

UNITED STATES OF AMERICA

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LIBRARY OF CONGRESS

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COPYRIGHT OFFICE
SECTION 1201

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RULEMAKING HEARING: EXEMPTIONS FROM PROHIBITIONS ON
CIRCUMVENTION OF TECHNOLOGICAL MEASURES THAT CONTROL ACCESS TO
COPYRIGHTED WORKS

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THURSDAY,
MAY 15, 2003

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The hearing was held at 9:00 a.m. in room 2002-4C, UCLA Law School Moot Courtroom, Los Angeles, CA, Marybeth Peters, Registrar of Copyrights, presiding.

Present:

MARYBETH PETERS

Registrar of Copyrights

DAVID CARSON

General Counsel of Copyright

CHARLOTTE DOUGLASS

Principal Legal Advisor

ROBERT KASUNIC

Senior Attorney of Copyright

STEVEN TEPP

Policy Planning Advisor

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WITNESSES:

ROBIN GROSS

IP Justice

MIA GARLICK

IP Justice

STEVE METALITZ

Joint Reply Commenters

BILL KREPICK

Macrovision

DEAN MARKS

AOL Time Warner

GWEN HINZE

Electronic Frontier Foundation

REN BUCHOLZ

Electronic Frontier Foundation

ERNEST MILLER

Information Society Project,

Yale LS

KATHY GARMEZY

DGA

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

9:05 a.m.

1
2
3 MS. PETERS: Good morning. I'm Marybeth Peters,
4 the Registrar of Copyrights, and I would like to welcome
5 everyone to this fifth and last day of hearings in the Section
6 1201 Anti-Circumvention Rulemaking.

7 As many of you know, the purpose of the rulemaking
8 proceeding is to determine whether there are any particular
9 classes of works as to which users are, or are likely to be,
10 adversely affected in their ability to make non-infringing uses
11 if they are prohibited from circumventing technological measures
12 that control access.

13 Today there are three sessions and the very first
14 one will look at audiovisual works and motion pictures. Then
15 we'll go to another part of audiovisual works and motion
16 pictures where we look at public domain, ancillary, and sole
17 source material. We'll end up with region coding.

18 I think all of you know that the reply comments
19 and hearing testimony and any questions that follow it will form
20 the basis of the evidence in this rulemaking which in
21 consultation with the Assistant Secretary for Communications and
22 information of the Department of Commerce will result in my
23 recommendation for the Library of Congress.

24 I probably should point out that Jeff Joyner, who
25 is an attorney with the National Telecommunications and

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1 Information Administration, is here and he's part of this
2 process. Mike Hughes is an attorney for the General Counsel of
3 the Library of Congress is here and he, too, will play a role in
4 this process when the Library reviews my recommendation.

5 The librarian has to make the determination by
6 October 28th. He will have to determine whether or not there
7 will be any exceptions against circumvention during the next
8 three-year period which is October 28, 2003, through October 28,
9 2006.

10 The entire record is posted on the Copyright
11 Office websites and that will include the transcripts of all of
12 the hearings. The transcripts go up about one week after each
13 hearing. They will go up uncorrected but each witness will have
14 the opportunity to correct and then we will correct what is up
15 on our website.

16 Let me introduce the rest of the Copyright Office
17 panel before I go further. To my left is David Carson, our
18 General Counsel. To David's left is Steve Tepp who is Policy
19 Planning Adviser in the Office of Policy and International
20 Affairs. To my right is Rob Kasunic who is Senior Attorney
21 Adviser in the Office of the General Counsel. To his right is
22 Charlotte Douglass, Principal Legal Adviser in the Office of the
23 General Counsel.

24 Our goal is to have each panel to be divided into
25 three parts where first you present your testimony. Secondly we

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1 ask questions and then if any of you have questions of each
2 other and they have not arisen, then you will have an
3 opportunity to do that.

4 Hopefully the questions will be difficult and they
5 will be equally difficult for everybody. You should not read
6 anything into any particular question. You should not read
7 anything into the tone of the voice or the facial expression.
8 We have made up our minds about nothing. We are trying to scare
9 you. No.

10 The whole purpose is to get as much evidence as we can on the
11 record so that we can go back and reflect.

12 One of the things I want to say is these
13 microphones may be misleading. These microphones lead to the
14 person who is recording the transcript. They do not project
15 voices out so each of you needs to speak loudly so that the
16 people behind you can hear what is being said. If I see them
17 straining, I'll just go, "Raise your voice."

18 The first panel is looking at DVDs that are
19 tethered, looking at alternative platforms, and some non-
20 infringing uses. The panel is made up of Robin Gross of IP
21 Justice, MIA Garlick of IP Justice, Gwen Hinze and Ren Bucholz
22 of Electronic Frontier Foundation.

23 On this side of the table we have Bill Krepick of
24 Macrovision, Dean Marks of AOL Time Warner, and Steve Metalitz.
25 If you were here, you saw him a lot yesterday. He is

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1 representing many copyright owners and his comment is known as
2 the joint reply comment.

3 Let's start with the proponents and let's start
4 with IP Justice. I don't know how you're going to divide it up.

5 MS. GROSS: Mia will deliver the testimony.

6 MS. PETERS: Okay. Good.

7 MS. GARLICK: Good morning. IP Justice welcomes
8 this opportunity to testify to the Copyright Office about the
9 adverse impacts Americans are experiencing in their ability to
10 enjoy DVDs in non-infringing ways.

11 The cause of this adverse impact is the access
12 control technology employed by the movie industry to DVDs. The
13 magnitude of this harm warrants the recommendation by the
14 Copyright Office over the exemptions proposed by IP Justice in
15 its submitted comments to permit circumvention in order to view
16 a DVD on an unsupported player.

17 We are mindful of the reasons given in the last
18 rulemaking for rejecting any exemptions in relation to DVDs. IP
19 Justice, therefore, wishes to emphasize four important
20 procedural factors in relation to this proposed exemption.
21 These procedural matters are important because they shape the
22 substantive findings of the rulemaking.

23 First, we wish to remind the Copyright Office that
24 it's responsibility is to users and not to copyright owners.
25 Congress introduced the anti-circumvention measures to encourage

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1 copyright owners to make their works available digitally or, in
2 the words of the last rulemaking, the measures were intended to
3 be used for facilitating.

4 The responsibility of the Copyright Office in this
5 rulemaking is not to repeat Congress' logic but to protect users
6 and ensure access, not availability of protected works such as
7 DVDs. This did not occur in the first rulemaking in 2000. In
8 that rulemaking the Copyright Office gave undue preference to
9 the interest of copyright owners and in doing so improperly
10 reconsidered the interest of copyright owners.

11 Second, the structure of this rulemaking as
12 interpreted by the Copyright Office effectively precludes it
13 from achieving its purpose. The Copyright Office insists that
14 the exemptions be defined according to class of work. Adequate
15 protection of user rights requires that the exemptions be
16 dropped with reference to the type of user and the circumstances
17 of use.

18 For example, if a person watches a DVD at home,
19 they are not infringing the copyright owners public performance
20 right. But when they watch a movie in a cinema, the public
21 performance right is implicated.

22 Third, the Copyright Office has set an unduly high
23 evidentiary standard given the nature of the harm it is supposed
24 to protect against. This led to one of the Copyright Office's
25 conclusions in the first rulemaking that all allegations of harm

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1 were hypothetical in nature.

2 However, the adverse effects experienced by users
3 are likely of their very nature to be individual and discrete,
4 difficult to measure and quantifying. This does not detract
5 from the existence of such harm and it does mean that the
6 Copyright Office should accept as sufficient evidence news
7 reports and principled analyses of the likely harm which take
8 into account the interaction of the circumvention measures with
9 the limitations and exceptions for users under traditional
10 copyright principles.

11 It also means that the Copyright Office should
12 give the comments and testimony supplied by ordinary individuals
13 as much, if not more, weight as the views of corporations.

14 IP Justice urges the Copyright Office to be
15 mindful of the context in which this rulemaking occurs. This is
16 important in three respects. To begin with, the context of this
17 rulemaking is very different to the first.

18 Then the prohibition on access circumvention had
19 not yet taken effect. Three years later restricted access DVD
20 technology is more prevalent. Thus, the extent of the impact on
21 users must be greater because the anti-circumvention measures
22 are broader than copyright.

23 The second important factor the Copyright Office
24 should take account of is that the impact of any exemption will
25 necessarily be limited. Acts of circumvention of access

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1 controls are by their nature inherently noncommercial and
2 personal. Anyone who seeks to take advantage of an exempted act
3 of access circumvention must be highly technically literate.

4 A person cannot require a circumvention device or
5 service from a third party, nor make it available to someone
6 else because to do so will infringe the anti-trafficking
7 provisions of Section 1201.

8 This means that only a limited number of people
9 are likely to be able to avail themselves of any of the
10 exemptions. Thus, the impact on the copyright owner of any
11 exemption will be limited.

