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ANTI-CIRCUMVENTION RULEMAKING HEARING

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FRIDAY,

MAY 9, 2003

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The hearing was held at 9:30 a.m. in the hearing room of the Postal Rate Commission, 1333 H Street, NW, Washington, DC, Marybeth Peters, Register of Copyrights, presiding.

PRESENT:

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

A-G-E-N-D-A

SESSION ONE: STATIC CONTROL COMPONENT PROPOSALS:
STATIC CONTROL COMPONENTS, INC.
Seth Greenstein 5
Rebuttal 54

LEXMARK INTERNATIONAL, INC.
Ralph Oman 57
Rebuttal 58
Joseph M. Potenza
Christopher J. Renk

PROFESSOR JANE GINSBURG 44

Questions 59

SESSION TWO: BROADCAST NEWS MONITORING PROPOSAL:
INTERNATIONAL ASSOCIATION OF BROADCAST MONITORS
Todd Murphy 149
Pro Sherman 153

ELECTRONIC FRONTIER FOUNDATION
Seth Schoen 164

THE WALT DISNEY COMPANY & ABC TELEVISION NETWORK
Troy Dow 171

ALLBRITTON COMMUNICATIONS COMPANY AND
NATIONAL ASSOCIATION OF BROADCASTERS
Jerold Fritz 178

Questions 185

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

9:31 a.m.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GREENSTEIN: Good morning.

MS. PETERS: Thank you.

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

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

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

interoperation and functions of the printer and toner cartridge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Static Control submits that the proper

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PETERS: A plural.

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

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

Thank you.

MS. PETERS: Thank you, Mr. Greenstein.

Mr. Oman?

MR. OMAN: Thank you for the opportunity--

MS. PETERS: There's a switch.

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

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

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

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

MS. PETERS: You are so assured.

MR. OMAN: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

computer programs.

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

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

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

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

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

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

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

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

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

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

has not opposed that request.

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

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

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

appeal.

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

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

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

In its initial notice of inquiry, the

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

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

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

these activities are in fact noninfringing uses under current law.

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

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

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

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

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

case in mind in that quote.

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

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

Obviously, remanufacturers would prefer

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

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

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

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

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

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

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

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

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

Thank you very much, Madam Chairman.

MS. PETERS: Thank you, Mr. Oman.

Professor Ginsburg?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

MS. PETERS: Okay. Thank you.

Mr. Greenstein, the panel noticed that

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

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

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

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

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

Indeed, Lexmark's trial expert conceded

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

So until the complaint was filed, Static Control did not know that there was a toner loading program or any copyrighted work on the chip. Indeed, we had no way of knowing that that small number of bytes, 34 or 55 bytes, constituted a toner loading program. As we noted in our papers, that number of bytes is in fact less information than is necessary to write the name and the title of the Librarian of Congress.

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

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

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

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

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

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

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

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

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

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

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

MS. PETERS: Okay. Thank you.

Do you want to add anything at this point?

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

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

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

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

MS. PETERS: Certainly.

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

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

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

MR. OMAN: Thank you.

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

Let me start with a couple of questions.

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

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

MR. OMAN: Prebate.

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

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

MS. PETERS: Accessing that computer program.

MR. OMAN: Yes.

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

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

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

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

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

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

title. It has to be a copyrighted work.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PETERS: Okay. You made that point.

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

MR. KASUNIC: Thank you.

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

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

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

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

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

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

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

examine in whether or not Section 1201 would apply.

MR. GREENSTEIN: If I can address this?

MR. KASUNIC: Yes.

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

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

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

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

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

MR. KASUNIC: Professor Ginsburg?

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

So, it sounds good in the abstract, but

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

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

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

distinction on computer programs would actually work.

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

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

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

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

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

abstraction that you've been straining to obtain.

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

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

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

MS. PETERS: Good.

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

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

(f)(2), the first clause also seems to address the question of enabling the identification and analysis, but after the all important comma, it says "or for the purpose of enabling interoperatability of an independently created computer program." So it seems to me that, at least under that reading, even if the interoperatability information is available so you don't have to circumvent to find out how to make an interoperatable program, if you want to use an interoperatable program, then (f)(2) would apply. So you can't short circuit 1201(f) by making the information about introperatability otherwise available.

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

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

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

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

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

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

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

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

MR. KASUNIC: Please.

