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Section 1201 06-05-2012

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U.S. COPYRIGHT OFFICE

HEARING ON EXEMPTION TO PROHIBITION ON
CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR
ACCESS CONTROL TECHNOLOGIES
SECTION 1201 (DIGITAL MILLENNIUM COPYRIGHT ACT)

Library of Congress
Thomas Jefferson Building
Whittall Pavilion
Washington, D.C.

June 5, 2012

9:05 a.m. - 5:24 p.m.

Reported by: Denise Brunet, RPR

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1 A P P E A R A N C E S :

2

3 P A N E L M E M B E R S :

4 D A V I D C A R S O N

5 C H R I S R E E D

6 R O B E R T K A S U N I C

7 B E N G O L A N T

8 S T E P H E N R U W E

9

10 P R O P O N E N T S :

11 M A R K R I C H E R T, D i r e c t o r, p u b l i c p o l i c y,

12 A m e r i c a n F o u n d a t i o n f o r t h e B l i n d

13 M E L A N I E B R U N S O N, E x e c u t i v e d i r e c t o r,

14 A m e r i c a n C o u n c i l f o r t h e B l i n d

15 C H R I S T I A N V O G L E R, P h . D ., A s s o c i a t e p r o f e s s o r

16 a n d d i r e c t o r, t e c h n o l o g y a c c e s s p r o g r a m,

17 G a l l a u d e t U n i v e r s i t y

18 A N D R E W P H I L L I P S, P o l i c y c o u n s e l, N a t i o n a l

19 A s s o c i a t i o n o f t h e D e a f

20 B L A K E R E I D, S t a f f a t t o r n e y, I n s t i t u t e f o r

21 P u b l i c R e p r e s e n t a t i o n

22 (A p p e a r a n c e s c o n t i n u e d o n t h e n e x t p a g e .)

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1 APPEARANCES (continued):

2

3 PROPONENTS (continued):

4 MARCIA HOFFMAN, Senior staff attorney,

5 Electronic Frontier Foundation

6 BRETT WYNKOOP, New Yorkers for Fair Use

7 JAY SULZBERGER, New Yorkers for Fair Use

8 AARON WILLIAMSON, Counsel, Software Freedom

9 Law Center

10 MICHAEL WEINBERG, Staff attorney, Public

11 Knowledge

12

13 OPPONENTS:

14 DEAN MARKS, On behalf of AACCS LA

15 BRUCE TURNBULL, On behalf of DVD CCA

16 STEVE METALITZ, On behalf of Joint Creators

17 and Copyright Owners

18 LINDA KINNEY, Senior vice president and

19 associate general counsel, MPAA

20

21

22 (Appearances continued on the next page.)

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1 APPEARANCES (continued):

2

3 OPPONENTS (continued):

4 JESSE FEDER, Director of international trade

5 and intellectual property, Business

6 Software Alliance

7 MATT WILLIAMS, On behalf of Joint Creators

8 and Copyright Owners

9

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

2 MR. CARSON: We're going to get started now.

3 I take great pleasure in welcoming you to the final
4 day of the hearings on our rulemaking with respect to
5 exemptions from the prohibition on circumvention of
6 technological measures that control access to works
7 protected by copyright.

8 We have a pretty full schedule today. We're
9 going to have four topics, four separate sessions to
10 deal with those four topics. Our first topic has to
11 do with a proposal for literary works distributed
12 electronically that contain digital rights management
13 and/or other access controls which either prevent the
14 enabling of the book's read-aloud functionality or
15 which interfere with screen readers or other
16 applications or assistive technologies that render the
17 speech and specialized formats and are legally
18 obtained by blind or other persons with print
19 disabilities, as such persons are defined in
20 section 121 of title 17, United States Code, or are
21 legally obtained by authorized entities, as described
22 in such section, distributing such work exclusively to

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1 such persons.

2 We have two panelists this morning on this
3 proposal. Mark Richert of the American Foundation for
4 the Blind, and Melanie Brunson of the American Council
5 for the Blind.

6 With that, I will let whichever of you wishes
7 to go first -- you have up -- to speak. You have up
8 to ten minutes to present your case.

9 MR. RICHERT: Thank you so much. This is
10 Mike Richert, American Foundation for the Blind. And
11 if I can, just a point of personal privilege. If
12 folks who are on the dais would just introduce
13 themselves and their titles, please.

14 MR. CARSON: I beg your pardon? I'm sorry.
15 Someone was whispering in my ear, so I didn't hear
16 you.

17 MR. RICHERT: If you all could just introduce
18 yourselves and your titles so that we know who's on
19 the dais.

20 MR. CARSON: Yes. David Carson, general
21 counsel of the copyright office.

22 MR. KASUNIC: Rob Kasunic, deputy general

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1 counsel.

2 MR. REED: Chris Reed, senior advisor for
3 policy special projects in the office of the register.

4 MR. RICHERT: Excellent. Thank you so much.

5 Well, thanks, again, for allowing us to
6 present today. We presented before you several years
7 ago on a similar topic, and the exemption that we are
8 proposing is somewhat different from the one which the
9 copyright office and the librarian of Congress has
10 granted in the past.

11 But we are back again because the problems
12 that we flagged in the past persist. And there are
13 two areas. I don't really want to capitulate all of
14 the points that we tried to make in our written
15 testimony that we, at the American Council of the
16 Blind, American Foundation for the Blind did jointly,
17 but just to flag a couple of them. There are
18 technological issues that prevent people who are blind
19 or visually impaired, people with print disabilities,
20 as defined by law, that inhibit their ability to
21 access the text of e-books that they have lawfully
22 purchased or otherwise obtained. But there are also

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1 limitations in terms of those entities that try,
2 admittedly their best, to provide access to people
3 with disabilities.

4 We're living in a era now where, thankfully,
5 more and more publishers are beginning to recognize
6 the need for access to their works. And, yet, we are
7 at very much the infant stages of that effort. People
8 are still struggling with how exactly to ensure
9 accessibility. Sometimes they get it right, and many
10 times they don't get it right. So there are really
11 two things that we're concerned about.

12 We're concerned about the persistence of
13 these digital rights management controls which often
14 get in the way of a screen reader or other access
15 technologies. But we're also concerned about this
16 exemption and the need for it because sometimes the
17 accessibility that is attempted to be put in place
18 does not do the trick. It is inadequate to our needs.

19 So, in short, what we're hoping to do is to
20 have the copyright office and the librarian again
21 recognize an exemption that would do two things, that
22 would allow individuals who are blind or visually

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1 impaired or those with print disabilities to
2 circumvent controls when it's necessary to do so in
3 order to actually get access to the text; and to also
4 have the ability for especially organizations,
5 so-called authorized entities working on our behalf,
6 to get around -- to circumvent such controls when it's
7 necessary to improve the accessibility that may or may
8 not be built into an e-book's functionality.

9 When I talk about improving accessibility,
10 let me just give one illustration, and I'm sure
11 Melanie will correct the mess that I make as I do
12 this. But, you know, right now it seems as though
13 people want to provide access by simply hitting a
14 button that allows the book to read to you. It dumps
15 speech basically into your lap or into your ear
16 without much control over how that material is
17 presented.

18 And particularly in the education context --
19 and, you know, I'll just put in a shameless plug for
20 the following panel. We're going to be talking, among
21 other things, about the applicability of all of this
22 stuff in the education world. And I want to say that

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1 particularly for folks in higher ed, it's particularly
2 necessary to really be able to interact in a robust
3 fashion with the -- with e-books. And simply to dump
4 text out without any real sophisticated way to
5 navigate through the text, to be able to search on key
6 words, et cetera, maneuver around -- those kinds of
7 features are extremely important.

8 So we don't see that kind of robust
9 accessibility, and we want to make sure that, when
10 individuals, and particularly when organizations,
11 authorized entities, are improving accessibility for
12 us, that the sometimes rather draconian provisions of
13 the DMCA don't come crashing down to prevent that from
14 happening.

15 That's my summary statement, and we look
16 forward the dialogue and any questions you may have.

17 MR. CARSON: Ms. Brunson.

18 MS. BRUNSON: Thank you. Mr. Richert has
19 described the concerns, the problem that we face
20 pretty thoroughly. I don't have much to add at this
21 point except to expand upon the one aspect of controls
22 that creates, I think it's fair, to say the largest

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1 headache for our community. I am a representative of
2 a membership organization that is representative --
3 whose members come from all across the country and, in
4 fact, we have several members in foreign countries.
5 The American Council of the Blind is the organization
6 that I represent, and I think it's fair to say that
7 one of the issues that arouses the most passion within
8 our membership is the issue surrounding the ability to
9 read books.

10 And the one issue that I think causes the
11 most consternation is the measures that, for whatever
12 reason, disable the ability to access digital books by
13 reading them out loud. That has ramifications for our
14 membership that people do not have -- do not, frankly,
15 have nearly as much sympathy for as they do
16 anti-piracy measures that are more directly related to
17 simply preventing unauthorized use.

18 And so there is -- there is a huge
19 distinction in the minds of the average reader with a
20 print disability when you talk about that particular
21 issue as opposed to simply measures that are aimed at
22 prohibiting piracy. We are here primarily because the

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1 digital book advent has the potential to level the
2 playing field for our community in terms of access to
3 education, in terms of access to employment and in
4 terms of our ability to participate in, frankly, the
5 cultural and the community life of this society that
6 we live in.

7 However, we find ourselves, in spite of that
8 potential, being frustrated by the measure of -- the
9 number of measures that, once again, create obstacles
10 for us simply because nobody at any level of the
11 process -- well, I shouldn't say nobody because, as
12 Mr. Richert indicated, publishers are beginning to
13 look at access. But we have still, in the vast
14 majority of cases, whether it's because the players
15 won't read out loud or because the books have measures
16 built into them that prohibit use with screen readers
17 or read-aloud functions on those limited number of
18 players that do provide them -- we have, once again,
19 obstacles to our use of a technology that could very
20 easily make it possible for us to be on a level
21 playing field with people who do not possess the same
22 print reading disabilities that we do.

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1 So what we're seeking is that degree of
2 flexibility within the copyright law that would enable
3 access to those works. And we are -- we are extremely
4 interested in seeing that this happens. And I too am
5 happy to answer questions and -- but that is the
6 conclusion of my statement.

7 MR. CARSON: Thank you very much. Let me
8 start. In reading your proposal, one comment struck
9 me -- a couple struck me, actually, but the one that I
10 want to point to right now is a comment where you
11 said, We want to be on the record that is the
12 experience of people who are blind and visually
13 impaired that the shutting out of people with print
14 disabilities from full and fair access is indeed a
15 rampant problem, but this is not our burden of proof.

16 What is your burden of proof in this
17 proceeding?

18 MR. RICHERT: I think it's -- this is Mark.
19 I think it's to illustrate that this problem that we
20 have brought before the copyright office persists.
21 And I think we have done that in our remarks,
22 especially our written testimony, flagging both the

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1 limitations of the accessibility that some groups are
2 trying to build in, and also the persistence of the
3 digital rights management controls that are still
4 blocking access.

5 I think, as we've tried to say in our written
6 statement, even one instance where that happens -- and
7 we know that it happens more than in one instance --
8 is a reason for requiring an exemption to be put in
9 place because we -- it's not about if it's 10 percent
10 or 50 percent of the market. It's about whether I,
11 whoever I may be, who have lawfully obtained a
12 particular work, can get access to it. And if I can
13 get access to it by getting around digital rights
14 management controls, I should be able to do that
15 without incurring the civil or criminal penalties.

16 MS. BRUNSON: The difficulty that we face is
17 that you don't know whether or not you're going to be
18 able to access a work until you have put your money
19 down and purchased it and then tried to use it. And
20 if you're on the job, it can cost you your job. If
21 you're in school, it can cause you to fail a class.
22 And you have no alternative.

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1 MR. CARSON: What does our record tell us
2 with respect to the extent to which electronic books
3 are not available in accessible formats?

4 MR. RICHERT: I think in previous
5 proceedings -- again, this is Mark. In previous
6 proceedings, we have provided the copyright office
7 with examples of controls -- works where controls have
8 either intentionally or inadvertently blocked access.
9 In the last proceeding, we were told that we didn't
10 present enough of those.

11 What we've tried to do in this proceeding in
12 proposing a slightly different and, we think,
13 hopefully clearer exemption is to take a more global
14 view and to say, rather than handing over a few
15 isolated instances -- five cases, 50 cases, 500
16 cases -- that, in fact, we are taking a more global
17 approach to indicate that, yes, we know from the
18 experience, the stated experience of blind and
19 visually impaired men and women across the country,
20 that controls still pose a problem, and even when
21 accessibility is attempted, there still may very well
22 be a need to improve on that accessibility, and if

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1 that means we need to get around such controls to make
2 that happen, we should be able to do that.

3 MR. CARSON: Can you explain to us the reason
4 why the proposed exemption that you have here differs
5 from that which has been granted in the past? Maybe
6 describe the different features and the reasons for
7 them.

8 MR. RICHERT: Okay. This is Mark. I'll take
9 this first, and then, Melanie, if you want to help
10 support or modify, that would be great. I think there
11 are principle ways that it's different. We understood
12 the previous exemption granted to indicate that if a
13 version of a work, a slightly different version of a
14 work was available -- so let's say you had a Kindle
15 version of a book and a Nook version of the same work,
16 that access to one of those works, if it's prevented
17 by digital rights management controls, if the other
18 product is available, then the exemption wouldn't
19 apply. I didn't explain that very adequately, but I
20 think you get what I'm saying. We understood that
21 that was the purpose and, in fact, the letter and the
22 spirit of that previous exemption.

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1 So we -- we recognize that the DMCA
2 specifically says that exemptions that you all grant
3 are only to be allowed in those instances where
4 another version or an identical version of the work
5 isn't reasonably available, and we simply don't
6 believe if an e-book, for example, is available on
7 those two platforms, but one of them happens to pose
8 accessibility troubles, that somehow the user with
9 print disabilities must use the other platform -- we
10 simply reject that as -- as a matter of public policy.

11 The other area in which this exemption
12 differs is that we are explicitly allowing authorized
13 entities to do the work and to circumvent controls
14 when the purposes of that exemption are -- are
15 intended so that we can streamline the process of
16 providing access. It's an awful lot to assume that an
17 individual consumer with print disabilities is going
18 to have the technological wherewithal to pull off
19 circumvention. So we believe that an authorized
20 entity who is doing work on behalf of folks with print
21 disabilities should be -- should be entitled to avail
22 itself of an exemption along the lines we're talking

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1 about.

2 MR. CARSON: Okay. So there's two
3 differences, basically. Let's turn to the first one
4 first. And what I heard you say was you think, as a
5 matter of public policy, it makes no sense to limit
6 the scope of the exemption to cases where there is no
7 format that is accessible. That's my words, but I
8 think that's essentially what you're saying.

9 MR. RICHERT: Well, the only thing I would
10 add to that would be I think the language of DMCA is
11 good when it talks about not reasonably available.
12 And I think we need to give some meaning to that. The
13 whole point of this exemption is to make sure that the
14 person with print disabilities can get access to the
15 thing that he or she has purchased or otherwise
16 lawfully obtained.

17 We shouldn't be expecting, we don't believe,
18 people to have to use -- they may not want to
19 patronize another vendor, for whatever reason.

20 MS. BRUNSON: They may not be able to
21 patronize because those formats are not necessarily
22 interchangeable in terms of usability.

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1 MR. CARSON: Let's explore that because
2 the -- you've appeared before us several times, and
3 this is, I believe, the first time we've heard you
4 articulate this public policy argument. And I don't
5 recall hearing any difficulties from you in the past
6 about the way the past exemptions have been set up.

7 So what's changed? Has the marketplace
8 changed? Has the way that people use e-books changed?
9 Or have you just changed your mind on what the good
10 public policy is?

11 MR. RICHERT: I think that the short answer
12 to that is that the language of the last exemption was
13 crafted in an environment where there weren't the same
14 kinds of -- we were trying to get as much as we could
15 possibly get, but I'm quite certain, because I think
16 you and I had that exchange at the last thing on this
17 public policy discussion -- if yours truly wasn't as
18 articulate then as I needed to be, then hopefully we
19 can make up for lost time now.

20 It most assuredly is not a change of mind.
21 It's a question of trying to make sure we get it
22 right.

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1 MR. CARSON: Chris.

2 MR. REED: Could you help us -- I want to
3 continue that point on the marketplace. Can you help
4 us understand the platforms that are out there? You
5 mentioned the three major ones in your comments, the
6 iBookstore platform, the Kindle platform and the Nook
7 platform. I understand Kindle, for example, you can
8 actually read Kindle books on devices other than the
9 Kindle itself. What implications, if any, does that
10 have for the accessibility of Kindle content?

11 MR. RICHERT: Well, I'll try to take a stab
12 at this. Being a public policy nerd means that I
13 don't get to know the innards of, you know, technology
14 as much as others in our organization do, but I'll
15 take a stab at it.

16 You know, a lot of folks who are blind or
17 visually impaired -- I'll just limit my comments to
18 that -- are accessing Kindle content obviously not on
19 the Kindle, but using a PC that's specifically adapted
20 for the purpose of trying to create access. That
21 accessibility is not nearly as robust as it needs to
22 be or could be, but what it shows is that a person

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1 with print disabilities then is required to be
2 grounded to a PC or otherwise wander around with a
3 laptop or otherwise find some way -- in other words,
4 they're not able to use the content on an equal basis
5 with others.

6 I don't know if that's your question, but I
7 think -- you know, the bottom line is we're in an era
8 now where we have content than can be displayed on a
9 variety of devices. We fear that even in such an
10 environment, these copyright protections may block --
11 and our experience is that they continue to block
12 access in a number of instances.

13 MS. BRUNSON: If I may just follow up on
14 that. What we've -- part of the issue is the
15 access -- the book itself, and part of the issue is
16 the extent of an individual's disability. If someone
17 has the ability to read large print, they have more
18 options than someone who has no ability to read print
19 off of a device's screen. And if one is limited to
20 the -- accessing the book through a text to speech
21 screen reader, then one has very limited options even
22 with regard to the Kindle books. You can only use

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1 them on some Kindles.

2 The PC app is really, as Mr. Richert
3 indicated, the most usable. But there again, you
4 don't have the access to the navigation features that
5 a sighted user would have using that book on either
6 the Kindle or the PC app because the screen reader
7 functionality is only limited to basic navigation and
8 you don't have the ability to do the searches and the
9 flipping to particular pages and things that the
10 sighted user, not hampered by the read-aloud function,
11 has access to.

12 Someone -- there is also a Kindle application
13 that is usable on iOS devices, but that, as I
14 understand it, is not usable by someone who needs to
15 read the book out loud. It is usable by someone who
16 can use it to read large print, but it is not usable
17 by someone who needs to read it out loud.

18 So there again, those are -- those are --
19 there are -- that form of access to e-books does have
20 serious limitations. And all of the other
21 functionalities have such -- you know, they're not
22 universally accessible. So if one were to make the

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1 argument that, well, a Kindle book is usable, that
2 would be -- so we don't need to grant access to an
3 iBook, then what you're simply saying is so that means
4 someone who can read it using large print would be
5 able to use it, but someone who is blind may be stuck.

6 MR. REED: How much of that dynamic is a
7 function of the device versus the book file or the
8 content itself?

9 MS. BRUNSON: It is my understanding that it
10 is a combination of the Kindle app and the book
11 itself.

12 MR. REED: Is that true for other major
13 platforms, distribution platforms of book content?

14 MS. BRUNSON: Yes, I believe so. Because --
15 for instance, iBooks that are created and sold in the
16 iBookstore one can use with greater ease than one can,
17 for instance, Kindle books, unless you're using a PC.

18 MR. REED: That's actually where I wanted to
19 go next because you've mentioned broadly two types of
20 accessibility. One is navigation and navigability for
21 those who are blind or visually impaired. And the
22 other is the ability to enable the read-aloud

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1 function. In your comments you've mentioned that the
2 iBooks are accessible, and I'm just wondering, does
3 that mean they have -- all books available through the
4 iBookstore have both of those accessibility features
5 enabled?

6 MR. RICHERT: This is Mark. It's probably an
7 exaggeration to say that every book in the
8 iBookstore -- I wouldn't want to swear to that. But
9 their accessibility is generally certainly, you know,
10 the best of that which is out there.

11 Part of the challenge that we have is that
12 not all people with disabilities are the same. And
13 certainly someone who, for example, may have
14 significant learning disabilities that fall within the
15 definition of print disabilities may require certain
16 accommodations, if I can use that term here, to the
17 content that might not otherwise be useful for other
18 folks.

19 So we know, for example, our colleagues in
20 the autism world are struggling with, you know, how
21 can we, for someone who has significant attention
22 issues or otherwise needs to have content adapted in a

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1 particular way, if we render that material or that
2 content in a way that's most useful for them and, in
3 order to do that, we need to get around copyright
4 protections in order to produce essentially a work
5 that makes sense for them, you know, we need to be
6 able to do that.

7 So I think to folks who are blind or visually
8 impaired, and I've only used personally the iBooks
9 stuff, to use the technical legal term, myself, you
10 know, a little bit, you know, I think their
11 accessibility is -- is generally pretty good. But I
12 also wouldn't want to try, for example, to use, in an
13 iBook format, a, you know, significant legal or
14 scientific or other technical work that would require
15 me to do a significant amount of navigation because
16 those controls just simply don't exist there.

17 MR. REED: On the marketplace point, we've
18 seen some evidence that the marketplace is evolving
19 rather rapidly in this regard. I think just today,
20 actually, there was an article about Macmillan
21 dropping DRM on a number of its science fiction titles
22 and launching an e-book store to sell those directly.

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1 What impact does that have, in any, on your need for
2 this exemption?

3 MR. RICHERT: This is Mark. I'll start with
4 that and ask my colleague to finish it for me. I
5 think it's an excellent sign. It shows, I think, that
6 people are beginning to open up to the realities of
7 the marketplace. The fact that there's movement is --
8 does not guarantee that a student, over the course of
9 the next three years, or an employee or someone,
10 frankly, doing a government position or in any
11 context -- it doesn't matter; we can hypothesize any
12 of those scenarios -- will encounter a book that has
13 technological measures in it which may prevent the use
14 of screen readers or other access software. And when
15 that happens -- not if, but when -- and that
16 individual, or an authorized entity, can make access
17 possible, they should be able to do that without
18 incurring the wrath of the DMCA.

19 And so I think the fact that we -- you know,
20 we're not asking for a perpetual exemption. No doubt
21 in three years we'll be back if there continues to be,
22 you know, persistent problems, particularly on the

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1 accessibility piece of this, not just the straight up
2 or down can I get in, but how well can I use the
3 content?

4 But certainly over the course of the next
5 three years, as the marketplace continues to evolve,
6 there's going to be a continuing need for this
7 exemption.

8 MR. REED: With respect to your proposed
9 exemption language, you had mentioned that one of the
10 major differences is the authorized entities, and I'm
11 just wondering if -- do you really need that to get to
12 where you want to go? I mean, if you had an exemption
13 that simply enabled circumvention for the purpose of
14 making accessible -- inaccessible content accessible,
15 which is -- which requires an underlying use, assuming
16 the underlying copyright use is authorized under
17 section 121, do you need the exemption language to be
18 written that specifically?

19 MR. RICHERT: This is Mark. I'll start with
20 it, and again, Melanie is also a lawyer, so she can
21 bail me out. You know, I think -- it's like anything
22 else. If it's not written in black and white, there

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1 may be a question as to whether or not it's
2 permissible.

3 You know, over the course of the last, let's
4 see, six, seven years with the advent of the --
5 so-called the Bookshare.org effort, Benetech's
6 Bookshare.org service, which a number of blind and
7 visually impaired folks, particularly students, have
8 really found useful -- it's one of several, of course,
9 in our field, but it's really quite a popular service.

10 You know, I know that the publishing world
11 has been particularly spooked by, okay, well, if
12 Bookshare can do it, where does this end? Who is
13 really entitled to produce materials in accessible
14 format? It's not the sort of thing where I think
15 people who are in the publishing and, you know,
16 rights owners' world would be comfortable with unless
17 we make it clear that, you know, we're not talking
18 about anybody being able to do this. We're talking
19 about individuals who qualify and their
20 representatives who are defined, we think, fairly
21 strictly by law.

22 So, you know, smarter lawyers -- all of whom,

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1 I'm sure, are up on that dais -- than yours truly at
2 least may find that's not necessary. If that proves
3 to be the case, then that's fine. I think we're just
4 concerned that it shouldn't just be up to an
5 individual to try to figure out, particularly in the
6 technological area, how to make it happen, that if
7 there are folks with some sophistication who can help
8 make access possible, they should have the ability to
9 do it.

10 MS. BRUNSON: I think that for -- you know,
11 the sense that we've gotten in our discussions with
12 publishers has been that they would feel better about
13 individual -- about authorizing organizations doing it
14 than individuals anyway, because they would rely on
15 the good faith of that authorized organization as
16 being a representative of someone who is, in fact,
17 qualified and eligible to do it, as opposed to
18 individuals.

19 Certainly, you know, we -- we have been
20 proposing the idea that it should be allowable by
21 either because it needs to be possible for someone who
22 purchases a book directly from the marketplace, but it

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1 also is a fact in our community that for a lot of
2 people their first -- the first place that they go for
3 access to materials is an authorized entity and,
4 therefore, they look to those entities to provide the
5 expertise when there's a obstacle that needs to be
6 overcome in order for them to get access.

7 MR. CARSON: On this authorized entity issue,
8 one thing that just occurred to me during the course
9 of this discussion was I think the language you've
10 proposed might change the situation significantly in
11 the following respect. There may be a flaw in this,
12 because it just occurred to me, but I'll think out
13 loud.

14 With respect to the exemptions that we have
15 had up until now, I think it's the case that in order
16 for someone to take advantage of this exemption, they
17 would have to have obtained a lawfully made copy,
18 which means either they bought it or maybe somebody
19 gave it to them, assuming the first sale doctrine
20 applies in that environment, which is a very
21 interesting question that I'm not going to try to
22 resolve today.

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1 MR. RICHERT: Right. Right. Right.

2 MR. CARSON: So at the very least, the
3 publisher gets whatever the publisher's price is, and
4 the person exercising the exemption gets the benefit
5 of actually being able to read what they paid for.
6 Not a bad deal for both sides, one might think.

7 MR. RICHERT: Right.

8 MR. CARSON: Looking at the language you
9 proposed today, I think what it means is that that's
10 not going to happen. And the reason I think that's
11 what it means, but maybe I'm wrong, is that when you
12 look at that second prong, what that will allow is it
13 will allow authorized entities that obtain one
14 legitimate copy to make as many copies as they like
15 under section 121 and distribute them for free,
16 meaning that that's money out of the pockets of the
17 publishers.

18 Now, maybe we don't care, maybe we don't
19 care. I imagine publishers care. But I just like to
20 think through the ramifications of that and figure out
21 if that's going to happen, should be we comfortable
22 with it? And if we're not comfortable with it, should

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1 we try to build something in here that offers some
2 protection for publishers in terms of their getting
3 their piece of the action here.

4 MR. RICHERT: This is Mark. A very fair
5 point. I think -- it certainly was not our intent to
6 create a situation where publishers are not getting
7 paid for what it is that they have done. We do
8 feel -- this is admittedly an emotional issue, not so
9 much a legal point or even policy point, but we often
10 get really frustrated with publishers who say, give me
11 my chunk of change even though I haven't bothered to
12 lift a finger to make sure that you can get access to
13 my material. So I think we need to balance those two
14 sort of competing points.

15 How to do that in that language -- I mean, if
16 that's a way to indicate that an authorized entity
17 isn't just freely distributing multiple copies of the
18 same thing -- of the same work to a bunch of folks
19 without providing an appropriate royalty, you know,
20 purchasing the -- you know, the work certainly makes
21 some sense.

22 I think we want to make sure that what is

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1 being paid to the publisher is the fair price of that
2 book in an inaccessible world, which is to say if I
3 need access in a way that they can't provide, I should
4 not be paying, for example, for a more expensive audio
5 book format, some -- more expensive large print
6 format. What the publisher or rights owner should be
7 compensated for is the price of the mainstream book
8 available to the general public because that's the
9 standard against which we would measure fairness.

10 MS. BRUNSON: I also want to add a caveat to
11 this discussion, and that is that one of the reasons
12 for proposing a situation that would allow multiple
13 uses is that if I am a person who doesn't have a
14 disability, I can go to any public library and buy --
15 or borrow that book without any regard for whether or
16 not the publisher is going to make any money off of my
17 borrowing it as opposed to buying it.

18 And so I think what we also need to do is to
19 be mindful of the availability -- the right of people
20 with disabilities to have the same opportunity that a
21 sighted person would have to do that.

22 MR. CARSON: In the current marketplace, is

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1 there anything akin to library borrowing for
2 accessible e-books?

3 MS. BRUNSON: Bookshare.

4 MR. CARSON: Bookshare does sort of lend them
5 out, but not permanently?

6 MS. BRUNSON: Well, actually, no. Bookshare
7 doesn't lend them out. You're right. The Bookshare
8 allows you to download them. Of course, there is the
9 NLS, the National Library Services download site which
10 allows you -- there again, though, they don't require
11 you to send them back. Unlike the traditional
12 borrowing of the cassettes and the Braille volumes
13 which you do have to send back, when you download
14 them, you do have to -- you don't have to return them.

15 MR. CARSON: So, again, just thinking out
16 loud --

17 MS. BRUNSON: So, no, there really isn't.

18 MR. CARSON: -- if you're going to
19 accommodate something like those two practices, what
20 you're really doing, for better or worse, is telling
21 any person who qualifies under section 121 to receive
22 such works, is you're telling them, well, you're not

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1 going to have to pay because there are ways for you to
2 get them from authorized entities without paying a
3 dime. Is that accurate?

4 MS. BRUNSON: Well, I guess it is. You know,
5 the only other thing that I was thinking is I think
6 NetLibrary still does have a process whereby, after
7 you've had a book for so many weeks, it goes away.
8 And some of those are now available in accessible
9 format.

10 MR. CARSON: Another issue -- maybe it's not
11 an issue; I have no idea -- but, again, sort of I'm
12 issue spotting, I think, with the authorized entities.
13 Is there any history -- maybe there isn't; I don't
14 know, but is there any history with respect to copies
15 that are in the hands of authorized entities being --
16 sort of appearing on the open market, being used in
17 ways that they aren't intended so that they actually
18 cut into the legitimate market to sighted persons for
19 the works, and is that something we need to be
20 concerned about if we extend this so that the
21 authorized entities themselves have the ability to
22 exercise this?

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1 MR. RICHERT: This is Mark. I am aware of no
2 authorized entity under that Chafee amendment,
3 section 121, that has been accused of allowing that to
4 happen or has obviously been the subject of a suit,
5 you know, so I hear -- we hear rumors of individual
6 students who love to share things with other people.
7 Quite frankly, if they did, they would be outside of
8 not only the old exemption that you all granted
9 before, but outside the one that we're proposing.

10 So I don't necessarily think that if that
11 were a dynamic, that it's something that can't be
12 reached under the existing law, even with our
13 exemption in place. But I'm aware of no authorized
14 entity, certain none of the major ones -- there's
15 really only a handful, frankly, that are playing in
16 this space. I mean, we've mentioned several of them
17 today. There are a couple of others we haven't
18 mentioned. But this is not something that we have
19 heard either out in hinterland or from publishers
20 directly.

21 MS. BRUNSON: And I think authorized entities
22 are conscious of the precariousness of their position

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1 and don't want to violate the good faith standard that
2 they're operating under, and so I think they have been
3 very careful. I believe that -- Bookshare we keep
4 talking about, but they actually have notices on their
5 website that, if they catch you, they will suspend you
6 and not allow you to donate anything -- or to download
7 anything anymore.

8 And they claim, although I'm not aware of the
9 specific instances, that they have actually booted
10 people out of the system, and those folks are no
11 longer eligible to come back and download books. So
12 I'm not aware of any specific instances, but they have
13 been very vocal about their willingness to protect the
14 privilege that they have.

15 And I think that all of -- the National
16 Library Service has the same statements on their
17 sites, and they will go after you if they catch you.
18 I did hear from the National Library Service of an
19 instance where a couple of years ago somebody -- I
20 believe they said from the UK -- got a book from
21 someone in the U.S. and advertised a copy of it on
22 eBay, and they got tracked down and both ends of that

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1 transaction got taken to task very quickly, and that
2 book was not on eBay.

3 So I think it's fair to say that everybody,
4 you know, in the community of users, as well as in the
5 authorized entity community, is mindful of the
6 rights holders' interests and the nature of the impact
7 on them of what we're proposing. And nobody wants
8 those -- nobody wants anyone's interest to be abused.

9 And so we're perfectly happy with efforts to
10 be as diligent in pursuing abuses as possible because
11 I think that we are only talking -- we're serious
12 about only wanting authorized users.

13 MR. CARSON: Now, section 121, which is the
14 section under which these authorized entities are
15 operating, requires that the copies distributed under
16 section 21 (sic) be in specialized formats exclusively
17 for use by blind or other persons with disabilities.
18 Is that a limitation that you intend to operate in the
19 context of this exemption?

20 MR. RICHERT: Yes. Yes, it is. They would
21 have to -- they would have to -- an authorized entity
22 that's participating in the exemption that we're

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1 proposing would have to conform with section 121.

2 MR. CARSON: I think we're done.

3 MR. RICHERT: Well, thank you very much.

4 MS. BRUNSON: Thank you.

5 MR. RICHERT: Appreciate the time.

6 MR. CARSON: Our next panel is scheduled to
7 start at 10:30, so we have a 40-minute break.

8 (Whereupon, a short recess was taken.)

9 MR. CARSON: All right. I think we're ready
10 to get started. This is the second session of the day
11 on classes 9A through 9D. We have a number of
12 witnesses here. I'm going to read them in the order
13 they appear on the agenda, and I'm assuming that's the
14 order we will go in, but if there's any -- okay. The
15 person who is first on the agenda says yes, so he
16 likes that idea.

17 Okay. So Blake Reid from the Institute for
18 Public Representation. Dr. Christian Vogler from
19 Gallaudet University. Andrew Phillips from the
20 National Association for the Deaf. Mark Richert,
21 again, his second appearance this morning from the
22 American Foundation for the Blind. Dean Marks on

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1 behalf of AACCS LA. Steve Metalitz, representing joint
2 creators and copyright owners. And Laura (sic) Kinney
3 of the Motion Picture Association of America.

4 We don't have microphones in here, nor do we
5 have captioning, so I would ask the witnesses to
6 please project because we do have a transcript, and I
7 am told we had some difficulty in the first panel
8 hearing, so we have even a bigger panel here, so
9 please speak up so that everything you say can be
10 heard.

11 I'm David Carson, general counsel of the
12 copyright office.

13 MR. KASUNIC: Rob Kasunic, deputy general
14 counsel.

15 MR. REED: Chris Reed, senior
16 advisor for policy and special projects,
17 office of the register.

18 MR. CARSON: With that, let's proceed.

19 Mr. Reid.

20 MR. REID: Good morning. Members of the
21 copyright office, thank you so much for the
22 opportunity to be here with you today, and thank you

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1 so much to the staff of the Library of Congress for
2 helping to accommodate us throughout the past several
3 weeks. My name is Blake Reid. I'm a staff attorney
4 at the Institute for Public Representation at
5 Georgetown Law. IPR represents Telecommunications for
6 the Deaf and Hard of Hearing, Incorporated, TDI, and
7 we filed the proposed classes of works that are the
8 subject of today's hearing on behalf of TDI, Gallaudet
9 University and the Participatory Culture Foundation.

10 The exemptions we propose center on adding
11 and improving accessibility features to video
12 programming, and specifically close captions for
13 people who are deaf and are hard of hearing, and video
14 description for people who are blind or visually
15 impaired.

16 I'm joined here by my colleagues, Andrew
17 Phillips from the National Association of the Deaf,
18 Mike Richert from the American Foundation for the
19 Blind, and Dr. Christian Vogler, the director of the
20 technology access program at Gallaudet University.

21 A quick overview of our plans. I think we're
22 going to go in just a very slightly different order

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1 than you mentioned, Mr. Carson. Mr. Phillips will be
2 sharing the specific perspective of the deaf and hard
3 of hearing communities regarding the proposed
4 exemptions. Dr. Vogler will give a short audio-visual
5 demonstration of the types of difficulties that people
6 with disabilities often face watching video
7 programming with missing or poor quality accessibility
8 features. And, finally, Mr. Richert will be sharing
9 the perspective of the blind and visually impaired
10 communities.

11 But I want to begin with a brief overview.
12 What brings us here today is copyright, and
13 specifically the need for relief from the
14 anti-circumvention measures of the Digital Millennium
15 Copyright Act. Those concerns stand against a larger
16 backdrop which is the nearly century long battle to
17 recognize the civil right of the more than 48 million
18 Americans who are deaf or hard of hearing, and the
19 25 million Americans who are blind or visually
20 impaired to access video programming on equal terms
21 with captions and video description.