12 Third, we would like to remind the Copyright
13 Office that despite Hollywood's promise during the last
14 rulemaking that Linux DVD player would be forthcoming, it has
15 three years later proved to be vaporware. This means that a
16 significant and growing proportion of the population are unable
17 to access the DVDs they have purchased.

18 Against this background, IP Justice makes the
19 following four substantive comments. First, we provided
20 evidence in our submitted comments of the need to bypass an
21 access control in order to view a DVD on an unlicensed system.

22
23 Second, the Copyright Office held in the last
24 rulemaking that users do not enjoy an unqualified right to
25 access works on a particular machine or device. This holding

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1 was inverted and misguided. It is the copyright owners who do
2 not have the right to dictate technology design. Technology is
3 a stable article of commerce.

4 Indeed, Section 1201(c)(3) clearly states that the
5 anti-circumvention provisions do not require the design of any
6 particular technological device. Users have a right to choose
7 between technology platforms. As a result, competition can
8 occur among technology providers to provide the best design, a
9 finding which restricts consumer choice, impermissibly extends
10 the copyright owner's monopoly.

11 Therefore, the Copyright Office cannot and should
12 not dismiss evidence of user harm based on technology
13 preference. It has never been the lure of this country that
14 copyright creates a right to dictate the technology choices to
15 the consumer.

16 DVDs are the personal property of their owners and
17 use restrictions by the movie studios interfere with the owner's
18 ability to use her property in lawful ways. It is not the
19 burden of the DVD owner to prove that she has the right to view
20 a film she has paid for. On the contrary, any impingements upon
21 the rights of the owner to lawful enjoyment of her property must
22 be justified by the law.

23 Third, in the last rulemaking the Copyright Office
24 incorrectly equated works available in DVD format to those which
25 are in analog format. In doing so, the Copyright Office ignored

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1 the innovation which digital technology makes possible. DVDs
2 are not the same as VHS.

3 DVDs consist of numerous features that are not
4 conceivable in analog format. They may contain audio in
5 different languages or subtitles, the ability to jump between
6 scenes, and additional commentary or information by actors and
7 directors.

8 Furthermore, the movie studios have little
9 incentive to continue to distribute VHS tapes in the future when
10 DVDs give them total control over what the individual can do
11 with the movie.

12 Fourth, and finally, there is no evidence that
13 user freedom of platform choice harms DVD copyright owners. A
14 person who wishes to view a DVD on a platform of their choice is
15 still a legitimate consumer. They must purchase the DVD prior
16 to viewing it.

17 The copyright owner is still compensated for that
18 DVD. Tethering, however, allows a copyright owner to extend the
19 monopoly and extract greater monopoly rents through its
20 licensing of DVD software and hardware.

21 This is the reason why copyright owners are
22 reluctant to give consumers choice in their technology platform.
23 This is the reason why the movie studio is content to ignore the
24 platform preferences of legitimate consumers.

25 The Copyright Office's duty is to the interest of

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1 consumers including those who wish to enjoy the DVDs they
2 purchase on Linux or any independently developed and, thus,
3 unlicensed DVD player. Thank you.

4 MS. PETERS: Okay. Thank you.

5 Gwen.

6 MS. HINZE: Thank you for the opportunity to
7 testify at today's hearings. In my comments this morning I
8 would like to firstly talk about the scope of exemption that EFF
9 has sought. Secondly, to address some of the comments that have
10 been made in opposition to the exemption that we have sought in
11 the joint comments.

12 The Electronic Frontier Foundation has proposed an
13 exemption for audiovisual works released disks that contain
14 access control measures that interfere with the ability to
15 control private performance, including the ability to skip or
16 fast forward through promotional material.

17 We are seeking an exemption to allow DVD owners to
18 eliminate un-fast forwardable advertisements or, in the
19 alternative, to take all necessary technical steps to defeat the
20 user operation, or UOP, blocking feature to permit consumers to
21 fast forward through these commercials on DVD content that they
22 have lawfully acquired.

23 Copyrights artists can use the UOP blocking
24 technology to mark certain portions of a DVD in a way that
25 disables the fast forward functionality of a user's DVD player

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1 when the DVD is inserted into a user's player.

2 This prevents viewers from fast forwarding through
3 mat content. Most, if not all, DVD CCA licensed DVD players
4 respond to UOP blocking measures incorporated into DVDs because
5 DVD manufacturers are required to produce DVD players that
6 detect and respond to UOP blocking commands as a condition of
7 obtaining a license from the DVD format to local licensing
8 corporations.

9 The use of this technology by copyright owners to
10 create zones of a DVD which consumers cannot fast forward
11 through clearly impedes a non-impinging use by a consumer.
12 Copyright owners do not enjoy any exclusive rights over private
13 performance in consumer's living room.

14 It is not one of the exclusive rights granted to
15 copyright owners under Section 106 of the copyright statute. A
16 consumer does not infringe any copyright right when she uses the
17 fast forward function on a DVD player to fast forward through
18 commercials on a DVD.

19 However, copyright owners are equipped to be able
20 to use UOP blocking to control what content viewers watch prior
21 to a feature presentation and, therefore, can place a
22 restriction on private performance.

23 This restriction on private playback is
24 implemented through a set of interlocking licensing schemes for
25 DVD players which in turn are premised on the use of an access

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1 control measure, CSS or content scramble system.

2 The use of the UOP blocking this way also
3 effectively removes the long-established limitation on copyright
4 owner's distribution right in the first sale doctrine recognized
5 in Section 109 of the copyright statute.

6 There is nothing in the legislative history of the
7 Digital Millennium Copyright Act that indicates that Congress
8 intended to upset the historical copyright balance struck by
9 Congress in the copyright statute or specifically to expand
10 Section 106 or override Section 109.

11 An exemption is justified here to remove this
12 limitation on consumer's private performance and to prevent
13 copyright owners from using an access control in the legal
14 sections of Section 1201 to control consumers lawful uses such
15 as fast forwarding that fall entirely outside copyright owner's
16 exclusive rights.

17 The opponents of this exemption have made three
18 main arguments. First, the joint comment submitted by the MPA
19 and the other joint commenters claim that EFF has failed to meet
20 the burden of establishing that the use of this technology has
21 had a substantial adverse impact on consumers non-infringing
22 use.

23 The joint commenters argue that the fact that we
24 have identified, and I quote, "Only a handful of titles with
25 such technology means that we have not met this burden and that

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1 any harm caused to consumers is a main inconvenience."

2 I have three comments in response. First, I would
3 like to address the standard of proof required. Unlike the
4 motion picture industry represented here, it is not possible for
5 consumers to provide comprehensive figures for the numbers of
6 DVDs released in the United States which have UOP blocked for
7 fast forwarding for two reasons.

8 First, affected DVDs are not labeled so a consumer
9 can only learn that a DVD has blocked fast forwarding if he or
10 she inserts it into a DVD player and is not able to fast
11 forward.

12 Second, even if individual users are aware that a
13 DVD contains content that cannot be fast forwarded through,
14 there is no centralized place or method for recording and
15 collecting this data.

16 It would be fundamentally inequitable to require
17 consumers to identify every single title affected in order to
18 meet the threshold burden in this proceeding. Such a standard
19 would undermine Congress' intended purpose as stated in the
20 Commerce Committee Report to provide a fail-safe mechanism to
21 protect consumers' non-infringing uses.

22 In our view, it should be sufficient proof if the
23 record contains evidence of a qualitative adverse impact on a
24 user's ability to make a non-infringing use of a work and
25 evidence that a number of DVD titles carry that feature.

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1 Second, as to proof of current substantial adverse
2 affect, the evidence on the record in this proceeding clearly
3 establishes that it is not just a handful of titles that are
4 affected. Sixty-six individual consumers submitted comments to
5 the Copyright Office in this proceeding in support of our
6 exemption. These comments describe their first-hand experience
7 of encountering non-fast forwardable promotional material on
8 over 40 popular titles.

9 These titles include Lilo and Stich, Beauty and
10 the Beast, The Little Mermaid, The Lion King, Toy Story I and
11 II, Monsters, Inc., a Very Merry Pooh Year, Bob the Builder,
12 About a Boy, Blue Crush, American Pie II, The Sixth Sense, Ice
13 Age, The Red Violin, Shawshank Redemption, The Borne Identity,
14 Baby Mozart, and Rudolph the Rednosed Reindeer.

15 An assessment of the substantial adverse impact on
16 consumers requires consideration of both the number of titles
17 which may contain UOP blocking, and the number of units of each
18 of those titles that has been sold to consumers.

19 All of the titles I mentioned are extremely
20 popular and were high-volume sellers. According to the 2002
21 year-end sales report from Video Business in 2002 Monsters, Inc.
22 sold 11.8 million units, Ice Age sold 7 million units, Lilo
23 Stich sold 6.6 million units, Beauty and the Beast sold 4.3
24 million units. In total there are just with those four titles
25 alone 29.7 million units in consumer households that may have

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1 been affected by the ability to fast forward through commercial
2 advertising. This is hardly an insignificant impact.