MR. POTENZA: We believe that if all the

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

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

MS. PETERS: Okay.

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

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

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

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

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

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

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

MS. PETERS: Okay.

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

MS. PETERS: Okay. Thank you.

Charlotte?

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

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

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

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

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

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

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

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

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

MS. DOUGLASS: Yes.

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

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

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

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

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

MS. DOUGLASS: Thank you.

Do you have anything further to say about that?

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

MS. DOUGLASS: Okay.

MS. PETERS: Finished? Okay.

Steve?

MR. TEPP: Thank you.

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

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

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

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

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

authorization of the copyright owner itself would be an infringement.

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

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

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

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

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

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

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

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

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

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

MR. TEPP: Okay.

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

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

MR. GREENSTEIN: As I inferred from your question.

MR. TEPP: Fair enough.

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

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

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

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

MR. GREENSTEIN: Yes.

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

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

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

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

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

the only difference that we're talking about.

MR. TEPP: Okay.

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

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

MR. TEPP: Okay. Thank you.

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

MR. GREENSTEIN: I agree with that.

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

MS. PETERS: Sure.

MR. TEPP: Thank you.

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

issue of reverse engineering.

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

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

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

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

Mr. Greenstein, before you answer and

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

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

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

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

MR. TEPP: Okay. Mr. Greenstein?

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

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

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

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

MR. TEPP: Okay.

MR. POTENZA: I just wanted to go back

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

MR. TEPP: Well, now I am confused.

MR. POTENZA: Okay.

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

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

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

MR. POTENZA: Well, what happens is a

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

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

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

MR. TEPP: I got it backwards then?

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

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

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

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

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

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

MR. GREENSTEIN: Thank you.

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

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

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

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

MR. TEPP: Okay.

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

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

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

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

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

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

MR. TEPP: Okay.

MR. POTENZA: I got lost with the --

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

MR. POTENZA: That's okay.

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

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

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

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

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

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

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

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

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

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

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

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

PROFESSOR GINSBURG: I don't know whether--

MS. PETERS: Jane, your microphone.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. TEPP: Mr. Greenstein is perplexed.

MR. GREENSTEIN: I don't see either one. I think if you granted the exemption, that would -- again, I think what we're talking about; are we talking about a past chip versus a future chip or a future business model or a future possibility of offering a toner cartridge chip that has only originally created software and the means to circumvent in order to permit inoperatability of that software with the printer engine program.

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

MR. POTENZA: May I address?

MR. TEPP: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

MR. TEPP: Okay.

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

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

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

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

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

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

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

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

MR. TEPP: Okay. Thank you.

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

MR. POTENZA: I think I'm satisfied.

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

MS. PETERS: No, that's it.

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

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

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

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

MR. GREENSTEIN: Well, certainly, anyone who seeks an exemption under 1201(f) and under 1201(a)

has the option of going to Congress to get a

specific exemption enacted. But --

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

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

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

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

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

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

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

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

MR. CARSON: Thank you.

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

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

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

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

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

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

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

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

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

MR. POTENZA: Yes. I can provide that.

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

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

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

MR. POTENZA: Okay. Thank you.

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

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

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

MR. CARSON: Well, maybe Lexmark can.

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

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

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

MR. POTENZA: That's correct.

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

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

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

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

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

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

portrayed by Static.

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

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

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

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

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

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

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

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

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

I would think that if this issue were

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CARSON: Okay. Let me get Lexmark

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

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

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

MR. OMAN: Yes, you can.

MR. CARSON: Okay.

MR. OMAN: Technically.

MR. CARSON: Yes. All right.

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

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

MR. CARSON: Yes.

MR. GREENSTEIN: As a pure matter of

technology?

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

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

MR. CARSON: Okay.

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

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

MR. GREENSTEIN: The DMCA.

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

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

MR. CARSON: Okay.

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

both authorized Lexmark cartridges and products.

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

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

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

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

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

MR. GREENSTEIN: That's their allegation.

MR. CARSON: All right. Are you saying

they're not works protected under title 17?

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

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

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

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

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

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

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

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

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

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

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

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

I think there's a different negative

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

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

MR. OMAN: The proponents of the exemption?

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

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

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

works?

MR. GREENSTEIN: No, not just that.

MR. CARSON: Okay.

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

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

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

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

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

MR. CARSON: Explain.

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

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

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

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

MS. PETERS: Can I ask you a question?