22 I'm really glad that our colleagues from the

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1 motion picture industry are here today. Hollywood has
2 actually played a really crucial role in the
3 development of accessible video. It was more than 60
4 years ago that Emerson Romero, who is the deaf brother
5 of Hollywood actor Cesar Romero, who you might know as
6 Batman -- the Joker from the Batman TV show --
7 beginning splicing subtitles in between the frames of
8 new films in an effort to make them accessible.

9 In 1958, Congress addressed video
10 accessibility for the first time by requiring the U.S.
11 Department of Health, Education and Welfare to procure
12 caption and distribute films to deaf viewers. In
13 1990, following a star-studded parade of Hollywood
14 stars before Congress, including the Oscar-winning
15 deaf actress Marlee Matlin, Congress recognized the
16 important role of consumer electronics manufacturers
17 in facilitating video accessibility. They passed the
18 Television Decoder Circuitry Act which, for the first
19 time, required all televisions 13 inches or larger to
20 include closed captioning decoders.

21 In passing the Telecommunications Act of
22 1996, Congress first recognized the importance of

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1 making content itself accessible, giving the FCC broad
2 authority to require closed captioning of video
3 programming and ordering the agency to conduct an
4 inquiry into video description.

5 I hope my industry colleagues will indulge me
6 in poking a little bit of fun. During the FCC's
7 initial rulemaking on closed captioning, the Recording
8 Industry Association of America sought an exemption
9 from the closed captioning rules for music videos on
10 the grounds that many song lyrics are unintelligible.
11 The RIAA cited the 1963 Congressional investigation
12 into the lyrics of Louie Louie which the FBI initially
13 suspected were obscene and subversive, but after a
14 thorough forensic investigation concluded were
15 indecipherable at any speed.

16 Undaunted, the FCC pressed forward and
17 implemented closed captioning and video description
18 rules. Unfortunately, a lawsuit led by the Motion
19 Picture Association succeeded in striking down the
20 video description rules in the D.C. Circuit.

21 In 2010, Congress finally enshrined video
22 accessibility as a full-fledged civil right, enacting

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1 the 21st Century Communications and Video
2 Accessibility Act, the CVAA. Among other things, the
3 CVAA required the FCC to reinstate its video
4 description rules for television that had been struck
5 down, extended captioning requirements to certain
6 Internet-delivered video, and updated the Decoder
7 Circuitry Act by requiring a variety of modern video
8 devices to include the ability to display closed
9 captions.

10 Now, two years after the passage of the CVAA,
11 we stand at a crossroads. On the one hand, we see
12 tremendous progress. A significant amount of
13 television content is now captioned, just one month
14 from today, television broadcasters and cable
15 companies will have to comply with the commission's
16 reinstated video description rules and provide a small
17 amount of video-described programming. And at the end
18 of September, the FCC's rules will begin to require
19 captioning of some Internet protocol-delivered video
20 for the first time.

21 And we want to acknowledge the efforts of our
22 industry colleagues to bring accessible video

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1 programming into the mainstream. Many members of the
2 industry have recognized the tremendous social,
3 political, economic and participatory opportunities
4 that access to programming affords their viewers, and
5 we appreciate that they've taken some of the steps
6 necessary to achieve universal accessibility.

7 Unfortunately, the industry's efforts have
8 been too limited and too slow for the tens of millions
9 of Americans with hearing and visual disabilities.
10 And, worse, they've been accompanied by a concerted
11 massive lobbying effort to undercut Congress' efforts
12 to recognize video accessibility as a civil right.
13 With content creation and distribution firms insisting
14 that providing accessibility measures is too
15 difficult, too expensive, and even in some cases,
16 undesirable, the following gaps remain in the law.

17 The CVAA does not require closed captions or
18 video descriptions of any fixed media-based video,
19 such as DVDs or Blu-Ray discs, or video description of
20 any Internet-delivered video programming. The
21 Consumer Electronics Association, which includes among
22 its members some of the founders of AACSB LA and I

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1 believe DVD CCA, recently petitioned the FCC to repeal
2 its rule that requires DVD and Blu-Ray players to even
3 be capable of displaying closed captions that are
4 voluntarily included by content creators.

5 The CVAA does not require closed captions for
6 any Internet-delivered program that has not first been
7 shown on television with captions. Deaf and hard of
8 hearing consumer groups met in person with Ms. Kinney
9 and representatives from Viacom, Disney and NBC
10 Universal last December, and we asked the industry to
11 commit to a voluntary time frame for captioning online
12 exclusive content. They refused. Instead, they
13 proposed a voluntary timeline by which they would
14 caption some small subset of programming within two
15 years, four years, six years and even eight years.
16 And by that time, I should note, we will be well
17 beyond the three-year time frame for this proceeding,
18 the next proceeding, and hopefully we'll have
19 concluded the proceeding following that. I think that
20 would be the seventh proceeding.

21 Thanks to industry pressure, the FCC's new IP
22 captioning rules do not require captioning of any

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1 video clips, quote/unquote, of IP-delivered
2 programming. Just last month, the Digital Media
3 Alliance, whose membership includes major video
4 distributors, such as Amazon.com, Apple and Microsoft,
5 filed for a nearly two-year delay in the FCC's IP
6 closed captioning rules. And, finally, a
7 long-standing FCC rulemaking to address widespread
8 quality problems that make captioned programming
9 effectively inaccessible stands dormant in the face of
10 industry opposition.

11 Now, underpinning these efforts to stall and
12 reduce the scope of accessibility rules is an
13 increasing insistence by industry members that
14 copyright law should prevent anyone but the owner of
15 the copyright in a video from making the video
16 accessible by adding or improving closed captions or
17 video description. Despite the reality that improving
18 and adding accessibility features to content is, at
19 most non-infringing fair use, which I don't believe
20 the joint creators opposed in their brief, and not to
21 mention the preemptive effect of numerous pieces of
22 accessibility legislation on the copyright act,

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1 industry members have repeatedly and successfully
2 argued to federal agencies and courts that requiring
3 accessibility impermissibly implicates copyright,
4 leaving the copyright act and the DMCA dangling like a
5 Damoclean sword.

6 Because video is now distributed almost
7 exclusively with digital rights management, specious
8 claims of copyright infringement now necessarily
9 implicate the anti-circumvention measures of the DMCA
10 as well. Just last month, Netflix, one of the largest
11 American distributors of online video, insisted to a
12 federal court in Massachusetts that it could not
13 caption its content because, among other things, doing
14 so would not only require Netflix to commit copyright
15 infringement, but to, quote, decrypt digital rights
16 management protections that accompany video files, a
17 separate violation of the Digital Millennium Copyright
18 Act.

19 The effects of copyright and DMCA liability
20 on video accessibility are severe and likely to worsen
21 over the following three years. First, the DMCA and
22 copyright provide an excuse for video programming

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1 distributors to avoid accessibility obligations.

2 Second, and more seriously, concerns over
3 DMCA liability create a chilling effect for license
4 distributors of video that are interested in adding
5 and improving accessibility features to better serve
6 their customers, but cannot do so without risking
7 liability under the DMCA for circumventing access
8 controls.

9 Third, these concerns create a chilling
10 effect for third-party technologists, researchers,
11 academics and others, like Dr. Vogler, who possess
12 cutting edge ideas for the next generation of
13 captioning, video description and other accessibility
14 technologies, but cannot successfully develop or
15 implement them because they and their employers cannot
16 afford to assume the serious financial risk of a
17 lawsuit under the copyright laws of the DMCA.

18 These concerns underscore the need for the
19 copyright office to grant the proposed exemptions to
20 permit accessibility efforts to go forward and ensure
21 that the DMCA does not stand as a barrier to
22 accessibility.

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1 We thank you for your time and consideration
2 of these very important issues. We look forward to
3 your questions and to a productive discussion with our
4 industry colleagues. And with that, I'd like to yield
5 the floor to Mr. Phillips.

6 MR. PHILLIPS (via interpreter): I'm Andrew
7 Phillips, the policy counsel for the National
8 Association of the Deaf. On behalf of the NAD, thank
9 you for this opportunity to address the issue of
10 exemptions to the anti-circumvention measures to
11 facilitate the addition and improvement of captions of
12 digital video programming distributed via the Internet
13 protocol or on fixed media.

14 The NAD represents over 48 million Americans
15 who are deaf or hard of hearing and experience
16 communication access limitations due to disability. I
17 want to focus on the quantity and quality of access to
18 DRM protected programs for individuals who are deaf or
19 hard of hearing in our country and to demonstrate the
20 critical need for these exemptions.

21 Now, on quality (sic), I remember growing up
22 in the 1980s and the 1990s and having to check the

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1 back of every video rental for the special closed
2 captioning symbol to be sure that the video was
3 accessible, and having to ask my family to pick a
4 closed captioned television show when we all gathered
5 around the family TV. It was frustrating for me and
6 my family as, oftentimes, shows or movies were not
7 accessible. And being a good family, they wouldn't
8 watch these inaccessible shows or movies when I was
9 around.

10 Of course, there were times when my family
11 really wanted to watch a special movie or some
12 breaking news that was not accessible, and so my
13 mother would try her best to interpret the program for
14 me in sign language. So imagine her sitting beside
15 the TV, interpreting the O.J. Simpson car chase or the
16 latest Disney movie at my brother's birthday party.

17 Fortunately for me, my family and my mother,
18 who is now hard of hearing, a substantial amount of
19 programming on television is close captioned, and many
20 mainstream fixed-disc movies are now accessible.
21 However, just as accessible programming has become the
22 norm for Americans who are deaf and hard of hearing,

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1 we have seen an explosion in online video programming,
2 the vast majority of which are inaccessible.

3 The NAD and other disability organizations
4 worked hard to pass the 21st Century Communications
5 and Video Accessibility Act of 2010, also known as the
6 CVAA, in order to make programs distributed via
7 Internet protocol accessible. However, there are many
8 gaps in the law, such as zero coverage of IP-delivered
9 programs that are never shown on television with
10 captions, and the FCC exemption for clips taken from
11 captioned TV programs and then shown online.

12 Every day I read the news online at CNN.com
13 or local news websites, and I am unable to enjoy the
14 vast majority of their video clips. Often, the news
15 clip will be the only source of information on a
16 particular topic with no accompanying written story or
17 text. This is incredibly frustrating and a cruel
18 reminder of those childhood days when I was barred
19 from accessing many television shows and movies.

20 The gaps in the CVAA go beyond video clips
21 and include a large amount of programming only
22 available online. Several online video programming

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1 distributors, including Hulu.com and Netflix, now have
2 Internet-only shows not available on television in the
3 United States. In fact, a January New Yorker article
4 explained that the future of television programming is
5 online, and more and more content will never make it
6 to the television screen, thus remaining beyond the
7 reach of the CVAA.

8 So how will individuals who are deaf or hard
9 of hearing access these online-only shows? Will their
10 families have to try to interpret these programs or
11 just skip them altogether? Or will third parties be
12 able to finally add captions?

13 This is why we need these exemptions, so that
14 these third parties, who are not the video programming
15 owners, can freely add captions. With new captioning
16 technologies and growth in the captioning industry,
17 the cost of captioning has greatly decreased. We also
18 need an exemption for fixed media, as many
19 non-mainstream programs on fixed media continue to be
20 inaccessible.

21 For instance, the NAD has received complaints
22 from many parents and schools about the lack of access

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1 to educational videos shown in schools. A leading
2 captioning software company told us that many schools
3 have tried to contact them about trying to caption the
4 videos themselves, but recognize that there are
5 copyright infringement concerns.

6 Now, related to quality, these exemptions
7 will not only allow for the addition of captions, but
8 will allow third parties to improve the quality of
9 captions. This means that editing spelling for
10 accuracy and improving the timing of the captions to
11 reduce or eliminate delays.

12 We have witnessed an increase in live
13 programming of news broadcasts, sporting events and
14 talk shows. These live shows are captioned real time,
15 so naturally the captions are a bit delayed by a few
16 seconds. Often these programs are later put online
17 with the delayed captions still in place. The
18 exemption will allow video programming distributors
19 and other third parties to align captions so that
20 they're timely and simultaneous.

21 Many Americans who are deaf or hard of
22 hearing, especially those who are older, also have

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1 visual disabilities and need large clear captions.
2 There is a growing market of video programming
3 software that allows users to customize the captions
4 by increasing the font size or improving the contrast.
5 We need to make sure that these controls are legally
6 available to individuals who are deaf or hard of
7 hearing and also visually impaired. Being able to
8 customize the appearance of captions is similar to a
9 hearing person being able to adjust the volume, bass
10 and treble in a program.

11 So, in closing, the CVAA Senate Report noted
12 that the information divide is leaving people with
13 disabilities behind, and that people with disabilities
14 suffer disproportionately higher rates of unemployment
15 and poverty. We need to bridge this information
16 divide and allow third parties to add or improve
17 captions to video programs by exempting these classes
18 of works from the anti-circumvention provisions of the
19 DMCA. Thank you. And, Dr. Vogler.

20 DR. VOGLER (via interpreter): Good morning.
21 I would like to thank you all for allowing me to
22 testify today. My name is Christian Vogler, and I'm

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1 the director of the technology access program for
2 Gallaudet University. Our group conducts research
3 into accessible technologies, and we're very excited
4 about the possibilities of improving access to videos
5 for deaf and hard of hearing and blind and deaf-blind
6 individuals. Unfortunately, the anti-circumvention
7 clause of the DMCA prevents us from doing so.

8 I would like to give you an idea of what the
9 current accessibility barriers are that people with
10 disabilities face as they watch and play back videos.
11 There are a total of seven different clips that I'll
12 be showing you, and I'll show you some of what they
13 have to do to overcome these barriers.

14 The first of the three video clips are shown
15 from the perspective of a deaf or hard of hearing
16 person having no audio. The next three are shown from
17 the perspective of a blind person with video only, or
18 no video. In the final video, we show our vision of
19 what accessibility can be like.

20 The video clips are taken from -- excerpt of
21 a movie called The Little Shop of Horrors. It is in
22 the public domain. We would have preferred to pick

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1 another example, but at the risk of violating the
2 DMCA, we chose the one that we did.

3 So moving to the first video, this first
4 video is a clip of what a deaf person might experience
5 with no captions.

6 (Video played.)

7 DR. VOGLER: So can anyone tell me what
8 happened in this video? Because I personally have no
9 idea.

10 Now, the next video does have captions, but
11 it's really poor quality in terms of the contrast, and
12 also it's not in sync with the video. So take a look
13 at that.

14 (Video played.)

15 DR. VOGLER: Okay. So, again, I'm still
16 confused, because I'm not certain who said what.
17 Also, you want to note that the font was very small
18 and the contrast is very poor. And it may look like
19 an exaggeration, but this is very much a similar kind
20 of situation that we individuals have to view, not
21 having the best contrast or control over font. So
22 again, having control over the font size and color

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1 often makes it much more readily available to us.

2 The next video shows good captions with good
3 synchronization, and also the caption are positioned
4 showing clearly who is saying what.

5 (Video played.)

6 DR. VOGLER: So again, we're controlling the
7 size and the color of the captions in this one.

8 (Video played.)

9 DR. VOGLER: So this really helps us
10 control -- and this is not controlled, though, if we
11 have subtitles, only if you're using captions. So
12 that one was much more clear, right?

13 Now, the next one I'm going to show you is a
14 videotape from the perspective of a person who is
15 blind. The first video, you'll be able to hear the
16 dialogue, but there's no description in terms of
17 what's actually happening.

18 (Video played.)

19 DR. VOGLER: So with this video, the blind
20 person has no idea what's happening. And,
21 unfortunately, this is a very common situation that
22 many people who are blind actually have every day.

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1 Now, this next one we're going to add the
2 video descriptions, but the descriptions aren't as
3 good as they could be.

4 (Video played.)

5 DR. VOGLER: So you probably noticed how the
6 description and the dialogue overlapped one another,
7 making it very difficult to understand what's actually
8 happening. So the next one I'll show you where the
9 dialogue and actual description are not happening
10 simultaneously.

11 (Video played.)

12 DR. VOGLER: So now there was a clear
13 distinction between what was happening, but
14 unfortunately, this kind of exceptional videotape is
15 very rare to find these days. And it's not able to be
16 improved upon because of the DMCA being as it is.

17 So I've shown you a number of videotapes that
18 are not accessible to individuals who are deaf and
19 blind. Individuals who are deaf and blind oftentimes
20 rely on a Braille display, so what I'd like to do
21 now -- for you now is to show you a clip that includes
22 both the video, the audio description, the captioning,

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1 and the text is actually being captured from the audio
2 description and shown on a Braille display. And
3 you'll see that here at the bottom of the screen. You
4 see the audio on the top line with the letters being
5 displayed, and underneath that is the Braille output
6 and then, underneath that, is the audio description of
7 what's happening -- or the video description as to
8 what's happening.

9 (Video played.)

10 DR. VOGLER: So this kind of video right now
11 is virtually impossible to find today. Industry and
12 content owners probably would not implement these
13 kinds of ideas because the market is so very small.

14 We would love to follow up with this kind of
15 research and make more videos more accessible to
16 people with disabilities, but due to the
17 anti-circumvention clause of the DMCA, we are unable
18 to do so. Thank you very much. I'd like to now turn
19 it over to Mark Richert.

20 MR. RICHERT: Thank you so much. When Andrew
21 began his presentation by talking about how, when he
22 was growing up in the '80s and '90s, he was deprived

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1 of television, it reminded me of how, once upon a
2 time, the members of the Congress, several of them
3 anyway, voiced a lot of opposition to the fact that
4 money was being spent to caption and, in some
5 instances, describe the film -- the show that many of
6 you may remember, Baywatch. And I just want to
7 testify, and make sure this is on the record, that I'm
8 extremely disappointed that Baywatch was never video
9 described for me. I feel deprived.

10 But be that as it may, I think what that
11 attitude sort of illustrates is that clearly there are
12 attitudes out there about whether or not people with
13 disabilities need all, most, some, full access to the
14 kind of programming that everyone else takes for
15 granted and may not be responsible enough to handle.

16 The communications act, as amended talks in
17 terms of what broadcasters, multi-channel video
18 programming distributors, others -- what their
19 responsibilities are with respect to providing
20 description and captioning, but I'm limiting my
21 remarks to video description now.

22 What it doesn't get at and what we're

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1 enlisting your help with today is to fill the gaps
2 where industry isn't expected to provide access to
3 programming, at least not expected in terms of what
4 the law currently requires.

5 With respect to video description, we're a
6 bit farther back even than our brothers and sisters in
7 deaf and hard of hearing world are in that the
8 communications act as amended provides for no video
9 description of IP programming, regrettably, but we
10 think even perhaps somewhat more significant than that
11 is the fact that there is virtually no video
12 programming used in educational settings that is
13 appropriately described and, therefore, made
14 accessible to folks who are blind or visually
15 impaired.

16 This is increasingly, of course, becoming a
17 problem in that, in the educational settings,
18 certainly K through 12 -- it's has been for a while
19 there -- certainly in higher education the use of
20 audio-visual materials is increasing exponentially.
21 So what we are seeing is that when this material is
22 not made accessible through captioning and certainly

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1 through description by the producer of the content,
2 nevertheless a child or a student of any age needs
3 still to have access. And in some cases, there are
4 actually legal obligations on the public schools or
5 institutions of higher education to ensure
6 accessibility, and yet the fact that copyright is in
7 place and restrictions are in place makes adapting
8 that video content very, very difficult.

9 I'll just point out one footnote in this
10 area. So often video description is seen as a
11 particular benefit to folks who are blind or visually
12 impaired, but to no other people generally, and
13 certainly to no other folks with disabilities. That's
14 simply not true. We're seeing more and more the
15 indication that video description is of tremendous use
16 to folks, for example, who are on the autism spectrum,
17 who though they may not need, as I might need, a
18 description of the young folks on Baywatch, they may
19 nevertheless need, whether it's in educational or
20 other settings, to have better information about the
21 expression of emotion, and that the provision of video
22 description for them, particularly if it's tailored

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1 for that purpose, can be a tremendous benefit in
2 helping folks on the autism spectrum better appreciate
3 emotion. That's just one example.

4 But if folks like Dr. Vogler and others are
5 not able to perfect video description and other forms
6 of adaptation to meet folks' unique needs,
7 particularly in niche areas of the disability
8 community that might not be served at all by the
9 market, we need to be able to have the flexibility to
10 do that. So we ask you to support the exemptions that
11 we're proposing. Thank you.

12 MR. CARSON: Thank you. By the way, I don't
13 know whether you've already given us a copy of the
14 audio-visual demonstration -- you have? Okay. Great.

15 Dean, are you next?

16 MR. MARKS: Yes. Thank you. My name is Dean
17 Marks, and I'm with the AACCS LA. AACCS LA is the
18 licensing authority for the AACCS technology, and that
19 is the Advanced Access -- sorry, I'm so used to
20 referring to it -- the Advanced Access Content System,
21 which is the DRM, the technical protection measure
22 that protects content on Blu-Ray discs.

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1 And I'm appearing on this panel, and it's a
2 privilege to be here, to make two very basic points in
3 response to the reply comments filed in this
4 proceeding. First, the reply comments suggested
5 somewhat that AACCS technology, along with other
6 content protection and DRM technologies, are offered
7 as a profit-making product for the founding companies
8 of these licensing organizations. And I want to state
9 for the record that that is not correct.

10 The AACCS license states, and AACCS LA has
11 always presented itself and always stated, including
12 in these proceedings, that it operates on a cost
13 recovery basis for the purpose of enabling the markets
14 for products and services that are supported by our
15 technology.

16 Second, and this is frankly the more
17 important point, I believe, in responding to our
18 comments filed in February, the AACCS LA offer of a
19 license to the developers of accessibility
20 implementations was for a free license. Some of the
21 comments made it sound like we were offering that
22 license in order to profit from people with

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1 disabilities, and that is not the case. We would
2 offer a free license, and the purpose would be to
3 enable those developers to work with the AACSS
4 technology to develop compatible implementations to
5 enable accessibility programs and to add accessibility
6 features to interoperate with the normal playback of
7 AACSS-protected Blu-Ray discs.

8 We would be happy to work with such
9 developers, such as Dr. Vogler, to make a free license
10 available and, further, to collaborate technically
11 with research and developers, such as Dr. Vogler, to
12 make sure these needs are met. AACSS LA has a
13 technical committee with some very fine engineers, and
14 we would welcome the opportunity to work together.

15 So that is why I'm appearing, to make those
16 two points, and I would be happy to answer any
17 questions the panel may have. Thank you.

18 MR. CARSON: Thank you.

19 Steve, you're next.

20 MR. METALITZ: Good morning. I'm Steve
21 Metalitz with the law firm of Mitchell, Silberberg and
22 Knupp, and I'm here on behalf of seven national

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1 organizations of creators and copyright owners. And
2 just to follow up on Blake's opening remarks, since
3 one of these organizations is the Recording Industry
4 Association of America, if anything I say is
5 unintelligible, you'll know why.

6 The joint creators and copyright owners do
7 oppose these proposed exemptions not because the
8 issues that are raised by them are not important; they
9 are important and, in fact, I would say they are
10 compelling, and the testimony this morning underscores
11 that. But our concern is we don't believe that the
12 proponents of the exemptions have satisfied the
13 standards that the Congress has laid down in this
14 proceeding and that the copyright office panel is
15 obligated to follow.

16 We've talked in many of the other panels
17 about two basic baskets of these criteria. First,
18 whether the use that would be made as a result of
19 circumvention is, in fact, non-infringing and, second,
20 whether there are alternatives readily available to
21 circumvention that would enable people to make that
22 use.

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1 And I think the burden in this proceeding is
2 on the proponents on both of those points, and I would
3 submit they haven't met that burden in their
4 submissions they have made, nor in the presentations
5 this morning.

6 On the issue of whether the use is, in fact,
7 non-infringing, again, I would just first like to
8 clarify that the standard is not whether it's likely
9 to be non-infringing. I think that's a misreading of
10 the legislative history surrounding this statute.
11 It's a -- it's a higher standard. The "is likely to
12 occur" standard really refers to activities that take
13 place in the future and haven't occurred yet. That's
14 not really the main issue here, although obviously
15 it's a factor. But, in fact, non-infringing is a
16 higher standard.

17 And I think it's, first of all, important to
18 recognize that creating captions and creating video
19 descriptions in particular is creating a derivative
20 work based on a copyrighted work. So the question of
21 whether there's a defense to that -- if it's done
22 without the permission of the copyright owner, is

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1 there a defense? And, of course, fair use is a very
2 logical place to look for that.

3 I'm not going to go through the whole
4 analysis here. I would just say, first of all, that
5 the assertion in the submission that this -- that
6 this -- that fair use is favored because this is
7 simply a matter of quotation I think mischaracterizes
8 what's involved here. Quoting an entire work is not
9 the type of quotation that is often referred to by the
10 courts as a paradigmatic fair use.

11 And then the final issue, of course, is the
12 fourth factor of the fair use analysis: What's the
13 impact on the market for the work, potential market
14 for the work? And that's a -- I recognize that that
15 can be a complex issue. It is important to note that,
16 especially with regard to captioning -- and I think
17 Linda will talk about this as well -- there's a very
18 broad market here that extends far beyond the
19 hearing-impaired community. So I think that's a
20 factor that needs to be looked at carefully.

21 But it really brings me to next basket, which
22 is alternatives to circumvention. And our problem

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1 here, based on the submission and based on the
2 testimony this morning, is I don't believe that -- I
3 would submit that the proponents haven't made the case
4 that they need to circumvent technological protection
5 measures in order to make the uses of captioning and
6 video deposition that they wish to make.

7 The -- I think Dean's remarks raise an
8 important point about whether some of the uses that
9 they wish to make could be accomplished through
10 agreement, through licensing, and free licensing, as
11 Dean pointed out, for at least some of the
12 technological protection measures involved.

13 I don't know that there's anything in the
14 record about whether the proponents have ever sought
15 such a license and whether they were able to obtain
16 it, but obviously, if they were able to do that, then
17 they wouldn't need to circumvent without authorization
18 because they would have authorization to do so for
19 these research purposes that Dean described.

20 I think if you look through the submission,
21 it's very difficult to determine what type of -- why
22 circumvention is needed to make the uses that are --

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1 that are sought. I'm not saying here that it's not
2 the case, but I just simply think the proponents
3 haven't made the case if it is there to be made.

4 Their first example is synchronization and
5 whether digital rights management, quote, may prevent,
6 unquote, access to the play head. Synchronization is
7 not, I wouldn't think, rocket science. It's a feature
8 that's -- timing of the play time of a disc, for
9 example, is a very commonplace feature. So I think
10 there needs to be more explanation about whether this
11 is an actual barrier that requires circumvention or
12 more of a theoretical one.

13 Several of the examples given -- and I guess
14 on pages 21, 22, 23 of the TDI submission -- is
15 that -- are for research and development of
16 technologies to extract captions from -- from a video.
17 Whether caption extraction software can be used to
18 enable the pass-through of captioning to an HD set is
19 another example that's given. And I think these go
20 very much to the point that Dean made. If the problem
21 is that researchers need to circumvent in order to
22 find non-circumventing methods of accomplishing this,

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1 then the logical question is whether that permission
2 has been sought to -- whether a license has been
3 sought in order to obtain that, and really just
4 whether there has been -- whether cooperation rather
5 than, you know, the recognition of an exemption might
6 be more productive.

7 But, overall, I think it is important to --
8 for the proponents to meet their burden of showing
9 that, for the use they want to make, they have to
10 circumvent technological protection measures. And, of
11 course, since this -- it obviously isn't just about
12 the disc environment that AACIS and the DVD CCA are
13 involved in. It's very -- this aspect of the
14 proceeding is very much oriented toward the online
15 environment and, as we've had other testimony
16 previously in this proceeding, there are quite a few
17 different technological protection measures used in
18 those environments. And I think, again, the burden is
19 on the proponents to show that those measures are
20 preventing them from making the use that they wish to
21 make.

22 We've even heard testimony earlier in this

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1 panel about captioning software that is available that
2 apparently allows people to make some of the changes
3 and improvements that are needed. So, again, I just
4 think the record doesn't, at this point, support the
5 proponents' claims.

6 The final point I'd like to make is that, as
7 we've stated on a number of other panels looking at a
8 number of other exemptions, there are some significant
9 drafting issues with the -- even if you conclude that
10 they have satisfied their burden with regard to the
11 use being, in fact, non-infringing and that they've
12 satisfied that burden with respect to proving that
13 they don't have alternatives to circumvention, I think
14 there are a number of drafting issues that would need
15 to be addressed. I'll just mention a couple.

16 One is, as drafted, these -- these proposed
17 exemptions make no reference to the visually impaired
18 or the hard of hearing or deaf. They would be equally
19 applicable to subtitling in a different language, for
20 example, which is clearly a market that the copyright
21 owner expects to exploit for subtitling their movie in
22 other languages. And so the fair use calculus could

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1 be quite different there. I think the focus of this
2 really needs to be narrowed and sharpened if you find
3 that the criteria have been met.

4 I'd also urge you to take a close look at
5 whether circumvention in order to create -- if needed
6 to create captioning, for example, or video
7 description that doesn't exist should be treated the
8 same as circumvention to improve on captions that have
9 been added by the copyright owner. And I think Linda
10 will talk more about the issue of the captioning
11 quality.

12 I recognize that, at some point, quality can
13 become so poor that it -- you know, the captioning is
14 not really functional. But, on the other hand,
15 there's another part of the spectrum, which is
16 captioning that may contain typographical errors or
17 that is a second or two behind in a news program, and
18 I would question whether those situations ought to be
19 treated the same in any exemption that you may see fit
20 to recommend to the librarian of Congress.

21 So I'll conclude there. Thank you again for
22 considering the views of the joint creators and

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1 copyright owners. I'd be glad to answer any
2 questions.

3 MR. CARSON: Thank you. Linda.

4 MS. KINNEY: Yes. Hello. I'm Linda Kinney,
5 and I'm here on behalf of the Motion Picture
6 Association of America. Thank you again for holding
7 these hearings and devoting this amount of time to
8 these issues. Obviously, as content owners, we're
9 very appreciative.

10 So I'm going to address a few issues that
11 were raised by the testimony earlier, talk a little
12 bit about the FCC order, but mostly about what the
13 industry is doing in the area, which I think is
14 important and impressive, and talk about some of the
15 issues that were raised, like the web-only content,
16 the quality issues, and also the customization of
17 captions.

18 So first of all, the FCC order, our industry
19 is working very hard to comply with the requirements
20 of that order and, by September, we have to caption
21 all programming, all TV episodes and any films that
22 are shown on television. Now, I think we appreciate

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1 and understand the importance of this community. I
2 think the disabled community has done an excellent job
3 underscoring that this is approximately 48 million
4 hard of hearing people, maybe 25 million blind people,
5 and that's a really important constituency for us. As
6 a practical matter, the studios -- their business
7 model is based on ratings; the more people who can be
8 reached, obviously the better and more successful we
9 are as companies too. So the incentives are aligned.
10 We've worked hard. We've done a lot of things on a
11 voluntary basis way before any requirements were
12 imposed.

13 So, for example, on the web issue, prior to
14 the FCC's rules, there were about 10,000 episodes just
15 on Hulu that had captioning on the web even though
16 there was no requirement to provide those captions.
17 So, again, just to show that our incentives are
18 aligned with the disabled community, I think we have
19 worked well with them, as they've also recognized. So
20 we're aligned in that regard.

21 With respect to some of the specific issues
22 that were raised, one of the concerns, which I think

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1 is speculative, is that -- with regard to the web-only
2 content. So from a studio perspective, obviously our
3 interests are to get our content out to as many
4 devices and as many locations and as broad an audience
5 as possible. So for the most part, we not only
6 release content to the theaters, but there's usually a
7 television window, and it may be on cable or some
8 other -- or a broadcast channel, and then ultimately
9 it ends up on the web. And anything, under the FCC
10 rules, that appears on television, whether it's a
11 motion picture or a TV episode, that's captioned has
12 to then be captioned on the web. So all of that
13 content will be available on studio websites, Netflix,
14 Amazon, other websites that -- that web content will
15 be available.

16 There are -- as some of the disabled
17 community has pointed out, there are some distributors
18 who plan to do web-only content as a way to compete
19 with some of the cable programmers. Netflix, for
20 example -- I don't speak for Netflix. They're not
21 here. But I do know, from conversations with them,
22 that they do plan to provide captions for some of

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1 their new programming that will be available on web
2 only.

3 So I would just -- rather than saying
4 web-only content is completely excluded from captions
5 and accessibility, I think that's not entirely
6 accurate, and it may be on a case-by-case basis.

7 With regard to the quality issue, there is a
8 very big difference -- we agree with the community
9 between captions that are provided by human beings
10 and -- captions that are provided by human beings and
11 captions that are provided by the existing technology.

12 So, for example, the speech-to-text
13 technology, which is very affordable, definitely has
14 some quality issues and, as a result, the content
15 providers do not use that as our primary means of
16 providing captions even though it is much, much, much
17 less expensive for us to use. We do use the four
18 major captioning houses out of Southern California
19 that provide very high captioning quality.

20 So I don't think there's really an issue for
21 the most part with studio content or content being
22 provided on television with captions. Those captions,

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1 again, are superior quality.

2 Some of the user-generated content -- if you
3 go to YouTube and you look up some -- they do offer
4 captioning for user-generated content, but that's
5 usually with this technology that's really
6 speech-to-text, and you will notice a lot of errors,
7 and it does impact accessibility. But, again, that's
8 not currently what we use to caption. So I think, as
9 a quality issue, our content is of superior quality.

10 And then the last point I wanted to raise is
11 with regard to the customization of captions. Part of
12 the FCC's rules do require that customization be
13 provided, and there are several components to that.
14 There is a device component and there is also usually
15 a software component.

16 The devices have to be -- have to have this
17 customization aspect by -- January 2014 is the
18 deadline. And these are very comprehensive. So, for
19 example, 64 colors have to be available in addition to
20 different size fonts. So all of that needs to be
21 provided by both the players and the distributor, but
22 also the device.

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1 We have, as our colleagues pointed out,
2 requested that our obligation sync up with that device
3 obligation for technical reasons, but all of that will
4 be happening, and we're working very hard to deploy
5 that.

6 I think, in addition to that, again,
7 completely voluntarily, because we have an interest in
8 getting our content out to this community, if you look
9 at Hulu, for example, you can already manipulate some
10 of the captioning, so you would never see what we saw
11 this morning in terms of that quality of caption. You
12 have three options. You have white captions. You
13 have black captions in case there is a snowy scene.
14 And then there's a highlighted option that has a
15 yellow highlight along the bottom that has black
16 letters and a yellow highlight so that you will always
17 be able to see the overlay and you won't have the
18 problem that we witnessed this morning.

19 So, again, those are voluntarily efforts by
20 the content industry to try to get this content out to
21 as many people as possible, to work with the disabled
22 community. And these things are being addressed and

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1 we are committing a tremendous amount of resources and
2 work force to accomplishing the types of things we've
3 talked about this morning because we do agree with the
4 disability folks that this is a very important
5 community to provide access to content.

6 So with that, I'll be happy to answer any
7 questions.

8 MR. CARSON: Thank you very much.

9 Before we go to questions, I'll give the
10 various witnesses supporting the proposed classes an
11 opportunity to respond to anything said by any of the
12 opponents and -- with the usual caveat, this is an
13 opportunity to respond to what you just heard, not to
14 elaborate on other matters. So...

15 MR. REID: So I'll go through a few -- just a
16 few responses here. First, Dean, we're thrilled to
17 hear that the license that you're offering is a free
18 license. I think the tenor of our comments -- was
19 worried that it wasn't a free license was based on the
20 language in the comment, which didn't suggest that
21 it's free, so we appreciate that.

22 With that said, I want to go back to

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1 something that Gene Quinn said yesterday, which is
2 that what we're talking about here is a fair use. And
3 we're talking about research that we want to do. We
4 don't have to ask permission to do that, and we
5 shouldn't have to ask permission to do that.

6 And while it's great that we might be able to
7 get a license for the technology that you have, we may
8 not be able to get a license with respect to the
9 content itself. We're not certain that you're going
10 to be able to provide us a license that completely
11 shields us from 1201 liability, so we really
12 appreciate the offer, and I'm sure you'll get a call
13 or an e-mail from Christian at some point to talk to
14 you about this. But we don't think that's enough.

15 On to the points that Mr. Metalitz made.
16 First, talking about whether the use that we're
17 talking about is non-infringing and whether the burden
18 of proof is whether it's likely to be non-infringing
19 or is, in fact, non-infringing -- well, first there's
20 a Supreme Court case, Universal v. Sony, where they
21 drop a footnote and suggest at least -- and admittedly
22 it's dicta -- that providing accessibility merely for

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1 the convenience of a disabled person is like a per se
2 fair use. This is at the core of fair use.

3 There's some language in the legislative
4 history, the 1976 Copyright Act, that we think is
5 instructive in this regard, and that's all in our
6 brief.

7 So it's not about, you know, whether or not
8 it's a derivative work or not. We're very confident
9 that this is fair use. And even if you don't want to
10 rely on what the Supreme Court said and what Congress
11 has said, if you go through the analysis, which we did
12 in our brief, this is not that complicated.