3 Third, in assessing the impact of these
4 technological measures on non-infringing use, the nature of the
5 harm to individual consumers must be taken into account. In the
6 case of each of the 66 consumers who filed comments with the
7 Copyright Office, the harm was significant and rose beyond a
8 mere inconvenience.

9 They were simply not able to avoid the
10 objectionable material. The harm was doubled when they were not
11 able to prevent their children from viewing the objectionable
12 material on various Disney titles.

13 A number of parents commented that they had
14 specifically purchased DVDs as a means of controlling their
15 children's exposure to commercial advertising and were
16 understandably upset when they couldn't fast forward through
17 that material. That is not mere inconvenience.

18 The second argument made by opponents is that the
19 problem is amenable to a market solution and, therefore, does
20 not warrant granting an exemption. In support of this argument
21 they have pointed out that 99 percent of the DVD releases of
22 Tarzan, one of the titles referenced in AFS december comments,
23 are no longer being released by Buena Vista Entertainment with
24 unskippable commercials.

25 They also state that Buena Vista changed that

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1 three years ago in response to market feedback. Even if it is
2 true that 99 percent of the Tarzan releases do not contain
3 unskippable ads, which of course it's not possible for consumers
4 to verify, there are 1 percent of the presumably millions of Tarzan
5 DVDs sold which contain unskippable material.

6 In addition, the 66 comments filed by consumers in
7 this proceeding indicate that the practice is still going on and
8 has not stopped voluntarily. The bulk of the comments submitted
9 list DVD titles purchased or rented in 2003 or 2002.

10 For instance, commenters complained that on titles
11 rented or purchased as recently as January 2003 including About
12 A Boy, The Red Violin, Baby Doolittle's World of Animals, A
13 Knight's Tale, and Universal's The Bourne Identity, they were not
14 able to fast forward through promotional material. DVD
15 publishers clearly have not decided to stop releasing DVDs with
16 promotional material with disabled fast forwarding despite
17 consumer complaints.

18 It is unclear that DVD publishers would have any
19 business incentive to do so. It is precisely for this reason
20 that we believe it is appropriate and justified for the
21 Copyright Office and the Library of Congress to step in and
22 grant an exemption to allow consumers to lawfully bypass non-
23 fast forwardable commercials.

24 The third argument made by our opponents is that,
25 and I quote, "It is far from clear that this feature is an

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1 access control within the meaning of the statute." Given that
2 the DVD CCA claims trade secret protection for its multi-tiered
3 licensing scheme, EFF has not been able to view the various
4 license terms to determine exactly which technological
5 protection measures on the DVDs are invoked in disabling fast
6 forward functionality on a user's DVD player.

7 The joint commenters' use of this feature
8 presumably refers to UOP blocking. If so, it misconstrues our
9 argument. We do not claim that UOP blocking is an access
10 control and we have not sought an exemption to circumvent UOP
11 blocking.

12 Our argument as explained in our submission is
13 that given that UOP responsiveness appears to be a requirement
14 for DVD CCA licensed DVD player it would be impossible for a
15 consumer to override the UOP blocking response on their DVD
16 player without circumventing CSS.

17 This is because the interlocking set of licenses
18 from DVD CCA and the other DVD licensing entities are premised
19 on the use of CSS. It is the acting circumventing CSS that
20 would put a consumer at risk of legal liability under Section
21 1201(a).

22 It's the position of the copyright owners'
23 litigation in two law suits, the Remeirdos case in the 2nd
24 Circuit, and as recently as March 2003 in the opposition papers
25 filed in the 321 Studios case which is before the court this

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1 morning, that CSS is an access control for the purposes of
2 Section 1201.

3 The fourth argument I would like to address is an
4 argument about available of works. There is no critical
5 evidence that the use of unskippable or un-fast forwardable
6 advertising is integral to any business model that benefits the
7 public. It is not at all clear that the ability to embed
8 unskippable content meaningfully encourages the distribution of
9 creative works that would not otherwise be made available.

10 A threat by copyright owners to withhold content
11 if they are not able to insert commercials on DVDs seems
12 implausible. If the exemption were granted copyright owners
13 would continue to have the ability to insert ads but consumers
14 who had the know how would be allowed to avoid viewing these.

15 Finally, I would like to emphasize that the
16 exemption that EFF is narrow. It is narrow to permit consumers
17 to permit consumers to make a non-infringing use of DVDs that
18 they have lawfully acquired.

19 The exemption would only permit users to eliminate
20 mandatory advertisements on DVDs or, alternatively, to take all
21 necessary steps to defeat the UOP blocking response on a DVD
22 player for the limited purpose of giving consumers the ability
23 to fast forward through advertisements. This exemption is not
24 an invitation to copyright infringement.

25 First, to the extent the copyright owners are

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1 concerned about potential copyright infringement they would
2 still retain all rights and remedies currently available to them
3 under copyright law including the ability to bring a suit for
4 infringement.

5 Second, a Second 1201(a)(1)(d) makes clear the
6 Library of Congress can only grant an exemption to permit non-
7 infringing uses of a class of works. Finally, copyright owners
8 can control the scope of any potential adverse effect of this
9 exemption by limiting the number of DVD releases that contain
10 unskippable content.

11 In balance then the harm here, any harm to
12 copyright owners from granting this exemption is minimal since
13 the exemption would only apply to a limited number of titles and
14 since copyright owners could control the scope of impact of the
15 exemption by limiting releases containing unskippable content.

16 By contrast, the present harm to consumers who
17 have acquired these disks without any way to know prior to
18 purchase of their unskippability, and without any way to restore
19 the control of their private non-infringing use, is substantial.
20 Thank you.

21 MS. PETERS: Thank you. Let's go to this side of
22 the table. Let's start with Mr. Krepick.

23 MR. KREPICK: Thanks very much. Macrovision
24 Corporation, one of the world's leading suppliers of copy
25 protection and digital rights management technology, recommends

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1 that no exemptions be granted for any of the 50 requested
2 submissions of copyrighted works under the DMCA, general ban on
3 circumventing technologies and devices.

4 On February 20, 2003, we submitted a detailed
5 statement to the Library of Congress Copyright Office outlining
6 our opposition to any exemptions under Section 1201 of the DMCA.
7 I would refer the rulemaking proceeding participants to that
8 submission for additional detail.

9 Essentially we believe that the current anti-
10 circumvention provisions of Section 1201 of the Act have not
11 resulted in any material adverse effects on consumers,
12 educational institutions, consumer electronics manufacturing, PC
13 manufacturers, or any other class of content users or
14 distributors. In fact, we believe the reverse has been true.

15 Since the enactment of the DMCA the unbridled
16 success of the DVD business from both a hardware and software
17 standpoint is the best proof supporting both strong copyright
18 laws and anti-circumvention provisions to help content owners
19 manage and distribute their content in the new digital world in
20 which we operate.

21 As way of background, Macrovision has a unique
22 perspective on the subject matter as we are neither a content
23 owner nor a hardware manufacturer. Rather, we are an
24 independent technology supplier that has developed flexible copy
25 protection and digital rights management solutions to help

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1 content owners distribute their digital content in a secure
2 manner while retaining a variety of enabling features that will
3 allow consumer to time shift and space shift content that has
4 been acquired legitimately.

5 From our standpoint it is important to note that
6 those who are arguing to exempt certain classes of copyright
7 works under Section 1201 refer to anti-copy protection trilogy
8 of fair use, first sale doctrine, and the Sony Betamax case.

9 In aggregate, these conditions are deposited as
10 evidence that consumers have been granted special entitlements,
11 or even legal rights, to make any number of copies of digital
12 content or to play digital content on any number of devices, or
13 to use any type of illegal circumvention technology to gain
14 access to content for their own purpose.

15 I am not a lawyer and I realize this anti-copy
16 protection trilogy evokes a tremendous amount of case law
17 discussion laced with plenty of emotion, but I believe that
18 rules for licensing and distributing digital content entered a
19 whole new realm in the 1990s and ushered in a brave new world of
20 digital copyright law.

21 Some proponents of copyright anarchy suggest that
22 copy protection, access control, digital rights management
23 technology should be circumvented wherever consumers are not
24 able to freely copy and distribute content with the same "ease
25 and versatility that they have historically exercised and the

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1 rights they retain under copyright historical balance." That's
2 from some comments that IP Justice submitted on December 17th,
3 2002.

4 The problem with this misguided thinking is that
5 is it based on the perception that copyrights historical balance
6 is the same in the year 2003 as it was in 1990. This is just
7 not the case. With tremendous technological advances in PCs,
8 optical disk burner devices, digital compression technologies,
9 and the Internet, the historical copyright balance is
10 tremendously off kilter and the copyright owners are at a severe
11 disadvantage when it comes to controlling their digital content.