PROFESSOR GINSBURG: Yes.

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

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

MS. PETERS: Right.

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

MS. PETERS: Okay. That's right.

MR. GREENSTEIN: In the case of the non-

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

MS. PETERS: After the first, right.

MR. GREENSTEIN: After the first use.

MS. PETERS: Right. Is that right?

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

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

MS. PETERS: No, actually --

MR. POTENZA: Or someone made that comment.

MS. PETERS: Mr. Greenstein said that we

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

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

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

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

MS. PETERS: Right.

MR. POTENZA: The toner loading program is smaller.

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

MR. POTENZA: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

MR. POTENZA: I am.

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

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

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

MR. OMAN: It is a technological possibility.

MR. CARSON: Yes. Yes. Okay.

MR. GREENSTEIN: Agreed.

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

a noninfringing use. Is that correct?

MR. GREENSTEIN: Yes.

MR. CARSON: Mr. Oman?

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

MR. CARSON: Well, sure.

MR. OMAN: Remanufacturing cartridges.

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

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

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

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

title.

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

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

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

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

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

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

MR. CARSON: Of course.

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

MR. CARSON: Okay. You should get back

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

MR. POTENZA: Yes. Okay.

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

MR. POTENZA: Okay.

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

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

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

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

PROFESSOR GINSBURG: Right. Right.

MR. CARSON: Okay.

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

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

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

PROFESSOR GINSBURG: Right.

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

PROFESSOR GINSBURG: Right.

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

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

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

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

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

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

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

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

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

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

MR. CARSON: Understood. Understood.

MR. POTENZA: Mr. Carson?

MR. CARSON: Yes.

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

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

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

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

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

MR. CARSON: Professor Ginsburg?

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

MR. GREENSTEIN: That's right.

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

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

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

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

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

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

MR. CARSON: I rather doubt it.

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

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

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

MS. PETERS: And so with that, this

concludes the first panel.

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

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

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

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

MS. PETERS: Okay.

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

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

Association of Broadcast Monitors.

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

Is that okay?

MS. PETERS: Yes.

MR. MURPHY: Okay. Thank you.

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

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

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

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

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

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

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

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

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

Pro?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the FCC adopts broadcast flag with no

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

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

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

We have discussed this issue with

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

Todd?

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

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

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

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

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

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

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

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

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

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

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

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

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

We realize that there may be some dispute as to whether broadcast monitoring is an infringing or noninfringing activity. For the most part, the broadcasters have given us permission to monitor their news programs either through formal agreements or informal handshakes. In other cases, we monitor content for which the broadcasters do not own the copyright, such as the video news releases that run during a television news program, or for that matter the commercials. So a formal license agreement is not required in those cases. Unfortunately, there are a few stations that routinely send cease and desist letters to some of the sole proprietorships that belong to our organization. While the number of threats may be small, they have a devastating effect on those small companies. If a monitor has to drop one of the three stations in the local market, it is effectively out

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

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

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

I would be happy to answer any questions afterwards.

MS. PETERS: Thank you.

Mr. Schoen?

MR. SCHOEN: Thank you, Register Peters.

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

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

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

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

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

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

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

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

replace them.

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

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

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

in anyway.

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

MS. PETERS: Okay. Thank you.

Mr. Dow?

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

First, with respect to the proposed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PETERS: Thank you, Mr. Dow.

Mr. Fritz?

MR. FRITZ: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

MS. PETERS: Thank you, Mr. Fritz.

Start the question with Mr. Carson?

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

MR. FRITZ: We don't know.

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

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

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

MR. CARSON: We'll prove that.

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

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

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

MR. SCHOEN: Mr. Baumgarten.

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

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

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

If we didn't feel that broadcast flag

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

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

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

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

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

MR. CARSON: You're doing what?

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

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

MR. SHERMAN: In the context of rulemaking.

MR. CARSON: OF this rulemaking?

MR. SHERMAN: Yes. Yes.

MR. CARSON: Okay.

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

MR. CARSON: Give them our thanks.

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

MR. CARSON: Talk to you later.

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

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

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

issue. We don't know.

MR. CARSON: Anyone else?

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

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

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

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

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

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

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

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

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

MR. DOW: Yes. Yes.

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

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

MR. CARSON: Has it even asked the question?

MR. DOW: Not that I know of.

MR. FRITZ: Whether or not news or news-

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

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

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

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

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

MR. FRITZ: Exactly.