13 The market factor, which is the keystone of
14 fair use, we have a decades long record of people
15 saying, this is too expensive, we don't want to
16 provide this. We can't do it. And we're seeing some
17 of that now, but I think this is per se fair use. And
18 I also wanted to tag the issue of preemption. We
19 think the message from Congress in this regard in
20 passing the '96 telecom act and in passing the CVAA is
21 to content owners, listen, you guys need to make every
22 bit of content that you have accessible unless you

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1 can't afford it.

2 So we think that that rolls back the
3 copyright with respect to accessible products. You
4 can't say to the FCC, oh, we can't afford to do this
5 particular content, but then we're going to turn
6 around and assert copyright on that in another
7 context. We think those -- those sort of claims are
8 preempted.

9 We've detailed this in our brief, and I want
10 to note, because Mr. Metalitz has been giving people a
11 hard time for the last couple of days, there's nothing
12 about what's on the record already, there's nothing in
13 Mr. Metalitz's brief engaging in any of these points
14 about fair use or preemption, and we encourage you to
15 take that into account because we feel like we made
16 our case on that front.

17 With respect to the different kinds of TPMs,
18 I know this issue came up yesterday. As we detailed
19 in our brief, this is a shifting landscape, and you
20 can't ask us to build a foundation here on shifting
21 sand.

22 The leading video providers, including folks

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1 like Netflix, are changing their DRM schemes all the
2 time. There's no possibility that we can predict in
3 the next three years all the DRM schemes that are
4 going to be involved in online video. And it can't be
5 the case that an exemption is going to fail for that
6 reason, because the technology itself is changing so
7 fast. I think somebody brought up yesterday, this is
8 ultimately about the classes of works at issue and not
9 the changing TPMs.

10 With regard to the drafting issues, and not
11 specifically referring to people who are blind or
12 deaf, here is the problem that we see with that -- and
13 Mark alluded to this a little bit. The benefits of
14 closed captioning and video description are not just
15 for people that are -- have disabilities. How many
16 people in the room have looked at closed captions
17 while they're at the gym or at a bar. I know I have.
18 That blows the exemption right there because if
19 somebody circumvents for the purpose of adding closed
20 captions and it happens to benefit somebody who is not
21 blind or visually impaired, then we've got a problem.

22 And that's actually been the selling point

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1 with a lot of this legislation in Congress is that
2 this is good for people outside of the disability
3 communities. So we want to make sure -- you know, we
4 appreciate the want to put some sort of limitation in
5 about that, but you need to be careful that that
6 doesn't totally vitiate the exemption altogether.

7 With respect to the issue about other
8 languages, clearly we're not talking about translating
9 something to French. If we need to put in some sort
10 of limitation that reflects that, we're only talking
11 about programming as it's made available in the United
12 States in whatever sort of languages that you make it,
13 with the possible caveat that there are sometimes
14 foreign language portions of the programs that you
15 provide subtitles for or that you are intending to
16 translate for an American audience. We want to make
17 sure that's included in the exemption.

18 Let's see. So the other issue -- and maybe
19 we can get into this more a little bit later -- is
20 creating accessibility features versus improving
21 accessibility features. When we're talking about
22 improving quality issues, this is not going to be a

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1 rehash of what we talked about yesterday with all of
2 the fineries of pixels and making remixes and all that
3 kind of stuff. The difference with quality is between
4 accessibility and not. And the suggestion -- and, I'm
5 sorry, Mr. Metalitz, but you made this point in your
6 comments that it might just be a mere inconvenience if
7 there's a quality issue. It's the different between
8 content being accessible and not. And, you know, that
9 shouldn't make any difference in the exemption that
10 we're talking about.

11 Let's see. Just a couple of quick points on
12 the remarks that Ms. Kinney made. She said several
13 times that the CVAA applies to -- requires captioning
14 for Internet protocol-delivered content that's been on
15 television. I want to clarify that stuff that's been
16 on television with captions -- so the FCC has
17 exemptions -- they have about 15 different categorical
18 exemptions, including the sort of the grandchild of
19 the music video exemption that we talked about
20 earlier. There are several different ones. There are
21 hundreds of individualized exemptions that people file
22 for. So we're not talking about all content that's

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1 been on television, and so I just wanted to clarify
2 that.

3 And when we're talking about a case-by-case
4 basis, I wanted to make kind of a broader point here.
5 We don't want to recaption or make accessible stuff
6 that's already accessible. Right? I don't think
7 we're asking for that. If there's stuff that's out
8 there that you guys are making accessible, that's
9 great. We don't want to revisit that issue. And as I
10 said at the beginning, we think -- we would love it if
11 you guys took sole responsibility for these issues.

12 So we're amenable to a limitation, and I
13 think Mr. Metalitz suggested this in his reply
14 comments, about works that are already accessible.
15 But we want to talk what we mean by accessible, and we
16 want to make sure that any such limitation
17 incorporates these quality issues because, like I said
18 before, these quality issues are the difference
19 between accessibility and non-accessibility.

20 In terms of high-quality captions, you
21 mentioned that the studios are using high quality
22 captions -- I'll let Andrew and Christian speak. They

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1 have a little bit more experience with that, but I
2 just want to say the rest of the industry doesn't
3 necessarily use high-quality captions. In particular,
4 the FCC, for a large portion of programming on
5 television, permits what's called the electronic
6 newsroom technique where they basically feed the
7 script of the show or the script from the teleprompter
8 into the captions. And so if anybody deviates from
9 the script or there's an unscripted moment and
10 something else happens, no longer captioned.

11 So, you know, the level of quality is not
12 there. We've initiated a quality proceeding at the
13 FCC. We filed a rulemaking -- a petition for
14 rulemaking on that more than seven years ago. It's
15 been vigorously opposed by the industry and it's sat
16 dormant since then, so we're not seeing a lot of
17 action on that front.

18 And, finally, the very last point on the
19 issue of customization and the issues surrounding
20 being able to change the font and the size and the
21 color and all that stuff, it's required in the FCC
22 rules, but not necessarily for DVDs and Blu-Ray

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1 players. In fact, the Consumer Electronics
2 Association just filed a petition for reconsideration,
3 trying specifically to get DVDs and Blu-Ray players
4 out of the rules so that they won't have to include
5 all those customization options.

6 Also, the rules kick in on January 1st, 2014.
7 Again, the Consumer Electronics Association just filed
8 a petition asking to clarify that refers only to the
9 date of manufacture and, as you know, it can take a
10 very long for devices to be manufactured and then
11 imported. They sit on store shelves for a long time.

12 So we think, realistically, we may be looking
13 at a date that's in July of 2014, maybe as late as
14 2015. And we're talking about a significant portion
15 of the three-year time frame for this rulemaking. So
16 maybe that's an issue we need to come back and address
17 in 2015 when we talk to you guys next. But we'll see.
18 And we don't think that's manifested in the
19 marketplace yet.

20 MR. PHILLIPS (via interpreter): Thank you
21 for the opportunity to respond. In regards to points
22 that were made by the opposing group, I've actually

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1 been watching online for the past ten years, and I've
2 been -- I remember when ESPN actually started putting
3 a lot of their clips and a lot of their movies from
4 the day of sporting events to the Internet, and a lot
5 of members of the deaf and hard of hearing community
6 have contacted them, because the online video
7 programming distributors -- we've been asking for
8 captioning, and oftentimes we'll get the response that
9 they're working on it or it will happen, it's coming
10 soon. But still to this date it has yet to happen.

11 So a lot of those promises -- we appreciate
12 the intentions behind them, but so far, in our
13 experiences, they've come up empty. And, you know,
14 instead, what we've seen -- you know, they have these
15 legal requirements to make certain programs
16 accessible, and when there is no legal requirement,
17 then rarely is access provided, and that's the reason
18 why we're here, that this presents opportunities so
19 that we can make those programs that are not covered,
20 making them accessible.

21 A lot of deaf and hard of hearing people need
22 the ability to be able to customize captions. And

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1 while I personally watch a lot of online videos, I
2 would say that most websites do not allow me to make
3 customization changes, making something easier to
4 read.

5 For example, Hulu.com, you may be able to
6 change the color, but I don't think that you can
7 change the size of the font or the caption.

8 DR. VOGLER (via interpreter): If I may,
9 thank you again for your comments, and there are a
10 couple of points I wanted to respond to. First of
11 all, regarding the license, the free license, in
12 response, I do appreciate the offer that you've made
13 to provide that. It does raise a few concerns in
14 terms of the situation that I have displayed with the
15 video that I've used today.

16 This video is called Xine, X-I-N-E. And it's
17 a developmental open source project that we're working
18 on. It has excellent accessibility features. And
19 it's great base for working. It's got good GPL. So
20 we are aware of the limitations, but that doesn't
21 necessarily mean we can always get a license because
22 distributors don't always work with us. They say that

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1 it's a violation of GPL. So that's one concern.

2 The second concern with the license is that
3 many of the issues take many years to actually get
4 addressed, regardless of the license. So it may two
5 years, due to the expense involved. So two or three
6 years of people working on code in order to make it
7 accessible really allows an exorbitant amount of time
8 to pass. So this is a concern of our situation, and
9 people are also concerned about the risk of violation
10 of copyright laws. And so, as a result, they're not
11 willing to engage in assisting us in development.

12 I did also want to point out that a number of
13 the comments that were made were given from the
14 perspective of the content creators. That's not
15 necessarily our biggest problem. Our biggest problem
16 actually comes from, how is it we can play back
17 content to make sure that the playback is accessible?

18 And just to give you an example, if a person
19 buys a legal document of a DVD player or has a license
20 or whatever they might get, and I provide a program to
21 enhance accessibility and have it available, like what
22 you saw today, a person is not able to use a

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1 particular program that they purchased because the
2 playback on the video doesn't have the improved
3 accessibility features. We have may have the ability
4 to make it technologically happen, but because of the
5 barriers in place technologically, they cannot access
6 those features. So this is the situation we see
7 ourselves in.

8 If you don't change content, if you don't add
9 new captions, if you simply make the content more
10 accessible, the person who is the end user cannot take
11 advantage of the enhanced accessibility features.

12 So, for example, if you have a DVD -- most of
13 the DVDs currently today have subtitles for the deaf
14 and hard of hearing. And those will show up on a DVD,
15 but you have no control over the size of the font and
16 you also cannot convert them to Braille. So those are
17 not possible features.

18 The technology is very easy to add to allow
19 those subtitles to make those features customized, and
20 it won't change any content or anything else.
21 However, the owner of the video with the playback
22 rights will not allow this to happen because they say

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1 it's a violation of the DMCA. So that's the situation
2 we're currently faced with.

3 MR. RICHERT: This is Mark Richert. Just a
4 brief word on some of the comments from our colleagues
5 as they apply to video description.

6 Just to give you a sense of the scope of
7 material that we're talking about, or not talking
8 about, for many, many years we've been struggling to
9 try to see more broadcast television, cable television
10 programming made accessible through video description.
11 It's been pointed out the rules that were in place
12 over 12 years ago now -- were initially struck down.
13 We've got them reinstated as a result of the CVAA.
14 The compromises that were struck essentially mean that
15 there will be no more than 36 hours of described
16 programming per week.

17 We were actually told at a presentation not
18 unlike this by our colleagues, some of whom are not
19 here, but from the broadcasting industry, well, that
20 should be plenty of programming for you. And some of
21 us actually sort of responded, not necessarily too
22 much in jest, well, maybe we ought to restrict the

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1 sale of, you know, commercials to 36 hours' worth of
2 commercial -- if that's enough for folks.

3 When you look at the realm of online
4 programming, the CVAA does not allow for any
5 expectation on, quote/unquote, industry. We use that
6 term "industry" so broadly because there are plenty of
7 folks, including our colleagues here, who have done a
8 lot in this area. But, quote/unquote, on the industry
9 the obligation is zero to provide access via video
10 description.

11 With respect to quality issues, our
12 colleagues in the deaf and hard of hearing world -- it
13 seems, as always, we can learn a lot from their
14 ability to advocate because they at least have a
15 proceeding, even though it's been lingering for seven
16 years, on quality. We don't even have that. In fact,
17 we're prohibited from addressing the issue of quality
18 video description with respect to the modest rules
19 that we've even been able to reinstate.

20 And as I indicated in my opening remarks, and
21 will capitulate here again, none of what we've talked
22 about is really addressing the whole issue of

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1 educational materials, of which there is a tremendous
2 lack.

3 So what we're really talking about is the
4 ability of the disabilities community to be able to do
5 the work that clearly others are unwilling or
6 seemingly unable to do.

7 And we know that by getting around
8 technological limitations, technological measures to
9 try to protect copyright, that is an area that will
10 allow further development and to fill these gaps that
11 others aren't willing to fill.

12 MR. CARSON: Before we go to questions,
13 anything that was just said any of you feel any need
14 to respond to? Dean.

15 MR. MARKS: Yes, thank you very much. And I
16 appreciate the remarks, and I just wanted to respond
17 in the following, which is the subject of the hearing
18 as the technological protection measures and whether
19 they're serving as an obstacle to accomplish fair
20 uses.

21 And so what I was saying in my opening
22 remarks, and I really do want to reiterate that is

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1 that to the extent that AACCS is standing in the way of
2 research to create these descriptive programs or
3 captioning, or the steps as to how you could sync them
4 up more readily with the program, and that's why the
5 community is seeking an exemption -- what I was trying
6 to state is I don't think that's necessary because
7 we're happy to give you a license so that you don't
8 have to circumvent, so that you can have the
9 content -- you know, the license that will allow you
10 to decrypt and work with the content so you can do the
11 syncing.

12 Frankly, you know, whether the software
13 itself that may do the descriptions or open -- or
14 closed captioning is open source or not open source,
15 that's not necessarily of relevance to us. We can't
16 speak for content owners who may have issues with
17 putting descriptors on without authorization. But for
18 AACCS as a licensor of a DRM technology, we have
19 discussed this and we have no problem with the notion
20 of issuing a license to allow this research work to be
21 done. And we -- and we would not, you know, be
22 standing in the way.

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1 And so I wanted to particularly respond to
2 Blake's question about whether our giving a license
3 could shield them from 1201 liability. I mean, I
4 think the answer is yes because the -- if you're a
5 licensee, you're operating, you know, under
6 authorization and so, therefore, there really wouldn't
7 be 1201 liability. So I just wanted to make those
8 clarifying remarks.

9 MR. CARSON: Let's explore that, Dean,
10 because I don't have the text of 1201 in front of me,
11 but I'm not sure that what you described is accurate.
12 I'd be delighted to be proved wrong.

13 But my recollection of the language of
14 1201(a) is that it is a violation of section
15 1201(a)(1) to circumvent a technological measure that
16 controls access to a copyrighted work without the
17 authorization of the copyright owner. So does AACRS
18 actually have the authority to give a license that
19 would absolve one of liability for a violation of
20 1201(a)(1) when I'm pretty sure the language in
21 1201(a)(1) is, in fact, "without the authorization of
22 the copyright owner"?

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1 Yes, in the definition, it would circumvent a
2 technological measure, it means to descramble a
3 scrambled work, decrypt an encrypted work or otherwise
4 to avoid, bypass, remove, deactivate or impair a
5 technological measure without the authority of the
6 copyright owner.

7 So -- Steve is also waving his hand. Either
8 of you, please answer.

9 MR. METALITZ: I have to say one of the
10 problems here that I'm having is that I don't
11 understand the basis for the claim that there's a DMCA
12 violation here because --

13 MR. CARSON: We'll get to that.

14 MR. METALITZ: -- I don't understand --

15 MR. CARSON: We'll get to that.

16 MR. METALITZ: -- what the activity is. But
17 I think, getting to this point, as I understand,
18 what -- one of the things that the proponents want to
19 do is research to figure out ways so that they can
20 generate their own captioning and video description
21 and link that up with these works. And I think what
22 Dean is offering is that they can, if they need to --

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1 if they need to, you know, kind of --

2 MR. MARKS: Remove the DRM.

3 MR. METALITZ: -- remove the DRM -- obviously
4 maybe you would have a copyright -- you might need a
5 copyright owner's agreement in a particular case as
6 well, but I think he's saying that to the extent that
7 use of their technology would be required in order to
8 do this, they're perfectly willing to grant that on a
9 free basis so that the researchers could figure out a
10 way to do this without circumvention.

11 It's kind of a reverse engineering problem,
12 it seems to me, more than -- than an infringement
13 problem. But, again, I admit, I'm still mystified,
14 after all the pages of submission and all the
15 testimony here -- I think Dr. Vogler, for the first
16 time I heard him say that someone told them it would
17 be a DMCA violation, and I'd love to know who told
18 them that and what were the circumstances.

19 And -- it's simply unclear to me what the
20 proponents want to do that -- and why circumvention --
21 why the TPM is standing in the way. I don't know
22 whether they want to put the captioning and the video

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1 description on copies and make new copies and
2 distribute them to the public, or whether they want to
3 distribute new players to the public that will enable
4 people to see captioning and hear video description
5 that's not otherwise there.

6 I just think it would help, in answering
7 these questions, if we had a more concrete idea of
8 what it is they want to do and exactly where the
9 section 1201(a)(1) constitutes a barrier.

10 MR. MARKS: Let me -- I agree with that. I
11 want to try and answer your question directly. I
12 think, technically, you're correct under the law
13 because we are not the copyright owner; AACSLA is not
14 the copyright owners of the underlying works.

15 However, as the owners of the technological
16 protection measure itself, in our licensing it out to
17 someone to do the research where someone has entered
18 the license and signed the license, just like a device
19 manufacturer, as long as they're following the
20 license, I think there's going to be a pretty hard
21 road to climb to say that, in following a license
22 agreement, you have circumvented.

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1 For example, content owners, if they want to
2 use the technology to protect their works, have to
3 come to us to get a license. So the technology is
4 AACCS' to license.

5 MR. CARSON: Is there anything in your
6 licenses with the content providers that could be
7 construed as giving you the authority to act on behalf
8 of the copyright owners so that, when you give
9 permission to circumvent, that permission is being
10 done -- what's the language, Rob? Is it under or with
11 the authority of the copyright owner?

12 MR. MARKS: Will you give me a minute?

13 MR. CARSON: If the answer is yes, yes.

14 MR. MARKS: Got it. Thank you, Bruce. Took
15 me a couple of times.

16 I think the answer is they're not
17 circumventing because they're using it under a
18 license, so they're not avoiding, bypassing,
19 hacking -- they're not doing that because it's a
20 license -- it's a use that's licensed.

21 MR. CARSON: So I gather they would be doing
22 exactly the same thing that they would be doing

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1 without a license, but by virtue of the fact that
2 there is a license, it suddenly is no longer
3 descrambling, decrypting or avoiding, bypassing or
4 deactivating or impairing the technological --

5 MR. MARKS: Correct. That's the position we
6 would take.

7 MR. CARSON: I would love to get there. I'm
8 not sure I'm convinced, but okay.

9 Anyone on that side of the table want to
10 speak to this whole issue before we move on?

11 MR. REID: Yeah. So, first, I think what
12 Dr. Vogler was trying to get at is a lot of the
13 software, the video playback software that folks like
14 him are able to work on, uses an open source license
15 which tends to be incompatible with -- for example, I
16 think under your standard license, we wouldn't be able
17 to incorporate your technology because then we would
18 have to release the source code for your technology
19 out into the world, and I imagine your license isn't
20 compatible with that. And the leading accessibility
21 software and the leading video playback software
22 that's available to educational researchers, to the

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1 best of my knowledge, is under the general public
2 license or some variant of that.

3 With respect to the non-infringing
4 activities -- do you want us to get into that now?

5 MR. CARSON: I'm going to want you to get
6 into that.

7 MR. MARKS: Can I respond to that --

8 MR. CARSON: I like to make sure we're done
9 with this.

10 MR. MARKS: -- just for a second?

11 You know, David, when you have a player, a BD
12 player, it's descrambling the AACS technology as well.
13 Right? So are you saying that all player
14 manufacturers are at risk of -- you know, even if
15 they're following the letter of the license, to being
16 sued for 1201 violations?

17 MR. CARSON: And I suppose the answer has to
18 be found in the license; otherwise, how do you get
19 there? Is that where you're going?

20 MR. MARKS: Right.

21 MR. CARSON: I follow that.

22 MR. REID: I mean, I think the other thing to

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1 mention here is, one, we don't have this license in
2 front of us to look at, and so we're speculating here.

3 The other thing is, we're talking about a
4 variety of different DRMs; we're not just talking
5 about the Blu-Ray --

6 MR. MARKS: I understand, right.

7 MR. REID: -- DRM and the DVD DRM. We're
8 talking about the wide variety of DRMs that exist
9 online --

10 MR. MARKS: Right.

11 MR. REID: -- and we don't have anybody in
12 the room that can talk about those.

13 MR. MARKS: I understand and appreciate that.
14 And what -- and I want to make sure that -- that my
15 remarks are appropriately cabined in terms of saying
16 the license that we would offer, which would allow the
17 researchers to be able to -- to the extent that the
18 DRM is preventing the access to the content to be able
19 to research as to how closed captioning or video
20 description software could interact with the
21 underlying content that's protected by the TPM, that's
22 what the license would be about.

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1 To the extent that you're talking about
2 incorporating somehow the TPM to interact with the
3 your particular piece of software that would require
4 the keys to be disclosed because it's open source
5 software, I mean, that -- that would obviously be
6 problematic. And so -- but what we understood the
7 comments to be is, gee, we want to be able to access
8 the underlying content to be able to see if our
9 programs can interact properly with the content, sync
10 up with the content, and we can't do that because the
11 DRM is standing as a barrier.

12 And what we're saying is, we will license you
13 so the DRM does not stand as that barrier.

14 MR. CARSON: Let's explore the extent to
15 which the DRM is a barrier. What do we know about, A,
16 whether, and B, the extent to which the problem you
17 have is caused by technological measures that control
18 access to works?

19 MR. REID: Sure. So I'd like to start with
20 the Netflix example. And I wish someone from Netflix
21 was here on the panel today, but they told a federal
22 court in Massachusetts, hey, we would love to make all

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1 of our content captioned, because the fine person at
2 the National Association of the Deaf are going after
3 them to make their content accessible, but we can't do
4 it because, to do so, we would have to circumvent an
5 access control and risk violating the DMCA.

6 So, you know, I can't speak for them, but
7 that's -- we're talking about a huge fraction of
8 online video, and they are the mainstream provider,
9 and they are saying, we can't make our stuff
10 accessible right now, even though we would like to,
11 without cracking a TPM. And that's on the public
12 record now.

13 With respect to the activities that we were
14 talking about, I think, with due respect to
15 Mr. Metalitz, we've laid this out in our brief in
16 pretty careful detail the kinds of activities that
17 we're talking about. One, we're talking about
18 overlaying a visible transcription of the audible
19 portion of an audio-visual work on the visual portion
20 of the work, or vice versa. And to be able to do
21 that -- and so we can use -- we talked about the
22 website Universal Subtitles as an example.

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1 And, by the way, if you look up the first
2 tech hearing, there's a video of it on YouTube, and
3 we've started transcribing that on Universal
4 Subtitles. We've only made it through your remarks,
5 but -- you can see how this works without DRM.

6 What YouTube is does they expose, via an
7 application programming interface, an API, the
8 play head of the player to the accessibility software
9 and it says, okay, right at this moment I'm at one
10 minute, I'm at one minute and one second, I'm at one
11 minute and two seconds, so on. The user pauses and
12 says, we'll pause. And the accessibility software can
13 say, okay, I've got this subtitle file, or I've got
14 this caption file with these time codes stamped in it.
15 Oh, we're at one minute; I need to queue up the
16 caption that's appropriate to be on the screen at one
17 minute.

18 So that works when there's an API that
19 exposes the play head to the developer.
20 Unfortunately, that only exists in open players that
21 don't have DRM: YouTube, video -- there's some HTML5
22 players. It doesn't work with Netflix. It doesn't

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1 work with Hulu. We've talked to the folks that are
2 behind Universal Subtitles, and they say they can't do
3 that on the mainstream streaming sites. So that's one
4 example.

5 The other part -- the other examples that
6 we've proposed are extracting the captioning and video
7 description data from an audio-visual work for the
8 purposes of making corrections to the content. And in
9 particular this is talking about errors in captions.

10 And if you go to the website captionfail.com,
11 you will see an endless parade of problems with
12 captions that would be funny if you could hear the
13 audio that was going on. But if you're actually
14 watching that and trying to figure out what was
15 actually said, it wouldn't be so funny.

16 And wouldn't it be great if we could come
17 with a database of -- and I'm just hypothesizing
18 here -- if we could come up with a database by which
19 people that are watching online videos or DVDs could
20 say, hey, at minute one minute of the movie War Horse
21 there's a problem with the captions. They misspelled
22 the name of the horse. Here's the correct name of the

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1 horse. And we could design a player that goes out to
2 the database and says, ah, when you're watching the
3 DVD War Horse, grab the corrected captions and insert
4 them in at that moment. That's an example of what
5 we're talking about.

6 Again, we can't do either the extraction or
7 the overlay without cracking the DRM. And we can come
8 up with similar examples for video description.

9 MR. CARSON: Can I just ask, is that true
10 with respect to DVDs and Blu-Ray?

11 MR. REID: So far as I know -- and maybe
12 Dr. Vogler can chime in on this -- but I believe it's
13 impossible to access the caption files without
14 actually being able to circumvent the DRM or using the
15 technology that AACIS LA and DVD CCA would offer.

16 DR. VOGLER (via interpreter): That's
17 correct.

18 MR. CARSON: That was Dr. Vogler saying it's
19 correct.

20 DR. VOGLER (via interpreter): Yes.

21 MR. REID: And so the third activity that we
22 outlined is talking about improving of the quality of

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1 the rendering. And this is all the stuff that we
2 talked about earlier in terms of adjusting the font
3 size, adjusting the color. And, actually, if you'll
4 indulge me a moment, the video programming
5 accessibility advisory committee that Congress formed
6 when it created the CVAA identified several different
7 components with respect to captioning. And sorry,
8 Mark, they I think I left you guys out on this front
9 again -- but they said, one, the presentation of the
10 format, semantically significant formatting such as
11 italics, colors and underlining, the timing of the
12 presentation -- and then they identified seven
13 specific things.

14 So one is support for a 64-color palette and
15 allowing users to override default font color with one
16 of eight standard colors, the ability to vary
17 character opacity, support for various font types as
18 well as the ability for users to select default fonts
19 supporting the full 64-color palette. It's the
20 standard called CEA-708. And the full 64-color
21 palette for backgrounds, allowing users to adjust the
22 opacity of the background. So, normally, you might

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1 see a black background behind the captions. We're
2 kind of used to the white on black. You might want to
3 change that color and the opacity of that so you can
4 actually see what's behind the captions. A lot of
5 times there will be text on the screen that the
6 captions cover up. You might want to be able to move
7 them around. Character edge attributes they talk
8 about.

9 Let's see. I think that's -- those are kind
10 of the big ones. The CEA-708 standard is quite
11 detailed. But the VPAC -- the advisory committee that
12 Congress created actually identified these as all
13 important issues. And we need to be able to extract
14 the captions or access the caption file in a way,
15 particularly if the Consumer Electronics Association
16 isn't going to include this capability on DVD players,
17 to be able to take the captions, take the text, and
18 actually be able to manipulate it in the ways that we
19 described earlier.

20 I think the other important issue we haven't
21 quite gotten at today -- and this is, again, specific
22 to captions -- but it's the difference between

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1 captions and subtitles and subtitles for the deaf and
2 hard of hearing. I think we've heard all of those
3 terms at some point today. So the important
4 difference here is that captions themselves, closed
5 captions, come in text format. So you can actually
6 manipulate the display of the text. It's like you're
7 in Microsoft Word. You make the text bold, you make
8 it bigger, you can do different sorts of styles, you
9 can do all this different stuff.

10 When we have subtitles or subtitles for the
11 deaf and hard of hearing, as the content industry is
12 starting to call them now, they're actually images
13 that are overlaid over the top of the video, so
14 they're like -- if you printed out a piece of paper
15 from Microsoft Word, you couldn't really -- you
16 couldn't change the font at that point. So it's,
17 like, take that piece of paper and plaster it over the
18 video.

19 So a lot of the captions that -- or a lot of
20 the subtitles that we're seeing now are in that format
21 and, in that case, we may have to extract the file,
22 run it through optical character recognition, have a

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1 user or some sort of crowdsourcing solution that
2 actually sits there and transcribes those subtitles so
3 that they can be turned into an accessible format and
4 displayed in an accessible way and so on.

5 And, again, we've detailed these pretty
6 thoroughly, I think, in our opening proposal. But I'm
7 happy to answer any specific questions about those
8 activities.

9 MR. REED: Can I just ask you a question
10 about the play head comment? Are you saying you need
11 frame-accurate time code or is the -- even content
12 that's protected, I think, gives you minute and second
13 information. Why is that not sufficient to achieve
14 your desired purpose?

15 DR. VOGLER (via interpreter): Okay. Well,
16 let me give you an example. And just, first, to
17 clarify, you're saying that the protection and -- with
18 the protection, you don't get the minute and second
19 information? Is that what the question was?

20 MR. REID: So I think what you're -- correct
21 me if I'm wrong. You're talking about when you pop in
22 a DVD or you're watching something online or whatever.

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1 You see a little minute and second counter down in the
2 corner.

3 MR. REED: Well, you see a version of the
4 time code. It's not the frame-specific time code that
5 the player uses to render the images, but it's time --

6 MR. REID: But you're talking about the thing
7 that shows up --

8 MR. REED: Well, more specifically, with
9 respect to IP video, when you're playing something on
10 Hulu or Netflix, which I understand from your comments
11 are protected and you can't get access to the
12 play head, you still get time information. You
13 generally know where you are in that -- that's how
14 it -- I mean, you can go from device to device and
15 pick up where you left off.

16 MR. REID: So I think it's important to
17 distinguish the "you" in this situation. As the
18 viewer, when I'm sitting there on Netflix and I see
19 the time code down in the bottom, I know what time it
20 is.

21 When we're talking about accessibility
22 software that's overlaid on the top, the accessibility

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1 software can't see the screen and interpret, okay,
2 we're at one minute and one second. It needs to be
3 able to penetrate the DRM to get to that information.

4 Whether that's possible with just the minutes
5 or the seconds or -- I mean, obviously something
6 frame-specific might be better, depending on the
7 particular caption format that we're talking about.

8 But the point is the accessibility software
9 can't get at what the eye can get it, that you could
10 look at, unless we want to start talking about screen
11 capture software, which I think no one is interested
12 in after yesterday.

13 MR. REED: But your position is you need to
14 circumvent in order to access that?

15 MR. REID: Yes, sir.

16 DR. VOGLER (via interpreter): If I could
17 respond to that, I just wanted to as well that
18 sometimes a screen capture is not possible. And I say
19 that because the DRM also will say that that area of
20 the screen is not accessible and will not allow you to
21 screen capture as a result of that.

22 So even if it's possible technically to

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1 capture the screen information and get that time code,
2 sometimes specific programs are not allowed to do so.

3 MR. REID: And we're talking about a variety
4 of different user interfaces that are going to render
5 the time code in a variety of different fonts. So, I
6 mean, conceivably, we could think of some sort of
7 specialized screen capture software that can focus on
8 that particular little corner of the screen in every
9 variation of player out there and, like, on the fly,
10 do optical character recognition to figure it out. We
11 don't think that's super realistic.

12 You know, the far, far, far easier way and
13 possible way is to crack the DRM and actually get
14 access to the play head. And that's how all the
15 people that are making this software is doing it, if
16 you look at the Universal Subtitles folks. When
17 they're actually able to succeed with this technology
18 is when they have access to the play head.

19 MR. RICHERT: With respect to video
20 description, there's really three ways that you can
21 get description. Of course, you can have your buddy
22 or someone live describing it to you, obviously.

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1 Second, you can have a source that's external to the
2 content you're trying to have described that's
3 hopefully sequenced or synchronized appropriately so
4 that you can weave the narrations into appropriate
5 pauses. Obviously, we can all imagine the technical
6 troubles with making that happen, though some people
7 have been trying to play with solutions like that when
8 you can't get access to the content.

9 And the third area is, of course, to weave
10 the soundtrack, if you will, of the descriptions right
11 into the product that needs to be described. And in
12 order to do that, it's quite clear that you need to be
13 able to puncture, to circumvent, get behind the scenes
14 and fiddle around with, certainly, the audio tracks.

15 And it's not just a question of, okay, we'll
16 run the video image through, but we'll put our own
17 audio track on. It literally, especially in this day
18 and age of surround sound and everything else -- and I
19 am really now getting into areas that are well beyond
20 what I know anything about, but I can tell you that
21 the engineers, if they were here, they would tell you,
22 you know, it's a really trick to make sure that the

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1 description appears on the center track, or what have
2 you, to make sure -- the center channel, to make sure
3 that description is rendered appropriately for the
4 user. And that requires an awful lot of
5 sophistication to make sure that description is heard
6 properly, particularly if you're talking about
7 broadcasting it.

8 Again, I just want to make sure that we're
9 understanding this is not just about entertainment.
10 That is specially with respect to educational
11 opportunities. We're not going to have -- it's not
12 only inefficient; it's likely to be completely, you
13 know, lacking in quality if we tried to do the first
14 or the second of those approaches to description, to
15 have a third party live describe it for you or to
16 somehow synchronize a separate track at the time --
17 we're really talking about getting behind the scenes
18 for the content, building it directly in, and in order
19 to do that effectively and appropriately, we really
20 need access to the code.

21 MR. REID: And let me be clear. If the
22 industry were committed to providing accessibility

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1 interfaces, or APIs for this stuff, we could certainly
2 envision a system where Netflix gives out the
3 play head information, it gives out the captioning
4 data, it permits you to overlay things in a particular
5 way, it permits you to mess with the mix of the video
6 description, all of that kind of stuff -- you know, we
7 could certainly conceive of ways that the system could
8 be implemented in a way that doesn't interfere with
9 the DRM.

10 You know, I want to make sure we're on the
11 record as saying we understand the reasons that you
12 guys use DRM. We understand that there are serious
13 problems with piracy and, you know, we're not here to
14 tell you don't use DRM. You know, we understand why
15 you do that. And there are ways we could conceive of
16 designing a system that wouldn't require cracking the
17 DRM, but that's not the reality today.

18 MR. CARSON: I'm trying to figure out exactly
19 what the end product of the kinds of things you're
20 doing is going to be, and what I'm getting at is --
21 let's start with physical media, DVDs, Blu-Ray and so
22 on. At the end of the process, what are you going to

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1 be giving the community you serve? Are you going to
2 be giving them the original DVD with some software?
3 Or are you going to be giving them a new copy of the
4 work? Or how is this going to happen?

5 MR. REID: So, I mean, ideally, I don't think
6 we would want to be doing anything like distributing
7 copies of the works, and I know, Mr. Metalitz, you
8 expressed some concerns about that in your filing.
9 We're not going to be creating the new accessible
10 version of War Horse and dropping it in the mail to
11 people.

12 I think we are talking about a couple of
13 things. One, we're talking about players, and
14 obviously there's this trafficking issue floating out
15 there. The way that these players are traditionally
16 distributed is they've got all the accessibility
17 stuff. They've got all the video playback stuff.
18 They don't have the circumvention component. They
19 kind of -- it's like the chip in the car without the
20 spark plugs.

21 Then the user can legally download that code,
22 and if they choose to violate the -- well, I don't

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1 know if downloading violates the trafficking
2 provisions. We can talk about that in another
3 context. But they might download the circumventing
4 component in another way. Or they might talk to
5 somebody like Mr. Marks and get the spark plug that
6 they need to actually do the circumvention.

7 But we're talking about designing players
8 and, by the way, you know, folks like Dr. Vogler need
9 to actually design the players. In the course of
10 designing the players, they're going to need to be
11 doing circumvention to see how they work with actual
12 products.

13 So I think we're talking about distributing
14 players. We might be talking about distributing
15 ancillary bits of content in terms of the corrected
16 captions, in terms of the corrected video description.

17 You know, we're obviously not going to
18 reproduce the entire -- you know, the entire corpus of
19 the movie where possible, but we might, as I mentioned
20 before, have the database where, at minute number one
21 on War Horse there's, you know, the following spelling
22 error, and that might be distributed in some publicly

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1 available way.

2 MR. CARSON: So the end user would be
3 receiving, in this context, the actual DVD or Blu-Ray
4 disc --

5 MR. REID: Yes. Yes. Yes.

6 MR. CARSON: -- and you might have additional
7 software and data that is interacting with it in the
8 course of --

9 MR. REID: That's correct.

10 MR. CARSON: -- the performance.

11 MR. REID: That's correct. I think it's
12 important to emphasize that we drafted the exemption
13 specifically with that for users that already have
14 lawful access to the work. We're not envisioning the
15 situation that we talked about in the past hearing
16 might be somebody creating an accessible version and
17 distributing it to lots of people. We don't have
18 anything like that in mind.

19 We have in mind users that have lawfully
20 purchased the DVD, have lawfully purchased access to
21 Netflix, lawfully can view Hulu for free, or paid for
22 Hulu Plus or whatever, and being able to take some

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1 piece of software or some piece of code and overlay
2 that over the top. And, obviously, without violating
3 the trafficking provisions.