12 The digital world has eclipsed the old familiar
13 analog copyright domain and exposed digital content to mass
14 misappropriation. Sadly, many consumer activists and hardware
15 manufacturers are blind to this new technological reality and
16 have not accepted the fact that content owners need to license
17 their content with more controls than they have in the past.
18 Otherwise, they will not have any content to license in the
19 future.

20 It should be clear that when a content owner
21 licenses access to their digital content, they are allowed to
22 establish rules for usage and those rules may cover certain
23 types of format and playback devices. For example, DVD or video
24 cassette, MP3, cable broadcast TV, video on demand, etc. And
25 certain privileges with respect to public or

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1 private performance and certain provisions with respect to
2 copying or not copying by way of example.

3 Before the advent of the Internet peer-to-peer
4 file sharing services, ubiquitous optical disk burners, and
5 video encoders that could easily transform and compress analog
6 video to digital video, it was easy to say that if a consumer
7 bought content, they were at liberty to employ it with impunity.

8
9 This no longer pertains in the digital world since
10 the digital domain is essentially without borders. Essentially,
11 digital technology has exposed content owners to having their
12 content ripped off literally and distributed by both
13 professional pirates and casual consumer copiers.

14 In order to resolve this untenable situation, we
15 believe that several steps must be taken. First of all, we
16 believe there should be more cooperation from both the hardware
17 and content community.

18 We believe there should be deployment of new
19 generation of copy protection and digital rights management
20 technologies. We believe that the copyright laws should be
21 strengthened and legislation that support copy right protection
22 and DRM technologies. Finally, that worldwide enforcement of
23 such laws that encompass the physical world of optical disk and
24 the online world of the Internet.

25 Through these hearings we believe the Copyright

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1 Office is in a unique position to independently gather data and
2 assess the current state of affairs with respect to digital
3 copyright statutes.

4 Moreover, we believe that you can send a strong
5 message to content owners, hardware manufacturers, consumers,
6 and congressional representatives that we need to strengthen our
7 digital copyright laws and not weaken them by giving out
8 exemptions to bypass or circumvent various copy protection,
9 access control, and digital rights management technologies.

10 We have read through the submittals including
11 those from AOL Time Warner, DVD CCA, the Interactive Digital
12 Software Association, the MPAA, RIAA, and the Software
13 Information Industry Association. We find that these documents
14 are well researched, well articulated reflecting views that are
15 very much in line with our position.

16 We know that the Copyright Office is dealing with
17 a tremendous volume of input but we encourage the Copyright
18 Office to carefully consider these submissions before making a
19 decision on the DMCA anti-circumvention exemptions.

20 We also encourage the Copyright Office to consider
21 expanding its view and enroll in the broader area of copyright
22 law and legislation and to help our various legislators
23 formulate the appropriate copyright law amendments and digital
24 media laws that favor stronger copyright protection reforms in
25 order to shift the copyright balance more toward the content

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1 owners and away from the consumer activists and the hardware
2 manufacturers and the PC companies.

3 I'll talk a little bit about the four or five
4 classes of copyright works that we have comments on. The first
5 is copy protection for DVD. The argument is made that consumers
6 have a right to make backup copies of DVDs for their own
7 personal libraries.

8 The only precedent for this seems to stem from the
9 early days of unreliable computer floppy disks when PC and
10 software manufacturers realized that hardware and storage
11 technology was somewhat unreliable. Fast forward now to the
12 late 1990s and optical disk formats are extremely durable and
13 reliable and there is little need for backup.

14 In the video markets Macrovision's copy protection
15 technologies have been used on video cassettes dating back to
16 the 1980s and on DVDs from the inception of the format in 1997.

17 Consumers have become quite accustomed to the fact
18 that they not only have an FBI logo on the cassette or the DVD
19 warning against unauthorized copying, but the vast majority of
20 content has been copy protected and the consumers have not been
21 allowed to make any copies.

22 In the music space there has been no such copy
23 protection available until last year so consumers came to
24 believe they were entitled to make copies of all of their music
25 CDs. The entitlement situation in music space has no legal

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1 basis and has simply grown out of the unchallenged consumer
2 habits formed over time because of the absence of copy
3 protection and DRM technology.

4 Macrovision's Mark Belinsky addressed copy
5 protection in the music market yesterday in his testimony. We
6 believe that whether one is discussing CDs for audio or DVDs for
7 video, the content owners should be the ones who set the
8 licensed terms for the use of their content. If they want to
9 allow copies, they should be able to charge a higher price, or
10 they should be able to simply prevent copying if they so choose.

11 If they want to allow content to be played on
12 certain PCs or certain playback devices, they should have the
13 right to set those license terms. If consumers don't want to
14 buy the content under such restricted conditions, the free
15 market mechanism will provide ample feedback to the content
16 owner regarding the advisability of selling content under such
17 restricted terms. In short, we believe there is neither a need
18 nor a legal precedent for any circumvention exemptions in the
19 DVD area.

20 In the area of access controls, the arguments made
21 in favor of allowing circumvention of access controls run very
22 much parallel with the arguments to circumvent certain copy
23 protection controls.

24 In these instances opponents argue that digital
25 rights management technologies can be used to prevent consumers

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1 from gaining access to legitimately purchased content and other
2 formats, or on other devices that they might own.

3 This argument cuts to the central issue of who
4 owns the content and who has the right to license it with
5 certain restrictions. The content owner may choose to license
6 their video for DVD CSS format only, or they may well choose not
7 to support it on MPEG 4 or the DVX format.

8 If the consumer cannot find a legitimate
9 authorized version of the video in any format other than CSS,
10 then the consumer should not have the right to transcode the
11 video from CSS into MPEG 4 or DVX.

12 It is as simple as buying into the proposition
13 that content owners have control over their content with the
14 right to license it in certain formats for certain distribution
15 channels, for certain time windows, and for certain operating
16 system platforms. There is no valid reason to exempt anyone
17 under Section 1201 to circumvent any access control technology.

18 In terms of tethered content, the argument is made
19 that there are legitimate needs to move content from one PC to
20 another and that copyright law has never been construed to allow
21 authors to prevent a content owner's freedom to access lawfully
22 purchased content where and how they choose.

23 Arguments are made that consumers want to play
24 content, music or video, on other devices in the car or other
25 portable devices and somehow this want is translated into an

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1 entitlement. Although this transportability or space shifting,
2 device shifting, feature is desirable, content owners are not
3 legally bound to supply these features.

4 In fact, if they do supply these features, they
5 need assurance that the content will not be shared with the
6 world over peer-to-peer networks or through unauthorized optical
7 disk copies. Macrovision has DRM technology that can allow the
8 end user to move content between devices, but the technology is
9 designed to give the content owner control over the contents
10 licensing or usage rules.

11 If a content owner chooses to license content and
12 to tether to a single PC, that is the content owner's right. If
13 the consumer chooses not to buy the content with that
14 restriction, then the consumers can look for competitive
15 products with more liberal usage rules. The free market economy
16 can dictate success.

17 Again, there is no reason to bypass the copyright
18 law or to require an exemption under Section 1201. Content that
19 is digitized and downloaded to a PC or other digital device
20 exposes content owners to huge risks in ways unimaginable just
21 five years ago. The copyright laws must be strengthened and not
22 weakened in this regard.

23 The next comment I have is on stifling innovation.
24 Consumer electronics and IT companies and consumer groups
25 frequently make the point that strong copyright laws tend to

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1 stifle innovation because they essentially put manufacturers in
2 a straight jacket with respect to innovation.

3 If this is so, why have sales of DVD hardware and
4 DVD disks been the fastest growing consumer electronic success
5 story ever? Certainly it was not because there were copyright
6 control handcuffs that restrained innovation for the
7 manufacturers. The argument that copyright protection standards
8 would stifle innovation is hollow to the core.

9 In fact, if anything the content community can
10 argue that actions by copyright anarchists will do more to
11 stifle innovation than the implementation of copyright
12 protection and DRM technologies since the unabated proliferation
13 of pier-to-pier file sharing, circumvention software, and
14 unlicensed compression formats will force content owners to
15 reduce investments in new programs due to revenue deterioration.

16 The hardware companies cannot continue to turn a
17 blind eye toward the content owner's plight. They must be part
18 of the solution and not part of the problem. The U.S. has the
19 most robust content development business in the world accounting
20 for some 5 percent of our gross domestic product. The harm to
21 our society will come from weak or compromised digital copyright
22 laws, not from stronger, more targeted laws.

23 A few comments on regional coding. The argument
24 is made that consumers should be able to bypass regional
25 controls that are built in the DVD and PC game console devices

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1 since consumers may want to import games or videos from one
2 region of the world and play them in a device that is designed
3 to play content that is coded for another region.

4 Macrovision does not have technology in this
5 space, but we are sympathetic to the content owner's plight in
6 that they built their advertising marketing and distribution
7 strategies and campaigns for a given title around different
8 release dates in different parts of the world.