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

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

MR. CARSON: Are you currently charging fees?

MR. FRITZ: Yes.

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

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

service.

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

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

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

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

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

MR. MURPHY: I apologize.

MR. CARSON: What you're saying is all very interesting, but I've read it. I understand.

MR. SHERMAN: I'd like to add that not every broadcaster feels the way that the folks from Allbritton do. There are several broadcasters who simply will not permit the monitoring. We have any number of our members that have simply been sent cease and desist letters. And when they approached the stations and say "Can we talk about this? We'd be happy to license." They say absolutely not. This is our stuff, you can't have it under any circumstances.

MR. CARSON: And you're nodding your head, Mr. Fritz?

MR. FRITZ: And they get to do it. It's their programming. It's their right.

MR. SHERMAN: Yes. Understand.

MR. FRITZ: And in most instances where we've had to go to court, and when we go to those --

MR. SHERMAN: I would argue that some of it is not their programming.

MR. CARSON: Let's hear it one at a time, if only to spare the court reporter here.

MR. SHERMAN: Okay.

MR. FRITZ: With all due respect to Mr. Sherman, he gets to make those arguments on a case-by-case basis in front of courts. And every court that's considered his fair use arguments have rejected it.

MR. CARSON: Well, we'll talk about that in a moment, but I want to get back to my earlier question.

Okay. Let's assume that there will be some broadcasters who are just going to say no. Let's also assume what I've heard, I think, which is that most broadcasters are more than happy to work with you.

MR. MURPHY: Yes.

MR. CARSON: Any reason to believe that that segment of the broadcasting community won't do whatever it takes to make sure that once the broadcast flag is implemented, if it is, that you have the tools available to do whatever you need to do to transmit this stuff to your clients?

MR. MURPHY: Do I have any reason to believe that they won't?

MR. CARSON: That they won't? Yes.

MR. MURPHY: I have no reason to believe that companies like Mr. Fritz are with would not make that available to us.

MR. CARSON: Okay. Now let's go on to those who aren't quite so cooperative. Is it your position that when you want to take off-the-air or record off-the-air news broadcasts of a broadcaster who is not willing to say yes to you, that it's a noninfringing use when you do that for the purposes for which you're doing it?

MR. SHERMAN: There are certain instances where I would say it should be -- that I believe it is a noninfringing use. Could I give you an example?

MR. CARSON: Please.

MR. SHERMAN: Procter and Gamble puts out a video news release about a new product. They would like an opportunity to see how the station -- they clearly are the owner of that video news release, the copyright holder of that video news release. They would like to see how the station used that video news release and portrayed it. They could not.

MR. CARSON: Now, I believe that we've

heard from Mr. Fritz, and I believe Mr. Dow as well, both recounting -- and this jives with my recollection, not that I've looked at them lately, that there are a number of cases in this area and they all seem to say it's not a fair use and it is infringement. I may be wrong on that, but here's your opportunity to correct me. Are there any cases that go your way?

MR. SHERMAN: Yes, I believe there's one that's inconclusive, let me put it that way.

MR. CARSON: And what do the others do?

MR. SHERMAN: That's CNN. And that was my company that was involved where a lower court held that it was an infringing use. It was overturned on a three judge panel in the Eleventh Circuit. And when it went to en banc, they actually remanded it back to the lower court on a technicality and said start over again. And that's when CNN and VMS came to a resolution on it. We're licensed by CNN. Actually, we have license with Mr. Fritz' company as well.

We're not opposed to licensing. We're not opposed to paying. And that's not what we're here about. That's not the issue.

What we are here about is being

technically impeded from doing our job when we can under law.

MR. CARSON: Okay. Mr. Fritz and Mr. Dow, any reason to believe that as the Internet becomes even more and more the method of choice for people, including video monitors to deliver information, that your companies and companies like yours are going to be hesitant about permitting video monitors to use that to transmit what you agree that they can make copies of to their customers?

MR. FRITZ: Mr. Carson, I think that there's a marketplace for what the monitors want to do. When a court issues a subpoena for a news story from us, and we have no capabilities to preserve those stories, or the soccer mom or even a congressman that wants to know how he's playing or she's playing in the news, broadcaster pressed for staff may want to turn to somebody else to provide that service. So there's a marketplace for it.

Wherever there is a marketplace, businessmen will find a way to make that marketplace work.