4 MR. CARSON: And similarly with respect to --
5 hold on. We'll get to them. I just want to get
6 clarification.

7 With respect to content that is, say streamed
8 on the Internet, is the model that you would be using
9 one where the viewer would still be streaming that
10 original content over the Internet, but it would be
11 interacting with something on their own equipment
12 which would do what it needs to do to provide the
13 captioning or the description and so on?

14 MR. REID: Yeah, I think that's the idea.
15 And you might take a look at Universal Subtitles as
16 sort of an example for how this works. You actually
17 go to the Universal Subtitles website, and what they
18 do is they have this overlay over a YouTube video.
19 They embed the YouTube video in the Universal
20 Subtitles website. It's still streaming from YouTube;
21 it's still got YouTube's controls; it's still got all
22 the YouTube stuff. But over the top of the YouTube

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1 controls, it's overlaying accessibility features.

2 MR. CARSON: Now, anyone want to elaborate?

3 MR. PHILLIPS (via interpreter): Yes. I know
4 that Blake gave a great description about what we're
5 wanting to see in the future, and I think that that
6 goes back to some of the discussion that we had about
7 circumventing the DRM for research purposes.

8 A lot of deaf and hard of hearing people buy
9 DVDs themselves or have the right to access an online
10 streaming video. They should be able to circumvent
11 the DRM to be able to add the caption file or to be
12 able to improve the caption file or even customize it.
13 So, you know, it is possible.

14 MR. RICHERT: The only thing I would add with
15 respect to description is I -- I can see a need for
16 putting in the hands of a school district, some
17 educational institution, a work in its entirety for
18 educational purposes that's described. You know,
19 perhaps something we ought to be considering is, much
20 like with the case of captioning, there is open versus
21 closed captioning and you can select to have the stuff
22 displayed or not. Certainly that's been true with

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1 some DVDs that have been distributed in the past
2 where, you know, you clearly can select whether you
3 want description heard or not.

4 You know, if it makes people feel better that
5 the described content is essentially open description,
6 if I can put it that way -- I don't know that anyone
7 in our community would be concerned about it. But
8 I -- I certainly think that, you know, educational
9 institutions that are trying to serve kids with
10 disabilities, students of all ages with disabilities,
11 may very well need to have a work in its entirety
12 distributed to them.

13 MR. REID: Really quickly, are we clear on
14 the difference between open and closed captions and
15 description?

16 MR. CARSON: I'm not.

17 MR. REID: Okay. So open captions are
18 embedded into the video itself. That's what you might
19 think of as subtitles that you can't turn off. So you
20 know when you're watching a movie in a theater and
21 part of it is subtitled, that's an open caption.
22 Think of it that way.

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1 Same with video description. If it was an
2 open video description, that might mean that it's
3 playing whether you like it or not. You can't turn it
4 on or off. If it's closed, on the other hand, you can
5 toggle it and or off. Is that a fair description?

6 MR. PHILLIPS (via interpreter): Right.

7 MR. CARSON: Steve, you've often, in the
8 course of these hearings, reminded us of the
9 proponents' burdens of proof. We have an assertion
10 which, just by reviewing the comments, on the face of
11 it seems to be correct, an assertion by the proponents
12 that they did make a case for fair use, and you never
13 actively responded to it. So here's your chance.

14 Why is -- what's wrong with the case they
15 made in their proposal that the activity they want to
16 engage in is fair use?

17 MR. METALITZ: Okay. Well, I think I now
18 know more than I did 15 minutes ago about what they
19 want to do. And it's -- you know, maybe I'm -- maybe
20 it's my own density, but I now understand they have --
21 as I understand it, they have players that will enable
22 this if circumvention -- if they could add a

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1 circumvention capability to those players. That seems
2 to be what was said. So it's not a question of
3 distributing copies that -- or altering the copy.

4 Again, thinking about this in the fixed disc
5 scenario, you're not distributing altered copies or --
6 or generating new copies and distributing them, as I
7 understand it. And that obviously has an impact --
8 could have an impact on the fourth factor, fair use
9 factor, what's the impact on the market. So I think
10 it improves the argument for fair use because there's
11 not actually a different product out in the market, as
12 I understand.

13 MR. REID: That's correct. I mean, the one
14 caveat I'd offer to this -- and, again, unfortunately,
15 Netflix is not in the room, but when they're talking
16 about needing to circumvent to add captions to their
17 stuff -- and, again, I don't know if this is something
18 they actually want to do or they're just saying this
19 in court as an excuse; maybe you could ask them in a
20 post-hearing question -- they're obviously
21 distributing accessible content after the fact.

22 And that's presumably pursuant to a license,

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1 and I'm not privy to the details of their arrangement
2 with the folks on the content creation side of the
3 fence, so it's a little bit hard to argue on their
4 behalf here, but they're obviously distributing some
5 product.

6 But we still think that if Netflix is -- and
7 I want to be clear about this. If Netflix has to
8 crack the DRM on the videos it receives from the folks
9 on the content side of the house to make the videos
10 accessible, then we think that's a fair use
11 nonetheless.

12 MR. METALITZ: May I ask a question? Are you
13 talking about streaming video from Netflix --

14 MR. REID: Yes.

15 MR. METALITZ: -- or are you talking about
16 distributing the discs?

17 MR. REID: I'm talking about streaming video.
18 Do they still send out discs?

19 MR. METALITZ: But they may call it something
20 different.

21 MR. REID: Flixter or whatever. Sorry.

22 MR. METALITZ: Okay. I guess I'm not that

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1 clear on what your point is about Netflix. They told
2 you -- or they have represented that they can't do
3 what you want because it would be a DMCA violation?

4 MR. REID: That's correct. And I read a
5 quote from them earlier in the day. Do you want me to
6 read it again?

7 MR. CARSON: That was in court in
8 Massachusetts, I think you said?

9 MR. REID: Yeah. I can give you the Westlaw
10 cite if you'd like to see it.

11 MR. MARKS: That would be good.

12 MR. REID: Let's see. So in addition to
13 circumventing or to infringing copyright, quote,
14 captioning may also require Netflix to decrypt digital
15 rights management protections that accompany video
16 files, a separate violation of the Digital Millennium
17 Copyright Act which prohibits, quote, circumventing a
18 technological measure that effectively controls access
19 to a work protected by copyright, blah, blah, blah.

20 And that is 2012 Westlaw 157-8335, and that's
21 in the District Court of Massachusetts on the 1st of
22 May 2012.

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1 MS. KINNEY: Can I just -- this is Linda --
2 speak to that? I think that at least as of September
3 of this year, the new content that's being provided to
4 Netflix will be provided to them with a captioning
5 file. So all the content that we are providing, this
6 prerecorded content -- so the television episodes, the
7 motion pictures, the films, other things that --
8 again, all of our content is really on TV. So we will
9 provide them the actual captioning file. So they
10 don't need to caption it individually.

11 And I think that's really -- and maybe that's
12 evolving over time because these new requirements are
13 coming into play right now. But -- and I don't know
14 whether they're speaking to the past but, from the
15 future, going forward, it's going to be the content
16 owner really is the one in the post-production process
17 who's adding the captions and providing the file to
18 Netflix.

19 MR. CARSON: So we're looking at a three-year
20 window. When is that going to be happening?

21 MS. KINNEY: So the first deadline is
22 September of this year, and that's for all prerecorded

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1 content.

2 MR. REID: That's unedited.

3 MS. KINNEY: Yeah. Then we have another six
4 months after that, so it would be March of 2013, and
5 that's for live or near live content, which is harder
6 to do. And then you have another six months -- it
7 will be September of 2013 where you have edited
8 content.

9 So, for example, if you have Sex in the City
10 and you have an edited version that edits out certain
11 language or other things that are inappropriate for,
12 say, PG viewing, the captions have to be redone or
13 they're not going to sync up with the programming.
14 And to make it a quality captioned accessible video
15 with that new editing involved, it takes more work on
16 the back end.

17 MR. CARSON: But it's also going to have
18 words you don't want in it.

19 MS. KINNEY: Yes. Right.

20 MR. REID: Let's be clear, because that was
21 not quite a complete picture. There's also a 24-month
22 deadline, so six months, I think -- I don't know if

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1 it's two years from January 1st or six months after
2 the 18-month deadline, either way -- for video -- it's
3 called archival content, so stuff that's on Netflix
4 right now without captions that will, after the rules
5 kick in, which I think they have already kicked in;
6 they've been in the Federal Register, that's then
7 shown on TV later with captions for the first time.
8 Netflix -- so that's only talking about brand new
9 content that goes to Netflix.

10 Stuff that's sitting in Netflix's archive
11 because it's already been shown on TV that then is
12 syndicated again later, that doesn't have to happen
13 for another two years. And we're only talking about
14 content that has been shown on TV with captions and,
15 again, there are 15 categorical exemptions for
16 programming, for example, for studios that -- they
17 don't have to spend more than 2 percent of their gross
18 revenues for a channel per year to do captioning.
19 They don't have to do any captioning if they're in the
20 first four years of existence. They don't have to do
21 any captioning if they make less than \$3 million in
22 revenue for a channel. I could go on and on. There's

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1 hundreds of individualized exemptions. So we're not
2 talking about the entire world of programming that
3 Netflix might show. We're talking about some of the
4 files that they're captioning.

5 And, again, as we've pointed out in our
6 brief, Netflix has been sort of difficult about
7 explaining exactly how much captioning they have.
8 They say, oh, we make -- 80 percent of our streamed
9 hours are captioned, which we sort of like, well,
10 yeah, a lot of people are watching the shows that you
11 have that have captions on them because people want
12 captions, and they aren't watching the shows that
13 don't have captions. But we don't know exactly how
14 much their library is actually captioned.

15 But the point is they're saying -- or they're
16 at least arguing to the federal court, hey, for the
17 stuff that we don't get from the content folks with
18 the caption file intact, we'd like to be able to do
19 that for ourselves, but we can't do it because of the
20 DMCA.

21 MS. KINNEY: And just to clarify -- I think
22 we're not really that far apart in the sense that our

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1 only point is the content owners now are investing
2 enormous resources to make this content accessible.
3 And to the extent it is accessible, we don't think
4 that there should be an exemption for that content.

5 And it's not just content that is required to
6 be accessible. Our studios are going above and beyond
7 the requirements of the FCC and providing many more
8 captions, and some to archival content that's not
9 currently required. And so if that -- if we've
10 invested those resources, our -- at a minimum, our
11 request is anything that is accessible does not apply.
12 You know, an exemption would not apply for that
13 content.

14 MR. CARSON: It sounds like you've come very
15 close to saying that if you're not making it
16 accessible, you have no problem with them
17 circumventing in order to make it accessible. Is that
18 where you are?

19 MS. KINNEY: Well, with the exception of the
20 things that Steve has talked about. I think there are
21 several other issues involved here. But at a minimum,
22 we are concerned that there would be an overbroad

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1 exception.

2 MR. KASUNIC: But doesn't that come back to
3 the question of, what is accessible? If it's not
4 customizable, in your view, would that not be
5 accessible?

6 MR. REID: That's right. And, again, I want
7 to say -- again, we really appreciate what you guys
8 are doing both within the letter of the law and the
9 regulations and above and beyond that. And we know
10 you guys are doing more than that, and we appreciate
11 that. But again -- and, again, we don't want to spend
12 people's time -- you know, we don't want to have
13 crowdsource volunteers, we don't want to have
14 Dr. Vogler cranking away on circumvention code to make
15 stuff accessible that's already accessible. I think
16 we're all in agreement about that.

17 But, again, I want to emphasize that all of
18 these bells and whistles that we've talked about, the
19 ability to customize the appearance, is really
20 important, and I don't think we've said the word "deaf
21 and blind" quite enough today. There are folks that
22 are both -- have both -- that are both deaf or hard of

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1 hearing and visually impaired. They need to be able
2 to increase the size of the captions. They might have
3 color blindness that requires particular color
4 combinations. People have different size TVs in
5 different size rooms in their houses. I mean, you can
6 imagine the sort of permutations. The ability to
7 customize the captions is really, really important for
8 works to actually be accessible.

9 So when we say we don't have a problem with
10 this exemption having a limitation in it for works
11 that are already accessible, we want to make sure that
12 that definition of accessible means it's got all the
13 bells and whistles, it's customizable, it meets up
14 with the CEA-708 requirements and all of the above.
15 But, again, we're not opposing it in principle.

16 MR. CARSON: Dean.

17 DR. VOGLER (via interpreter): If I may as
18 well. I just wanted to stress again what Blake has
19 just said about this issue of accessibility and how we
20 define that. It's important to remember, as was said
21 earlier at a previous hearing, deaf and hard of
22 hearing and deaf/blind individuals are very different

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1 in nature. So what accessibility means to one person
2 often can be an individual thing, but we can make
3 something more standard.

4 So, for example, if you have good eyesight,
5 then you're able to have video with regular captions
6 online and find that to be accessible. But if you
7 don't have good eyesight or if you can't see at all,
8 just having the captions converted to Braille might
9 make it accessible, and just regular captions would be
10 insufficient.

11 So I just wanted to reiterate what has just
12 been said about accessibility and the definition of it
13 needs to be taken in the context of the differences
14 that we see in the general population.

15 MR. CARSON: Dean.

16 MR. MARKS: I just wanted to say I think the
17 dialogue you had back and forth with Blake and
18 Dr. Franklin was very helpful in terms of the notion
19 of the end goal is to create players that can interact
20 with the product as it's sold to the marketplace. So
21 not talking about distributing -- and I'm speaking
22 here on the optical disc world of distributing DVDs or

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1 Blu-Rays that have had all their protection stripped
2 off.

3 MR. CARSON: Sort of sounds like the old
4 clear play versus clean play situations for those of
5 you who recall that.

6 MR. MARKS: Exactly. Exactly. No, I think
7 that's sort of where I'm going. So two points. One,
8 I want to make sure that the marker is put down that
9 we're not only willing to engage in terms of the
10 research for the technology, but to the extent that
11 somebody is making the sort of player that Blake
12 described, from AACCS' vantage point, it's much better
13 if that player is a licensed player, decrypts the
14 technology -- decrypts, sorry, the AACCS DRM, plays
15 back the content, does whatever overlays are necessary
16 to make the content more accessible for the community,
17 and ends up protecting the content rather than the
18 sort of player you described, which is the player has
19 the overlay, and then the person has to go and
20 incorporate a circumvention tool to make the player
21 actually function.

22 It's better for us as both the licensor of

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1 the technology and, frankly, as the content owners who
2 are using the technology, the DRM, in the first place
3 to protect their content to have sort of a complete
4 package of a licensed player. I want to -- so we are
5 willing to also work with player manufacturers who are
6 seeking to accomplish what Blake described.

7 What I want to say also, in respect of that,
8 is with our license comes certain obligations. So,
9 for example, you know, the AAC3 license doesn't allow
10 the digital content to go out in the clear, a digital
11 output for example. So we would expect a player to
12 conform with the other obligations of the license, but
13 plenty of software players do, and there would really
14 be no reason why a player that incorporated
15 disability -- accessibility features couldn't do the
16 same thing.

17 So it was a long-winded way of saying as --
18 we would actually like to work with the folks who are
19 making these sorts of -- I assume they're probably
20 software players; is that right?

21 MR. REID: I mean, I think that's primarily
22 the idea. I mean, the only response I can say is the

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1 even better solution would be if the consumer
2 electronics manufacturers were making players that had
3 all these features in it instead of asking the FCC to
4 exclude them from the rules.

5 MR. MARKS: Unfortunately, I can't speak for
6 the consumer electronics manufacturers because my
7 other hat is as a studio, so...

8 MR. CARSON: There's one other hat that might
9 be missing from this equation. Are you or is anyone
10 else in the room in a position to speak on behalf of
11 DVD CCA?

12 MR. MARKS: That was my second point. Thank
13 you for that nice introduction. Okay. So I wear
14 multiple hats, and I am a board member of the DVD CCA.
15 I sit on the board of the DVD Copy Control Association
16 which is the group that licensing the CSS technology.

17 And I believe that the DVD CCA would support
18 the positions that I articulated on behalf of AACIS LA
19 and also give a free license for research to improve
20 accessibility to the extent that the CSS was
21 interfering with that, and also be eager to work with
22 player manufacturers to license those so that it could

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1 be one seamless operation. I would certainly advocate
2 for that as a board member.

3 If the panel asks a question, which I really
4 hope they will, then we can go back to the full board
5 of DVD CCA in order to submit a written reply that
6 gives confirmation. But I would advocate for it, and
7 I believe, knowing DVD CCA as I do, that -- that I
8 think they would be in the exact same position.

9 MR. CARSON: Here's one suggestion just to
10 throw out there, see where it lands. I mean, our time
11 is limited. We have to make some decisions relatively
12 soon.

13 MR. MARKS: Right.

14 MR. CARSON: Nobody up there has a clue where
15 we're going to come out. If you do have a clue,
16 you're probably wrong because I don't have a clue
17 where we're going to come out.

18 MR. MARKS: Right.

19 MR. CARSON: So that uncertainty might be an
20 incentive for you folks to sit down together and see
21 if you can work something out to your mutual
22 satisfaction. Maybe you can, maybe you can't. But if

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1 you can, then you avoid the uncertainty of where we're
2 going to end up and, as I said, if you -- if you think
3 you know where we're going to end up, then you're
4 ahead of us.

5 Let's put that out there for what it's worth.

6 MR. MARKS: I would say we really welcome
7 that. So -- I mean, this has been very, very
8 educational for me, and so...

9 MR. METALITZ: David, if I -- since I know
10 we're just about out of time --

11 MR. CARSON: Actually, we're going to take
12 whatever time we need because we want to make sure we
13 have a full record, so go ahead.

14 MR. METALITZ: Okay. I think today this has
15 been very useful in terms of flushing out a record
16 that really was quite deficient prior to today. I
17 would say that what I've heard today lessens the
18 concerns that we had about whether this use is, in
19 fact, non-infringing, the use that they're proposing
20 to make, since I think we have a little better
21 understanding of what that is. But it does leave me
22 with several questions, which I hope the -- that

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1 the panel will -- the copyright office panel will
2 think about. And, again, if you deem it appropriate,
3 we'd welcome the chance to make a further submission
4 on this.

5 One is I still think we have a very, very
6 weak record as to whether circumvention is necessary
7 to make the use that is required. In fact, Netflix
8 said something in a case five weeks ago that we didn't
9 hear about till we walked in here, and I know nothing
10 about that case. We'll go take a look at it, but I
11 don't think that establishes that there would be some
12 DMCA violation.

13 The second point is, as Dean said, I think
14 there's probably a lot that could be done here to
15 authorize circumvention, if you will, to license the
16 type of activity that's being requested, especially
17 the research and development part of it which is
18 predominant, I think, in the submission that the
19 proponents have made.

20 The third point is I think there is not --
21 the proponents have the burden of showing that
22 alternatives don't satisfy -- the alternatives are not

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1 viable for them to be making the non-infringing use.

2 And we've heard about synchronization in the
3 video description area. It could certainly apply in
4 the captioning area. There obviously are problems
5 with that, but there also could be a solution to some
6 extent. So I think that probably needs to be more
7 fully developed before you can conclude that the
8 burden has been satisfied.

9 And the final point is I think there's an
10 extremely fine line between the business model that
11 was presented today, which, as I understand it, is to
12 distribute software players that will achieve the
13 objective if they are married up with circumvention
14 software -- I think there's a very fine line between
15 that and trafficking in circumvention devices. So I
16 don't -- it's not totally clear to me that the
17 objective that the proponents are seeking to achieve
18 can be achieved with an (a) (1) exemption solely or
19 whether (a) (2) would also figure into this.

20 And I say that, again, having just heard for
21 the first time today exactly what they plan to do, or
22 more about what they plan to do. So that's an issue

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1 on which, if you think it's appropriate, we'd be
2 interested in making -- in thinking about it a little
3 more and making a further submission. But I think
4 that's another issue that you would need to --

5 MR. CARSON: I see the point. Yeah.

6 Chris.

7 MR. REED: Sort of to further that point, I
8 hear really five different uses of creation, playback
9 sort of fixing or repairing, customizing the
10 accessibility content, and then the research and
11 development that sort of underlies all of that. But
12 it strikes me that the non-infringing uses, perhaps
13 more specifically the fair use calculus that underlies
14 each of those, may well be different and, likewise,
15 the degree of circumvention needed to accomplish all
16 those may well be different.

17 MR. REID: I agree with you on the second
18 point, I mean, to the extent that we're talking about
19 several different activities. I disagree,
20 respectfully, on the first point. I think, as we laid
21 out in our brief, this is per se fair use. We're
22 talking about making works accessible for people that

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1 have already paid to access them.

2 And, moreover, we're talking about works that
3 Congress has specifically said, you need to make these
4 works accessible unless you can't afford to do so or
5 unless it's going to impede innovation to do so.

6 So if the excuse is, well, it takes time, we
7 need more -- you know, it's been too expensive for us,
8 it's going to take three years or however long it's
9 going to take -- that's core fair use that we're
10 talking about here, and I don't think that makes a
11 whole awful lot of difference.

12 MR. REED: And the authority for that was
13 Sony and the '76 House report; is that right?

14 MR. REID: Yeah, but I mean, I think the
15 authority beyond that is just the statutory factors
16 for fair use. When we look at the effect on the
17 market, I think we've -- and I've read a lot of
18 this -- that we've got a 15-year record at the FCC of
19 folks, with all due respect, like the Motion Picture
20 Association, saying, hey, please don't impose any
21 rules on us to do this. Relax the rules as much as
22 possible because this stuff is too expensive, it takes

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1 too long, it's going to hinder innovation and content,
2 if you make us do this, we're going to start putting
3 out less content, and so on and so forth.

4 And I think -- we've presented some examples
5 in our filing, but there's a detailed record at the
6 FCC and at Congress of this happening.

7 And, I mean, I don't think you need to look
8 too far beyond the recent accessibility legislation
9 itself. If we'd had our druthers about it, it would
10 have covered all online programming altogether, it
11 would have incorporated DVDs. But, instead, it got
12 this loophole, at the behest of folks in the industry,
13 to only cover stuff that's been on television with
14 captions. And so -- you know, I think that ought to
15 play into your calculus.

16 MR. REED: Beyond just building the players,
17 it sound like -- software or hardware players -- it
18 sounds like those players would be required to be
19 combining a lawfully acquired copy of copyrighted
20 content, DVD or a stream, with some database of the
21 additional -- we'll call it accessibility content.

22 MR. REID: Sure.

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1 MR. REED: Is that database not -- it strikes
2 me that that is a sort of a large database of
3 derivative works. But your position is that that's
4 fair use because of the authority you just cited; is
5 that right?

6 MR. REID: I think that's correct, but I have
7 to question whether it's a derivative work. I mean, I
8 think we're talking about -- in the specific instance
9 where we're talking about error correction of specific
10 caption content, I mean, I think we're talking about
11 very short phrases. I don't think we even get into
12 the derivative works.

13 MR. REED: Well, that makes sense to me, but
14 I'm thinking about a situation where -- I mean, one of
15 the other uses that I just articulated was creation.
16 And so if you have a DVD that, for whatever reason,
17 doesn't have any captions on it and somebody wants to
18 create that, now you've effectively got, I think, a
19 transcript, don't you?

20 MR. REID: Yeah, I mean, I think that's
21 correct, but I want to be careful on how I address
22 this because I know there's precedent, and

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1 Mr. Metalitz mentioned concerns earlier about
2 translations, and there's a translation right that we
3 understand the motion picture folks want to be able to
4 take a movie and sell it in France six months or a
5 year later in French or in other languages and so on.

6 And I think the main distinction that we want
7 to make sure we draw there is we're not talking about
8 translations to foreign languages. We're talking
9 about translations that Congress has explicitly
10 required in a number of contexts and has said, you
11 have got to make these translations unless you can
12 make a showing of some sort of financial burden to do
13 so.

14 So we think, to the extent that there's some
15 copyright interests that might have existed prior to
16 these accessibility bills coming into law, that right
17 has been abrogated and no longer exists.

18 MR. REED: You had mentioned a few times that
19 clips -- under the new FCC rules that clips are not
20 required; they're one of the categorical exemptions;
21 is that right?

22 MR. REID: That's correct.

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1 MR. REED: Are you alleging that there are or
2 will be circumstances where content that was in full
3 form, required to be captioned when it first aired on
4 television, that in clip form would not be captioned
5 when they're online?

6 MR. REID: That's exactly the case. And
7 you've actually just described what -- plus or minus,
8 what the FCC rule is. And in the interest of full
9 disclosure, I should say we've petitioned for
10 reconsideration for that part of the issue, which --
11 again, I'm sorry this proceeding doesn't happen a lot
12 more often, or we could come back and -- we could come
13 back and tell you we don't know when these petitions
14 are going to be resolved.

15 But as it currently stands, the FCC's rule is
16 that only full-length programming is required to be
17 captioned, and anything less than full-length
18 programming -- any sort of excerpts of programming,
19 which we're particularly concerned about in the news
20 context. Most of the new sites that we see -- I think
21 a majority of the sort of mainstream news sites that
22 we see in our research, and particularly including

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1 places like CNN, CNBC and so on, are presenting their
2 news online in clip format only with no captions, and
3 we're pretty deeply concerned about that.

4 And there have been -- there's a lawsuit
5 going on in California right now, under California
6 disability law, and CNN has said, we are -- CNN is
7 fighting this tooth and nail and saying, we are not
8 going to caption our clips unless the FCC makes us.

9 MR. REED: And these are things that would
10 have been captioned on their original broadcast. So
11 the captions exist somewhere; they're just not --

12 MR. REID: Yes, that's correct.

13 MR. REED: I was actually going to ask why
14 that would be, if you have any sense of if that's true
15 or not.

16 MS. KINNEY: Yes. So the problem is, in
17 certain circumstances when you have live captioning,
18 particularly if you have, like, a local news broadcast
19 and you have a reporter that's off-site somewhere,
20 those captions, in order to make it accessible
21 immediately, because there may be a breaking story,
22 they're added sort of by the content provider at the

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1 studio at the time.

2 So unlike prerecorded programming where you
3 have a captioning file, those captions -- that are
4 added in post-production, those captions, again, are
5 just sort of done at the time and added onto the
6 different -- to the local news broadcasts.

7 So when you then break up the broadcast and
8 put it on the web, you only have a full-length
9 captioning program. You don't have it -- you can't
10 segment it into subcategories which is usually how
11 this news broadcast is put on the web. So, right now,
12 that's the problem.

13 So news programming like The Today Show
14 that's put in its entirety onto the web, that would
15 have captions. Or 60 Minutes, any of these news
16 story -- or news-type programs that are posted in
17 their entirety. But if you wanted to search on the
18 web for individual -- like a one-minute segment by
19 some reporter who's off-site, that captioning isn't --
20 you can't then marry some captioning file with that
21 one-minute news segments because it's part of a much
22 longer captioning file. So that's why it's not posted

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1 on the web in the same way, if that makes sense. It's
2 a different type of captioning.

3 MR. REID: Just to be clear, we don't agree
4 with most of the details that we just went through,
5 but that's a fight we're having in another context.

6 MR. REED: And then, with respect -- you had
7 also mentioned rental DVDs often don't contain
8 captioned information that is contained on the retail
9 version of the DVD. How widespread is that?

10 MR. REID: I don't have a great answer to
11 that, but there have been several sort of notable
12 examples. I think we mentioned that Disney's Up -- I
13 think there are a couple of others; Andrew may know
14 better -- but where the subtitles -- and they're, by
15 the way, not captions, but subtitles or subtitles for
16 the deaf and hard of hearing. A studio will call them
17 a bonus feature, or something like that, which we
18 think is kind of insulting, but you actually have to
19 go buy the retail version. Or, back when Netflix was
20 still distributing DVDs, there would be a special
21 rental version that Netflix would distribute, and it
22 would show up without the subtitles because they're a

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1 bonus feature.

2 I can't speak to precisely how widespread
3 that is, but we know that that's a problem, and we've
4 gotten a lot of complaints from our constituents about
5 it.

6 MR. PHILLIPS (via interpreter): If I could
7 just add, related to video clips not being able to
8 keep or retain the captions when they're shown online,
9 I think a few months ago at the National Association
10 of the Deaf we had met with one leading software
11 company, Computer Prompting and Captioning Company,
12 which is located in Rockville, Maryland, and they gave
13 us a demo of where they were able to take something, a
14 movie that was shown online that did have captions,
15 and they were able to extract the captions and put
16 them somewhere else online where you were able to
17 retain the captioning.

18 So the idea that you have a full-length
19 program and you can't actually retain the captions
20 within a video clip when it's extracted, that's
21 actually not what we believe, because there is the
22 software that's out there that makes it possible.

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1 MR. REID: We understand there's some
2 software where what Ms. Kinney described is true and
3 other software where it's not possible, and the
4 software just isn't pervasive that permits the clips
5 to be sort of chopped up.

6 MS. KINNEY: Just to clarify, so that example
7 is indeed accurate. Prerecorded programming can be
8 chopped up in that way. In fact, that's how we edit
9 something like Sex in the City. We edit out parts of
10 it, and that will be then appearing on the web with
11 captions. It's usually the live captioning that's the
12 issue. And those are issues that I think, over
13 time -- major studios at least are looking into this
14 and trying to figure out how to do it and will work --
15 are working through those issues. But right now the
16 technology that's used in the newsroom is not --
17 you're not able to break it up into -- slice it up
18 into segments.

19 MR. REID: To be specific, the FCC's rules
20 are not specific about live versus non-live
21 programming. It's video clips in general. And, with
22 respect, if this an issue that's going to take more

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1 than three years for the studios to sort through and
2 resolve, we'd submit to you guys that an exemption is
3 appropriate.

4 MR. RICHERT: If I may, you mentioned
5 derivative works, and I just want to weigh in on the
6 description side of that. So if the scenario you
7 described where there's a separate, if you will, audio
8 track that's synchronized with the original work,
9 clearly that separate description track is not, in our
10 view, a derivative work. It's -- it's an add-on
11 feature that someone else is providing to facilitate
12 description. It's not a copy of -- or -- you know, in
13 that sense, a true derivative work.

14 Now, if we have a situation where -- and I
15 think the school example is one we cannot forget. If
16 we're expecting schools and educational institutions
17 generally to have the appropriate equipment, certainly
18 in the short term, they're not going to have it to be
19 able to do that kind of synchronized, sophisticated
20 rendering of stuff with description.

21 So what we're likely talking about, at least
22 in the short term, with respect to making video

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1 programming, video content more accessible through
2 description is to have a video program that has, in
3 fact, been modified and, to one degree or another, has
4 been distributed to folks with disabilities who need
5 that content.

6 MR. REID: Just to tag onto this really
7 briefly -- I know we're running low on time -- but
8 this argument about derivative works and video
9 description and copyright and captions has been made
10 over and over again at the FCC. It comes up during
11 every single rulemaking where the distributors and the
12 content folks say only the content folks can do these
13 accessibility features.

14 And the problem that we're having is they're
15 saying, on one hand, okay, it's our content, we own
16 the copyright in it, so we should maintain control
17 over it, and that means we should do the captioning.
18 Okay, we can understand that argument. But then to
19 have it coupled with the argument that, oh, by the
20 way, we can't afford to do captions and please don't
21 make us do captions and providing captions violates
22 our First Amendment rights, or providing video

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1 description violates our First Amendment rights --
2 that was actually the basis of a lawsuit under which
3 the video description rules were thrown out in the
4 D.C. Circuit -- you can't have it both ways. It's --
5 either it's your responsibility or you have to let
6 other people get in on it. And I think that's the
7 reason we're here today.

8 MR. METALITZ: Let me just make it clear,
9 we're not trying to have it both ways. And I don't
10 think there's any question that we are talking about
11 the creation of derivative works here. The issue is
12 whether it's infringing, and that's where the fair use
13 argument comes in. But it's just as clear that this
14 is a derivative work -- you know, I think it certainly
15 fits well within that.

16 I mean, I think the whole issue of
17 alternatives, which Mark was addressing -- and we've
18 heard today just in this hearing, at least on two
19 occasions, about software that apparently can extract
20 caption files without circumvention.

21 MR. REID: And I'm --

22 MR. METALITZ: I mean, there may be

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1 differences there, but I just think all of these need
2 to be explored.

3 MR. REID: I mean, we're talking about
4 software that does this on video that doesn't have DRM
5 or -- I think there was the moment yesterday where
6 someone says, yes, there's great software out there,
7 and it's called HandBrake. I think it's the same sort
8 of deal. We can design really great software -- the
9 software that Christian has cooked up is really great,
10 but it doesn't work with DVDs unless we can load in a
11 library that circumvents the CSS.

12 MR. MARKS: Just one quick question on behalf
13 of DVD CCA, which I'm not officially representing.
14 What I wanted to do is, you know, just ask whether --
15 without requiring you folks to ask us a question --
16 may we submit a statement about what I presumed is
17 going to be DVD CCA's position on the free license for
18 researching and the willingness to work with the
19 player manufacturers? It would be obviously a very
20 short statement, but I would like to be able to do
21 that if that's possible.

22 MR. CARSON: If the statements -- the reason

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1 I'm being cautious here is we -- the record is what it
2 is and --

3 MR. MARKS: Right.

4 MR. CARSON: -- it's not going to be anything
5 further unless it's in response to a direct question
6 from us. So that's the reason I'm being a little
7 cautious here.

8 MR. MARKS: Okay.

9 MR. CARSON: But if what you're saying is a
10 letter from DVD CCA saying, what he said we say, you
11 know --

12 MR. MARKS: That's basically it.

13 MR. CARSON: -- you don't have to quite put
14 it that way, but I think that's not a problem and we'd
15 welcome that.

16 MR. MARKS: Okay. Thank you very much.

17 MR. CARSON: Now, where that takes us, I
18 don't know.

19 MR. MARKS: Okay. I understand.

20 MR. CARSON: So, in conclusion, I guess, I'll
21 reiterate -- I'm sorry, Professor Vogler.

22 DR. VOGLER (via interpreter): Just briefly

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1 for the record, I would say -- I would be more than
2 happy to work with you to make -- and also the player
3 manufacturers so that we can coordinate those efforts.
4 There's been a past history, however, of showing an
5 inability to work well with the player manufacturers
6 because the HDMI requirements don't necessarily work.
7 And part of the FCC ruling is to make sure that the
8 DVD and the players actually are able to show closed
9 caption on HDMI. And CEA has never filed a
10 consideration on that, even though it's very easy to
11 do. It's not happening.

12 MR. REID: And, again, there's the issue that
13 you brought up earlier which is, does this license or
14 permission, our blessing -- as much as we appreciate
15 it from Mr. Marks -- actually get us out of liability
16 under 1201? And I think the concerns that you
17 mentioned suggest that it's not.

18 And, again, it's a little bit late in the
19 game for us to be having this sort of detailed
20 argument that wasn't really presented in these terms
21 earlier.

22 MR. CARSON: Well, I think, to be fair, what

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1 I'm hearing from this side is that it wasn't entirely
2 clear to them precisely what you're asking for. Now
3 that they have a better sense of it, there may be
4 something they can do.

5 But all I'll say on that point is we're going
6 to continue, obviously, to work on this, and we're
7 going to, as soon as we can, certainly by the end of
8 the summer, give a recommendation to the librarian on
9 what to do.

10 To the extent that you can make it easier for
11 us and maximize the chances of getting a desirable
12 result by sitting down and working out a way in which,
13 in whole or in part, what you're seeking is something
14 that you can live with and you've work out a deal
15 where that is licensed, that's to everyone's benefit.

16 And I'm not suggesting it has to be a deal
17 that covers everything. If it covers part of it, that
18 makes our job easier and it gets you a guarantee that
19 you can do what you can do under whatever you work
20 out, if you can work it out, and everyone is a winner.
21 And, you know, maybe we're left to mop up the stuff
22 that didn't get included in that.

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1 It's ambitious, I think, obviously, in terms
2 of timing. Maybe it can happen, maybe it can't, but I
3 encourage you at least to have those discussions
4 because, as I said, at this point, it's a crap shoot
5 for both sides.

6 MR. REID: Can I ask -- or maybe I'll just
7 let you know, the docket at the FCC where a lot of
8 these issues are still in the process of being
9 resolved is at the media bureau. It's number 11-154.

10 MR. CARSON: I assume that's in our record,
11 isn't it?

12 MR. REID: It should be in the record.
13 Please let us know if there's any more information we
14 can provide about the latest and, if you'd like, we
15 can let you know when decisions come out that are
16 related to what we've talked about today.

17 MR. CARSON: I think it's fair to say if
18 there are any decisions by the FCC that are pertinent
19 to this, yeah, please just send them on to us.

20 MR. REID: Okay.

21 MR. CARSON: Preferably without editorial
22 comment unless you think perhaps to understand it you

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1 need go give a brief summary of what the decision is.

2 MR. REID: Dastardly decision.

3 MR. CARSON: Anything else from anyone?

4 All right. It is five minutes to 1:00, and
5 I'm going to -- I think we will reconvene at five
6 minutes to 2:00 promptly. I think there's enough give
7 in the schedule that we can still finish by the end of
8 the day, and this gives everyone an opportunity to
9 have lunch.