9 There are a variety of reasons for this but
10 suffice it to say that the content owners have valid business
11 reasons for wanting to control the timing of the releases of
12 their product in different parts of the world.

13 When the regional coding systems are hacked, or
14 the hardware is chipped, it is a clear case of contributory
15 copyright infringement since content owners' copyright licenses
16 are violated with respect to specific terms, dates, time
17 periods, locations, and formats for release.

18 Often times Macrovision's copy protection
19 technology is hacked along with the regional coding. Even CSS
20 encryption hacks. The content owners then find themselves in
21 double or triple jeopardy situation where one hack has multiple
22 infringing and circumventing components. Again, we believe
23 there is no valid reason for regional coding exemptions to be
24 allowed under Section 1201.

25 The last comment that I have is on the

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1 nonskipable or unskipable DVD or TV advertising features. The
2 argument is put forth by those who want a special exemption to
3 circumvent the nonskip features for DVD or TV advertising
4 relates to an assumption that consumers should be able to modify
5 the content and/or the playback devices that they legally
6 acquire.

7 What is again left out of this equation is the
8 notion that the content owners have the right to package their
9 content as they see fit and to license the right to use it
10 according to specific terms, one of which might be to require
11 viewing or listening to the program with integrated advertising.

12 Rather than allowing consumers to bypass the
13 content owner's packaging by endorsing circumvention, the
14 appropriate action by the Copyright Office would be to allow the
15 market place to determine the outcome and to have consumers vote
16 with their pocketbooks regarding whether they want to buy or
17 rent programs with built-in nonskipable advertising.

18 Macrovision as a technology provider understands
19 that certain technologies can be implemented to prevent ad
20 skipping and we would encourage the Copyright Office to affirm
21 that these technologies should be added to the category of
22 legally protected digital copyright control technology under the
23 DMCA and they should have no circumvention exemptions either.

24 Thank you very much for the opportunity to present
25 this.

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1 MS. PETERS: Thank you.

2 Mr. Marks.

3 MR. MARKS: Good morning. My name is Dean Marks
4 and I'm Senior Counsel, Intellectual Property, for AOL Time
5 Warner. Thank you very much for the opportunity to appear
6 before you today. It hardly seems like three years have passed
7 since the last time I appeared before you up at Stanford. I had
8 to throw away my shirt from that last appearance having been
9 grilled so hard by David Garson.

10 Anyway, here we are again today. Because AOL Time
11 Warner has already submitted written reply comments. Because
12 you have already heard from another AOL Time Warner witness,
13 Cheryl Perlmutter, at the recent hearings in Washington, I will
14 not take the panel's time to repeat or further endorse
15 statements that we have already made.

16 Instead, I just wanted to make the following very
17 brief observations about the DVD market. In 2000, the year of
18 the last hearing for this rulemaking, there were approximately
19 13 million households in the U.S. with DVD players. By year end
20 2002 that number had risen to over 40 million.

21 In 2000 182 million DVD disks were sold into the
22 U.S. market. In 2002 the number of disks sold in the U.S. was
23 685 million and nearly 1 billion are projected to be sold in
24 2003.

25 Between 2000 and 2003 the average retail price of

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1 a DVD in the U.S. dropped by more than 10 percent. The decrease
2 in price of DVD players and DVD ROM drives has been even more
3 dramatic. DVD players are now available for under \$100 in the
4 U.S. and DVD ROM drives are widely available for under \$40.

5 Perhaps of even greater interest to the panel are
6 the following facts. In 2000 less than 4,000 titles were
7 available in the U.S. market on DVD. As of April 2003 over
8 22,000 titles are available on DVD in the U.S. In 2000 less
9 than 300 Japanese anime titles were distributed in the U.S. in
10 DVDs playable on U.S. Region I DVD players. As of April of this
11 year that number has grown to over 1,400 anime titles.

12 In 2000 approximately 600 foreign language feature
13 films were distributed in the U.S. on DVD by distributors
14 serving the U.S. DVD player market. That is, Region I players,
15 Region I disks. As of April of this year the number of such DVD
16 foreign language feature film titles distributed in the U.S.
17 market, again for Region I players and disks, had risen to over
18 1,700 titles.

19 The source for these facts and figures is this DVD
20 release report which is a published report and this is one
21 revised as of April 23, 2003. If it is of interest to the
22 Copyright Office, I would be happy to submit this for the
23 record.

24 These facts demonstrate that in the intervening
25 years since the last rulemaking proceeding, access to works via

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1 the DVD format has grown dramatically. The technical protection
2 measures used to protect copyrighted works on DVDs from
3 unauthorized access including the regional coding access control
4 and, and this is critical, the associated legal regimes and
5 legal protections that go along with these technical protection
6 measures, have been crucial to giving content owners the
7 requisite security to release their works on DVD on this high
8 quality digital format.

9 Indeed, these technical and legal protections have
10 not served to stymie access to works. Quite to the contrary.
11 They have materially contributed to the stunning success of DVD
12 and the increased available and access to the U.S. public of an
13 ever growing, ever richer variety of works including foreign
14 works.

15 In the final rule issued in the prior rulemaking
16 proceeding, the Copyright Office found that, "It appears that
17 technological measures on DVDs have increased the availability
18 of audiovisual works to the general public, even though some
19 portions of the public have been inconvenienced."

20 The facts outlined above indicate that in the
21 intervening three years the preservation of the legal integrity
22 of the DVD technological measures has led to a virtual explosion
23 in the availability of audiovisual works to the U.S. public.

24 The request for exemptions sought in this current
25 rulemaking proceeding with respect to DVD are by in large

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1 similar to the ones sought in the previous rulemaking. The
2 rationale articulated by the Copyright Office and the Library of
3 Congress in 2000 for rejection of these requests still applies
4 today.

5 Indeed, I believe the rationale is even stronger
6 today because many, if not all of the non-infringing uses sought
7 to be achieved via the exemption requests, can actually be
8 satisfied through means that do not involve circumvention
9 contact.

10 Today these non-circumventing means are available
11 more inexpensively and with less burden to users than they were
12 in 2000. I'm sure we will get into all of these issues in
13 greater detail so I will leave off here and look forward to your
14 questions. Thank you.

15 MS. PETERS: Thank you.

16 Mr. Metalitz.

17 MR. METALITZ: Thank you very much. Good morning.
18 It's a pleasure to be back here with you again. I'm going to
19 make just very brief general comments and then we will get to
20 the questions which I know we are eagerly awaiting.

21 Some of these comments apply, I think, also to
22 some of the discussion in the last panel yesterday afternoon
23 because I think the thrust of most of the proposed exemptions
24 that we are hearing about this morning really boil down to the
25 ability to platform shift or to move between formats or between

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1 devices, among devices, and so forth, which is similar to the
2 issues that were discussed yesterday about CDs.

3 I just want to make three general observations
4 about this. First, there is really nothing new in this issue.
5 If you look at the history of copyright markets, there is
6 nothing new about copyright owners deciding to release their
7 material in fewer than all the formats that are available in the
8 market place. There are many examples, some of which we site in
9 the reply comments.

10 The law has never required copyright owners to
11 make their material available to every format for every machine
12 or device that exist in the market place. Certainly nothing in
13 Title 17 has ever required this. The DMCA did not change that.
14 This is the backdrop against which we have to look at these
15 claims for exemption.

16 Second, I don't think we should indulge in the
17 presumption that what is necessary to be done in order to
18 platform shift is non-infringing activity. To the contrary, I
19 think the general rule is that it would be infringing activity.

20 In most cases platform shifting involves making a
21 copy and, obviously, that implicates the reproduction right and
22 you would have to look at whether any applicable defenses were
23 there. We shouldn't assume that platform shifting activity is
24 non-infringing.

25 Third, I think there is strong evidence and what

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1 Mr. Marks has summarized is a very good example of it, that the
2 release of copyrighted material in a way that is not playable on
3 all formats or on all platforms can be a use facilitating
4 strategy. There is really no better example than the explosive
5 growth of the DVD.

6 When you think about all of the different formats
7 that have been floated or tried or introduced over the years,
8 and I'm not thinking here primarily of audiovisual works but in
9 software and everything else, the landscape is littered with the
10 failures of these different formats.

11 What is really astounding about DVD is how
12 successful it has been, how the public has embraced it, and how
13 it has increased the availability of all these titles to the
14 public really in a manner that is unprecedented.

15 But the same argument could be made as far as
16 software that is linked to a particular machine or device or a
17 database that might be accessible only from devices on a
18 particular university network operating under a site license.

19 The issues are not really that different in all
20 those circumstances and they demonstrate that the strategy of
21 making copyrighted material available without necessarily
22 catering to every single format in the market, or every single
23 platform in the market, can be a useful facilitating strategy
24 and just what Congress was intending to encourage in the DMCA.

25

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1 I've given my speech yesterday about the digital
2 cornucopia so I won't repeat that but I think this is really
3 part of that feature. I think to evaluate these claims for
4 exemption, I would, of course, encourage you to look back at
5 what you decided in the year 2000 where many of these issues
6 were ventilated.