To the extent that the Internet or digital copies make that more difficult, so be it.

We'll try to come up with ways to make that marketplace work, absent just shutting it down. There is a need for it and I think we'll come to a way to work it out.

But I will tell you, that it isn't going to be this year. It isn't going to be next year. It isn't going to be the year after. And case closed. That's all you need to concern yourself with, at least at this point in time.

MR. CARSON: We'll get to that in a moment.

Do you have any response to that?

MR. DOW: No. I agree. I think that this an area in which there are relationships that have gone back for some time. This is an area in which these things will continue to be pursued pursuant to licensing agreements and that the particular uses will be dealt with as they're presented and evaluated on what the use is that's trying to be made. What the impact of the use is. And will be dealt with in the licensing structure between the parties as it has been in the past. I have no reason to think that that relationship won't continue into the future.

And, again, this is again is sort of

speculative because this whole area of striking licensing deals for recording of digital television so that you can then transmit that digital television over digital connections is down the road. Because all of this is taking place right now with respect to analog broadcasts, which the broadcast flag is simply not a factor in.

MR. CARSON: Let's get into that. I heard that 2006 is the current deadline for digital conversation. What's the date in 2006? Before or after October 28, 2006?

MR. SHERMAN: My recollection is it's June, but I'm not so sure I can't agree with Mr. Fritz. You know, we've been around this place along time. Things don't necessarily happen when people expect them to happen.

MR. CARSON: Sure.

MR. SHERMAN: And the fact is that there are many broadcasters who already haven't met their deadlines for conversion, and so there is real question as to whether it's going to happen.

MR. FRITZ: There's a two part statutory test, Mr. Carson. One is 2006. But there has to be 85 percent penetration in any particular market, that's digital penetration. That means household.

That means all your houses have to have a set that gets a digital broadcast. And there's not an economist, there's not a government, Billy Tauzin, Fritz Hollings, nobody on the Hill will step out on a limb to say that that's going to happen in 2006.

If it happens while we're all still practicing, I'd be surprised.

MR. CARSON: Is there anyone here who would assert that by the end of 2006 analog signals will no longer be available?

MR. SCHOEN: You might have some particular programming that's digital only, as you have for example a few new networks that are starting up that are all digital networks and things that are produced only in digital. So the programming may not be exactly equivalent, but I would not assert that there would not be analog programming.

MR. CARSON: Okay. Well, let me rephrase my question, because that's a valid point, I guess. Is there anyone who would assert that with respect to what we're talking about here, which is essentially news broadcasts, that some of those news broadcasts by the end of 2006 will not be available in analog?

MR. SHERMAN: Yes.

MR. CARSON: Sorry. Who was that?

MR. SHERMAN: That was Mr. Sherman.

MR. CARSON: All right. And elaborate.

MR. SHERMAN: The fact is that there is original news programming already occurring on the Internet. We're already being asked by our customers to monitor that programming and to provide them with either links to it or copies of it. And to the extent that it's already digital, there is no analog.

MR. CARSON: Okay.

MR. FRITZ: It's not broadcast.

MR. CARSON: Not broadcast. Okay.

MR. SCHOEN: There is a possibility, certainly, of broadcasters producing material of that nature.

MR. CARSON: Sure. Okay.

The final question, broadcast itself is not an access control, but we're talking about the fact that it would work in connection with access controls. First of all, assume the FCC issues a regulation requiring adoption of the broadcast flag. Is it inevitable in such a case that part and parcel of that regulation will be that people will have to

employ access controls?

MR. FRITZ: I'm not really sure I agree with your premise that it's not an access control.

MR. CARSON: Okay. Great. Well, then by all means disagree with me and explain to me why I'm wrong.

MR. FRITZ: I'm not sure.

MR. CARSON: Oh.

MR. FRITZ: I'm not sure what the Commission is going to come out with, and no one here can predict whether it's going to be an access, because we don't know what it's going to look at.

MR. SCHOEN: As an non-lawyer, I would point to the statute, which I probably ought not do and I'll probably get in trouble for doing it as a non-lawyer.

We have 1201(c)(3), the no mandate provision, and we have the definition of effective. And when I go and talk to lawyers, many of whom are good friends of mine, they refer to the broadcast flag as exactly the kind of thing that 1201(c)(3) is in there to say that you don't have to respond to. It's where you have some information, but it doesn't actually have an effect, it doesn't actually do anything in the ordinary course of its operation,

but it's sort of notifying you and it's sort of informing you.