10 (Whereupon, a luncheon recess was taken at
11 12:55 p.m.)

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1 AFTERNOON SESSION

2 (2:01 p.m.)

3 MR. CARSON: Let's get started, folks. We're
4 already starting late, and that's not your fault;
5 that's just because the last panel ran long. But
6 hopefully we can catch up to the schedule, hopefully
7 by the end of this panel. We'll see how -- kind of
8 how lively you are.

9 So this is a panel to discuss proposed
10 exemptions 4 and 5. We actually have proponents only
11 for class -- well, initially, we only had proponents
12 only for class 4, but since we have an opponent for
13 class 5 who wanted to speak here, a proponent for
14 class 5 has elected to come out here to respond.

15 So here's going to be the order. Aaron
16 Williamson, proponent of class 4, followed by Jay
17 Sulzberger and Brett Wynkoop, also proponents for
18 class 4, followed by -- do you have a preference who
19 goes first? Jesse Feder, an opponent of class 4 and 5
20 and, finally -- well, not finally -- Steve Metalitz,
21 an opponent of class 4, and finally Marcia Hoffman,
22 who spoke in California but is being given an

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1 opportunity here to address anything said by the
2 opponents at this meeting.

3 So with that, let's start with Aaron.

4 MR. WILLIAMSON: Thanks, David. As you said,
5 my name is Aaron Williamson. I am attorney with the
6 Software Freedom Law Center. I represent copyright
7 owners. My clients produce free and open source
8 software for distribution to the general public under
9 generous copyright terms.

10 I'm here to propose the exemption for
11 computer programs that enable the installation and
12 execution of lawfully obtained software on a personal
13 computing device where circumvention is performed by
14 or at the request of device owner. Essentially, I'm
15 here to propose an exemption that would allow my
16 clients to produce software for available hardware.

17 This exemption is an expansion of the mobile
18 phone jailbreaking exemption granted after the 2009
19 rulemaking. That exemption was granted on July 26th,
20 2010 and, since, the market for applications has
21 expanded uninterrupted.

22 Apple, the primary opponent of that

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1 exemption, has now seen more than 25 billion
2 applications sold in its App Store. The Android
3 market has sold well over 10 billion. And as
4 intended, the exemption has bolstered the market for
5 applications that aren't approved by Apple for
6 inclusion in the App Store. As my colleagues at the
7 Electronic Frontier Foundation have pointed out,
8 Cydia, the third-party store, available only to owners
9 of jailbroken devices, has been accessed through
10 50 million different iOS devices.

11 When the 2000 (sic) rulemaking began,
12 smartphones were relatively new. The iPhone had only
13 been released the previous year, and the first Android
14 phone was two months old. Now, a mere three years
15 later, the majority of Americans own smartphones.
16 This incredible growth has spurred the introduction of
17 other types of mobile computing devices that have
18 themselves become ubiquitous in the last three years.

19 The iPad, for example, was introduced on
20 April 3rd, 2010, four months before the librarian of
21 Congress granted the jailbreaking exemption for
22 smartphones. Today, over 67 million iPads have been

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1 sold.

2 The Amazon Kindle, in its infancy during the
3 2009 rulemaking, has been through six different models
4 and, by the end of last year, was selling a million
5 units per week.

6 These new devices, along with video game
7 consoles, personal music players, set-top boxes, smart
8 watches and a host of other new personal computing
9 platforms, have in a very short time supplanted the
10 personal computer for a number of common uses.

11 Perhaps the best example of this can be seen
12 right here in this room. At the technology
13 demonstration hearing, I counted at least three people
14 taking notes on their iPads rather than on a laptop.
15 But people are using personal computing devices, like
16 tablets and smartphones, in place of personal
17 computers for most common computing tasks. They read
18 e-mails on smartphones and e-book readers, they browse
19 the web and produce art on iPads, and they track the
20 progress of their exercise routine on smart watches
21 that talk to their smartphones which sync to their
22 tablets. The personal computer has had a good run,

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1 but the personal computing device is ascendant.

2 But just as Apple and the iPhone produced the
3 momentum behind this wave of new devices, they also
4 set a trend that endangers innovation. The lock-down
5 that Apple imposed on the iPhone, which prevented
6 users from installing any software that hadn't been
7 preapproved by Apple and ensured that Apple would face
8 no competition to its star applications, is now an
9 industry standard. Android phones are largely
10 considered more open devices than iPhones, but nearly
11 every Android phone available prevents users from
12 replacing the operating system or from accessing
13 select functionality. All mass market e-readers are
14 locked down almost identically to the iPhone,
15 prohibiting the installation of non-approved
16 applications and after-market operating systems. The
17 same is true for video game consoles.

18 These locks have become so ubiquitous on
19 mobile computing devices that, in the last three
20 years, they have found their way back to traditional
21 personal computers, a class of devices previously
22 quite open to third-party innovation. Microsoft is

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1 leading the way in this, recognizing that the smaller,
2 lighter computers of the future will run on the ARM
3 architecture, the favorite platform for mobile
4 devices, rather than on Intel chips. Microsoft
5 recently mandated that any ARM-based Windows device
6 must irreversibly prevent users from installing
7 unapproved operating systems. This policy applies not
8 only to Windows phones and tablets, but also to the
9 new class of ultralight notebooks already being
10 produced by such vendors as Qualcomm and ASUS.

11 Microsoft is also taking a page from Apple's
12 App Store book and will only allow the next generation
13 of Windows application, called Metro applications, to
14 be sold through the Windows store.

15 These locks are often billed by operating
16 system vendors as security features, but their primary
17 purpose and effect is to impede competition. Personal
18 computers were fertile ground for innovation in the
19 application and operating system markets because they
20 are free to innovate on top of the hardware available
21 to them. They didn't need to make deals with hardware
22 vendors in order to produce a competing software

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1 product.

2 The locks imposed on new devices close this
3 route to innovation, which is the route taken by most
4 of the software success stories of our time.

5 Microsoft, Apple and Google made their first millions
6 building software for available hardware, unimpeded by
7 any effort by the hardware or operating system vendor
8 to stop them.

9 As we heard at the tech demo hearing,
10 Mozilla cannot count on having the same -- yeah,
11 cannot have the same opportunity to enter the mobile
12 operating system and mobile browser markets. They
13 were able to build their Boot2Gecko operating system
14 because this proceeding made it legal for them to gain
15 administrative access to modern smartphones that were
16 already available to test it on. They were able to
17 produce a stable version of the Firefox browser for
18 Android for the same reason.

19 But while every other mobile operating system
20 vendor, including Apple and Microsoft, has adapted
21 their operating systems to tablets after tackling
22 smartphones, Mozilla will have trouble doing the same

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1 because while tablet computers are essentially
2 identical to smartphones, except in their size and
3 marketing, it is not legal to circumvent the same
4 locks on tablets that it is on smartphones. The same
5 goes for e-book readers, personal music players and
6 the whole generation of devices we have yet to see.

7 In this way, locks served to protect
8 incumbents, who have relationships with hardware
9 manufacturers that are unavailable to upstarts, from
10 competition from new entrants like Mozilla.

11 I expect that the first thing you notice
12 about this exemption is that it appears to be quite
13 broad, but I believe that it's only as broad as
14 necessary to enable innovation on the new generation
15 of computers. The devices that are replacing personal
16 computers are not susceptible to simple
17 categorization, something that was made apparent at
18 the hearing for the tablet computer exemption proposed
19 by the Electronic Frontier Foundation.

20 The line between a tablet and an e-book
21 reader, for example, is arbitrary. Both are hand-held
22 computers, usually large than a phone and smaller than

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1 a laptop with a prominent display, but what makes the
2 iPad a tablet and the Kindle Fire an e-book reader is
3 entirely a matter of the software installed on each by
4 the manufacturer.

5 The same is true for the line between a
6 smartphone and a tablet. The primary distinction is
7 size. Many tablets even contain cellular antennas
8 identical to those in phones. Tablets are usually
9 bigger, but new devices, like the Samsung Note, have
10 largely erased that distinction. The applications
11 available for each are essentially identical.

12 I could go on, but the point is that these
13 devices are all personal computers with different
14 inputs, outputs and default configurations. They are
15 used for a set of tasks that overlaps broadly from one
16 device to another, and the justifications for and
17 interest in jailbreaking each of them are the same as
18 they are for smartphones.

19 Addressing each new type of device piecemeal
20 via this process not only doesn't make any sense,
21 given the lack of distinction between the devices, it
22 would critically burden innovation, leaving follow-on

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1 innovators like Mozilla a minimum of three years
2 behind incumbents in producing software for new
3 devices.

4 To understand this, we can look at the iPad.
5 It was released during the last notice and comment
6 process and before the ruling was made. And by the
7 time of the ruling, over 3 million of them had been
8 sold, with all of the same restrictions as the iPhone.
9 The devices were nearly identical, and all of the same
10 reasons to grant an exemption applied on the day it
11 was released, but nonetheless hopeful developers had
12 to wait three years to even ask for the right to
13 innovate on top of the iPad platform. This is not how
14 innovation happens.

15 Finally, the exemption's inherent limitations
16 foreclose unintended consequences. It allows
17 circumvention only for the installation of licensed
18 software -- not even for the modification of
19 restricted software -- and only on hardware owned by
20 the user.

21 I urge you to grant the proposed exemption,
22 which is well within your authority in this rulemaking

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1 and is essential to innovation in the modern computing
2 age. Thank you.

3 MR. CARSON: Thank you very much.

4 Mr. Sulzberger and Mr. Wynkoop.

5 MR. WYNKOOP: Hi, there. Brett Wynkoop from
6 New Yorkers for Fair Use. I would like to start out
7 by saying that I am what might be considered a
8 copyright Nazi. I believe in strong traditional
9 copyright. But the DMCA has much less to do with
10 copyright than it does control. My term of art for
11 this law is the Digital Millennium Control Act because
12 it gives control of your personal computing devices to
13 the person that you bought the device from.

14 As Aaron so aptly pointed out in his opening
15 statement, most of the smaller computing devices,
16 physically smaller computing devices these days
17 prevent the owner from installing the software they
18 wish to install for their own purposes. The only
19 reason to lock these devices up that way is, as Aaron
20 said, to allow the incumbents to have control over
21 your computing environment rather than for you to have
22 control over your computing environment.

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1 I have several of these small devices myself,
2 and it's absolutely vexing that it's a crime to use
3 them as I wish to use them. It is my tool. I have
4 purchased it. I have taken it home from the store.
5 So it should be up to me to employ my tool the way I
6 wish to employ it.

7 It's not -- it's not really correct to say,
8 oh, well, you can only use your computing device the
9 way the vendor you bought it from said. In that case,
10 you don't own the computing device; you have leased
11 the computing device; you have purchased essentially a
12 limited right to make only certain use of it.

13 From the standpoint of innovation, the -- it
14 indefinitely locks out small companies. I work for a
15 company in New York City called Hera (phonetic)
16 Partners. Our primary business is designing
17 e-commerce websites, but a secondary business we have,
18 because our customers have asked us to do this, is to
19 design tablet applications for both the iPad and
20 Android tablets.

21 The unfortunate thing is if the incumbents in
22 those markets -- namely Apple and Google -- decide,

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1 oh, we don't want that application in our official
2 store, then you're locked out of the market because
3 not everybody in the country is going to go through
4 the process of breaking the encryption on their device
5 to allow the device to accept the software they want
6 it to accept.

7 The personal computer revolution came about
8 in the '80s. Because mainframes were, by design, very
9 restrictive and it was very time-consuming to get
10 anything changed on an application running on a
11 mainframe at your company, so as the personal computer
12 got more powerful, there were upstarts that began
13 innovating, and that's where we got, for instance,
14 spreadsheets, that's where we got word processors,
15 that's where we got a whole slew of applications that
16 we all take for granted today, and it was because
17 small personal computing devices that are much less
18 powerful than this computer that I've got in my pocket
19 were open and people could put on the software they
20 wanted and experiment the way they wanted to innovate.

21 To a first approximation, I don't believe
22 that the Digital Millennium Control Act even belongs

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1 on the books in the United States of America, but the
2 reality is we have this odious piece of legislation
3 that our lawmakers so ill-advisedly passed, and we
4 have to come now to Washington every three years to
5 beg -- literally beg to be allowed to use our
6 computing devices. It's wrong.

7 I also don't believe that we should have
8 different classes of exemption for computing devices
9 of different physical sizes. As Aaron said, it's a
10 computer, whether it's physically this big or whether
11 it's this big or whether it's as big as the room.
12 It's a computer.

13 The computer I'm holding in my hand today is
14 many, many orders of magnitude more powerful than the
15 computer that I used on my first job as a UNIX system
16 administrator supporting that was several hundred
17 users in database searches. So just the fact that the
18 exemptions have to be laid out by what the physical
19 size of the computer is is ludicrous. And I would
20 urge you to allow the citizens of the United States
21 America to have private ownership of their computers
22 and to have the ability to employ their computers the

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1 way they wish to employ them.

2 Now, this is not to say that every citizen of
3 the United States is going to legally employ their
4 computer, but every citizen of the United States does
5 not legally employ their automobile. Every citizen of
6 the United States does not legally employ their
7 handgun. Every citizen of the United States does not
8 legally employ any particular tool that man has come
9 up with in the last many thousands of years. So to
10 outlaw a class of tools because some people may not
11 employ them legally is just totally wrong.

12 Instead, the focus should be on, oh, somebody
13 has done an illegal act, let's shut that person down,
14 let's put that person before the judicial system
15 appropriately. But don't criminalize the citizens of
16 the United States because they want to use their tools
17 to build and produce.

18 I make my living off of copyrighted works.
19 As a matter of fact, I produced three copyrighted
20 works last week that I got paid for. I'm a firm
21 believer in copyright law. But I'm not a believer in
22 prior restraint of how you can use your tools.

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1 Jay.

2 MR. SULZBERGER: Thanks. Okay. I'm -- of
3 course. Yeah.

4 I guess what I want to say is going to be
5 very much along the lines of what Aaron and Brett
6 said. And I want to emphasize two things. There's a
7 broad general misunderstanding of what's at issue here
8 in the newspapers, and certainly I think it is mainly
9 a misunderstanding on the part of the people against
10 such exemptions. It isn't about copyright -- as both
11 Brett and Aaron said, it's not about copyright. It's
12 about the issue of the right of ownership of a
13 computer.

14 Now, Bunnie Huang wrote two comments. Bunnie
15 Huang is a hot shot. He maybe the most distinguished
16 hardware cracker. He's also a designer of hardware,
17 which is cryptographically protected against people
18 who don't have the right of access to devices. He
19 submitted one comment in his own person. He's
20 admitted a second one and he asked people to sign it.
21 25,000 people signed his comment which was in favor of
22 these exemptions. He certainly mentioned exemption 4,

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1 I think -- 4 and 5 -- I've forgotten even which. I
2 also agree very much that, as both of our side just
3 said before me, both people -- yeah, look, this is a
4 big heavy computer with a big screen, because my eyes
5 are going and because I like to have a lot of storage
6 and to have it be actually able to compute sometimes.
7 But it's the same thing -- modulo (phonetic), the
8 gross human interface and how much it weighs -- as
9 that thing. And -- maybe that thing is a little
10 weaker in some directions, but, you know, by two years
11 from now it won't be.

12 Let me just -- what I want to draw attention
13 to is -- now, this is speculative, but -- and it might
14 be felt to be out of place. There's an implicit --
15 the arguments of the other side, there's all sorts of
16 implicit theories about how they won't be able to make
17 any money anymore if these exemptions are granted.

18 Let me say, by the way, that I think granting
19 the exemptions may result in a certain number of
20 people using their computers and their connection to
21 the net to commit massive copyright violations, just
22 as I think people still occasionally rob banks, and

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1 they often use a car to get away. So -- let's see.

2 What can I say about that?

3 The issue just isn't one of copyright, and
4 let me tell you why it can't -- oh, I'm should have
5 quoted Bunnie Huang. Bunnie Huang said, if these
6 exemptions aren't granted, the present bright line of
7 ownership -- that's what he called it -- bright line
8 of ownership -- you walk into the store ten years ago,
9 if I bought a computer, I walked out of the store, it
10 was mine. Now, most people don't fool with their
11 computers. They don't get control of it. That's
12 partly the reason these exemptions aren't granted and
13 why the DMCA was passed.

14 If you run Windows, under copyright law,
15 you're not allowed to -- you're allowed to look at it
16 and disassemble the operating system or modify it;
17 you're not allowed to publicize -- I think that's a
18 mistake -- the results of your work. But be that as
19 it may, in practice, people don't actually, most of
20 them, hack on the lower levels of their Windows
21 operating systems. But some of us do. I don't do it
22 in Windows, but I do it in other systems. Sometimes I

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1 touch the metal. Okay? I don't do it often. It's
2 not my job. But I've modified the kernel and run a
3 modified kernel.

4 The right of ownership is not clear in
5 people's minds because, in practice, they don't
6 exercise their rights in that direction, just as most
7 people don't take apart their car engine and rebore
8 the cylinders. But they own a car. I think it's
9 still true that we have the right in America, because
10 it's a right of property and a very important one, we
11 get to rebore the cylinders.

12 Now, that doesn't mean that we get to drive
13 over the speed limit or get to run over people or get
14 to make too much noise. I'm all in favor of those
15 things. I'm all in favor of, actually, much stricter
16 enforcement of many of those laws, and greater limits.

17 But something in my house that I bought that
18 once upon a time the analogous thing, the ancestor of
19 it was a general purpose computer which I control, the
20 idea that to prevent speculative -- in my case, I
21 would never, ever commit a copyright violation. I've
22 never downloaded a popular song, neither one that I

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1 paid for -- hopefully some of the money gets to the
2 artist, although that's doubtful in practice as we
3 know -- nor one that people have made available; the
4 people making available have probably committed a
5 copyright violation. And I've never done it. Why?
6 I'm not interested in those popular songs.

7 But I have downloaded large copyrighted
8 works, and I download them often. Now, this is
9 another thing. If you don't grant the exemption, a
10 lot of people's rights, which are right next to
11 copyright, will be severely impaired.

12 Last time in the demonstration -- I'm not
13 going to do it; it would take me a moment to pull it
14 out -- I have a little so-called USB memory stick, and
15 last time I stuck it in a different computer and it
16 booted the operating system. You couldn't see it. If
17 this exemption isn't granted, Microsoft has formally
18 declared they will do their best to stop that from
19 happening on any computer with an ARM chip that they
20 have a deal -- and they're going to get a deal with
21 almost all of the manufacturers. That will never
22 happen. In other words, I have a copyrighted work,

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1 which is worth something. I may not have paid for it,
2 because the guy freely licensed it. Other ones
3 similar to it, you pay.

4 This thing -- does it contain an OS? This
5 little thing contains a copyrighted very good
6 operating system, a variant of which, by the way,
7 unless you've modified the internals of -- you're
8 running a variant of this operating system which is
9 free. The upper layers are under restrictive
10 copyright license, and Apple claims it will be very
11 annoyed and make a lot of noise. Apple, by the way,
12 is strongly -- and correct me if I'm wrong. Apple
13 strongly is against all these exemptions. I think I
14 spoke to an Apple representative earlier.

15 But Apple has been very kind. People
16 violate -- they violate on a massive scale today the
17 anti-circumvention, the prohibition on circumvention
18 of -- I've forgotten the full technical name, but the
19 DRM stuff. Apple makes no attempt to actually lock
20 down their devices, no serious attempt; it's usually
21 within 24 hours. I've heard there's even a website
22 you can go to -- the most recent iPads and iPhones.

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1 And you go to the website using your iPad and you
2 press a big red button and, after a couple of minutes,
3 if your connection to the net is good, it says,
4 Congratulations, Root, and you've got Root on the
5 device. That's to say you own it.

6 And when we say that we don't own the iPad
7 until you get Root, let's be very clear on this.
8 Kindle -- and as if it's our propaganda team -- maybe
9 they did -- Kindle some years ago got confused about
10 the copyright status of the book 1984 by George
11 Orwell. And so people who bought it from the Kindle
12 store for probably a dollar -- it may even have been
13 one of the freebies -- they went into people's
14 Kindles -- this is very hard to believe because, of
15 course, there are laws in the United States against
16 somebody invading your computer and destroying some of
17 your files. You could go to jail if you're convicted
18 for that.

19 They went in to the Kindle of I don't know
20 how many thousand people, and they destroyed that
21 file. Later on they said that they got confused about
22 the copyright status. But what it shows is what

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1 Amazon thinks, and Amazon thinks, correctly, that they
2 own every Kindle until it's been jailbroken.
3 Jailbroken, practically, they don't anymore.

4 As for Android, Google owns every one that
5 walks out of the store, but Google says in the
6 Chromebooks they wouldn't cooperate with any vendor
7 unless they make it possible, by flicking -- actually,
8 you have to flick two switches in a row, and I've
9 actually a Samsung Chromebook; there are two switches.
10 Once you flick them, you own it.

11 Now, certain services will not be available
12 to you, right, once you've put on your own operating
13 system. We have zero problem with that. That, of
14 course -- they're offering a service that happens to
15 be over the net. They don't like the looks of the
16 machine in the other end. I think that's pretty much
17 within their -- I think it's wholly within their
18 rights to say, nope, you don't get it, sorry, you
19 don't get it.

20 And the issue is not one of some small
21 hampering or convenience. The issue is something that
22 lies at the foundations of -- at least what the

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1 history books used to say, and I think some of our
2 propaganda still says -- it's that every American, if
3 they've got the money, can buy something and use it as
4 long as they don't injure other people or violate
5 certain rules, like the FCC has rules in this thing.
6 Right? I don't recommend changing the hardware so
7 that I can, say, suppress all your telephones in the
8 room. I'm utterly against that because that's an
9 interference with other people's stuff. But --

10 MR. CARSON: Your time is up. I'll give --

11 MR. SULZBERGER: I'm very worry.

12 MR. CARSON: -- you two minutes to wrap up.

13 MR. SULZBERGER: The issue isn't a small
14 issue. It's not an issue of convenience. And the
15 people have spoken, by the way. People want control
16 over their devices. Thanks.

17 MR. CARSON: Thank you.

18 Jesse.

19 MR. FEDER: Thank you, David. I'm Jesse
20 Feder, director of international trade and
21 intellectual property for the Business Software
22 Alliance, and I'm here to speak in opposition to

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1 classes 5 and 4.

2 I'm going to start off with a couple of
3 statistics, and then I will spare you statistics for
4 the remainder of my statement. There are over a
5 hundred million smartphone users in the U.S. today and
6 there are tens of millions of tablet users. Well over
7 a million apps are available from thousands of
8 individual software developers for the four top mobile
9 software platforms, Android, iOS, RIM and Windows
10 phone. And literally tens of billions of apps have
11 been downloaded.

12 Fierce competition exists among the major
13 software platforms and the multitude of apps that run
14 on them. The range of choices available to consumers
15 is truly mind-boggling. It's against this background
16 of a dynamic, competitive marketplace that the office
17 must decide whether to grant an exemption under
18 section 1201, an exemption that's being sought in the
19 name of consumer choice and competition.

20 Our view is that granting an exemption would
21 be justified by neither the statute nor public policy.
22 In point of fact, the TPMs at issue play a key role in

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1 motivating investment into these platforms and the
2 apps that run on them.

3 I'll begin by discussing class 5, since many
4 of the arguments against that class also apply to the
5 much broader proposal for class 4. I'll then discuss
6 the additional reasons why we oppose the proposed
7 class 4 exemption.

8 The proponents of class 5 have not met their
9 burden of demonstrating a substantial adverse impact
10 on their ability to make non-infringing uses of a
11 particular class of copyrighted works. The class 5
12 proponents allege that there is a substantial class of
13 consumers who are harmed by their inability to install
14 lawful, unapproved apps on the mobile device of their
15 choice.

16 To be certain, there are some users who
17 install or wish to install only legitimate apps that
18 are not available through the curated distribution
19 model employed by some platforms. But there is no
20 evidence that this is a significant group. For
21 example, EFF has proffered statistics about the number
22 of phones that have been jailbroken and the number of

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1 installations of Cydia. But these statistics in and
2 of themselves do not establish that a large number of
3 users are jailbreaking their devices solely to install
4 legitimate apps.

5 Jailbreaking is a precondition for installing
6 pirated software, and Cydia distributes pirated apps
7 as well as legitimate ones. So many of the users
8 counted in these statistics are engaged in piracy.

9 Even if the proponents could demonstrate a
10 substantial adverse impact, they have failed to show
11 that the harm they allege is not outweighed by the
12 positive effects of the use of TPMs on the
13 availability of copyrighted works.

14 Access controls are central to a distribution
15 system that benefits consumers, independent app
16 developers and third-party content creators as well as
17 developers of mobile operating systems. They're at
18 the heart of a curated model of software distribution
19 that gives consumers a level of assurance regarding
20 quality and security and gives app developers and
21 content creators a level of assurance regarding
22 anti-piracy.

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1 The end result is a staggering number of apps
2 that have been developed by thousands of independent
3 developers and distributed to the public. Consumers
4 have a vast array of choices, including hundreds of
5 thousands of apps that are available for free. They
6 also have the option of foregoing the curated model by
7 choosing a platform, like Android or Linux, that is
8 much more open.

9 TPMs on mobile devices have led to widespread
10 availability of works. In short, they are precisely
11 the kind of use-facilitating technological protection
12 measures that Congress sought to promote in enacting
13 section 1201.

14 The flip side of that proposition is that
15 permitting the disabling of these locks decreases the
16 value of copyrighted works by undermining the value
17 proposition that the platform creator offers to users
18 and independent developers. A big factor in what
19 makes a platform attractive to consumers is the
20 availability and quality of applications that run on
21 the platform. If a platform becomes less attractive
22 to application developers or if customers lose

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1 confidence in the quality or security of the apps
2 available to run on it, they will be less likely to
3 choose it, thus reducing the value of the platform and
4 the software that runs it.

5 For their part, app developers who experience
6 high levels of piracy on a particular platform see the
7 value of their works decline as they lose the ability
8 to monetize them. There is plenty of discussion in
9 the developer community about how higher rates of
10 piracy on the Android platform, for example, is
11 driving them to alternatives like the iPhone.

12 Moreover, unauthorized reproduction and
13 modification of an operating system for the purpose of
14 running non-approved applications is not a
15 non-infringing use because it is not a fair use.

16 In our view, the fair use argument for
17 jailbreaking relies on an inappropriate extension of
18 two Ninth Circuit cases on reverse engineering, *Sega*
19 *versus Accolade* and *Sony v. Connectix*.

20 *Sega* and *Sony* are cases involving
21 intermediate copying in the development of an end
22 product that is not substantially similar to the

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1 original computer program. When the owner of a device
2 jailbreaks it, he creates and uses a substantially
3 similar -- in fact, substantially identical -- version
4 of the operating system.

5 In the reverse engineering cases, the use of
6 the original program was viewed as indirect. Here,
7 we're talking about a direct and more or less
8 continuous use of the modified version of the program
9 for the same purposes as the original.

10 Jailbreaking is not transformative, as the
11 Supreme Court used the term in Acuff-Rose. It does
12 not add something new with further purpose or
13 different character. The hacked operating system is
14 of the same character and serves the same purpose as
15 the original operating system. Very little new or
16 additional expression is added, only what is necessary
17 to break the TPM.

18 Finally, I'd like to take a few moments to
19 clarify our view on section 1201(f) before I discuss
20 proposed class 4. In section 1201(f), Congress
21 created a narrow exception for non-infringing reverse
22 engineering that contains a number of important

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1 safeguards. Jailbreaking would not qualify.

2 First, the exception is for development of
3 interoperable software. Jailbreaking by consumers is
4 not for the purpose of developing software.

5 Second, since the customer who jailbreaks a
6 mobile device generally does so in violation of the
7 license terms for the operating system, there is no
8 longer a lawful right to use the software as required
9 by the statute.

10 Third, the information needed to make
11 applications interoperable with a mobile device is
12 readily available to app developers. Platform
13 developers make software development kits available to
14 app developers to help and encourage them to develop
15 apps to run on their platforms.

16 We do believe, however, that section 1201(f)
17 is relevant in this proceeding as an expression of
18 congressional intent. Congress has stated that, while
19 achieving interoperability is a valid basis for an
20 exception in some circumstances, those circumstances
21 are narrow.

22 The fact that Congress has created a specific

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1 exception under section 1201(f) and that the proposed
2 class would not qualify for it should weigh against
3 granting an exception under section 1201(a)(1).

4 Regarding proposed class 4, it is far broader
5 than proposed class 5, covering all personal computing
6 devices. We believe that the reasons just stated for
7 rejecting the narrower class 5 apply here as well.

8 In addition, we note that the argument for
9 exempting personal computers relies on speculation
10 about how a specification, UEFI 2.3.1, will be
11 implemented sometime in the future. There is no
12 current impairment of non-infringing uses that the
13 proponents of class 4 can point to, and their
14 speculation is insufficient to establish a likelihood
15 that there will be an impairment of non-infringing
16 uses in the next three years.

17 As the House managers report stated, the
18 evidence of the likelihood of future adverse impact
19 during the time period has to be highly specific,
20 strong and persuasive, and that is simply not the case
21 here. The proponents have simply not met their
22 burden.

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1 I would just like to respond to a couple of
2 things that were said before I turn to my colleague
3 here. One is that there's a great deal of talk of
4 right of ownership. I think, to the extent that
5 that's at all relevant in this proceeding -- and I'm
6 really not at all certain that it is -- I think we
7 have to bear in mind that the kinds of transactions
8 that we're talking about here are transactions that
9 involve sale of hardware, but also licensing of
10 software and other content and other ongoing
11 relationships, both between the consumer and the
12 software developer that is providing updates for the
13 software that's embedded in the device, and also with
14 the carrier, if this is a device that works on a
15 telecommunications network.

16 So we're talking about something far more
17 complex than the sale of a book that you put on your
18 shelf. We're talking about ongoing contractual
19 relationships here that govern much of what the
20 proponents of the exemptions would like to argue are
21 simply inherent in the right of ownership of the
22 device that you buy.

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1 And, with that, let me turn to --

2 MR. GOLANT: Steve, before you go, I just
3 wanted to let people put on notice -- because I have
4 questions about what you just said, so just think
5 about -- it's about the UEFI, because I'm very
6 interested in that, what Windows 8 does. So rather
7 than ask questions when they're done, just think about
8 that as you go forward.

9 MR. METALITZ: Thank you. I'm Steve
10 Metalitz, here representing seven national groups of
11 copyright owners and creators. I'll be very brief
12 since I did have the opportunity to speak on this at
13 the hearing on May 17th with regard to proposal
14 number 5. The only thing I'd like to say about that
15 is that on May 31st -- in the hearing on May 17th it
16 was pointed out that much of the information we had
17 provided about the relationship between hacking of the
18 smartphone operating systems and firmware and piracy
19 was rather outdated, and so we were asked if we had
20 any more up-to-date information. We do. We've
21 submitted it to you. We've copied our -- the
22 proponents, and I've got a couple of copies here, if

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1 people are interested.

2 But, basically, I think this material makes a
3 couple of points that Jesse has already summarized.
4 One is that there is a link between jailbreaking, as
5 it's called, and pirate applications. Indeed, the
6 leading app store that -- for providing jailbreaking
7 tools also provides many pirate applications, and I
8 think that's documented in these materials.

9 I think the other point that's important here
10 is -- and, again, Jesse has referred to this -- is
11 that while there certainly are competitive models
12 here, and you can compare the Apple model and the
13 Android model in terms of the degree to which
14 unrestricted applications are available in an
15 unrestricted manner in the latter more than in the
16 former -- and the marketplace obviously is going to
17 decide which of those models will prevail or whether
18 they will continue to co-exist as they do now.

19 But one difference between those two models,
20 which is spelled out in many of these articles, is
21 that the Apple model does encourage and support
22 greater development and dissemination of new apps.

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1 There's far more apps available on the Apple model
2 than in the Android model even though Android is far
3 more prevalent in the marketplace. So the potential
4 market is larger, but developers are not as eager to
5 exploit that because that Android marketplace is
6 characterized by very high levels of piracy.

7 So, again, this is in these articles that
8 talk about if app piracy worsens, developers will
9 return to iOS or even switch to Windows phone 7. Both
10 are more secure than Android.

11 So in terms of the dichotomy that the office
12 drew in its 2010 recommendation between business
13 interests and copyright interests, we've already
14 indicated that we hope the office will revisit that.
15 We don't see the basis for that in the statute.

16 But, in fact, here is a case where it's clear
17 that the interests that underlie the model, the Apple
18 model, for example, in contrast to the Android model,
19 include promotion of the development and dissemination
20 of copyrighted work. So the business interest is a
21 copyright interest, and one that is directly relevant
22 to one of the criteria Congress asked you to apply

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1 which is the effect on the availability of copyrighted
2 works.

3 I'll just say, with regard to number 4, and
4 I'm sure we'll have some questions about it, I think
5 in some sense -- you know, we heard from the previous
6 witnesses that you can't really draw a sharp line
7 between a tablet and a computer, a personal computer,
8 between 4 and 5. I think part of this is perhaps the
9 fallout of the failure of the proponents of
10 exemption 5 to provide any definition of a tablet, and
11 I think it would be a very unwise move to recognize
12 any exemption in that area unless there's a clear
13 definition so that people will be able to know what
14 the exemption covers and what it doesn't cover.

15 I think, again, if you look at the
16 marketplace as it exists now, it is a highly
17 competitive marketplace, as Jesse indicated. And if
18 you are looking for a place where you have an
19 unrestricted ability to install any application you
20 want, that option is clearly available in the personal
21 computer marketplace. Any -- there's some speculation
22 that it might not be as available in the future, and

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1 that's the word that the proponents use; it really
2 doesn't amount to any more than speculation and, as
3 Jesse has indicated, that falls far short of the
4 standard you've been asked to apply.

5 And even in this -- you know, the issue of
6 installing a new operating system, I'm not -- I'm not
7 going to take it as a given that that actually
8 involves circumvention of access controls on the
9 existing operating system, but even if it does,
10 commodity hardware in the PC space is available. I
11 think in the Software Freedom Law Center submission
12 they say, well, it's not available in the mobile phone
13 space, but it is certainly available in the PC space.

14 So in other words, you have -- users have
15 access, if they want, to a computer on which they can
16 install their own operating system, so the options are
17 available; circumvention isn't required to do that,
18 and there's really -- the proponents haven't been
19 able, I think, to carry the burden of showing that
20 exemption is -- meets the statutory standards with
21 regard to number 4.

22 So I will stop there, and I'll be glad to

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1 answer any questions that you might have.

2 MR. CARSON: Thank you.

3 Marcia.

4 MS. HOFMANN: Thank you for having me back
5 again today. I am excited to be back again, speaking
6 with you about these issues, because I think they're
7 very important. I'm Marcia Hoffman. I'm a senior
8 staff attorney with the electric Electronic Frontier
9 Foundation. My organization is the proponent for
10 proposed class 5. I have four points in response to
11 Mr. Feder.

12 First of all, consumers will suffer an
13 adverse impact if exemption 5 isn't granted. For
14 three years now, people had been benefiting from the
15 2010 exemption that was granted that allowed the
16 jailbreaking of smartphones and, since then, tablets
17 and other mobile devices have been introduced to the
18 market.

19 For the past three years, there's been
20 tremendous growth, not only in the market, as
21 everybody agrees, but in the practice of jailbreaking
22 and in the development of independently designed but

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1 unapproved third-party applications for use on those
2 devices.

3 If this exemption isn't granted, then the
4 people who have been making legitimate lawful uses of
5 this type of software on their iPhones for the past
6 three years are all going to become criminals. Their
7 behavior is going to become illegal. And people who
8 are doing similar things or would like to do similar
9 things with tablets are going to be chilled in their
10 ability to do so. And there's simply no reason for
11 that.

12 And I think it's worth noting, by the way,
13 that the anti-circumvention provisions of the DMCA do
14 carry criminal penalties. I mean, this is not just a
15 situation where people need to be worried about being
16 sued for jailbreaking their phones so that they can,
17 you know, configure a custom interface that they like
18 better than the one that Apple provided, but they
19 actually have to think about the fact that there are
20 criminal penalty and, in theory, they could go to
21 jail. Would anybody ever prosecute them? Probably
22 not. But it's something that they have to think

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1 about. And that kind of a legal cloud does not
2 encourage innovation, and it doesn't encourage
3 consumer choice, and it doesn't encourage competition.
4 So I encourage you to think about that.

5 Number two, exemption 5 is a narrowly crafted
6 exemption that is not going to legalize piracy. I
7 want to be incredibly clear about this, particularly
8 in light of the article submitted by Mr. Metalitz on
9 Friday and one submitted by Mr. Feder yesterday.
10 These are all articles that express concern about
11 piracy. I think that they are completely -- they have
12 nothing to do with our exemption request.

13 Our exemption request is about making lawful
14 uses of third-party software, and piracy simply
15 doesn't fit into that equation.

16 As the evidence submitted by Mr. Metalitz in
17 his opening comments showed, piracy was an issue back
18 before the 2010 exemption was granted, and we can see
19 that it is still an issue today. And I think that
20 that's, you know, something that nobody disputes.