7 I think you will conclude when you do that that
8 the proponents not only have to convince you that you made the
9 wrong decision in 2000, which certainly the testimony you've
10 heard here suggest it. The proponents are taking on that
11 burden.

12 They also have to show that even if you were wrong
13 then, you are still wrong now under a circumstance in which the
14 availability of the product and the availability of
15 alternatives, as Mr. Marks referred to and I'm sure we will get
16 into in more detail in the question and answer period, the
17 availability of alternatives is also increased that would enable
18 people to gain access in a myriad of ways to this material. I
19 think that makes the burden that much more difficult.

20 I do want to say a word about the unskippable DVD
21 advertising issue. I have to say I find this puzzling. I kind
22 of think if you looked up de minimis non curat lex in Black's
23 Law Dictionary you would find a citation in Ms. Hinze's
24 testimony.

25 I think to think that because you might have to

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1 wait 30 seconds to access or to see the movie that you've gotten
2 on DVD, to say that rises to the level of substantial adverse
3 impact as cognizable in this proceeding. I find it hard to get
4 my mind around that.

5 I think the other point that came out clearly
6 today is that the inability to skip DVD advertising to the
7 extent it occurs, and I think there is a dispute about the
8 extent, whether it's in more than a handful of cases, but to the
9 extent that it does occur, I think the EFF testimony makes it
10 clear that it is not due to an access control. I think if you
11 look at the definition of access control in the statute, I think
12 that is the right conclusion.

13 Their argument appears to be that although the
14 inability to fast forward in some circumstances is not an access
15 control, it is part of the licensing requirements for an access
16 control and, therefore, you should be allowed to circumvent the
17 access control, in this case CSS, in order to overcome this
18 inability to fast forward. I think that is what they are saying
19 here.

20 I think this is a classic example of the tail
21 wagging the dog, or perhaps, to put it a little more
22 graphically, it's an invitation for the copyright industries to
23 trim their fingernails with a chain saw.

24 They are basically saying that because people have
25 to wait 30 seconds to watch the movie, they should be entitled

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1 to strip off all protection from these movies, put them in the
2 clear, and let anything -- remove all the protections that CSS
3 provides. I think that is taking this argument a little bit too
4 far.

5 And, again, the argument that the unskippable ads
6 don't benefit the public, I think we could conceive that and
7 still point out that as the Copyright Office found -- is
8 recommended and the Librarian found, the availability of CSS
9 very much does benefit the public. The use of CSS on DVDs has
10 been a substantial factor in increasing the availability of
11 copyrighted material for non-infringing uses.

12 I don't think the EFF can have it both ways here.
13 If the problem is something that is not CSS, then perhaps they
14 could be asked. I think there was a reference to that in Mr.
15 Krepick's testimony about how you would deal with that problem
16 without inflating it to the much larger issue of CSS.

17 Again, I appreciate the opportunity to provide
18 these general observations and I look forward to your questions.

19 MS. PETERS: Thank you very much. Let me start by
20 trying to get something clear. I think I know it but I want to
21 verify it. When, in fact, there is an exception granted and
22 somebody can circumvent an access control, say, for example, if,
23 in fact, one were granted and it

24

25

1 circumvent it is there still protection attached to it?

2 MR. MARKS: Let me try and answer that because the
3 CSS system involves several different functional components.
4 There's the encryption, the CSS encryption, the contents
5 scramble. It's called the contents scramble system which is the
6 40 bit encryption on the disk which scrambles the content.

7 There are flags on the disk that indicate the
8 regional coding which is separate and apart from the CSS
9 encryption itself. There are something called the APS trigger
10 bits, and Bill can correct me if I'm getting this wrong with the
11 macrovision, which are the bits that trigger the macrovision
12 being applied to the content when it travels out the analog
13 output. Each of those, while they are required under the CSS
14 license, are separate functional components.

15 Therefore, I don't think it's necessarily the case
16 to address one of the components. For example, the UOP which I
17 frankly do not consider an access control technology that you
18 have to say in order to address something with the UOP it
19 requires circumvention of the CSS encryption itself. I do not
20 believe that is the case.

21 MS. PETERS: Okay. Let's take the UOP. At the
22 end of the day they have made their case turning that button
23 that says on, do not fast forward off. What do they have to
24 circumvent?

25 MR. MARKS: Right. As far as I understand it, and

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1 this is something that I think, frankly, we would need to look
2 into some more. I don't believe there is any requirement of the
3 CSS license as to how the UOP functions as far as my review of
4 the CSS license have been, although it's mostly been the content
5 provider license rather than the hardware adopter license.

6 There is nothing in the CSS license that requires,
7 you know, in linking the encryption or in decrypting the CSS
8 encryption system you must not allow consumers to fast forward
9 if this certain code is in there. I don't believe there is any
10 nexus between the CSS encryption nor the license for the CSS
11 encryption that details obligations about what can and cannot
12 happen with the UOP.

13 There certainly are obligations that flow from the
14 CSS license, for example, as to whether the compressed content
15 once it's decrypted can be made available on a user accessible
16 bus, for example.

17 There are all sorts of robustness and compliance
18 requirements as to what a hardware manufacturer needs to do to
19 treat the content once it's decrypted. I do not believe there
20 are any requirements dealing with this fast forwarding issue.

21 MR. MARKS: Okay. I'm going to go over here.
22 Yeah.

23 MS. HINZE: First I would like to make it clear if
24 there was any doubt about what I said before. My opening
25 remarks included a statement that said EFF is not contending

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1 that UOP blocking is an access control. I would like to make
2 that clear.

3 MS. PETERS: But you said --

4 MS. HINZE: Our argument is that there is a
5 conditionality here and what is required. For instance, for
6 someone to take the benefit of our exemption would be a
7 modification of the DVD player. Now, DVD CCA play includes a
8 number of different licenses. One of them is a CSS license.

9 The particular feature, UOP, as I understand it --
10 again, I would like to preface my comments by pointing out that
11 the entire licensing regime is subject to trade secret
12 protection and it's something that EFF is not being able to
13 review -- that from various sources, including Jim Taylor, who
14 is a DVD expert and is the producer of this book "DVD
15 Demystified" and runs the most technically comprehensive DVD
16 online information.

17 According to his understanding, and according to
18 other sources we have been able to see publicly, the requirement
19 for UOP blocking responsiveness is something that is in the DVD
20 format Logo Licensing Corporation license. In order to get
21 access to the trade secrets and the trademark DVD to put on your
22 silver box, you need to respond to UOP blocking. That's what
23 your DVD player has to do.

24 For instance, there may be two ways to meet our
25 exemption. The first one would be to take your DVD CCA licensed

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1 DVD player and modify it to turn off the UOP feature, as we
2 understand it, because of the conditionality of the licenses
3 because each of the licenses, in turn, are premised on this set
4 of -- this set of influxing licenses are premised on the use of
5 CSS.

6 Our understanding from what we've been able to
7 find out publicly is that it does involve the CSS violation in
8 order to get under the envelope and into the actual player.

9 The second way you might be able to achieve our
10 exemption would be to create your own player. You could, for
11 instance, if you were technologically savvy enough you could
12 create your own software player to do this.

13 The problem with that is that the copyright owners
14 on the other side of the room have made a stated position in
15 litigation that playback of a DVD on a nonauthorized, non-DVD
16 CCA licensed player is a violation of Section 1201(a). From
17 that point of view an exemption would be required for a consumer
18 to do what I just said.

19 MS. PETERS: Let me just step back a minute. Both
20 sides say that the UOP is not an access control. The only thing
21 we have authority to even consider is an access control. If, in
22 fact, it's not an access control, I don't see how we help you.

23 MS. HINZE: The two examples I've given you of the
24 way --

25 MS. PETERS: But our basically saying that you can

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1 circumvent, we can't say you can circumvent anything.

2 MS. HINZE: In either case it's necessary to
3 circumvent CSS. CSS is an access control. CSS is regarded as
4 an access control by the copyright owners. They have stated
5 that position in the Remeirdos case in the 2nd Circuit Appeal
6 briefs that they filed and, as I said, most recently in March
7 2003 papers in the 321 Studios case they made their proposition
8 that CSS is an access control.

9 The Librarian and Copyright Registrar in the 2000
10 rule also addressed the nature of CSS as both an access and a
11 copy control because it requires a CSS violation. In this case,
12 in order to actually make the UOP modification, a circumvention
13 of CSS would require an exemption.

14 MS. PETERS: Okay. I'm going to go to Dean. The
15 question I'm going to have over here is this side of the table
16 seems to basically in a lot of what it's advocating is that fair
17 use, whatever your reasoning is, that licenses that are put in
18 place by content owners should be overridden. I'm coming back
19 there but think about that while I go over here.