What I hear from the lawyers is that as a statutory matter you can't say that the broadcast flag itself in the absence of any other legislative or regulatory enactment is a measure that effectively controls access to a work.

MR. CARSON: You can't say that it is?

MR. SCHOEN: You can't say that it is, that is you can also say that it is not.

MR. CARSON: Okay. Well --

MR. DOW: In the absence of a regulation is what you're saying?

MR. SCHOEN: No. If you had a regulation, then you may have a new legal situation. But in the legal status quo. My impression is that even that the lawyers among the broadcast flag mandate advocates agree with that, and they believe that that's why a regulation is appropriate. Because they believe that existing law 1201(c)(3) says that you don't have to respond to it because it's not effective.

MR. CARSON: Okay. Well, of course the reason we're here is we're here to determine whether we need to come up with an exemption to the

prohibition on circumvention of technological measures that control access to copyrighted works. So I guess what I need to hear and I'm not sure I'm hearing it, is whether it's likely and if so how is it likely that we're going to be dealing with technological measures that control access to copyrighted works that are implicated by the broadcast flag proposals. So could someone explain to me just how it is that we're dealing with access controls here?

MR. SCHOEN: When the programming comes out of the receiving device, if the receiving device is behaving the way that the movie studios said that the receiving device should behave, it is only allowed to put it in certain forms. And I believe that people would assert that those forms that it's allowed to come out in, are access controls.

MR. CARSON: Everyone here agree with that? Okay. Good. I'm done.

MS. PETERS: Okay. Mr. Tepp?

MR. SHERMAN: Can I just suggest my nodding my head does not mean I agree with it. I didn't understand it.

MS. PETERS: Oh. Okay.

MR. TEPP: All right. I think I'll make

everyone on the panel happy by saying I think I just have one quick question. I hope it's quick.

There have been a number of statements by Mr. Dow and Mr. Fritz which are potentially devastating to the proposed exemption. But let's assume all of those go in favor of the proposed exemption so that we're assuming that within the next three years there will be a substantial number of news broadcasts that are digital only. We're assuming that the FCC in that time period issues this regulation and that it applies to news broadcasting. We're assuming that Mr. Sherman and Mr. Murphy are talking about is a noninfringing use.

All that, what prevents the companies that your organization represents and that you're representing before us today, from using something like a hand held digital recorder to get a screen shot of the news broadcast as it's being rendered on a television and then using that, which obviously takes you back outside the broadcast flag system, to give to your clients copies of the broadcast, sort of the segments of the broadcasts they're interested in seeing?

MR. MURPHY: What would prevent them from doing that?

MR. TEPP: Right.

MR. MURPHY: I guess nothing, although it seems it would be rather cumbersome. They'd have to have thousands of these hand held devices trained on television screens recording the screen shots and the audio.

MR. SHERMAN: And it's multiple screen shots. I don't know how frequently you take these screen shots. But visuals are an important part of the medium, otherwise it would be called radio.

MR. MURPHY: I mean it's possible. It seems very cumbersome and it would probably be cost prohibitive. We'd have to charge you $50,000 a segment to compile that.

MR. TEPP: All right. Well, screen shot isn't the right word. I shouldn't have used that term. I'm talking about simply recording with a recorder the actual broadcast with moving video and the sound that goes along with it. But let me --

MR. SHERMAN: Probably nothing more than the affordability by the clients who ultimately pay for it.

MR. TEPP: Is that substantially different from whatever investment is necessary in order to do whatever it is your companies do now to

produce these videoclip services?

MR. SHERMAN: I don't know the economics of what you're asking, so I can't answer.

MR. MURPHY: If the question is, is it possible to do it another way, probably. You could use digital to analog conversion. But then I think we're coming back, and I'm not an engineer nor a lawyer, circumventing something that had been put in place to prevent you from doing that. And if the broadcasters allow us to do that, that's fine. But we don't want to put ourselves in a situation where we are having to break a law to prevent breaking a law.

MR. SCHOEN: I would actually another non-lawyer opinion on that. MPAA is actually advocating another regulation, because they also believe that activities that are somewhat similar to that are also not prevented by existing law. And so it is certainly the opinion of many lawyers that that kind of activity is also not an act of circumvention; if you were to, say, tape off the screen or going through analog.