21 If this exemption is granted, what it will do
22 is clear the way for people to make lawful fair uses

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1 of software on their devices. It won't clear the way
2 for piracy. It won't remove any existing legal
3 remedies that copyright holders have when users are
4 infringing content or pirating apps or installing
5 pirated apps. All it will do is clear the way for
6 lawful uses, and that's it.

7 And so, you know, to the extent that piracy
8 may continue, you know, basically if this exemption
9 isn't granted, then all jailbreaking is going to be
10 illegal. But if it is granted, then people will
11 actually be able to make lawful uses. So I think that
12 that is important to recognize.

13 Third, we heard some testimony about the vast
14 array of apps that are available. I think that that
15 would be a much smaller array of apps if it weren't
16 for the fact that developers are able to develop for
17 platforms like the iPhone, if they can't get their
18 apps approved by Apple, and distribute those
19 applications through other alternative markets. And
20 so I think that jailbreaking does nothing but
21 encourage development and encourage competition and
22 encourage innovation.

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1 And, you know, if developers decide that they
2 don't like developing for the Android platform, for
3 instance, because piracy is a big issue there or for
4 whatever other reason, they can choose to develop for
5 some other platform, and jailbreaking opens the way
6 for them to be able to do that.

7 Just briefly, 1201(f), I mean, I think we
8 talked about this at length at the last hearing. It
9 is true that Congress granted a reverse engineering
10 exception at 1201. I don't think Congress could have
11 foreseen what we're looking at today, and that's what
12 this rulemaking process exists for, so that you can
13 actually grant exemptions when Congress perhaps
14 couldn't have foreseen what was going on.

15 Now, I would appreciate the opportunity to
16 respond to the articles submitted by Mr. Metalitz and
17 Mr. Feder in writing, but I, you know, just want to
18 say, really, I think that they are beside the point
19 because they have to do with piracy. And I just want
20 to reiterate, this proposed exemption has nothing to
21 do with piracy. It wouldn't legitimize piracy. It
22 wouldn't legalize piracy. It would legalize lawful

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1 fair uses, and that's it. Thank you very much.

2 Oh, one more thing. I know you had questions
3 for me at the last hearing, and one of them was, as
4 Mr. Metalitz said, what is a tablet? And that is not
5 something that responds to Mr. Feder, so I'm not going
6 to address that now. But if you have any questions
7 that you would like to bring up with me here that I
8 can answer, I would be happy to address those things.
9 I'm prepared to do that. Thank you.

10 MR. CARSON: Before we go to questions, do
11 any of the other proponents have anything to say in
12 direct response to what was said? And it really is in
13 direct response to what was said, not just something
14 else you want to say.

15 MR. SULZBERGER: It's very direct. Mr. Feder
16 stated that the harm of keeping the law as it is
17 today, namely the anti-circumvention -- I don't know
18 its technical name is -- clause that the DMCA
19 enforced -- is -- you know, the harms are speculative.
20 No, they're not. As of last week, Microsoft has
21 attained (sic) to a lock now defended by the DMCA upon
22 most computers. So all Dell computers, all HP

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1 computers, all Lenovo computers from this day forward
2 will not allow you to install a different operating
3 system.

4 Now, I think Mr. Metalitz pointed out that
5 there's a difference between diddling with iOS and
6 installing a different operating system. I want to
7 emphasize, I agree there's a difference. And the more
8 important issue is I think you should be able to
9 diddle with it. All right? But that's a small issue
10 for me.

11 The big issue is the absolute lock-out of
12 other operating systems on the ARM -- that is the
13 formal, strict, openly declared, repeatedly, position
14 of Microsoft. If they make a deal with a vendor, and
15 it's an ARM device, they're going to do their
16 darnedest, backed by the present law with criminal
17 penalties, to stop me, if I buy such a device -- I'm
18 sorry. I'll be slow. I didn't see that you were
19 using the wonderful multi-strike steno device.

20 If you buy an ARM device next year and a deal
21 has been made by Microsoft -- and I don't know if
22 Microsoft would take you to court. They're

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1 intelligent about that. Unlike Sony -- Sony I think
2 has tried to start to induce courtroom proceedings
3 against Geohot, but I'm not sure -- it was resolved
4 before it was in court --

5 MS. HOFMANN: It was a civil case.

6 MR. SULZBERGER: It was a civil case, okay.
7 I stand corrected.

8 Okay. So it's not speculative. Because of
9 the long history of domination by Microsoft of major
10 sellers of home computers, they've been able now to
11 get to a position where it's not just that, you know,
12 when the stuff comes there, you can throw away the
13 thing and they'll never give you a refund -- although
14 that's in the law, they're required to, they won't do
15 it.

16 Now, when I go to install with that little
17 thing, the FreeBSD thing today on this machine, I put
18 it in, I boot it, a new operating system is running.
19 If I want to install it, there's an install script
20 maybe on that thing -- or I have to use another one;
21 it doesn't make a difference -- I can put whatever OS
22 I want on this machine. There's no electromechanical

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1 crypto bar to it, and certainly no electromechanical
2 crypto bar backed by criminal penalties if I do it and
3 then publicize how to do it.

4 The issue is the right of private ownership
5 of computer hardware. It's nothing else.

6 And let me just say -- and this is more than
7 pro forma in my case -- I don't in any way approve of
8 people massively committing copyright violations
9 via -- I don't even know the names of these stupid
10 programs they use. It has nothing to do with it. The
11 issue is whether, in practice, given the present
12 business situation, whether next year I can buy this
13 machine and put an operating system of my choice on
14 it, which again, I repeat -- I'm not boasting; it's
15 just a fact -- of course I'm boasting. I never ever
16 violated anybody's copyrights, although I put a lot of
17 copyrighted material on here, several different
18 operating systems, all of them free. And the
19 competition -- I just want to close with one thing.
20 This is all in answer to the two things.

21 If, say, in 1985 -- and it could have
22 happened in 1985; we had the techniques -- the UEFI,

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1 or Palladium or the TPM -- it has many names. We got
2 them to change the name in 2003 because we made it
3 stink in the nostrils of people who knew about
4 computers.

5 If that had been in force, then when Apple
6 was going bust in the '90s and trying to build an
7 operating system which they seemingly didn't have the
8 resources to do -- they had the resources; they didn't
9 have the intelligence to hire people who could build
10 an operating system. And they brought Steve Jobs
11 back. He said, I'll sell you my little operating
12 system. It's a free operating system. It's the one
13 that ran Next. It's, once again, a FreeBSD. It's a
14 complicated thing. The lower level is something
15 called Mock (phonetic). The top level is FreeBSD.

16 And I can run a free Apple system without all
17 the Apple stuff on top. Okay. If that isn't a
18 serious impairment of competition -- I'm sorry.
19 Please forgive me for going -- one more thing.

20 Competition in which arena? And cui bono?
21 The people who really benefit from this is not the end
22 user who likes to watch movies on their device. I

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1 know that's their theory. And I might even say it's
2 partly true. But the people who really benefit, who
3 really rake in the dollars, it's Apple. And Microsoft
4 hopes it will be in that position. And Sony.

5 And so you have to ask yourself, what arena?
6 You have to be precise. I'll just add one more. The
7 precise thing is I won't be able to boot, I won't be
8 able to go into the store, spend 500 or 1,000 or
9 \$1500, get this nice laptop and then boot the
10 operating system, the only one that I run. I won't be
11 able to do it. It will cost me a lot more. It will
12 probably be available for a few more years. They'll
13 work to extinguish that. That's the issue. Not
14 copyright. Sorry. I went on too long. Thank you.

15 MR. CARSON: I will give you an opportunity,
16 but I want to make sure I understand the point you
17 made about Microsoft. Is it that Microsoft, A, I
18 gather has made some deals with some equipment
19 manufacturers --

20 MR. SULZBERGER: Yes.

21 MR. CARSON: -- so that's part of it.

22 MR. SULZBERGER: Yes.

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1 MR. CARSON: And as part of those deals, the
2 new Windows operating system will be installed on
3 their computers --

4 MR. SULZBERGER: Yeah.

5 MR. CARSON: -- with access controls that
6 prevent one from taking it off? Is that the notion?
7 Or am I missing something?

8 MR. SULZBERGER: I don't know. You may be
9 able to destroy it. I'm not sure. But you certainly
10 will not be able to install a new operating system.

11 This one has got a operating system that I
12 installed by making a -- I've forgotten if I made a CD
13 or a little thumb drive. It was a year and a half
14 ago.

15 And the way it works is you have to go into
16 the BIOS. When it starts up, there's a little button
17 you press and you come to the BIOS, and it's somewhat
18 mysterious. And the last time I pointed out, when I
19 bought a different machine -- I brought a different
20 machine; I think I bought it the day before -- it had
21 a password on it.

22 Now, if you don't put the password in on the

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1 machine that I showed before, you're going to have a
2 hard time. You might be able to crack into it, but,
3 you know, that's not my interest. I bought a machine
4 for 200 bucks -- I think it was 220 or 200, but I've
5 forgotten -- and I wanted to run that day my own
6 operating system. I needed another machine for some
7 purpose.

8 So I called the guy up. He gave me the
9 password. I put it in. But it's the equivalent of
10 that password -- but it's a much better system. The
11 BIOS in that thing, if I didn't know the password, I
12 actually know how to get around it. It's not a big
13 deal. It would take me a day or so. Right? I'd have
14 to pull out a little battery. It's a stupid,
15 uninteresting thing. I can get around it.

16 But the new things are such that either you
17 have to go to Microsoft and beg them to sign the
18 so-called kernel of the operating system -- now, as a
19 matter of fact, in the past week, a distribution of a
20 new Linux called Fedora -- it's the so-called free
21 version of Red Hat -- they decided they'd pay \$99, not
22 directly to Microsoft, indirect payment, a one-time

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1 fee, and they would sign a certain number of their
2 kernels, and then it would boot. Okay?

3 In the future, any whole operating system
4 author -- and all operating systems are under
5 copyright -- just about all today. I think very few
6 are in the public domain. They're all huge
7 copyrighted works with literally hundreds of
8 thousands, at a minimum, man-hours of work by highly
9 skilled people. They're created. The ones I'm
10 interested in are freely licensed. Okay? So you don't
11 pay money. If you want to -- by the way, some of the
12 freely licensed ones you have to pay money for. It's
13 not an issue of money.

14 But the licensing is such that I get to
15 freely modify them, and in some cases I can
16 redistribute binaries of the modified ones. In other
17 cases, when I redistribute the binaries, I'm required,
18 by the terms of the copyright license, to offer a copy
19 of the source. Okay. Let's leave that aside.

20 This is -- if this exemption number 4 is not
21 granted, it will almost surely end the -- I hesitate
22 to use the word "market" -- the distribution of

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1 valuable copyrighted works. As I said, if in 1985 the
2 system had been put in, you might be running an Apple,
3 and they might be as rich as they are today. When it
4 came to it -- and I don't believe this number, but it
5 keeps on getting quoted, so I'll cut it in half. They
6 spent 500 million. The quote is 1 billion, and it's
7 repeatedly quoted by people who looked at their
8 numbers. I don't believe it. It's impossible. But
9 even 500 million is impossible. They spent
10 500 million and got nothing. They wanted to build a
11 so-called proprietary or source-secret operating
12 system. And I actually learned something about
13 privately -- thank you. I've come to the end of my
14 time, as I am reminded by Aaron.

15 MR. WILLIAMSON: David, if I could have the
16 opportunity to make my response to their particular
17 points now --

18 MR. CARSON: You can in a moment, but I just
19 want to follow up on what he said.

20 MR. WILLIAMSON: Okay.

21 MR. CARSON: I'll get back to --

22 MR. SULZBERGER: There wouldn't be any Apple,

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1 at least in the form we know it today --

2 MR. CARSON: Okay.

3 MR. SULZBERGER: -- if this had been in force
4 in 1985. That's all.

5 MR. CARSON: I'd like to get Jesse and/or
6 Steve to react just factually to Jay's account of the
7 new deal Apple has made, apparently, with some
8 equipment manufacturers.

9 MR. SULZBERGER: Microsoft.

10 MR. CARSON: I'm sorry.

11 MR. SULZBERGER: Microsoft, not Apple.

12 MR. CARSON: My apologies.

13 MR. SULZBERGER: Apple doesn't do anything
14 today --

15 MR. CARSON: Sorry. I misspoke.

16 MR. SULZBERGER: -- offensive with regard --

17 MR. CARSON: Is it your --

18 MR. SULZBERGER: -- to those machines.

19 MR. CARSON: -- understanding that he has
20 given an accurate account? And, if not, what's
21 inaccurate about it?

22 MR. SULZBERGER: One week old.

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1 MR. FEDER: I am going to have to get back to
2 you on the specifics because --

3 MR. SULZBERGER: One week old.

4 MR. FEDER: -- this is new information. I
5 think that a couple of the key words that were spoken
6 just a few moments ago was "I'm not sure" and "I don't
7 know."

8 I think exactly how this is going to play out
9 in the marketplace is a matter of pure speculation.
10 As far as I understand, this applies to a particular
11 chip architecture but not to all chip architectures.
12 There is still the availability of white box PCs on
13 which you can install the operating system of your
14 choice. So we're not talking about making all PCs
15 impervious to the installation of a new operating
16 system.

17 But on the specifics of the Microsoft
18 announcement, I'm going to have to get back to you on
19 that.

20 MR. CARSON: And do you have any
21 understanding of the purpose of this deal -- of this
22 aspect of the deal that basically says you can't

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1 install another OS?

2 MR. FEDER: I don't know. Again, this is
3 speculation on my part, but one of the common ways for
4 malware to infect a system is to alter the kernel.
5 And the more you harden that, the more you protect it,
6 the more secure the system it is.

7 MR. CARSON: Jay, you're nodding your head in
8 agreement or --

9 MR. SULZBERGER: Oh, absolutely.

10 MR. CARSON: Okay.

11 MR. SULZBERGER: We have no problem with --
12 indeed, Linus Torvalds, who is the lead developer and
13 original author of the so-called Linux kernel, he
14 recently, on his blog spot, he said, you know, of
15 course we all love Palladium as long as we get to
16 install the keys that we want. That's the issue.
17 Who's got the password to the boot loader? That's the
18 only issue.

19 The issue is not UEFI/TPM/Palladium/secure
20 boot, whatever you want to call it, which by the way
21 is in basically most machines in the past five years.

22 MR. FEDER: David, I think I could save us

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1 some time.

2 MR. GOLANT: I'm sorry. I just want to
3 follow up, in reference to what we're all discussing,
4 I read a lot, and one of the articles I came by was
5 from Boing Boing on May 31st by Cory Doctorow which
6 says, Lockdown: Free/open OS maker makes -- pays
7 Microsoft ransom for the right to boot on users'
8 computers, which relates to everything you just said.

9 So --

10 MR. SULZBERGER: That's what it is.

11 MR. WILLIAMSON: -- in reference to your
12 response, please look at this as a starting point by
13 which to think about things.

14 I'll give my understanding of the UEFI
15 situation as it stands now. I don't have specific
16 information about the deal that Jay is referring to,
17 but --

18 MR. SULZBERGER: One week.

19 MR. WILLIAMSON: -- in -- so previously, and
20 I believe this is why Steve and Jesse have referred to
21 our comments as speculation in our initial filing,
22 Microsoft had published -- before that time, Microsoft

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1 had published a tentative policy regarding UEFI
2 essentially saying that UEFI secure boot, which is the
3 mechanism, essentially the technical protection
4 measure, by which you can lock down the operating
5 system on UEFI-enabled computers.

6 So Microsoft had published a draft
7 specification stating that Microsoft -- or
8 Windows-certified computers would have to implement
9 UEFI secure boot, which is the technical production
10 measure. At that time, they didn't mandate whether it
11 had to be -- you know, whether a circumvention should
12 be allowed to the user or anything like that. But we
13 said, this is a signal that these measures are moving
14 to the personal computing market.

15 Since our initial filing, Microsoft published
16 a new specification for Windows certification. That
17 specification divides personal computers into two
18 categories: Those that are based on the Intel
19 architecture and those that are based on the ARM
20 architecture.

21 For the Intel architecture, the specification
22 states that computers that implement -- or all

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1 computers must implement UEFI and UEFI secure boot,
2 but the physically present user must be able to
3 install new operating system keys into the UEFI
4 firmware, thus allowing them to install the operating
5 system of their choice.

6 MR. CARSON: That's for the Intel?

7 MR. WILLIAMSON: That's for the Intel
8 architecture.

9 For ARM, the specification states that they
10 must implement UEFI secure boot. Secure boot must be
11 enabled and a physically present user must not be
12 allowed the install new keys or turn off secure boot,
13 meaning that only operating systems whose keys already
14 exist in that firmware at the time of purchase, or
15 later updated by Microsoft and its partners, will be
16 able to be installed on the computer.

17 MR. CARSON: Thanks.

18 Brett, you had wanted to speak.

19 MR. WYNKOOP: Yeah. My UEFI comments I'm
20 going to leave aside because Aaron stated them quite
21 properly. I will say that what the other side has
22 said about, well, all this talk of UEFI is pure

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1 speculation, it hasn't come to be, it hasn't come to
2 be -- it is my belief -- and that's all it is, my
3 belief, my personal opinion -- that the reason the
4 UEFI stuff has not been written in stone by Microsoft
5 and the rest of the englobulators is because they are
6 intentionally waiting until after these hearings and
7 until after the ruling is made, because then they will
8 gain a significant business advantage if the American
9 citizen is enjoined from being able to make use of his
10 tools the way he wishes to.

11 The other side also said that the only reason
12 for jailbreaking one of these devices was for piracy.
13 Well, that's entirely wrong. There are people, such
14 as myself, that are fed up with our cell phone
15 carriers shoving crap down to our phones. My
16 particular phone has at least four applications on it
17 that did not come on it when I bought it, that I did
18 not install, that have been shoved down by Sprint in
19 the year and a half I've owned the phone.

20 And they're constantly, between them and
21 Google, shoving applications down to the phone in the
22 form of updates that I don't particularly want, thus

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1 forcing me to continuously uninstall stuff when I
2 can't uninstall it -- but some things don't even show
3 up in the uninstaller that is available to the owner
4 of the device.

5 The lack of exemptions would definitely
6 stifle the free market, as Jay has pointed out, the
7 ability to boot the operating system of your choice on
8 any computing device. If you physically own that
9 hardware, you should be able to put whatever software
10 on it you want, that you have a legal right to use.

11 And the way UEFI is spec'd to work, the way
12 many of the smaller, more mobile devices work today,
13 it is very difficult for the ordinary person to make
14 that choice even if they want to.

15 When my father was still alive, he asked me
16 at one point to set him up a personal computer at
17 home. My father had been an electronic technician in
18 the Navy for 30 years. His job was mainly maintaining
19 computers. He thought he could maintain a computer.

20 I gave him a Windows computer because my
21 mother insisted on it, because that's what the
22 neighbors had. I advised against it, but that's what

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1 he got. After a few months, he said to me, well, this
2 is happening, that's happening; how do I fix this?
3 How do I fix that? Well, I'm sorry, Dad, you can't
4 get at the inside.

5 A few months later, I replaced it with a
6 completely different operating system, something
7 called FreeBSD. And my dad was in hog heaven until he
8 died because he could actually fix things when they
9 went wrong, he could tinker with things, he could
10 essentially be the backyard tinkerer that has brought
11 us so many innovations in this country.

12 Without these exemptions, you're getting rid
13 of the backyard tinkerer. Today's backyard tinkerer
14 tinkers with his computer as opposed to a
15 steam-powered machinery or pumps or internal
16 combustion engines, although -- albeit there are still
17 some people that tinker with those and try to come up
18 with improvements. But by and large the majority of
19 tinkerers, the majority of individual makers in this
20 country make things using what is essentially the
21 universal machine. This is the machine that I can
22 give instructions to to do anything today. That will

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1 not be the case if these exemptions are not granted,
2 especially if the englobulators get things like UEFI
3 lock-in through.

4 MR. WILLIAMSON: May I have the opportunity
5 to finish responding to the specific points that they
6 made during their --

7 MR. CARSON: Sure.

8 MR. WILLIAMSON: Thank you. So Jesse made
9 the point that the operating system for mobile devices
10 is thriving, and I'd like to counter that point. I
11 think that it's better characterized essentially now
12 as a duopoly. We have roughly equal market share
13 between Android and iOS on smartphones, for example.
14 The remaining, say, 10 percent of the market is shared
15 by a rapidly declining RIM, who makes BlackBerry
16 devices, and the Windows phone whose future is
17 uncertain at this point.

18 RIM, who chopped I think some 400 jobs last
19 week, or last month, is, I think, most analysts would
20 say, not necessarily long for this world in at least
21 its present form. Palm is also a recent loss in
22 the -- in this market. So now we've gone from four

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1 relatively strong players to perhaps two.

2 So the idea that competition is thriving here
3 I think is incorrect, and I think that Mozilla is sort
4 of one of the few potential players who has a real
5 credible shot at entering this market at this point.
6 But, as I said, they've been relying on the exemption
7 granted in 2010 in order to make an entry into the
8 market.

9 Both of the opponents also made the point
10 that alternative app stores encourage piracy, saying
11 that there are pirated apps in the Cydia app store.
12 That may be. I'm not sure. I don't have evidence for
13 that myself. But my understanding is that Cydia's
14 policy is against pirated apps, just as the iOS app
15 store's policy is against pirated apps.

16 I've had several clients, free software
17 developers, who have come to me with reports that
18 their software, GPL'd software, was being distributed
19 in the app store in violation of the new general
20 public license and, therefore, an infringement of
21 their copyright.

22 So piracy is not a problem that is unique to

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1 jailbroken phones or to Cydia. It's a problem that
2 will always be with us, and no matter how strictly one
3 curates an app store, piracy can still be a problem.

4 I think that the difference in piracy that
5 you see on Android versus iOS is not necessarily due,
6 as the opponents have said, to the more open nature of
7 Android, to the side-loading of applications, but
8 rather to its rather lackadaisical approach to the
9 curation of apps.

10 If you have less review of the applications
11 that are going into the app store, then sort of by
12 definition you're going to miss more piracy, but that
13 has nothing to do with whether a user is able to
14 jailbreak a phone and install a new operating system.

15 The statistics as to the success of the app
16 store I'm happy to hear because I think that it
17 vindicates the -- your decision in the 2009
18 proceedings to grant the exemption for smartphones.
19 The fact that applications have continued to grow
20 uninterrupted since that time, as I said in my initial
21 comments, I think demonstrates the wisdom of that
22 exemption.

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1 As I said regarding UEFI, at this point,
2 there is -- it's not speculative what's going to
3 happen with UEFI. Microsoft has definite policies,
4 and we now have new devices, laptop computers that
5 being produced on ARM, Windows-certified, that you'll
6 be unable to install alternative operating systems on
7 unless Microsoft has approved a key for that operating
8 system, usually in collaboration with a vendor.

9 And, of course, for my clients, it's not --
10 it's not adequate that you be able to make a deal with
11 a particular licensing authority to get a key into
12 computers because -- for example, one of my clients,
13 Gentoo, a Linux-based operating system with hundreds
14 of thousands of users is built from source every time,
15 which means that the -- whatever -- you know, whatever
16 image you apply a key to will be different from the
17 image that a later user will actually install on a
18 computer and, therefore, a key-based system
19 corresponding to a particular operating system image
20 could never work for an operating system like that.

21 And I -- you know, as my final comment at
22 this stage, I'd like to point out that the statutory

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1 standard is not that circumvention be absolutely
2 necessary to make the use the fair use or the
3 non-infringing use at issue, but that users of
4 copyrighted works are adversely affected. And I think
5 that the opponents have repeatedly tried to elevate
6 the statutory standard so that, you know, if there is
7 any way that the market has provided any sort of
8 answer to a problem, that it's no longer a problem. I
9 don't think that's the case. I think that as long as
10 users have -- as long as we've demonstrated that users
11 are adversely affected by the prohibition, then I
12 think that you are well within your right to grant an
13 exemption.

14 MR. CARSON: Any responses to what was --
15 what's been said since you two last spoke?

16 MR. FEDER: Sure. Let me first start with
17 the standard. The language in the legislative history
18 is substantial adverse effect. So we're talking about
19 something more than an adverse effect that affects a
20 few people, you know, a few diehard people who want to
21 tinker with the guts of their computer. We're talking
22 about something that is significant in the context of

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1 the marketplace that we're talking about. And we're
2 talking about a marketplace of millions and millions
3 of phones, millions and millions of other devices.

4 So I think the fact that marketplace
5 alternatives do exist -- we've demonstrated that they
6 exist -- really puts a heavy burden on the proponents
7 to establish that this is more than just an adverse
8 effect on a few people.

9 MR. GOLANT: Can I ask -- I'm sorry to
10 interrupt, but so what is the threshold, then, in
11 terms of, when do you get to that point when it
12 becomes an adverse effect? Is it a hundred thousand?
13 A million? 5 million? That seems to be an ongoing --

14 MR. FEDER: I think it's going to depend on
15 the marketplace you're talking about. In this
16 particular instance, we're talking about a marketplace
17 of hundreds of millions of devices. So I think you
18 have -- the -- the threshold is correspondingly
19 higher. I can't give you a precise number.

20 I think the question of piracy is very
21 relevant. Jailbreaking enables the installation of
22 pirated apps. I don't think anybody here would

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1 dispute that that is the case. Regardless of how you
2 have drawn the -- the class that's being proposed, on
3 day one, you may jailbreak a phone for the purposes
4 set forth in that class and it's a perfectly legal act
5 if it falls within the exception. On day two, the
6 phone is still jailbroken and it still enables the
7 installation of pirated apps, and on day three and
8 day four and so forth.

9 So we need to be cognizant of what the effect
10 is. Even if the intention is only to permit certain
11 kinds of installations on jailbroken phones, once you
12 throw the doors wide open, pirated stuff is going to
13 find its way onto these devices. We know that it
14 does.

15 MR. GOLANT: But isn't it the case that I
16 would have -- if I'm an honest citizen and I jailbroke
17 my phone, that doesn't necessarily mean that I'm going
18 to download pirated apps. For me at least there is a
19 disconnect. There is the possibility that it may
20 happen, but it doesn't mean I'm going to take action,
21 just like I can drive a car, I avoid everyone on the
22 road, I could hit that person on the curb, but I

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1 don't. So isn't that the same -- don't you want to
2 trust the people who do this for those purposes?

3 MR. FEDER: Again, you have to look at the
4 nature of the marketplace. And the fact is that a lot
5 of people are jailbreaking their phones in a belief
6 that it's a perfectly legal thing to do, and they're
7 doing it for the purpose, maybe initially -- maybe the
8 purpose develops later on, once they find they can
9 install pirated apps -- but they are installing
10 pirated apps on their phones.

11 There is a definite connection between --
12 definite causal connection between jailbreaking a
13 phone and the installation of pirated content on that
14 phone.

15 But -- and this is a key point, and Steve
16 alluded to it before -- the copyright interest doesn't
17 begin and end with piracy. There is more at stake
18 here. What we're talking about is, what is the
19 economic model to sustain creativity? And we no
20 longer live in a world where the sole or even
21 predominant model is sales of copies for a particular
22 price.

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1 In the case of these kinds of devices, we're
2 talking about business models -- that's not a dirty
3 word in this context. We're talking about business
4 models where there are different income streams
5 belonging to different people, including the copyright
6 owner of the operating system.

7 You don't sell -- as a general matter, you
8 don't sell copies, individual copies divorced of the
9 rest of this transaction of the operating system. But
10 that doesn't mean the operating system has no value
11 and it doesn't mean that this is being done as a
12 charitable endeavor. It's part of a business
13 endeavor. It's part of a business model that sustains
14 the creative process.

15 And, you know, there was a lot of talk about
16 what's the distinction between, say, a Kindle and an
17 iPad, and I think there is a meaningful distinction to
18 be made there, but it's not a meaningful distinction
19 based on technology. It's a meaningful distinction
20 based on the underlying business model.

21 The Kindle is sold at a lower cost because of
22 another expected income stream, the sale of

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1 copyrighted books, e-book, on the device. This is all
2 tied together. And if the purpose of jailbreaking a
3 device is to permit the -- essentially an end run
4 around this business model, what you're essentially
5 saying is that it is okay to acquire this work for
6 something other than the customary price and to
7 benefit from the use of this work for other than the
8 customary price.

9 MR. GOLANT: I mean, I respect what you said
10 in terms of business models and free enterprise, but
11 at the same time, I have concerns about user rights
12 and competition, and I think that -- would you agree
13 where we have to balance those -- copyright
14 interests, business interests, user interests and
15 competition -- all in this bundle as we go forward to
16 craft an exemption?

17 MR. FEDER: I think, for one thing, we're
18 looking at a truly competitive market in spite of some
19 of the allegations here. We have competition among
20 different platforms. I mean, Android was just a blip
21 when this process took place a couple of years ago,
22 and it has now emerged as the top -- the most widely

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1 used mobile operating system.

2 What's going to be the case three years or
3 six years hence? It is a competitive marketplace.
4 And it's a hugely competitive marketplace among apps
5 that run on these devices. So I don't -- if
6 competition is a concern for you, and bearing in mind
7 there's a whole other body of law to deal with with
8 anti-competitive behavior --

9 MR. GOLANT: Right. Agreed.

10 MR. FEDER: -- which is not a part of this
11 process. There is competition. There is a lot of
12 competition.

13 MR. GOLANT: But doesn't the competition stop
14 once I buy my phone? In essence, I pick my phone as
15 an Android, but now it's mine to do what I want in
16 terms of what it runs -- what runs on it? I mean,
17 again, there are thousands of phones out there. I
18 like the Android operating system, but maybe I do not
19 want something crammed down into my phone and I can't
20 get rid of it. So shouldn't I have that right?

21 MR. METALITZ: You can't get rid of your
22 phone or you can't get rid of --

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1 MR. GOLANT: No, can't get rid of --

2 MR. METALITZ: -- the application?

3 MR. GOLANT: As we had heard from the
4 witnesses here that Sprint sometimes -- I have
5 Sprint -- sometimes downloads things when you have an
6 update. I can't get rid -- I don't know the basics
7 upon which to extract that particular thing that they
8 put in there that bothers me because maybe it's a new
9 background or something. I don't have that
10 wherewithal, but some people may well do. Shouldn't I
11 have that right to somehow correct what I believe to
12 be something I did not ask for?

13 MR. METALITZ: I think perhaps your -- your
14 approach to competition is a little bit different than
15 what Jesse is referring to because people who don't
16 like how they're treated by a -- you know, by a
17 particular business can go to another business where
18 they're treated more to their liking. And this even
19 extends to the very tiny, tiny minority of people who
20 want to install a home-cooked operating system on
21 their computer. They have that ability. They will
22 have that ability.

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1 And while I have no knowledge -- firsthand
2 knowledge about this Microsoft UEFI deal, if it's as
3 described by the proponents, they would still have
4 that ability. So I'm not sure how the burden of
5 proving that they need to circumvent in order to make
6 the use of a particular program that they want has
7 been met in that circumstance.

8 MR. SULZBERGER: May I -- I'll try to be very
9 brief. I agree with Jesse Feder and Steve Metalitz
10 fundamentally. And this is my point I've been trying
11 to make here for several of these hearings.

12 The other side's minimum demand is absolute
13 ownership of every personal computer on earth.
14 Because nothing else -- when they say business model,
15 what they mean is from boot until you close it off at
16 night after you've watched your movies -- because you
17 have a contract -- it's under the control of Apple or
18 Microsoft.

19 I agree with what they said fundamentally.
20 And they're now -- I was hoping to be able to make
21 this argument. I wasn't able to make it. They're
22 claiming that the entire operating system must be

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1 considered to be a piece of DRM, which this law, the
2 DMCA, applies to, and you can't touch it. This is
3 crazy.

4 When the law was passed, the technical means
5 were some ridiculous little piece of software that
6 people would run Windows and then they'd get around
7 it. Right? Now the other side is saying they must be
8 granted a legal power to haul somebody into court
9 because they touched the operating system on a piece
10 of hardware they bought. That's what they just said.

11 I agree with them. That's what they're
12 claiming. And that's why exemption 4 should be
13 granted so when we buy a piece of hardware -- you're
14 going to have to outlaw other operating systems
15 because -- look for example, suppose somebody uses --
16 I can't bring the name of any actual operating system
17 in, so I'll invent a new operating system called
18 Infringo. It's freely licensed. Its sole purpose is
19 to go out on the net and infringe copyright.

20 Now, obviously, that must be outlawed. Now
21 it is outlawed under today's copyright laws. Okay?
22 Certainly its use is outlawed to infringe.

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1 They're claiming that they must be granted,
2 in effect -- and, in truth, deals will be made --
3 sorry. It's prior restraint. And -- I'm sorry. I've
4 been told to use that word by somebody who knows what
5 it means, who has actually gone to law school. Okay.

6 So -- okay. Maybe not. Maybe it's by a UNIX
7 engineer who has got a lot of copyrighted works under
8 his belt.

9 So the issue is now open. The other side
10 says the entire operating system, from the metal on
11 up, must be under their control; otherwise, you know,
12 people can use it to pirate stuff. Okay. That's
13 their argument.

14 Our argument is I bought the hardware, and
15 you can't twist this section of the DMCA to stop me
16 from installing an operating system of my choice.
17 That's it.

18 I would like to ask permission to send you, I
19 hope within the month, something on the exact issue of
20 UEFI. If Microsoft had stuck last week to what it
21 claimed, we'd have much less objections, but they
22 didn't. They said -- they always claimed that, once

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1 you sit before it, you put on your own key. In
2 practice, not true, as we discovered last week, but
3 that's a separate issue. But -- I mean, it's related
4 to -- but, okay. That's it. They've made my
5 argument.

6 MR. CARSON: Jesse, did you want to respond?

7 MR. FEDER: Well, I just wanted to respond to
8 one thing that was said. We're not claiming that the
9 entire operating system is a DRM. We're saying that
10 the operating system is a copyrighted work and that
11 modification of the operating system in order to
12 eliminate the DRM is an infringement.

13 I wanted to respond to one more point that --
14 I wanted to respond to one more point that Marcia made
15 which was a little troubling to me. It would seem to
16 be that -- and correct me if I'm mischaracterizing
17 this -- is that people have a reliance interest today
18 in the exemption that was granted in the 2009
19 rulemaking, and given that the whole structure of this
20 process is a de novo review every three years, that
21 simply can't be right. I mean, that cannot be a
22 cognizable harm that you look to, or one would never

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1 be able to roll back an exemption once it is granted.

2 So I would strenuously object to going down that
3 route.

4 MR. CARSON: Marcia.

5 MS. HOFMANN: I would like to respond to that
6 and then also a point that Mr. Feder made earlier. I
7 think that if we can't take that into consideration at
8 all, then, you know, that would mean that the law
9 would be completely chaotic. I mean, if this were a
10 situation where the Copyright Office couldn't consider
11 at all whether or not it has granted an exemption in
12 the past and, you know, everything were completely
13 de novo in every way, shape and form moving forward, I
14 think we'd be in a situation where people would be in
15 constant confusion about the state of the law, they
16 could never rely on the legal protections they think
17 that they have.

18 And, you know, I realize the standard of
19 review here is de novo, but I think that, as a
20 practical matter, it is within the Copyright Office's
21 discretion, and I think it makes sense, to consider
22 whether or not there has been this legal protection

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1 for the three years prior, or even before that.

2 And if there, you know, are good reasons not
3 to continue granting the exemption, I think that, of
4 course, that's worth taking into account as well. When
5 the Copyright Office is considering whether or not to
6 renew an exemption.

7 But, I mean, the fact that, you know, people
8 for three years now have been jailbreaking their
9 phones and that that might suddenly become a
10 completely illegal criminal act and the effect that
11 will have on consumers is worth taking into
12 consideration. It may not be dispositive, but it's a
13 factor that is worth thinking about at the very least.

14 MR. CARSON: The first time you made that
15 point, I wasn't certain whether you were saying what
16 I'm about to say, but I just want to make sure.

17 I got the impression that you were saying
18 that if we let the exemption expire at the end of this
19 current term and that we don't issue a similar new
20 exemption, those folks who have already jailbroken
21 their phones will suddenly be in violation of
22 section 1201. Was that your point?

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1 MS. HOFMANN: No, I think moving forward they
2 will be.

3 MR. CARSON: If they continue to jailbreak in
4 the future?

5 MS. HOFFMAN: Right. Yes. Exactly.

6 I mean, with respect to phones -- I mean, my
7 thinking about it is that people who have jailbroken
8 their phones during the current exemption period have
9 done so lawfully. But if the exemption isn't renewed,
10 then moving forward, people who continue to do that,
11 or people who do it for the first time, would be in
12 violation of the law.

13 And as for tablets, there's never been an
14 exemption. So people who do it now, in theory, are in
15 violation of 1201 and, moving forward, they would
16 continue to be in violation of 1201.