20 MR. MARKS: I just wanted to raise a point of
21 clarification because I believe, as Ms. Hinze who just spoke,
22 when she mentioned that as far as her understanding goes that
23 the UOP functionality and responsiveness as a requirement of the
24 DVD format license, that may well be the case.

25 If that is the case, that adds to my clarification

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1 of the situation because the DVD format license is quite
2 separate and apart from the CSS license. They are two
3 completely separate licenses. They are administered by
4 completely separate licensing organizations.

5 CSS, which is the access control technology
6 license, which is administered by the DVD Copy Control
7 Association, is separate and apart from the DVD format license.

8
9 My understanding is that you can take a DVD format
10 license and not take -- in fact, I'm quite sure of this -- need
11 not take a CSS license if what your desire is is to put content
12 onto a DVD in the clear without any access control technologies.
13 There is no requirement by the DVD format license that you take
14 a CSS license in order to put content out and make content
15 available on DVD.

16 There is another case, and I'm not positive about
17 this so I state this as an uncertainty and I will try and find
18 out whether this is the case or not. I am not sure that you are
19 even required to take a DVD format license in order to put
20 content onto DVDs. I believe the format license is tied to the
21 DVD logo. If you want to use the DVD logo, you must take a
22 format license. If you are prepared to pay the patent holders
23 who license the DVD patents for the format itself, you can do so
24 without taking a DVD format license. I believe that is the
25 case. I will check on that and get back to you.

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1 MS. HINZE: May I comment on that?

2 MS. PETERS: Sure.

3 MS. HINZE: My understanding is that the DVD
4 format licensing logo corporation license actually gives access
5 to --

6 MS. PETERS: Can you speak up?

7 MS. HINZE: Sorry. The DVD format Logo Licensing
8 Corporation license gives access to two things. One is the logo
9 and the second thing is the trade secrets, a second of the trade
10 secrets that are involved in the DVD technology. I am not in a
11 position obviously as a nonindustry spokes person to know
12 whether or not it is a requirement.

13 What I would like to point out to the Copyright
14 Office is that the EFF made assiduous efforts to try to find
15 whether such a player exist on the market, whether there is, in
16 fact, a DVD CCA license player that advertises nonresponsiveness
17 to UOP blocking.

18 We were not able to find that. We can't verify
19 that it's not a actual requirement to not take a DVD CCA license
20 -- I'm sorry, DVD format Logo Licensing Corporation license.

21 We believe, based on what we have seen available
22 publicly, that it is a requirement and that requirement as part
23 of the interlocking set of licenses is premised on the use of
24 CSS as, if you like, the outer layer that surrounds the box.
25 Therefore, in order to modify a UOP feature that is included in

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1 a box, by virtue of that license would require a violation of
2 CSS.

3 MS. PETERS: Thank you.

4 Steve.

5 MR. METALITZ: Even if we assume that what was
6 just said is true, it's hard to see how the first scenario that
7 Ms. Hinze described about disabling the UOP blocking is a
8 violation of 1201(a)(1). It might be a violation of some of
9 these licenses.

10 MS. PETERS: Right.

11 MR. METALITZ: But if it's not a violation of
12 1201(a)(1), then it's not part of this proceeding.

13 MS. HINZE: Well, I guess my response would be if
14 it's clear that violating CSS is not a violation of 1201(a)(1)
15 in the first of the two responses I gave, modifying an existing
16 DVD CCA licensed player, my understanding is that the copyright
17 owners have had the steady position that circumventing CSS is,
18 in fact, a violation of 1201(a)(1).

19 My second suggested way that this exemption might
20 actually take place in practice would be for someone to build
21 their own unlicensed DVD CCA, unlicensed software version of the
22 DVD player which wouldn't respond to UOP blocking.

23 My understanding of the copyright owner's position
24 based on, as I've said, the two lawsuits where they have made
25 this their position, is that any playback of the DVD in non-DVD

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1 CCA authorized player violates Section 1201(a)(1). That is, as
2 I understand it, the position that was taken in both the
3 Remeirdos case in the 2nd Circuit and in 321 Studios case
4 currently pending in the court.

5 MR. MARKS: I think, with all due respect, there
6 is a little confusion going on because --

7 MS. PETERS: That would not be hard.

8 MR. MARKS: You are absolutely correct that the
9 copyright owners do take the position that circumvention of the
10 CSS encryption system is a violation of 1201(a) and is a
11 circumvention of an effective access control technology. We
12 agree on that.

13 I think we also agree on the fact that UOP
14 responsiveness in and of itself is not an access of control
15 technology. Where there seems to be some area of disagreement
16 and confusion is is it possible to circumvent the UOP without
17 circumventing CSS.

18 My view, but I am a lawyer and I'm not an engineer
19 and I will try and find out something about this, is that it is
20 possible to defeat the UOP without circumventing CSS, but I
21 don't know that for sure. What I do know is that this notion of
22 interlocking licenses and requirements built one on the other I
23 do not believe to be the case because the licenses are separate.

24

25 If UOP responsiveness is required by the DVD

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1 format license, then the argument or complaint is what the DVD
2 format license, not with CSS as an access control technology,
3 which is licensed by the DVV CCA. I wanted to just make another
4 point of clarification.

5 The content owners and others do take the position
6 that if somebody builds a DVD player that is not licensed
7 through the DVD Copy Control Association which decrypts CSS
8 encrypted DVDs, that that is an authorized activity, is a legal
9 activity because those devices aren't authorized to get to the
10 decryption keys and, therefore, those devices are violative of
11 the anti-circumvention device provisions. But anyone is free to
12 build a DVD player that can play not encrypted DVDs, non-CSS
13 encrypted DVDs. The CSS license doesn't control that.

14 MS. PETERS: Can you consider what we were just
15 talking about as a follow-up question and actually come back to
16 us with clearing up some of this uncertainty?

17 MR. MARKS: Yes. And if I may, I would like to
18 enlist the help of the DVD Copy Control Association which also
19 testified and submitted comments.

20 MS. HINZE: Can I just make one final reply before
21 we go onto another topic, which I'm sure we will do.

22 MS. PETERS: Sure.

23 MS. HINZE: In response to Mr. Marks' last
24 comment, I just wanted to make clear that the source for my
25 statements --

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1 MS. PETERS: Can you --

2 MS. HINZE: Sorry. In response to Mr. Marks' most
3 recent statement about the position that copyright owners have
4 taken in the Remeirdos case and in the 321 Studios case about
5 playback of a DVD on a non-DVD CCA licensed player.

6 The statement that I am making about playback
7 comes from, as I said, the 2nd Circuit Appeal briefs in the
8 Remeirdos case. The particular cite for the statement I am
9 relying on is in our briefs. It's in note 43 of page 62 of the
10 appellant's reply brief.

11 The statement is related to playback. Now,
12 perhaps what Mr. Marks is saying is that would in practice look
13 like decryption because in order to play the content of a
14 machine, you would need to decrypt.

15 In either case, just to make it clear for the
16 record, the stated position as I understand it, and I have not
17 heard anything different from that based on what I've just said
18 this morning, is that playback of a DVD on a non-DVD CCA
19 authorized software or hardware DVD player violates Section
20 1201.

21 MS. PETERS: I had a question about this side of
22 the isle which had to do with tethered DVDs or space shifting,
23 those kind of things, which appear at points to violate
24 licenses. I just wanted a comment on how you view the various
25 licenses that come attached with a lot of the material in

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1 digital form.

2 MS. GROSS: I can address that. What these
3 licenses do is they have the -- they control who can manufacture
4 DVD players, the kinds of features that people can make --
5 people can use, the kind of experience that people can have.

6 These licenses are the mechanism that control this
7 and then the CSS is what bypasses or prevents people from
8 getting through those licenses. I think it is really important
9 to talk about -- when you were talking about overriding license
10 terms, consumers never see a license.

11 Consumers are not licensees. Consumers do not --
12 are not parties to any contract. Their rights haven't been
13 restricted legally in any way. The manufacturer of the DVD
14 player and the technology company may have license agreements
15 between them but that's between them.

16 The consumer is not obligated to follow the
17 agreements in their contracts. They are not a party to those
18 agreements. I'm a little confused when you're saying overriding
19 licenses. People who aren't a party to contracts aren't -- they
20 are not overriding the contract. They are simply not a party.
21 They are engaging in activity outside of the scope of the
22 license.

23 MS. PETERS: Okay, but now you purchased a DVD and
24 it's tethered to a machine and you want to basically untether
25 it. When you buy a CD and it's clear that it's tethered to a

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1 machine, you as the consumer know that.

2 MS. GROSS: I'm a little confused. What do you
3 mean you would know a CD is tethered but a DVD is not?

4 MS. PETERS: Frequently when you purchase
5 something -- like I'll take it away from the DVD. I'll take the
6 e-book -- you know that it's limited to a particular machine.

7 MS. GROSS: Well, when you say you know it is
8 limited, do you mean you have signed an agreement that says it
9 is limited or do the copyright holders wish for it to be
10 limited?