MR. CARSON: Is not an act of circumvention?

MR. SCHOEN: That it is not an act of

circumvention.

MR. DOW: And I think the simple answer is, is that what we're talking about is assuming that the proposed broadcast flag regulation gets enacted the way it's been proposed by the MPAA and the NAB and others, that broadcast flag regulation would have no restrictions on analog recordings, and so it wouldn't be an act of circumvention to act in compliance with the rules that are set forward in the regulation. But I think all of this goes to the point that what we're talking about again here is a matter of preference, not a matter of an impediment, the ability to make fair uses.

MR. MURPHY: But I think it's true, and I don't know if everyone will agree or can we agree that analog is going away. Analog will be gone. Analog signal will be gone.

MR. TEPP: Well, my question presumed that there's substantial number of broadcasts of news programming in digital only format. So that's not the point I was trying to ask about. The reason I'm assuming all that for the purpose of the question is to focus on whether or not you can use, for example, a hand held recorder, analog or digital recorder, to record what's being rendered on the

various TV sets, and I guess it would take a lot of them, for your companies to do essentially the same thing they're doing now without offending 1201(a)? And correct me if I'm wrong, your answer has been primarily that it would be a lot more costly or that it would be burdensome and you're not sure how much the cost would be as compared to the equipment they have now?

MR. SHERMAN: I just don't know what the cost would be. If there were an impediment, the only impediment is that it would make it eventually so costly that nobody could afford the service and it would simply go away.

MR. SCHOEN: I can think of something that they lose by doing that, and a way in which it's not equivalent. And the simplest place to start on that is closed captioning. Broadcast monitors, as I imagine not being directly familiar with their business, would get a lot of benefit from having access to captioning data that's transmitted along with the news program. One reason is that in the digital television world they could do a text search on the captioning data and that could be very useful to their customers.

In the digital television standards

there's actually a lot of what engineers call metadata, which is like program scheduling and the captioning and text descriptions and things like that. And that's actually carried along with the programming.

And a television set is not actually going to display all of that information that it's present in the signal on the screen. So I think to the extent that their customers are relying on getting access to some of that metadata, there's a thing called the PSIP and it has some of that information. And I don't think that they can get that information in a straightforward way without access to the digital signal. I'm skeptical whether they could get that.

MR. TEPP: Do they get that now?

MR. SCHOEN: Well, that data doesn't exist in the analog TV signal, so it's specific to the digital TV signal. You have captions. But in the digital TV signal you have whole other categories of information beyond captions.

MR. FRITZ: I just have one quick response, and that is that's essentially what's going on today. And in the context of your hypothetical where you assumed it was a

noninfringing use, I'm not sure you can make that assumption. Because what goes on today, either we own it or we don't own it. And remember, what this broadcast flag and what the proceeding at the FCC is attempting to do is to protect programming that we own so that it's not transmitted all over the world via the Internet and we don't end up in another Jump TV or I Crave TV situation where we're having to essentially protect an entire industry from massive theft.

MR. SCHOEN: I regret Mr. Dow and Mr. Fritz going to the merits of the broadcast flag issue. Because I really think that that's not before the Copyright Office and I hope that we don't have to get into a discussion of the merits or the purpose of the broadcast flag.

I think the issue that's before the Copyright Office is the effect of the broadcast flag on the broadcast monitors or other users and not whether the broadcast flag is a good idea or what it's for.

MR. DOW: I would actually agree with that with just one small exception, which is that the extent that the Copyright Office is examining the extent to which technical measures are use-

facilitating, that the merits of the flag, one of the arguments in favor of the flag is to preserve the vitality and the creativity and the value of free over-the-air broadcast programming in the digital environment. And so I think that it would be relevant to the extent that you're getting into the details of the flag to have that consideration before the panel.

MR. TEPP: Okay. Thank you.

MS. PETERS: Okay. Charlotte?

MS. DOUGLASS: I just have an initial question for Mr. Dow. I think I've heard from everybody else, about whether or not the broadcast flag as you are before the FCC, and as you proposed it, do you consider that to be an access control or do you consider it to be something else?

MR. DOW: Well, I think as I said, the broadcast flag in the absence of a regulation is a signal which right now is simply not responded to. If your question is assuming that a broadcast flag regulation is put in place, is the broadcast flag an access control? I think that Ms. Schoen is absolutely right, that what the flag does is it triggers certain protections. It says when your content comes across and it's flagged, it says treat

me in accordance with certain rules. And those rules dictate that certain technologies be applied and that those technologies are in fact access controlled technologies.