17 MR. CARSON: And, of course, we've had
18 classes of work expire in the past and we're still all
19 here.

20 MS. HOFFMAN: Yes, it's true. The world
21 hasn't ended. I recognize that. But I do think this
22 would affect millions of consumers. And I think

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1 there's plenty of evidence in the record to show that
2 a lot of people jailbreak devices, or root devices, if
3 we're talking about Android. And we're not talking
4 about five people or 50 people. As I mentioned during
5 the last hearing, when the jailbreaking tool Absinthe
6 was released in January, over a million devices
7 downloaded it over a weekend.

8 MR. CARSON: Steve, and then Brett.

9 MR. METALITZ: Just two minor points. First,
10 I'm sure if the office were to decide not to issue a
11 similar exemption to the existing jailbreaking
12 exemption, I'm sure EFF would do an excellent job of
13 informing people about the change in the legal status,
14 so it would not come as a surprise.

15 The other point -- I hear often from the
16 right-hand side of the table here the adjective
17 "criminal" applied to the activity that is not covered
18 by a 1201(a)(1) exemption. I just wanted to get on
19 the record that, of course, the criminal liability for
20 1201(a)(1) only applies if you circumvent willfully
21 and for private financial -- pecuniary advantage or
22 private financial gain. So it's a -- it's not the

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1 same thing as to say it's a violation of 1201(a)(1).

2 MS. HOFMANN: So that might be, for example,
3 Mozilla? I would think.

4 MR. METALITZ: I think -- well, I don't know
5 what their -- I don't know what their situation is,
6 and there are other provisions of the statute that --
7 many of the groups we've talked about here I think
8 need to look at what their status would be with regard
9 to those provisions. All I'm saying is that if
10 1201(a)(1) were to apply, starting on October 28th,
11 to -- as it does not now -- to the activities that are
12 within the existing exemption, it would not mean that
13 anyone would necessarily be in any criminal liability.

14 MR. CARSON: Brett, you had a point.

15 MR. WYNKOOP: Yeah. Just going to what the
16 other side is saying that the effect of not getting
17 these exemptions is limited to a few kooks, like
18 myself, who want to run what they want to run on their
19 computers and it would not harm the citizens at large,
20 I just want to point out, I just pulled up on my very
21 tiny computer here a website called Netcraft. What
22 does Netcraft do? Netcraft gives statistics on what

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1 software is used by the web servers on the Internet.

2 Greater than 80 percent of the web servers on
3 the Internet are using free software booted on free
4 operating systems, which, if this UEFI stuff happens,
5 that will be the end of it. My company, Hera
6 Partners, will be stuck between a rock and a hard spot
7 with, how are we going to run websites for our
8 customers?

9 The websites that we design and build and
10 host for our customers are built using an entire free
11 software stack with the Linux operating system at the
12 bottom, or the FreeBSD operating system at the bottom,
13 depending upon some little technical twiddly things,
14 followed by the Apache web server, followed by the PHP
15 language, followed by a piece of software called
16 Magenta, which is also freely licensed software, all
17 of which would not be able to boot on a computer that
18 was restricted to booting software only approved by
19 Microsoft.

20 And what would the harm in that be? Well,
21 the harm in that would be you would have, as computers
22 aged out and became no longer fast enough or no longer

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1 able to be maintained because parts were not
2 available -- you would have large numbers of websites
3 going off the net. You would probably also have, to a
4 certain extent, a number of websites that would shift
5 over to using Microsoft's inferior products for these
6 services, and paying Microsoft a large tax for that.
7 I don't think that it is in the best interest of the
8 American public to do something that will have that
9 kind of an impact.

10 And not granting these exemptions will indeed
11 have that kind of an impact. The half-life of a
12 production computer system is no more than three
13 years.

14 MR. CARSON: Okay. We're rapidly running out
15 of time, and we haven't really even gotten to our
16 questions. So I'm going to ask that -- Ben is going
17 to have some questions. Listen to them carefully.
18 Only respond if you've really got something to say in
19 response to them, and try to be succinct because, if a
20 question is being asked, it's because we're curious
21 about something that may make a difference, and the
22 more time you take in going off point, the less likely

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1 we are to get your answer that you really want us to
2 hear, so -- Ben.

3 MR. GOLANT: Thank you. Directed to Aaron:
4 In response to what Jesse and Steve had said about the
5 scope of your exemption, I too had found it a little
6 bit difficult to wrap my hands around it. I'm not
7 exactly sure -- it seems rather broad, even though you
8 said it's limited. Is it solely -- or I should say --
9 substantially directed at replacing operating systems
10 or is there a larger component to that because you
11 used the term "software" rather than "operating
12 system" so I'm just trying to figure out what the
13 scope of this matter was.

14 MR. WILLIAMSON: Certainly our primary
15 concern is the ability to replace operating systems on
16 available hardware. And I think if push came to
17 shove, we would accept an exemption that -- that only
18 extended that far.

19 I think that, however, it's important to
20 recognize that there, you know, a number of users of
21 devices of all kinds -- but we've seen it particularly
22 on smartphones -- sorry. We've seen it particularly

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1 with users of smartphones and tablets. It's important
2 for many users to be able to get access to
3 applications that are not available through the
4 official channels on their devices. It's not
5 important to them to replace operating systems.

6 And so, you know, I think that it's important
7 to take those users into account when crafting an
8 exemption, but if you have the ability to replace the
9 operating system, then you'll generally have the
10 ability to replace applications as well. It's just a
11 technically more difficult step, and I wouldn't want
12 to leave those users out in the cold.

13 MR. GOLANT: Isn't EFF's exemption request
14 about apps, isn't that more to their concerns that
15 they addressed or not? I'm just trying to figure
16 out --

17 MR. WILLIAMSON: Well, as I understand EFF's
18 exemptions, they apply to operating systems and
19 applications as well.

20 MR. KASUNIC: Can I follow up on that? My
21 understanding was that -- I think, Steve, you
22 carefully said that installing a new operating system

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1 might not be -- may not be circumvention?

2 MR. METALITZ: I mean, this issue has come up
3 before in different contexts in this proceeding. And
4 the question is whether you need to circumvent in
5 order to delete something and install something else.
6 I don't know -- I mean, it's a factual question. I
7 don't know the answer to it. I think the burden is on
8 the proponents to show that what they want to do
9 requires circumvention because, otherwise, they don't
10 need an exemption.

11 MR. KASUNIC: Jesse, do you have any thoughts
12 on that in terms of -- if you took all of the software
13 off of a device so -- part of the point was that I buy
14 this device, this machine, and I want -- I own that
15 machine, and there often isn't any licensing terms on
16 the machine itself; the licensing is with respect to
17 the software.

18 Can you -- well, I guess the first question
19 is, can you completely wipe it? Is there firmware or
20 other things that might not be able to be completely
21 uninstalled on the machine? And if you can, is there
22 any copyright issue and infringement issue or

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1 circumvention?

2 MR. FEDER: Starting from -- the second
3 question, I think, is the easier question. Deleting
4 an operating system is not a copyright infringement.

5 MR. KASUNIC: Or circumvention?

6 MR. FEDER: Well, the question is, is there a
7 TPM that needs to be circumvented in order to have the
8 privileges you need to wipe the operating system?
9 That seems to be the assertion that's being made here.
10 It's a factual issue. I don't know -- I don't have
11 the factual answer to that question.

12 MR. METALITZ: The reason I raise that is if
13 you look at the -- the software -- the SFLC
14 submission, on page 10 it says, While modification of
15 the preinstalled operating system is sometimes
16 necessary to circumvent an application lock, the same
17 is not true of OS locked -- operating system locks.
18 Removal of a device's default operating system does
19 not require its reproduction, derivation,
20 distribution, performance or display, and so cannot
21 infringe, you know, section 106. I think that's
22 Jesse's points.

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1 It struck me that I'm not sure you would need
2 to access it in order delete it. So I don't know
3 whether there's any circumvention involved.

4 MR. WILLIAMSON: I mean, I think there's --
5 there are definitional issues here that aren't easily
6 resolved by resort to the -- to any cases or to the
7 statute itself. It's possible that I can be proven
8 wrong on my statement in there that, for every mobile
9 operating system, there's no need to perform any
10 modification of the operating system to get the
11 necessary permissions to remove it.

12 There are, you know, as I understand it,
13 essentially three ways in which users are prevented
14 from removing an operating system. One is simply
15 withholding administrative rights, which makes it
16 impossible to delete at least some portions of the
17 operating system because you simply don't have delete
18 access.

19 Another is to actually, you know, sign the
20 operating system so that the firm -- yeah, so that the
21 system will not boot an unsigned operating system.
22 And that's another type of measure that's used to

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1 prevent users from installing a new operating system,
2 but it also controls access to, I believe, the
3 operating system that is loaded.

4 And then yet a third and further measure is
5 to encrypt the boot loader to make it impossible to
6 even install a new boot loader that would then install
7 unsigned images.

8 And so there are various measures employed.
9 I think that all of them can certainly be construed to
10 control access to the existing operating system,
11 therefore, causing there to be a section 1201(a)
12 violation when you circumvent them.

13 MR. GOLANT: That was very clear? Was that
14 in your comments, because I'm not sure I --

15 MR. WILLIAMSON: I'm not sure if that -- all
16 of that was stated clearly.

17 MR. GOLANT: I just have a couple more
18 questions. Yes?

19 MR. WYNKOOP: One more thing on that. As I
20 believe the only computer systems engineer on this
21 panel today, if you have burned into read-only memory,
22 soldered into the circuit board of the computer a tiny

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1 program that says you can't load anything that I don't
2 want you to load, then it becomes, from a practical
3 point of view, impossible to load another operating
4 system on top unless you can somehow wipe that
5 read-only memory chip and reprogram it.

6 Now, I'm not a lawyer, but one -- the
7 reasonable man test would say somebody could call that
8 circumvention. But from a practical point of view, it
9 just makes it impossible for even very astute people
10 to make that change of operating system, because there
11 are read-only memories that are actually read-only.
12 Once they're burned, that's it. They can't be
13 reflashed. You've burned out little pathways in the
14 chip, and it will only do one thing. It is then a
15 one-trick pony.

16 MR. KASUNIC: Putting that back to copyright
17 owners, is there any copyright interest in preventing
18 someone from completely wiping the device?

19 MR. METALITZ: It's not a copyright -- I
20 think Jesse already stated --

21 MR. FEDER: Yeah, it's not an infringement.
22 I think --

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1 MR. KASUNIC: It may be a 1201 issue, but the
2 question is, is 1201 somehow protecting a copyright
3 interest or is it protecting a hardware interest?

4 MR. METALITZ: Well, I know that the office
5 has made this bifurcation of what interest is being
6 affected. I think, just looking at the statute, the
7 question of installing new operating system is, I
8 think, totally irrelevant to the proceeding.

9 MR. SULZBERGER: I must have misunderstood.
10 I'm sorry.

11 MR. METALITZ: It's -- circumvention has a
12 definition, and it has to do with access to a
13 copyrighted work. So if you're removing the existing
14 operating system, the question is, do you need to have
15 access to it in order to do that? So that if there
16 is -- whether it's in the form of ROM or some other
17 form, if there is an access control mechanism that you
18 have to circumvent in order to do that, then we're in
19 the right -- then we're at the right table here. But
20 if not, not.

21 MR. KASUNIC: We're at the right table, but
22 we're not necessarily asking the right question.

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1 Right? So the question would be if, in order to
2 obtain access to the copyrighted work in order to
3 protect the copyright interest in that work -- or is
4 the purpose of getting access to that work to
5 completely obliterate the work? And I think those are
6 slightly different things where you're not actually
7 going to use the copyrighted work in any way in the
8 second, in the latter case, and so access is just
9 being used sort of as the -- of the copyrighted work
10 could be being used as the hook there, or a
11 non-copyright purpose.

12 MR. METALITZ: I suppose if the only purpose
13 of the access control mechanism was to prevent the
14 obliteration of the work, would it qualify? Is that
15 your question? I think that's -- I'm not sure what
16 the answer to that question is. But in this case, I
17 think, if there is access control in the operating
18 system, that's probably not its only purpose.

19 MR. FEDER: Again, I think this comes back to
20 really a security issue. That's the main reason why
21 you put these sorts of locks in place, to prevent
22 tampering with the operating system in a way that's

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1 harmful to the user.

2 So I think, at the end of the day, there are
3 some real factual questions here and -- you know, I
4 come back to what I said at the beginning, which is
5 that it is the burden of proponents of these
6 exceptions to establish that what they're really
7 talking about here is circumvention of an access
8 control for a non-infringing purpose and that there is
9 a substantial adverse impact.

10 So, you know, at the end of the day, I can't
11 answer the technical question right now, but I think,
12 in essence, the burden is on the proponents to answer
13 those technical questions in this proceeding.

14 MR. GOLANT: Could I just ask -- say, for
15 example, it is possible to -- think about this -- that
16 the DRM is a physical thing in a phone or a laptop or
17 any other computing device, and I took a tool and I
18 ripped it out. Would that be an act of circumvention?

19 MR. METALITZ: Yes. You're avoiding
20 bypassing or -- I don't think extracting is in there,
21 but --

22 MR. GOLANT: What I'm saying, though -- I own

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1 the phone, not the software, but it's embedded in a
2 chip, and I just took out the chip. That would be a
3 circumvention?

4 MR. METALITZ: If that controlled access.

5 MR. CARSON: Is the chip controlling access
6 to a copyrighted work?

7 MR. GOLANT: I just put a needle in and I
8 destroyed it. I'm just trying to --

9 MR. METALITZ: Similarly if you took a chip
10 and soldered it into your video game console in order
11 to circumvent an access control on the operating
12 system -- I mean, it could be in hardware or it could
13 be in software.

14 MR. KASUNIC: "Remove" is the word the
15 statute.

16 MR. WILLIAMSON: Steve construed the issue as
17 whether you need to access, within the meaning of the
18 act, the copyrighted work in order to remove it. And
19 I don't think that's the issue under the statute. I
20 think the issue is, first, whether the technological
21 protection measure controls access to the copyrighted
22 work, and then whether your use is non-infringing.

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1 And here, I think particularly -- I mean, if
2 we think -- we'll take the example of one type of
3 technical protection measure, which is, for example, a
4 UEFI-like operating system signing procedure -- in
5 that case, that signature or that encryption scheme
6 does control access to the copyrighted work. We only
7 want to circumvent it for purposes of removing the
8 operating system. And that -- I think those are the
9 two steps we're concerned about.

10 MR. SULZBERGER: Just briefly. I think that
11 when the law was passed, nobody would have
12 considered -- access to a copyrighted work means a
13 popular song which you've obtained either legally or
14 illegally, and then the whole -- there's some piece of
15 software that stops you from putting it up on your
16 personal website and making it freely available,
17 assuming it's under a restrictive license -- that's
18 what they're focused on.

19 This is a completely different question, and
20 it's merely a coincidence -- it's a misuse. They're
21 homonyms. Sure, the propriety OS is a copyrighted
22 work. That I don't doubt. Accessing it, when you're

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1 fiddling with the boot loader or modifying the boot
2 loader -- if the DMCA -- and this is part of the
3 reason I always say it doesn't deal with copyright --
4 there are many reasons I say it -- look, that's not --
5 you're not copying something and making profit by
6 distributing it. That's not what happens. You want
7 to put your own operating system on it.

8 And the use of the word "access" to remove,
9 it's more like -- it's not quite a pure coincidental
10 homonym. There's some sense of access, but it ain't
11 the same thing.

12 Removing the -- whatever little thing is on
13 the song and then redistributing it, that is a
14 thousand miles from my putting my operating system
15 only a piece of hardware that I bought. It just
16 doesn't -- and the other side, by the way, I want to
17 thank them for their absolute honesty. This is maybe
18 a new question for them. They hear it and they tell
19 the truth. They don't know it sounds different. You
20 know, yeah.

21 MR. GOLANT: Just a couple more things. Two
22 minutes.

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1 MR. CARSON: Whatever you need.

2 MR. GOLANT: Jesse, you had made a number of
3 statements in the opening. Is that part of the
4 record, some of the assertions that you made, or are
5 these something new outside the record? In other
6 words, do we already have this on hand?

7 MR. METALITZ: The statistics?

8 MR. FEDER: The statistics?

9 MR. GOLANT: Yes.

10 MR. FEDER: Those are -- well, those are --
11 I'm not sure those are in the articles that we sent to
12 you. They are all from published articles. I can
13 pull them up and --

14 MR. GOLANT: Right. I'd just like to have
15 some substantiation to what you say so we can put it
16 in the record.

17 Last question is, we're going back to this
18 issue of a tablet. How really can you define what a
19 tablet is? I mean, from what I heard, it's a small
20 computer that you hold in your hand. Is that enough
21 for us to go forward to say that they've established
22 the class upon which we can grant an exemption?

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1 MS. HOFMANN: May I?

2 MR. GOLANT: Yes.

3 MS. HOFMANN: So we thought this might come
4 up, and so we took a stab at a definition. And what
5 we did is we took a look at a bunch of the definitions
6 that are out there. There are some from various
7 magazines. There are some from companies like Intel.
8 And we tried to identify some of the common factors.

9 And so this is what we suggest. A tablet
10 computer is a personal mobile computing device,
11 typically featuring a touch screen interface, that
12 contains hardware technically capable of running a
13 wide variety of programs that is designed with
14 technological measures that restrict the installation
15 or modification of programs on that device and is not
16 marketed primarily as a wireless telephone handset.

17 MR. CARSON: Could you read that to us one
18 more time?

19 MS. HOFMANN: Yes. And of course we would be
20 happy to put this in the record as well.

21 MR. CARSON: I think you are.

22 MS. HOFFMAN: A tablet computer is a personal

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1 mobile computing device, typically featuring a touch
2 screen interface that contains hardware technically
3 capable of running a wide variety of programs that is
4 designed with technological measures that restrict the
5 installation or modification of programs on the device
6 and is not marketed primarily as a wireless telephone
7 handset.

8 MR. CARSON: Okay. The first part of that I
9 follow and I get. I'm not quite sure why you are
10 including in the definition of a tablet the fact that
11 it is contains technological measures that control
12 access. Why should that be part of a definition of a
13 tablet? I can well imagine a tablet which has no
14 technological measures on it of that nature.

15 MS. HOFMANN: Right. Well, you know, I think
16 we were thinking about this in the context of our
17 definition of our proposed class. And we were trying
18 to define a device that met the criteria that we were
19 seeking in exemption 4.

20 And so the reason that we put that in there
21 is because we wanted to make clear that we're talking
22 about a situation where a device has certain

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1 technological protection measures that make it
2 impossible for a consumer in the ordinary course of
3 things to install or modify programs on the device.

4 But if the goal is simply to define what a
5 tablet is out of the context of that particular
6 proposed class, that might not be necessary.

7 For the same reason we said it's not marketed
8 primarily as a wireless telephone handset because we
9 wanted to differentiate it from a smartphone, which is
10 also in our proposed class.

11 MR. CARSON: Okay. I think it's probably
12 unfair to ask people to react to it, but I can ask and
13 you can decline. But any reactions at this point?

14 MR. FEDER: I need to see it on paper.

15 MR. METALITZ: If Marcia will send it to us,
16 we'll --

17 MR. CARSON: Let's do this. This is a new
18 and potentially helpful suggestion. If you could --
19 it will take us a little while to get that transcript
20 back. So if you could give us the actual -- maybe
21 e-mail us the actual text --

22 MS. HOFFMAN: Absolutely.

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1 MR. CARSON: -- we will send it to everyone
2 on this panel --

3 MS. HOFFMAN: Absolutely.

4 MR. CARSON: -- and we will ask people to
5 react to us within ten days, please.

6 MS. HOFFMAN: Yes.

7 MR. WYNKOOP: We can do that because we still
8 have free unfettered use of the computers today.

9 MR. CARSON: Better make it seven days just
10 in case.

11 Anything else? Okay. Well, thank you very
12 much, folks. We are running behind, but I at least
13 need some time to reflash my memory. So let's
14 reconvene at 4:15.

15 (Whereupon, a short recess was taken.)

16 MR. CARSON: Sadly, we're nearing the end of
17 our journey together. Dealing with proposed
18 classes 10A and 10B, we have a panel consisting of
19 Michael Weinberg from Public Knowledge, Dean Marks
20 from AACCS LA, Bruce Turnbull, counsel of DVD CCA and
21 Matt Williams, of Mitchell, Silberberg and Knupp,
22 representing the Joint Creators and Copyright Owners.

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1 Is that the order we'll go in as I see you from left
2 to rate or is it -- okay. Good.

3 Michael, you can start off.

4 MR. WEINBERG: I'm glad I'm not the only
5 one -- it's the first time up for all these panelists
6 all day. I feel bad for you guys. You've been here
7 the better part of three days.

8 Thank you all for this opportunity. I'm
9 Michael Weinberg, and I testify today on behalf of
10 Public Knowledge in support of class 10A.

11 By any measure, DVDs have been wildly
12 successful, with billions sold since their
13 introduction in the late 1990s. The hundreds of
14 consumers who wrote to you in support of this
15 exemption were a sample of American households, many
16 of which own dozens or even hundreds of motion
17 pictures on DVD. These DVD owners make up some of the
18 movie industry's best customers.

19 Those customers are frustrated with technical
20 protection measures that stop them from making
21 legitimate personal copies of those motion pictures.
22 The customers who wrote to you, who represent millions

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1 of similarly situated Americans, simply want to be
2 able to watch their movies in a way that makes sense
3 for them. They do this every day with the music they
4 own on CD at the click of a button. But DVD CSS makes
5 what should be a simple task illegal. Fortunately,
6 this proceeding gives you an opportunity to change
7 that.

8 Let there be no mistake. There is nothing
9 illegal about personal space shifting. In one of the
10 few cases to directly discuss personal space shifting,
11 the Ninth Circuit citing the Supreme Court in Sony,
12 described space shifting music for personal use as,
13 quote, paradigmatic non-commercial personal use. That
14 description is just as applicable to the practice of
15 copying motion pictures from DVDs for use in personal
16 devices, and it is a description that is widely
17 accepted by the public and industry today.

18 I will not repeat the extensive fair use
19 analysis from our comments in these opening remarks.
20 At this time, I will merely remind the office that
21 personal space shifting is a non-commercial,
22 potentially transformative use of a work that has been

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1 released and sold to the public with no cognizable
2 negative impact on the value of the work.

3 Tellingly, opponents have been unable to
4 point to case law suggesting otherwise. The closest
5 case they've been able to find, UMG v. MP3.com,
6 considers a business purchasing recordings on CD and
7 making them available to the public, not consumers
8 accessing recordings they have purchased themselves on
9 the device of their choosing.

10 In fact, there are very few cases addressing
11 the issue of personal space shifting. This would be
12 unexpected if there was a legitimate case to be made
13 against the practice. After all, personal space
14 shifting of a variety of media is widespread and has
15 been for over a decade. And, as we all know, large
16 content owners, including those represented here at
17 the table today, have never been shy about enforcing
18 their rights when they feel there's been a violation.
19 However, they've avoided bringing claims against
20 personal space shifting.

21 In fact, the RIAA, one of the joint creators
22 and copyright owners represented today told the

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1 Supreme Court that personal space shifting was, quote,
2 perfectly lawful. Similarly, the MPAA and the RIAA
3 have extensive commercial agreements with Apple and
4 its iTunes platform, which builds one-click space
5 shifting functionality directly into its software.

6 The shortage of case law is no barrier to the
7 Register granting this exemption. As the Register has
8 recognized, the statutory requirements to evaluate
9 exemptions necessarily requires a degree of
10 independent examination. The statutorily mandated
11 process of consulting, determining, weighing the
12 likelihood of future impact and recommending all
13 require the Register to draw conclusion beyond the
14 black letter of the law, which the Register has done
15 in previous proceedings.

16 Furthermore, the Register's recommendation
17 does not prevent rights holders from litigating the
18 issue. If a court were to find non-commercial
19 personal space shifting to be an infringement, the
20 existence of the exemption would offer the infringing
21 party no protection from a copyright infringement
22 judgment.

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1 Beyond the question of the underlying
2 legitimacy of the use, the statute presents the
3 Register with a number of factors to consider in
4 evaluating the requested exemption. In this case, all
5 relevant factors weigh in the favor of granting the
6 exemption.

7 The first factor, the impact of the exemption
8 on the availability of the copyrighted work, has
9 traditionally been evaluated a three-part test
10 considering the actual impact on the availability of
11 the work, the availability of the work in other
12 formats, and alternative means of access.

13 As the Register recognized in the previous
14 rulemaking, widespread access to CSS circumvention
15 tools has caused no discernible impact on the
16 willingness of copyright owners to embrace DVD-based
17 distribution.

18 In our current world of one-click CSS
19 circumvention, it strain credibility to imagine that
20 granting this exemption would have any impact on the
21 availability of works on DVD.

22 Additionally, while some motion pictures are

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1 available in non-DVD formats, ten years of DVD-first
2 distribution has created a huge number of works which
3 are only available on DVD.

4 In the case of works that have been
5 re-released in formats that might allow some sort of
6 personal space shifting, it is unreasonable to require
7 consumers to repurchase motion pictures they already
8 own simply to make a legal use of the works.

9 As for the third part of the test, we saw and
10 heard in earlier testimony that alternative means of
11 access are inadequate substitutes both in output
12 quality and in burden on consumers. Using either
13 camcording or screen capture to create a high-quality
14 reproduction, which are by no means exact
15 reproductions, is a technically complicated process
16 that is time and computing resource-intensive. When
17 compared to the one-click copy that most consumers use
18 to space shift music, the technical complexity alone
19 excludes millions of Americans from this perfectly
20 legitimate activity.

21 Even if a consumer overcomes the technical
22 problems, the result is an imperfect, inadequate copy.

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1 Image quality matters to average consumers.
2 High-definition televisions are not only sold to media
3 studies departments. Movie studios do not spend
4 hundreds of millions of dollars on sets and special
5 effects in the hopes that a documentarian will include
6 a clip in their next film. The PBS documentary image
7 quality standards described in the earlier technical
8 demonstration are expensive to maintain, but they
9 exist because average viewers can tell the difference.
10 Poor quality images can fundamental change a motion
11 picture.

12 The second and third statutory factors, which
13 consider nonprofit and critical uses, do not directly
14 apply to this requested exemption. However, there's
15 nothing in the language of the statute to suggest that
16 impacting every element is a prerequisite for granting
17 an exemption.

18 The fourth factor considers the impact of the
19 exemption on the value of the work. As mentioned
20 briefly earlier and discussed extensively in our
21 proposal and reply comments, this exemption will have
22 no negative impact on the market for the value of

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1 copyrighted works. It will not contribute to piracy.
2 It will not somehow confuse consumers. It will not
3 add to the supply of unauthorized copies of works.
4 The Register has recognized this in the past, and
5 nothing has occurred to alter the soundness of that
6 conclusion.

7 The fifth statutory factor is simply any
8 other factor that may be relevant to the proceeding.
9 In the 2010 recommendation, the Register formally
10 recognized what had long been obvious: CSS is being
11 used predominantly to prevent reproduction, not
12 control access. As a result, socially beneficial
13 non-infringing uses are being adversely affected by
14 the prohibition against circumvention. That was true
15 then, and it is true today.

16 I'd like to conclude with an observation.
17 The Register and Copyright Office would do a
18 disservice to itself and the public if it failed to
19 recognize the true state of affairs with regards to
20 motion pictures released on DVD. This exemption is
21 not about piracy. CSS has been cracked for well over
22 a decade. Movie piracy is widespread, a fact that

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1 many of the opponents of this exemption spend a great
2 deal of time and money pointing out in every available
3 forum. There is no latent infringement capacity
4 waiting to be unleashed by the Register's
5 recommendation.

6 This exemption is not about confusing the
7 public. People space shift media every day and are
8 capable of understanding the difference between space
9 shifting media they own and illegally downloading
10 media that they do not.

11 This exemption is about restoring the rights
12 of consumers who play by the rules. It's simply
13 allows consumers, who have lawfully acquired motion
14 pictures on DVD, to space shift them for personal use.
15 Restoring this type of ability is precisely what this
16 proceeding is designed to do, and I urge you to do so.

17 I look forward to answering your questions.

18 MR. CARSON: Thank you.

19 Dean.

20 MR. MARKS: Thank you. Dean Marks on behalf
21 of AACSLA, the Advanced Access Content System
22 Licensing Authority, and here just to make two very

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1 limited and brief points. First, as we have said with
2 regard to a number of the other requests for
3 exemptions filed in this proceeding, we want to
4 emphasize that requests that do not specifically name
5 Blu-Ray discs or the AACS technology cannot be granted
6 with respect to such discs and technology. And that
7 includes the request filed by Public Knowledge that is
8 the subject of this panel, and also one of the
9 requests filed by an individual. And this was noted
10 in our comments in February, but I wanted to be sure
11 we put that on the record for the testimony here
12 today.

13 Second, with regard to the handful of
14 requests from four individuals who wish to make
15 back-up or convenience copies of content where the
16 requests did refer to Blu-Ray discs or AACS
17 technology, AACS LA notes that none of these requests
18 state with any specificity that the AACS technology is
19 impeding an identified authorized or fair use, none
20 actually provide the necessary explanation of why the
21 uses is an authorized use and that such use is not
22 able to be satisfied due to the presence of AACS as an

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1 effective technological measure under the law, and
2 none of them state the kind of specific, narrowly
3 tailored class that the Register has stated is
4 required for an exemption.

5 Accordingly, we request that each of these
6 individual requests not be granted, at least as to
7 AACS technology on Blu-Ray discs.

8 And I'm happy to respond to questions the
9 copyright panel may have. Thanks.

10 MR. CARSON: Thank you.

11 Bruce.

12 MR. TURNBULL: I'm Bruce Turnbull,
13 representing the DVD Copy Control Association, same
14 organization we were yesterday for the record. And
15 here -- I'm going to start out with the proposition
16 that I think the proponents have not met their burden
17 of demonstrating that the uses are, in fact,
18 non-infringing uses. We can get into that, and
19 perhaps Matt will have more to say about that.

20 I want to spend my time on three points that
21 DVD CCA thinks are critical. First, that the class is
22 not the narrow refined class that the Copyright Office

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1 has stated is essential to the granting of any
2 exemptions. Second, that granting an exemption of
3 this scope and breadth would overwhelm the CSS
4 licensing system to the great detriment not only of
5 DVD CCA, but of the movie industry that has relied on
6 it -- the integrity of the licensing system for nearly
7 15 years, and the consuming public who have enjoyed
8 DVD as the format for that period of time. I have
9 some points to make about how Public Knowledge, I
10 think, misconstrued points related to that in their
11 responding comments. Third, the ways in which content
12 is now available and will be available in the next few
13 years satisfy the desire to have content available on
14 a wide variety of consumer devices.

15 First point. The proposed class is precisely
16 the kind that the Copyright Office has considered and
17 rejected in previous rulemakings and the kind that the
18 office warned against in its initiation notice in this
19 current proceeding. To take a couple of points from
20 the initiation notice, the Copyright Office said a
21 class of works was intended to be a, quote, narrow and
22 focused subset of broad categories of authorship

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1 identified in section 102. That was quoted in the
2 Commerce Committee report.

3 Second, again, from the initiation notice,
4 the goal is to fashion an exemption that is neither
5 too narrow nor too broad to remedially address the
6 evidence of present and likely harm. It shall be an
7 appropriately fashioned exemption that will assist
8 users and copyright owners alike by temporarily
9 suspending the prohibition on circumvention for
10 appropriately tailored, adversely affected classes
11 while preserving the prohibition on all other classes.

12 And our view is this would effectively not
13 preserve the prohibition on the rest of the class.

14 From the 2006 rulemaking, there are a number
15 of points -- and this is what we've got up on the
16 screen here is a comparison between what the Register
17 found and the librarian found to be an unacceptable
18 class and what is proposed here.

19 In relation to the effect on criticism
20 comment, news reporting, teaching, scholarship and
21 research, the proposed class is premised -- for
22 personal performance is unlikely to have any

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1 beneficial effect on reporting, teaching, scholarship
2 or research.

3 So we -- obviously, it does not meet that
4 category.

5 The effect of circumvention on the market for
6 or value of a particular class of copyrighted works,
7 the -- what was found unacceptable was a broad
8 exemption, all motion pictures on DVDs, potentially
9 harmful to copyright owners and would adversely affect
10 the public by undermining the incentive for
11 distribution of digital copies of motion pictures and
12 audio-visual works.

13 And that's precisely the category here.

14 In the 2010 rulemaking, the office talked
15 about proposals that were narrowly tailored with
16 regard to a discrete set of users who had demonstrated
17 a sufficient need to circumvent DVD access controls
18 for limited, non-infringing purposes. And no
19 proponent had demonstrated the need to circumvent in
20 order to copy a motion picture in its entirety, and no
21 proponent has demonstrated the need to use a
22 quantitatively large percentage of the motion picture.

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1 And, again, we think these are comments that
2 were well taken from the prior proceedings and were
3 reiterated as part of the initiation notice in this
4 proceeding.

5 Furthermore, the kinds of considerations that
6 were discussed in previous panels, various gatekeepers
7 in the professional filmmaker context, other limiting
8 factors in the vidder panel -- we had quite a bit of
9 discussion about various factors there -- are
10 conditions that are designed to ensure that an
11 exemption is not misused. There's no suggestion of --
12 and we couldn't come up with any suggestions of those
13 kinds of limiting factors or gatekeeper roles that
14 would be present when you're talking about
15 circumvention that would be used by the entire
16 population.

17 And, here, we believe this is a classic case
18 of the exception swallowing the rule. It would not
19 have the kind of narrow tailoring that the Copyright
20 Office has required in prior proceedings and as set
21 forth in the initiation notice.

22 Now, with regard to the licensing regime, we

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1 cited particularly the Kaleidescape case in our
2 comment. Aspects of the Real Networks case are also
3 relevant here. In the Real Networks case, the court
4 found that CSS technology is -- still effectively
5 controls access to DVD content for the average
6 consumer. Notwithstanding what Mr. Weinberg had to
7 say about the status of the CSS technology, it has
8 been recognized by courts as still being effective.

9 In the Kaleidescape case, the harm to DVD CCA
10 was found to be from a space shifting Kaleidescape
11 product which is, you know, a form of the kind of
12 space shifting that's proposed here -- the harm was to
13 the integrity of the CSS license agreement, and that
14 harm was sufficient to support an injunction against
15 the distribution of the Kaleidescape product. So not
16 only was there a finding that the Kaleidescape product
17 was a violation of the agreement that DVD CCA had with
18 Kaleidescape, but in addition that the harm to the
19 integrity of the licensing system was sufficient to
20 justify the injunction.

21 And that, again, I think is precisely the
22 kinds of space shifting that is proposed here, and we

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1 believe the kind of harm that would occur to the
2 DVD CCA licensing system.

3 The third point I wanted to emphasize -- and
4 I think we're going to see a little video on this in a
5 minute -- but I wanted to emphasize, from DVD CCA's
6 perspective the various alternatives that are in the
7 marketplace today that allow consumers to have movie
8 content in a wide variety of devices from a wide
9 variety of sources, some of them streamed, some of
10 them download, some of them copies that they've made.
11 UltraViolet is probably the preeminent example that's
12 out there the marketplace and growing today. We saw
13 the tech demo about UltraViolet from Mitch Singer on
14 May 11th. Digital Copy is also prominent on -- with
15 many, many movies that are distributed in disc form,
16 particularly Blu-Ray. There are an array of
17 sources -- of content available through online
18 distribution mechanisms of a variety of kinds. These
19 are alternatives to the circumvention that the
20 proponent suggests.

21 By the way, I would note that we are not
22 suggesting that screen capture or video recording with

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1 your cell phone are alternatives in this case. We
2 would not recommend those as -- for the purpose of
3 capturing an entire work. Those were demonstrated and
4 indicated in our prior testimony as alternatives for
5 clip copy circumstances. We don't propose them here.

6 Finally, as we discussed yesterday, while DVD
7 remains king -- 75 percent of the physical product
8 movie distribution is still on DVD -- however, the
9 market for DVD and, indeed, the overall home video
10 entertainment market is in decline. And our concern
11 is very much that this kind of broad-based consumer
12 exemption available to every human being in the
13 country would contribute significantly to the further
14 decline and the more rapid decline of the DVD
15 marketplace.

16 Thank you. And I'll be happy to answer any
17 questions.

18 MR. CARSON: Matt.

19 MR. WILLIAMS: Thank you. I'm Matt Williams.
20 I represent the Joint Creators and Copyright Owners.
21 I will be brief because we're at the end of the day
22 and because, as Bruce said, the proposals we're here

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1 to discuss have been raised and objected in every
2 cycle of the proceeding since 2000, including the last
3 cycle in 2010.

4 Some things have changed since then and some
5 things have not. So, first, what hasn't changed, and
6 that's the case law. Public Knowledge has not cited
7 any case that was issued since the last cycle to show
8 the law has changed since the Register previously
9 considered it. Space shifting is clearly distinct,
10 for example, from search engine thumbnail copying as
11 in Perfect 10 or in Arriba Soft. That involved
12 publicly available search engines, so it's completely
13 different.

