather than the --

10 MR. ADLER: No. What I'm saying is, is
11 that I think in the marketplace right now we have
12 already seen that without the imposition of
13 government regulation there are a number of
14 publishers, including major publishers like McGraw-
15 Hill and I believe Harper Collins is another one.

16 MR. BOLICK: Correct.

17 MR. ADLER: That routinely affirmatively
18 enables the use of text-to-speech translation
19 software. I don't see the argument convincingly made
20 that the marketplace is not working to address this
21 problem. If it's not working quickly enough, I
22 think that can be attributable to the fact that e-
23 books are a relatively new product that have not
24 garnered mainstream acceptance in the marketplace,
25 in part because of the difficulty that DRM causes

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1 the users of e-books. That's an issue for publishers
2 to have to address, and they are attempting to
3 address it. But I don't think government regulation
4 at this stage is going to be terribly helpful to
5 either growing the e-books market or making sure
6 that this provides for the long term a source of
7 reading material in the types of formats that are
8 needed by the community with print disabilities.

9 MR. BAND: I just find, again, you know
10 I've made the point before, but I just find this
11 constant reference to an exemption as a government
12 regulation very curious, Allan, going back to your
13 first amendment days, your ACLU days, I guess I
14 would suggest that the First Amendment is also a
15 government regulation.

16 MR. ADLER: Well, yes, it is. And you
17 know the fact of the matter is in 1996 Congress
18 enacted a very substantial government regulation in
19 respect to the publishers. The Chafee Amendment
20 basically said look you lose control over
21 reproduction and distribution of these materials,
22 period, under this exemption. And we've learned to
23 live with it. In fact, not only have we learned to
24 live with it, but we think we've established a
25 fairly good record of working with the community to

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1 address these needs by trying to expand in a fairly
2 incremental way that has at each stage of the course
3 taken advantage of new technology to make the Chafee
4 Amendment expand the alternative sources of these
5 materials for the community that needs them.

6 Bookshare being the latest example.

7 And we've taken a lot of heat for
8 supporting Bookshare. There are a number of people
9 within this community, and particularly in the
10 author's community, particularly in the community of
11 literary representatives who I guess hadn't read the
12 Chafee Amendment in some time and thought that
13 Bookshare was wholesale stealing of their property.
14 We tried to explain to them that, in fact, it
15 wasn't. We explained that we had participated in
16 working out the balancing act that Congress had done
17 in trying to address this community's needs. And we
18 have continued to try to address these community's
19 needs on the foundation of Chafee.

20 But for you to come in and say now that
21 e-books by definition must be made to address this
22 problem simply because the technology permits it to
23 be made if the government mandates that, I think
24 that that's actually in the long run going to be a
25 very unwise strategy if you really think e-books

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1 holds a valuable role in the future.

2 MR. SCHROEDER: But I don't think we're
3 arguing that. Nor are we arguing that you haven't
4 made efforts. I mean, I think I've said before, I
5 think Chafee offers you a pretty good balance. Not
6 there was any real sincere likelihood that the
7 publishers were going to be required to actually
8 make their product useable by the blind and visually
9 impaired market, but it offers you a good balance in
10 the sense that you don't have to do the after-market
11 work, somebody is doing that.

12 But in the context of e-books, I think
13 it is in fact not entirely unlike Chafee, although
14 you're right, it's giving the power to the
15 individual to some degree to have the ability to get
16 past access controls, whether you call them a flag
17 or not, it's an access control that in fact thwarts
18 access to the material for one particular group of
19 users. And I want to stress that. That people who
20 are blind or visually impaired are the group that's
21 being singled out and denied access to this
22 material. And there's no reason for that.

23 And so, yes, the answer would be for
24 publishers simply to produce material with the text-
25 to-speech flags on, for example, and to work with

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1 the developers of software to insure that access is
2 allowed. But that's not a requirement and that's not
3 what anyone is seeking. I would desire it, but it's
4 not what we're seeking. It's Congress' role to do
5 that.

6 What we are seeking is an assurance that
7 the individual and/or producers of the specialized
8 technology made use of by this particular group of
9 individuals has the opportunity to have access to
10 this material if you won't provide the access in any
11 other way.

12 MS. PETERS: Well, it is now 4:30 and
13 I'm going to take the privilege of chairperson and
14 close the hearing.

15 And I want to thank each and every one
16 of the witnesses. Your testimony was certainly
17 informative. I think that a lot of questions came
18 bubbling up, and I think that we may have some more
19 questions that we will be getting back to you with.

20 MR. ADLER: We'd love them.

21 MS. PETERS: Okay. We're very happy
22 that you're -- because you're going to get them.

23 So, thank everybody.

24 And we all will be back tomorrow morning
25 at 9:30. And if anyone else wants to come back,

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1 you're welcome.

2 (Whereupon, at 4:30 p.m. the hearing was
3 adjourned.)

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