MS. DOUGLASS: Thank you.

Mr. Fritz, if a person wanted to get a copy of a certain segments of your broadcasts from one of your member companies, what would that person need to do in order to get companies?

MR. FRITZ: Typically the way it happens, Ms. Douglass, is that the station would get a call from Johnny's mom saying I saw my son, can I get a copy of that. Some broadcasters will say, "Sure, here it is." They'll charge them 35 bucks and you'll get a copy in the mail.

Similarly, a station might get a subpoena from either in a civil case or a criminal case wanting a particular story that was broadcast, and the station would on its own.

In other instances where there are so many requests; if GM has a story on a new car or there is a controversy because of cellular telephones and Motorola wants to know what stories came out that day on Motorola, they'll ask the broadcast monitors for a nationwide search, and our

broadcasters, many broadcasters just don't have the time, the staff to respond in the time frame that those entities would want. And so we would say, "Listen, we can't have it," or they would go directly to the monitors. The monitors would then provide the analysis and the good product that they have for a few.

In order for the broadcast monitors to do that, they would have had to have had a contract with my stations, and we're happy to do that. The contracts are nonexclusive, meaning that we allow other monitors to do it. We don't have an exclusivity to any one particular monitor service. And two, we get to do it ourselves if we want, because sometimes the court will want it. And so that's the mechanics of how it would happen.

MS. DOUGLASS: Okay. So you do it sometimes and sometimes you refer them to broadcast monitors?

MR. FRITZ: Yes, ma'am. And one further thing. In the case where we have archival material, like all of the material we have on former President Clinton when there is a movie to be made or if there's some story to be made, if there's a death of a prominent citizens and one of our stations has a

lot of its tape in its archives, we make it called directly for that for use in a longer public affairs programs or such. So we'll do some of it ourselves and some of it we'll refer to the broadcast monitor.

MS. DOUGLASS: I see. And do you register these news programs at all?

MR. FRITZ: If you watch our television programs, you will see at the end of every one of our television programs copyright Allbritton Communications Company.

MS. DOUGLASS: Well, do you then fill out a copyright application and send it to the Copyright Office?

MR. FRITZ: No, ma'am.

MS. DOUGLASS: Ah, okay. Let me see. In your statement, I believe, from International Association of Broadcast Monitors you said that there wasn't any commercial market for news programs. From whose perspectives were you talking about when you said there wasn't any commercial market?

MR. SHERMAN: And after-market. What we're talking about is that the after-market for the kinds of things that Mr. Fritz was talking about for providing them for almost any kind of purpose other

than being able to understand how the news is impacting your business is something our industry doesn't involve itself in. We don't archive the news. As a matter of fact, the licenses we have with Mr. Fritz' company and my particular company has with his company and as a matter of practice, we keep our tape no longer than 60 days and then it's recycled. And most, quite frankly, of the monitors do that because we simply can't afford to buy and archive large quantities of tapes.

We're serving the communications and public relations industry who need to know now. Sometimes they will wish to archive it for their own purposes so they can refer back to it somewhere in the future, but they all know that for them to do anything with it other than their own internal use, they're going to have to get permission to do so something with it. And I suspect Mr. Fritz' company, and I certainly know others, we as a matter of fact facilitate this for CNN. When someone wants to put a CNN piece on their website, we facilitate putting those people and CNN together so they can do it. We absolutely do not give them any permission. And as a matter of fact, one of our association's code of ethnics states that we have to very, very

specifically state that this is for internal research and review purposes only and may not be rebroadcast. And every single segment we send to any client, every single transcript we send to any client states that very plainly on it.

MS. DOUGLASS: So when you say no commercial market, you're saying that you're giving these clients copies for their own personal use and for their own corporate use?

MR. SHERMAN: Yes. When we say that we were putting in the context of there's not a heck of a lot of use for yesterday's newspaper either.

MS. DOUGLASS: Okay. Thank you very much all of you.

MS. PETERS: Okay. Then that will conclude the hearing.

I want to thank all of you for being here and bringing to our attention the various aspects of the proposed exception.

And this will conclude our hearings in Washington.

Thank you.

(Whereupon, at 2:13 p.m. the above-entitled hearing was concluded.)