14 I wanted to give some quotes from cases that
15 Public Knowledge relies on, because I don't think the
16 cases is really support their position. So in
17 Universal versus Sony, the Supreme Court said the
18 purpose of copyright is to create incentives for
19 creative effort. Even copying for non-commercial
20 purposes may impair the copyright holder's ability to
21 obtain the rewards that Congress intended him to have.

22 Similarly, in the Perfect 10 case that Public

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1 Knowledge relies on, the Ninth Circuit cited the Wall
2 Data versus L.A. County Sheriff opinion for the notion
3 that using a copy to save the cost of buying
4 additional copies is not a fair use.

5 So I just don't think the burden can be met
6 on in-fact non-infringing. There may be some
7 instances of space shifting out there that I don't
8 think have been identified in the record that could
9 qualify, but the burden has not been met.

10 Second, another thing that hasn't changed is
11 the rules and purpose of this proceeding. First, on
12 that, convenience is still not a valid reason for an
13 exemption. Yet, Public Knowledge admits it seeks an
14 exemption, the primary purpose of which is to avoid
15 inconvenience.

16 The last sentence of their reply comments
17 expressly says so. They say, if the exemption is
18 granted, quote, the only thing that will change is
19 that consumers will be finally able to make use of
20 motion pictures on DVD the same way they make use of
21 musical works on CD, as works they have lawfully
22 acquired and are free to move to whatever personal

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1 device is most convenience.

2 So they're expressly, I think, just
3 challenging whether convenience should be grounds for
4 an exemption, and I think the ground rules should
5 remain as they always have been on that point.

6 Another thing that hasn't changed is that one
7 of the ground rules is that providing consumers with
8 the most cost-effective -- excuse me, cost-effective
9 method of consuming video content -- that's not
10 grounds for an exemption. So Public Knowledge's
11 objections to small payments for different levels of
12 access, that should be disregarded.

13 So now, importantly, what has changed? I
14 think the factual record on the marketplace
15 availability of movies and television shows has
16 changed significantly. The record shows that much has
17 developed in the marketplace to undermine the position
18 that space shifting should be presumed lawful or that
19 an exemption is needed. Content is available in more
20 formats pursuant to licenses, and Public Knowledge
21 acknowledges that this is undeniable in their
22 comments.

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1 Copyright owners are exploiting existing
2 markets and developing potential markets without
3 exception. The record includes more testimony from
4 studio executives than ever before on this point, in
5 addition to our written comments.

6 The record also contains more testimony that
7 the security of access controls is critically
8 important for licensing these new services. Public
9 Knowledge has introduced no facts to rebut that
10 testimony, despite having the burden of persuasion.

11 This proposed exemption would undermine
12 revenue streams for new services. These services are
13 enabling the very means of access Public Knowledge
14 aims to champion. This is not about people paying
15 twice for the same access, but about paying for
16 different level of access. Copyright owners can offer
17 different levels of access at different price points
18 because the DMCA enables them to do so. This benefits
19 consumers who prefer limited access at reduced prices
20 without depriving other consumers who want enhanced
21 access and are willing to pay increased prices.

22 Buying one copy of a work simply does not

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1 transfer a license to copy the work as many times as
2 one chooses. This is the foundation of copyright law
3 in all sectors, and I want to read a few more quotes
4 from cases just to underscore that.

5 In the Napster opinion, the Ninth Circuit
6 said, Impact in one market -- here, the audio CD
7 market -- does not deprive the copyright holder of the
8 right to develop identified alternative markets --
9 here the digital download market.

10 In the opinion that Mr. Weinberg noted,
11 cited, UMG versus MP3.com -- granted, the case is
12 distinguishable in some respects, and we wouldn't say
13 that it's dead on point, but there are relevant
14 statements in the opinion. And, for example, the
15 court said, Defendant argues its activities can only
16 enhance plaintiff's sales since subscribers cannot
17 gain access to particular recordings made available by
18 MP3.com unless they have already purchased or agreed
19 to purchase their own CD copies of those recordings.
20 Any allegedly positive impact of defendant's
21 activities on plaintiff's prior market in no way frees
22 defendant to usurp a further market that directly

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1 derives from reproduction of plaintiff's copyrighted
2 works.

3 Finally, in the Sony versus Tenenbaum
4 opinion, which is an opinion that generally I would
5 not endorse as having my favorite articulation of
6 certain points of law, but I think on this point is
7 relevant -- there the judge said, Defendant claims
8 that copyright law does not protect what he labels an
9 outdated business model and that the plaintiffs have
10 other means of profiting from these works. What he
11 seems to be arguing is that even in the era of filing
12 sharing, the plaintiffs still make enough money from
13 their copyrights. But the sufficiency of the
14 plaintiffs' profits not is not the measure of fair
15 use, nor is the defendant's view of what amounts of
16 profits are enough relevant to fair use. Congress has
17 not capped the revenue that a copyright holder may
18 derive from its monopoly, and that is indeed a
19 quintessential legislative judgment.

20 Now, Public Knowledge claims that some titles
21 available on DVD are not available in other digital
22 formats, but I don't think they've pointed to one

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1 single such title in the record. So this failure
2 forecloses reliance on that argument in my view.

3 And, finally, although I think there's
4 absolutely no grounds for granting this proposed
5 exemption, I do want to point out that the proposal
6 itself lacks contours, the proposal does not define
7 space shifting, it does not properly limit the
8 proposal to owners as opposed to lawful possessors of
9 copies, for example, renters of a copy. And, again,
10 although Public Knowledge says at times that this is
11 about titles that are not available in any format but
12 DVD, it's not limited its proposal to such titles, and
13 there's no evidence to support that such titles are
14 causing consumers any concerns.

15 Importantly, I want to emphasize that my
16 clients recognize that their customers seek to access
17 content on multiple devices. They are striving to
18 provide such access through licensed and secure
19 methods, working with technology partners to create
20 new services that benefit consumers.

21 The Register should not undermine these
22 activities by recommending the proposed exemption to

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1 the librarian. And we want to play a very brief video
2 that describes some of these new services just so that
3 the record has a sense of what's out there.

4 (Discussion held off the record.)

5 MR. KASUNIC: In terms of some of the things
6 that we may be seeing some more about, is we -- at the
7 tech demonstration, we had one example of the Walmart
8 conversion business licensing agreement. And is that
9 something that -- I guess it's a question for both:
10 How does that fulfill this need?

11 MR. WEINBERG: No. The short answer is -- I
12 mean, it does provide -- and I was not the tech
13 demonstration, I apologize, but I thin I'm fairly
14 familiar with that offer. It charges consumers a
15 second time for something they already own. And I
16 think that is one of the core issues here, is that it
17 creates a completely unnecessary burden both
18 logistically, just because you have to go to Walmart.
19 And also you need to pay -- I believe it's 2 or \$3 per
20 disc to make this copy, and you're essentially paying
21 for a license for something that you do not need a
22 license to do.

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1 And so while it is true that you could have a
2 business model that charges consumers to make that
3 copy, I don't know that's a business model that the
4 Copyright Office should get behind and the copyright
5 law necessarily supports.

6 Similarly, I think if consumers were charged
7 every time they wanted to make a copy of a CD they
8 owned to move it onto an iPod or something like
9 that -- you could imagine a business model like that
10 and you probably would make a good deal of money in a
11 business model like that, but it doesn't make it a
12 business model that should be seen as legitimate,
13 especially in a proceeding like this.

14 MR. CARSON: And, of course, with respect to
15 music, we've got a particular statutory provision
16 which gives consumers permission to do that, which was
17 enacted sometime after section 107, which suggests
18 Congress seems to have seen it a necessity to enact a
19 statute, which suggests perhaps Congress didn't see
20 section 107 as providing that right.

21 So why should we assume that Congress didn't
22 know what it was doing? Or should we assume that

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1 Congress had some other purpose in mind?

2 MR. WEINBERG: I think what you have to look
3 at fundamentally is the understanding of where the
4 power of fair use is and what is allowed and what
5 isn't allowed. Although there are a number of cases
6 dealing with -- that sort of secondarily deal with
7 these issues in commercial agreements and -- you know,
8 we're talking about the validity of the CSS license in
9 terms of being on licensed players and things like
10 that, in Kaleidescape and Real, at its core you still
11 have a situation where you have people who want to
12 make personal copies of media that they own.

13 And the little amount of case law that we
14 have suggests that it's completely legitimate. And
15 the lack of case law, I would argue, also suggests
16 it's a completely legitimate activity. And it's not
17 limited to music. Music is the most obvious, but most
18 people actually have an understanding that it is
19 currently legal to make personal copies of movies they
20 own on DVD right now.

21 MR. CARSON: What's the relevance of most
22 people's understanding to the question of whether it

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1 is, in fact, legal?

2 MR. WEINBERG: So, obviously, this is not an
3 Athenian democracy. We don't vote on laws by
4 reason --

5 MR. CARSON: If it were, a lot of us wouldn't
6 be --

7 MR. WEINBERG: Right, right, right. Sure.
8 So it is not directly relevant to the legality. I
9 think the legality is something we deal with by
10 walking through the fair use analysis in our proposal.
11 But it does go to the question of undermining the
12 validity or the power of CSS. And when you -- or
13 confusing consumers, which is something that was
14 raised in some of the comments on the proposal. And
15 there's just -- there's simply no threat that
16 consumers will be confused by this exemption because
17 it actually restores the world to the way that they
18 think it is right now.

19 MR. MARKS: Well, I'm going to let Bruce
20 handle all the CSS stuff. I wanted to make one point
21 on the fair use of the personal copying, which is just
22 to remind the panel, as if you would need reminding

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1 anyway, but the one case that really dealt with in the
2 context of the audio-visual work, the Sony Betamax
3 case. It was very clear -- and the court made clear
4 in one of its footnotes -- the premise was for time
5 shifting where the copy of the work was made for later
6 viewing and then erased, and not a space shifting copy
7 which presumably is kept permanently for viewing on
8 alternative devices.

9 And I think that there's a dramatic
10 difference between the two.

11 MR. CARSON: Okay. Let's give Michael a
12 chance to respond to that.

13 MR. WEINBERG: I think there is -- there is
14 certainly a difference between time shifting and space
15 shifting. And I guess where I'm going to, I suspect,
16 fundamentally disagree with the rest of the panel here
17 is that the lack of case law specifically endorsing
18 space shifting does not suggest to me that space
19 shifting is not or cannot be a fair use.

20 And, furthermore, I think, as I mentioned in
21 my testimony, the reason that there is no case law on
22 it is because it is an activity that is so far from

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1 objectionable that rights holders have not seen fit to
2 bring cases against people who are doing it.

3 MR. CARSON: Bruce wants to make a point, and
4 then I think we may be ready to go to the video.
5 Bruce.

6 MR. TURNBULL: I think the reason there's not
7 case law -- or a reason there is not case law on this
8 is because of a fundamental difference in the product
9 market.

10 In the video realm the product market has
11 been based on the licensing regimes CSS, AACS, the
12 regimes that are set up for access from various
13 distribution networks, be they cable or online
14 distribution, where the machine that receives the
15 product has to obey certain rules, the same way in CSS
16 and AACS.

17 That's been very different from the music
18 market where music was distributed on unencrypted
19 open -- so you didn't need a license in order to get
20 access to it. And so the devices developed in a very
21 different way and the computer program developed in a
22 very different way.

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1 In the video market where the devices have
2 strayed from the license terms, Kaleidescape, Real,
3 they have been sued. And it has not gone off on a
4 fair use analysis because the issue had to do with the
5 contract and the violation of the DMCA. But the case
6 law -- to me, I think it's fundamentally because the
7 device and product makers have made their products in
8 accordance with the license agreements and the
9 distribution terms that have been put out there. And
10 so there haven't been -- you can't go into Best Buy
11 and buy a device that allows you to make a copy of a
12 DVD. They don't sell them.

13 You can get them off of the Internet on
14 websites that various people, you know, are
15 downloading from. I'm not disputing that, although
16 the reason you can do that is because of the way the
17 Internet operates. And although the cases were
18 brought and -- and -- you know, both from a trade
19 secret standpoint and from the DMCA standpoint, cases
20 were that those should not exist under the DMCA or --
21 or the contract.

22 But I think the case law has not developed

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1 because of the way the devices have -- and the studios
2 have chosen for, you know, whatever reason, perhaps
3 good reason, watching their brethren in the recording
4 industry, not to sue individuals who have perhaps made
5 copies of movies.

6 MR. CARSON: So what do we know about the
7 practice or non-practice in the marketplace of
8 individuals making personal copies of DVDs? Is it a
9 widespread practice? Is there anything in the record
10 that tells us one thing or another about it?

11 MR. MARKS: I can certainly say -- there were
12 two points I wanted to make. One point, in the
13 disc to digital service that has recently launched at
14 Walmart that Michael referred to and that was referred
15 to in testimony on May 17th, we've gotten a lot of
16 positive feedback from -- from it. There have been
17 YouTube testimonials that have been referred to of
18 consumer saying that they -- this was very easy, this
19 was very convenient. And we have not heard
20 testimonials from people saying, I'm doing this anyway
21 and why would I ever bother to --

22 MR. CARSON: Well, they certainly wouldn't be

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1 testimonials.

2 MR. WEINBERG: Actually, when the
3 announcement for the Walmart service was made, I put
4 up a blog post that was probably one of our most
5 viewed blog posts; not surprisingly, it was not as
6 positive as some of the YouTube testimonials about it.
7 And it was syndicated very widely with outrage about
8 that -- forcing people to pay to have the service.

9 And, again, we're basically now stacking up,
10 you know, some number of YouTube videos versus some
11 number of angry blog posts going the other way.

12 My point isn't that one is larger than the
13 other, but I would say that there -- in many quarters
14 of the public there has been a fairly negative
15 reaction to this as a service being offered.

16 MR. CARSON: But back to my question, do we
17 know anything about the general practice among the
18 public with respect to making personal copies of DVDs?

19 MR. TURNBULL: Well, I think there are two
20 points. I don't have statistics on this, but I think
21 two things are relevant here. One is that for many,
22 many people, watching a movie once is just fine. And

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1 so -- as compared with music where you're likely to
2 want to listen to it over and over --

3 MR. CARSON: You don't have small children,
4 do you?

5 MR. TURNBULL: Well, there are some
6 exceptions. But you can watch it over and over and
7 over again if you have the DVD. But -- but being able
8 to make a copy of it for lots of purposes -- I mean,
9 if you rent it at the store or whatever, you wouldn't
10 necessarily care about making a copy.

11 The second thing is that, until relatively
12 recently -- and it's not -- I don't mean in the last
13 six months, but relatively recently the file size of
14 the movie, if you were going to try to make a copy of
15 a DVD, you were making -- you were going to take up a
16 considerable amount of space on whatever storage
17 medium you had. And so the proposition of doing that
18 was something that many consumers, you know, wouldn't
19 want to bother taking up their files size.

20 So I think that, you know, the recent
21 phenomenon of all kinds of different devices of the --
22 of having lots of storage space is something that the

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1 market is reacting to. That's where the UltraViolet,
2 you know, comes in. That's where the -- the
3 availability of a variety of different services comes
4 in.

5 And so the market is responding to what may
6 be an increased or relatively new demand for
7 availability of movies on different kinds of devices
8 because, up till now, the devices didn't exist and the
9 file size was such that you didn't want to clog up
10 your system.

11 MR. CARSON: The reason I keep asking this
12 question is the Michael has made a point -- and I
13 don't necessarily accept it, but I at least want to
14 test it -- that there's a perception among the public
15 and a practice among the public of making personal
16 copies. And while I don't know there's evidence in
17 the record about this, I think we all probably
18 understand that, with respect to music, that's
19 probably true.

20 So I guess I'd like to know what Michael
21 knows about the practice or not of making copies of
22 DVDs.

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1 MR. WEINBERG: And it probably won't surprise
2 you to hear that I don't have extensive stats on the
3 practice that is now, you know, illegal to break DRM,
4 so I don't have numbers on it. But what I can tell
5 you in part of our reply comments we included hundreds
6 of comments from people talking about how they want to
7 be able to use this and how this is something that
8 they want to be able to do.

9 And some of them is, yes, they have children
10 who love a -- some subset of movies, and they want to
11 be able to put those movies on an iPad so, when they
12 travel, they can hand the iPad to their kids. People
13 who do traveling between -- there was one person who
14 said they have, as they described it, 27 linear feet
15 of DVDs and they travel to a summer house and they
16 would prefer to be able to have their movies on a hard
17 drive or two instead of five boxes in the back of
18 their car.

19 You have people who go through all sorts
20 of -- I would encourage you to look at the record and
21 see all the strange -- personally -- unexpected
22 specific uses.

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1 We have a -- one of my colleague has a nephew
2 who's autistic who loves this very small -- number of
3 movies, and so they want to be able to load them on an
4 iPad so they can give the nephew the iPad and just
5 sort of let him be comfortable and calm there without
6 having to keep switching things in and out.

7 In terms of the public perception, it's
8 funny -- I have -- again, I have three kind of very
9 short data points that are anecdotes.

10 The one is, of course, the Mitch Singer one
11 that was included in our comments, talking about how
12 comfortable he was with the idea of being able to put
13 movies on his PC, presumably without authorization,
14 but maybe he did. I don't know.

15 The other one is when we actually -- when we
16 sent out an e-mail to -- we sent out an e-mail asking
17 people to tell -- to tell you that they wanted to be
18 able to do this. And we actually got -- I got an
19 e-mail back from someone taking me to task. I just
20 want to read three sentences: I rarely complain about
21 your articles. Usually you have verified the facts.
22 But in this case clearly you have not. It is not

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1 illegal to break the lock on these DVDs.

2 This is someone who saw what we said and was
3 so mad about it they decided to write us in anger.

4 And the last thing is Darrell Issa,
5 Representative Darrell Issa did an "ask me anything"
6 at Reddit, which -- Reddit is an online community.
7 And so an "ask me anything" is when you go on there
8 and the community can ask you anything. You know,
9 it's a better or worse idea for various public
10 officials, but he decided to do it.

11 And -- you know, Darrell Issa is a
12 representative who I think we all can recognize is
13 someone who has a higher than average interest in
14 intellectual property. And so Reddit user Moondog
15 asked, As you sit on the subcommittee on intellectual
16 property, competition and the Internet, perhaps you
17 could explain why I can't legally make digital copies
18 of DVD for my personal use? Are you working to change
19 this?

20 And Representative Issa responded, You can,
21 in fact, make personal copies for your own use. A
22 good example would be ripping a DVD so you can play it

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1 on your iPad. That use is not prohibited.

2 MR. CARSON: So we have definitive authority
3 now, right?

4 All right. Let's take a break from the
5 questions and let's watch your presentation.

6 (Video played.)

7 MR. CARSON: Anything you want to add with
8 respect to that presentation?

9 MR. WILLIAMS: Well, I would just add that,
10 you know, in some of the other panels on other
11 proposals, some of the services you saw there, it was
12 questioned whether they were adequate alternatives,
13 because it wasn't just about consuming content for
14 entertainment purposes; it was about repurposing it
15 for some new work.

16 And, here, we have the opposite. The
17 proposal is people want to access digital copies of
18 content to enjoy it for entertainment purposes. And
19 so all of the services there that provide that exact
20 service are an alternative. And I don't see any way
21 around that.

22 So I would say that, in contrast to some

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1 other situations where there's a debate about
2 alternatives, here, the alternatives are clear.

3 MR. MARKS: I just had a couple of points.
4 One, there was -- Michael made a remark about, like
5 with Apple iTunes, that there was space shifting
6 involved there where you can do one click to shift to
7 a different device. And I just want to emphasize that
8 that is in the context of a license. The content
9 owners license the content to Apple. They give their
10 permission to allow for that space shifting. And the
11 entire ecosystem is protected by DRM.

12 And so part of what the panel has to do is
13 balance the damage to allowing circumventions of DRMs
14 and works being stripped of their protection versus
15 what the impact is on the purported fair use.

16 And in those space shifting situations that
17 are licensed by content owners and licensed with
18 increasing frequency, they satisfy the need for space
19 shifting that consumers want while still providing
20 adequate protection for the content.

21 And so these are alternatives that are here
22 that don't involve circumvention, and I think the

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1 notion -- and the circumvention that would -- there's
2 no way you can grant an exemption to circumvent for
3 space shifting and prevent the rent, rip and return
4 phenomenon.

5 I would have not heard any notion of how that
6 sort of damage could be put aside, not even talking
7 about piracy, from than sort of exemption.

8 And I sort of feel the argument about, well,
9 I own it, so, therefore, I get to add more
10 functionality to it as it comes along without having
11 to pay for it is really a specious argument. When
12 people bought DVDs, they knew they weren't allowed to
13 copy them. The devices that they had, as Bruce
14 referred to earlier, really made copying either
15 impractical or impossible.

16 Now that that's available doesn't mean you
17 get it for free. If I bought a cell phone that didn't
18 have texting and then Samsung came out with the next
19 version of the cell phone that had texting, it doesn't
20 mean I get that cell phone, the next Samsung version,
21 for free. And so I just think this -- the fact that I
22 own that particular copy means I get to make more or

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1 get to do more functionally with that copy, I just
2 don't buy it.

3 MR. WEINBERG: Let me address a few things.
4 First, just quickly, the reference I made to Apple
5 wasn't to this -- these other music services it has
6 rolled out, merely the fact that you can take any CD
7 and put it in iTunes and rip it to an MP3 file has
8 that no DRM. That's been built into iTunes since the
9 beginning, and there was no -- I cannot imagine that
10 they could have licensed that ability as sort of a
11 carte blanche situation. You know, that ability to do
12 that is part of that software. They do not have a
13 license for it unless I am very wrong on that. But
14 that's a fairly small point.

15 In terms of these services that were
16 mentioned here, I think there are -- I have two
17 reactions to them. First is that the selection on any
18 of these services, or even these services combined,
19 when compared to the universe of movies available on
20 DVD right now is incredibly limited. You're
21 talking -- this is anyone who has searched for a movie
22 on, you know, Netflix or Amazon Prime or any of these

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1 has probably had this situation. But it's true, there
2 are all sorts of films that are not available.

3 Again, we have not done a systemic study of
4 this at Public Knowledge, but I did, on Friday
5 afternoon, just send out a request to the staff and
6 said, tell me about movies that you have that are only
7 available on DVD.

8 And it shocked me -- it may have been because
9 we were all out of the office; the sinkhole had closed
10 us down -- but how quickly I got responses back. A
11 lot of people talked about movies that were kind of
12 foreign documentaries or about other foreign films. A
13 lot of TV shows are only available on DVD.
14 Apparently, most anime is only available on DVD.

15 And I actually went home -- and I only own I
16 think 19 DVDs. I'm not an avid DVD collector. But
17 even the 19 films that I known, which I did not
18 purchase in order to get a good sample of movies only
19 available on DVD -- three of them were not available
20 in any other format.

21 So these services, even if they were
22 adequate, would not cover a huge corpus of DVDs and

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1 motion pictures that are currently available and that
2 people own.

3 But in terms of the ones that are, I think
4 these services are inadequate, first of all, because
5 they do essentially require you to repurchase things
6 you already own. And that's not something that I
7 believe that the Copyright Office should stand behind
8 and that the law actually allows.

9 And the other thing is that a lot of them
10 require Internet connections. And that's something
11 that is not going to work in a huge number of
12 situations. One is because, for better or worse --
13 and a huge part of what Public Knowledge does when
14 we're not here at the Copyright Office, is try to
15 increase access to high-speed broadband, and that
16 access just isn't what it should be in this country
17 right now.

18 And in so many cases that access is limited
19 by fairly restrictive data caps. And so it simply
20 isn't possible, even if you have that high-speed
21 connection, to download full movies with any sort of
22 regularity. You could do one, maybe two a month,

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1 depending on what your connection is.

2 So these are not real substitutes for being
3 able to take media you already own and simply make a
4 copy. I think, ultimately, what we get back to with
5 this -- and the word that's been used a lot today and
6 yesterday and last week is balance. Right?

7 I mean, we could say, in order to space shift
8 a movie, you have to go and buy the movie -- the
9 rights to the movie from Universal Pictures for \$100
10 million. Right? Anything else is inadequate. But,
11 no, we say, okay, you could buy the DVD and then you
12 could also buy it again on iTunes and maybe you could
13 also pay for a Netflix subscription. We're talking
14 about kind of scale of balancing -- a balance of
15 hardships, whether or not this is worthwhile.

16 You know, is paying 2 or 3 or \$4 to copy a
17 DVD the same thing as being, you know, kicked out of
18 your house because the government wants to turn it
19 into a highway or something? No. We're working on a
20 completely different scale here.

21 But it is an inconvenience to consumers. And
22 so you balance that inconvenience against the cost of

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1 that inconvenience to rights holders. And what I
2 haven't been able to figure out is what that is. I
3 haven't figured out how to finish the sentence, if the
4 copyright office allows people to make personal uses
5 of movies they already own, then the day after that
6 happens -- X, the bad thing. I cannot figure out what
7 harm is done by allowing people do this, so I cannot
8 figure out how much evidence to give you because I
9 don't understand what I'm balancing against.

10 Because the idea that it's going to increase
11 piracy is, frankly, ridiculous. Piracy exists. The
12 idea that people are going to become confused about
13 the legitimacy of using media is also ridiculous
14 because they already think this is the case, so we
15 live in that world already. The idea that we are
16 going to prevent rights holders from reselling movies
17 to people they already own, that they could already
18 make the use of but for this law doesn't seem valid to
19 me.

20 So I don't understand what we're balancing
21 the hardship on consumers against.

22 MR. WILLIAMS: If I could just quickly -- I

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1 think, first, on this huge corpus of titles that
2 aren't available online but are on DVD, I don't think
3 there's one title in the record where that's
4 demonstrated. And I may have missed it but, if it's
5 in your comments, I missed it. And so I just don't
6 think that can be the basis for granting the
7 exemption.

8 On the question of, you know, what is the
9 harm, I think there's somewhat of a misunderstanding
10 or a misnomer going on. You know, when you buy a DVD,
11 you are buying the right to access that copy, but all
12 these great services that are being developed that
13 provide access in very different ways to multiple
14 copies, to streaming copies, to, you know, access in
15 multiple locations, that's a different offering, and
16 it's sold at a different price point. And the fact
17 that it's sold at a different price point enables my
18 clients to work with technology companies to develop
19 these services that benefit the consumer at the end of
20 the day.

21 And so I think the harm that you're unable to
22 identify is clear to me. It's that copyright owners

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1 and their technology partners offer products in order
2 to recoup investments to fund the creation of new
3 products and new services. So without that ability,
4 the new services dry up.

5 MR. CARSON: Bruce.

6 MR. TURNBULL: Two points. First is that the
7 kind of -- as I said in my opening comments, the kind
8 of space shifting that is proposed here is exactly the
9 kind of space shifting that DVD CCA has spent a lot of
10 time and effort to -- to make sure that its licensees
11 are not able to do under the license. It is exactly
12 what Kaleidescape was doing with their product. And
13 the basis for the licensing -- the integrity of the
14 CSS licensing system depends on the ability to enforce
15 those terms. And an exemption of this kind would make
16 that very hard for us to do.

17 The second point is that -- Dean mentioned
18 the sort of rent -- or borrow, rip and return model.
19 There is absolutely no way to police or ensure in any
20 way that, in fact, the person who makes the copies
21 owns the DVD. The whole premise of the DMCA came
22 about when Hollywood was looking at -- it was at the

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1 very time that CSS was being developed, that DVD was
2 being developed, and the concern was fundamentally
3 that you sell one copy of a work, and then everybody
4 in the world would be able to make copies, and you
5 wouldn't sell any more copies of the work.

6 And this is absolutely a concern with this
7 exemption request, that one DVD on the block and, all
8 of a sudden, you know, everybody has the right to make
9 a copy of it. And a lot of what was done -- I mean,
10 we used a mantra which some people criticized and had
11 its limitations, but the notion of CSS being a
12 technology that keeps honest people honest is, I
13 think, the reality in today's world where people who
14 are not honest can go on the Internet and find a way
15 to get around it. But people who are honest know, by
16 the barriers that are put in place by the technology,
17 they're not supposed to be doing this. You've
18 completely obliterated it if you grant this exemption.

19 MR. CARSON: So, Michael, when I read the
20 language of your proposed exemption, I think it does,
21 in fact, permit someone who rents a DVD or if I were
22 to borrow a DVD from Rob -- it's a lawfully made DVD

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1 and it's lawfully acquired, so by its very terms, it
2 would allow people to make copies -- is that intended
3 and, if so, can you justify it?

4 MR. WEINBERG: So let me address the rent,
5 rip and return issue and answer that question. If,
6 when you made -- if you bought a DVD and you made a
7 copy with the intention of taking that DVD and
8 returning it, you would not be making the copy for a
9 personal use. You would be making the copy to defraud
10 the store you were returning the disc to --

11 MR. CARSON: How so?

12 MR. WEINBERG: -- and you are outside the
13 bounds of the exemption.

14 MR. CARSON: Oh, if you bought a copy and
15 then returned it?

16 MR. WEINBERG: Yeah, if you're -- doing this
17 entire process is for the purpose of defrauding the
18 company you're dealing with, you're outside of the
19 exemption. So --

20 MR. CARSON: Let's talk about rental or
21 borrowing.

22 MR. WEINBERG: The same situation. When

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1 you're making the copy, right, the copy is a
2 non-commercial personal use. And if you're making
3 that copy with the intent of returning it or --
4 returning either the sale or returning the rental, I
5 think that the validity of that use becomes a problem
6 and it goes outside the scope of the exemption.

7 MR. CARSON: I don't follow that one bit.
8 It's non-commercial.

9 MR. WEINBERG: Right. Well, I would argue,
10 actually -- I would argue that it was commercial.

11 MR. CARSON: All right. I borrowed it from
12 Rob.

13 MR. WEINBERG: And let me actually answer
14 this a second way.

15 MR. CARSON: Because the first way didn't
16 work, so you better.

17 MR. WEINBERG: Well, no, because -- it's not
18 because -- well, have you lawfully acquired -- I would
19 argue you haven't lawfully acquired it. You're
20 borrowing --

21 MR. CARSON: Sure. I rented it. If I rented
22 it, I lawfully acquired that copy.

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1 MR. WEINBERG: Well, you haven't acquired
2 ownership of the copy.

3 MR. CARSON: You don't have the word
4 "ownership" in there. You say lawfully acquired. I
5 acquired it lawfully.

6 MR. WEINBERG: Okay. Then let me -- let me
7 answer this a different way. This is actually goes
8 back to keeping honest people honest.

9 Right now, anyone who wants -- anyone who has
10 bad intent to do this type of thing is doing it
11 already. The existence of the DMCA is not preventing
12 that person from acting in a bad way. And this is --
13 you know, this has come up in a couple of different --
14 of the hearings.

15 It is absolutely true that someone could
16 abuse this exemption, just as someone could abuse any
17 exemption. And it's really important to tailor them
18 as narrowly as possible to try and minimize that
19 abuse. You're never going to eliminate that abuse.

20 I think the thing to really pay attention
21 to -- and this is why I said, you know, it's really
22 important to recognize the state of the world as it is

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1 right now, not as we wish it to be.

2 Right now, the only people who are being
3 prevented from making these legitimate personal
4 copies -- and, you know, we're having an ongoing
5 conversation whether or not they're legitimate
6 personal copies, but let's assume, for this statement,
7 that they are legitimate -- the only people who are
8 doing that are people who really -- who are being
9 prevented by (sic) doing that by the DMCA are people
10 who really, really care about complying with every
11 element of the law.

12 And so is this -- is granting this exemption
13 going to open a floodgate of people who, before the
14 exemption, were not interested in renting, ripping and
15 returning, but now feel like it's been blessed by the
16 Copyright Office? That just strikes me as
17 unbelievably unlikely.

18 MR. CARSON: But if we use your language, we
19 are blessing that.

20 MR. WEINBERG: I don't know that you are
21 blessing that. I think you're blessing --

22 MR. CARSON: But that's the language. Why

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1 don't throw in -- let's assume everything you say is
2 true.

3 MR. WEINBERG: Okay.

4 MR. CARSON: Why not throw in the language
5 "when the person making the copy owns the copy from
6 which the new copy is made"?

7 MR. WEINBERG: I would not object to that.

8 MR. CARSON: All right. That's a step in the
9 right direction for sure.

10 MR. TURNBULL: I think you still have the
11 problem of -- there's absolutely -- I mean, in the
12 other circumstances, in the documentary circumstances
13 you've got, you know, an ongoing industry program, you
14 have a narrow group of people who are, you know,
15 working together on standards of, you know, fair use
16 and who are conducting educational programs. We had
17 one of the professors talk about conducting seminars.
18 You're not going to conduct seminars for
19 200-and-whatever million people on -- on, you know,
20 how this is going to work. There's absolutely no way
21 to contain it.

22 MR. WILLIAMS: I would just reiterate, as I

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1 said in my opening, that you still have the problem of
2 establishing that it's, in fact, non-infringing. And
3 they've admitted again today that the purpose is for
4 convenience and that the only other purpose is to save
5 a few dollars here and there, which I think you've
6 repeatedly said is not enough.

7 MR. CARSON: Right. And when I put the
8 proposition to him, I said, assuming everything else
9 you say is true.

10 MR. WILLIAMS: Okay.

11 MR. CARSON: So everything else is up in the
12 air.

13 Steve, do you have questions?

14 MR. RUWE: I'd like your reaction, Michael,
15 to the notion that this is -- that this would destroy
16 the ability to have limited access models, or the
17 nature of DVD is a limited access model?

18 MR. WEINBERG: So I'd like to say two things
19 to that. First is we drew this exemption narrowly. I
20 think one of the things that has become clear in the
21 last couple of days, at least to me, is that movies
22 are being distributed on many -- in many different

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1 ways by many different media, and this is not an
2 exemption that allows you to break the DRM on any
3 medium you want. Right. This is narrowly -- so it
4 does not -- I don't see how it impacts a Blu-Ray or
5 streaming because it's only tailored to DVD.

6 MR. RUWE: You said that if more unlocked
7 copy of entire works are made -- that's not the right
8 question. Basically, saying that this won't impact
9 the market for DVDs that are acquired already, that
10 basically -- so, therefore, it's not a detrimental
11 effect to the copyright owners. But wouldn't this
12 ability displace the offerings that they're making?
13 So would it have a negative impact?

14 MR. WEINBERG: Again, I think that's where
15 you get back to, should we recognize these offerings
16 as offering that are legitimate replacements for --

17 MR. RUWE: But it is a negative impact.

18 MR. WEINBERG: Well, it's only a negative
19 impact if you view that positive impact as really
20 existing, as legitimate.

21 MR. RUWE: Legitimate, but does it exist?

22 MR. WEINBERG: Yeah, it exists. But, you

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1 know, I mean, again, you could -- I think, if we were
2 talking about making clips available to teachers -- do
3 the clip services, do they charge per clip for
4 educational uses and things like that?

5 MR. WILLIAMS: No. These are free services
6 you can access online.

7 MR. WEINBERG: Right. So if those services
8 charged for each clip that educators wanted to use, it
9 would certainly be true that granting educators the
10 exemption would have a negative impact on those
11 services' ability to charge money. But I think the
12 larger question would be, is that a service that we
13 want to bless from a policy standpoint?

14 MR. RUWE: I get your point. I think I have
15 the answer -- when you said that you don't understand
16 would the harm is, there is at least some identifiable
17 harm. You question the legitimacy of whether the
18 benefit is rightfully theirs, but you understand that
19 taking something away, that is a harm?

20 MR. WEINBERG: Again, you know, I think we're
21 getting trapped in semantics. I don't know that we
22 should recognize the benefit so you wouldn't recognize

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1 the loss of it. But, yeah, I --

2 MR. WILLIAMS: I would just say the cases I
3 quoted earlier recognize that that's a legitimate
4 market.

5 MR. CARSON: Last opportunity for anyone on
6 the panel to make any point they wish. You don't have
7 to.

8 MR. WEINBERG: Again, I -- this is an
9 exemption that is designed to -- again, I'm open to
10 language narrowing it, as you suggested, but it is
11 designed to allow people, really targeted people, who
12 want to play by the rules, who have purchased DVDs --
13 you know, these are not the pirates. These are the
14 people who are paying for motion pictures who want to
15 make a legitimate use of it. And the only thing
16 preventing them from doing it is the existence of this
17 -- of the DMCA, which is why we have these exemptions.

18 So I would urge you to look at that as really
19 finding a way to reward these good actors. And it
20 really does not have an impact on any number of bad
21 actors that you could imagine, and probably already
22 exist and are functioning out in the world today.

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1 MR. CARSON: Thank you. And with that, we
2 will be happy to say we're closing this hearing.
3 Thank you very much.

4 (Whereupon, at 5:24 p.m., the proceedings
5 were concluded.)

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1 CERTIFICATE OF COURT REPORTER

2 I, Denise M. Brunet, the court reporter
3 before whom the foregoing proceedings were taken, do
4 hereby certify that the proceedings were taken by me
5 stenographically and thereafter reduced to print by
6 means of computer-assisted transcription by me; that
7 said proceedings are a true record; that I am neither
8 counsel for, related to, nor employed by any of the
9 parties to this litigation and have no interest,
10 financial or otherwise, in the outcome of this matter.

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