11 MS. PETERS: No.

12 MS. GROSS: I think that is an important
13 distinction.

14 MS. PETERS: My understanding with the e-book
15 reader is that you know it has to be played on a particular
16 device.

17 MS. GROSS: Why would you know that if you haven't
18 signed any contract? If you have always received books and read
19 them however you please, what would legally require you to only
20 watch or view something on a particular device?

21 MS. PETERS: Because you are told that this plays
22 on this machine or other ones or when you put it in your machine
23 this is the machine it will play on. You're raising it as a
24 labeling question. You are basically saying that there is
25 nothing that you purchase in the digital arena that you ever are

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1 told or know is limited in any way.

2 MS. GROSS: Why would I know something is limited
3 unless I have agreed for it to be limited? I mean, my point is
4 that the copyright holders may wish for something to be limited.
5 They may wish that I may only view something on a particular
6 device but that doesn't mean I know I may not do otherwise.

7 MS. PETERS: Okay.

8 Do you want to say anything about that?

9 MR. MARKS: I just sort of think as a matter of
10 frankly practicality going to your CD example, you know, when
11 CDs were first being introduced and consumers bought CDs, I
12 mean, they knew they couldn't be playable on turntables. If you
13 wanted to buy a CD and enjoy an CD you had to buy a new playback
14 device. I mean, similarly those people who were early adopters
15 of Beta, Sony Betamax players, knew that as VHS came onto the
16 market that the VHS tapes were not compatible with the Betamax
17 players even though they were both analog video cassette
18 recording and playback devices.

19 I think that is just sort of a natural and a given
20 that when a particular format is delivered to the market,
21 particularly a physical format but, frankly, an electronic
22 format too as in your e-book example, that it isn't necessarily
23 playable on every playback device or playback methodology that
24 a consumer may have available or may have in their homes.

25 MS. PETERS: Ms. Gross, we were talking about

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1 sense here. When you buy a particular thing, isn't it common
2 sense that it's not going to play on every single thing?

3 MS. GROSS: There's a big distinction between
4 knowledge and a legal requirement. It's true that I could buy
5 a record and it's not going to pay on my cassette tape, but I
6 could make a copy of it and play it on my cassette tape. So,
7 it's not some legal requirement that I can't put that music on
8 another form media. It's just the way the technology has worked
9 in the past. It's industry custom. It's not a legal
10 requirement.

11 MS. PETERS: If, in fact, your thing that you
12 brought on the record is also available on tape, what gives you
13 the right to convert it from a disk to a tape?

14 MS. GROSS: Well, I think the 9th Circuit Court of
15 Appeals in the Diamond Rio case made very clear that space
16 shifting your music from a CD or from any type of technology to
17 another is well within the personal use fair use rights of
18 individuals.

19 MS. PETERS: That case dealt with digital and the
20 fact that there's an exchange for no liability for consumers
21 because the manufacturers actually pay for the equipment and the
22 tapes. So, it's a no liability issue in Chapter 10.

23 I wasn't really talking about digital per se in
24 this case.

25 MS. GARLICK: I would also just like to point out

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1 that we are actually talking about access to content in
2 particular formats --

3 MS. PETERS: Right.

4 MS. GARLICK: -- not necessarily the availability
5 of the content as we mentioned in our -- in our sort of written
6 testimony that we gave early. It is also a different type of
7 content by virtue of the different type of format.

8 So, in that respect, we would submit that it's not
9 directly comparable to say oh, I can have it on a cassette tape
10 or I can have it in a digital format.

11 MS. PETERS: I'm not sure I get that distinction,
12 but okay.

13 I'm going to pass it at this point and go to you,
14 David.

15 MR. CARSON: Okay. The first question really
16 relates probably to everything we're going to talk about this
17 entire day, but let's -- let's get it out in the open now.

18 Mr. Metalitz, I think you, too, Mr. Marks, but I
19 especially recall you, Mr. Metalitz, talking about how
20 successful the DVD format has been, how many people have DVD
21 players, how many DVDs are on the marketplace. We refer -- you
22 refer to the digital cornucopia and so on and that's all well
23 and good, but I'm wondering if that doesn't create a problem as
24 well and the problem is this.

25 Three years ago you'll recall, one of the things

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1 we said when we were talking about DVDs was well, to the extent
2 that some people have come forward with problems presented by
3 DVDs and some of the restrictions you have with DVDs.

4 The fact that all this stuff is available on VHS
5 certainly makes those problems not such problems and that's one
6 of the reasons why we don't really feel we need to worry about
7 it. Certainly not the only reason, but one of the reasons.

8 Can we say today particularly looking forward to
9 the next years starting this October 28th that that's still
10 going to be the case? It's my impression that that's not going
11 to be the case, that we're no longer going to be able to say it
12 doesn't matter because this stuff is also available in other
13 formats. Because it may well not be and doesn't that make us
14 have to look a little harder at some of the other issues that
15 are being raised because of that.

16 MR. METALITZ: Well, I think you raise a good
17 question and first specifically with regard to the demise of
18 VHS, I think it, like so many other demises, it has been
19 somewhat exaggerated. It's still a \$10 billion business this
20 year and -- or in 2002 and it's not going to disappear in -- by
21 2006.

22 But, I don't think that's really -- as you pointed
23 out, that's not the only reason why you reached the conclusion
24 that you did in 2000. It may not have been the most significant
25 reason, but I think the best example I can give is the

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1 demonstration that Mr. Attaway gave for you earlier this month
2 in Washington in which he demonstrated that -- he used a digital
3 camcorder viewing the screen on which a DVD was playing to make
4 a excerpt from a DVD film and have a digital copy that could
5 then be used for all the fair use purposes and so forth that --
6 that were at issue there and that are at issue at some of these
7 --in some of these requests for exemption.

8 So, the fact that something -- let's assume that
9 -- that "Spiderman" was not available in VHS. That fact alone
10 certainly did not make it any less available for -- for
11 noninfringing uses. Because as he demonstrated, you could get
12 a copy that probably, in fact, is a higher quality copy than
13 what you would get by copying the VHS tape and you can use that
14 for fair use purposes assuming the copy is within the scope of
15 the fair use privilege and for forth.

16 It's just as available for that purpose even if it
17 were not in VHS and as we demonstrate in our -- in our
18 testimony, there -- and particularly when you get into public
19 domain materials, there are a lot of titles out there that are
20 available in DVD that were never released in VHS. So, to say
21 that -- if the focus of this proceeding is on availability of
22 copyrighted material for substantial noninfringing use, I think
23 the conclusion is that also without regard to the availability
24 of the VHS the growth of the DVD has increased that
25 availability.

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1 VHS obviously still remains important and it
2 probably will remain important at least in some segments of the
3 market for quite some time to come.

4 MR. MARKS: I agree with everything Steve has just
5 said and I just wanted to add a couple of other points which is
6 if you look at noninfringing use in terms of access and access
7 just to viewing the content, because I agree with everything
8 Steve has just said about fair use copying or taking clips that
9 now with digital camcorders and analog camcorders being widely
10 available thus camcorders being available at lower prices, query
11 whether it costs more to buy a camcorder to camcorder off a DVD
12 than to buy a second VHS. Just sort of do the editing that you
13 would need to do to take clips from a VHS. It's probably fairly
14 equivalent now.

15 But, in terms of the -- just viewability, it seems
16 to me that with the decrease, the dramatic decrease in price in
17 play-back equipment both in brams and in players, the barrier to
18 viewability and to use of DVD even if you had always used VHS
19 has really gone down. So, that as the market evolves and if the
20 market eventually does evolve to where movie titles are made
21 available only DVD and not on VHS, there really isn't this
22 barrier to access problem. I believe the CD/LP model is very
23 relevant here.

24 You know, for awhile CDs actually took off slowly
25 than LPs, but for awhile, both formats were in the market and

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1 now, I think it's pretty difficult to find LP records of -- you
2 know, certainly to the degree that titles are available in CD.
3 Frankly, I believe that the market will eventually move that
4 way. I don't think it's going to happen in the next three
5 years, but I anticipate that, you know, perhaps over the next
6 ten or 15 years that may well be the case. But, I think by that
7 time with the -- with the prices and the wide availability of
8 the equipment, access just is not an issue.

9 MR. CARSON: Anyone else want to address that?

10 All right.

11 One of the people on that side of the table, but
12 I don't recall who, in their testimony mentioned that well, it's
13 three years later and we still don't have a Linux-based DVD
14 player. Now, we certainly had some conversations about that
15 three years ago and we certainly had some statements that it's
16 just around the horizon. Is it? I mean where are -- where are
17 we with that? Why don't -- do we have a Linux player out there
18 and if not, why not?

19 MR. MARKS: I'll take that one. There -- when
20 last time around we talked about and both -- both at the hearing
21 and then in my follow-up letter to the copyright office that we
22 were aware of two licensees-- CSS licensees who were proceeding
23 the next compatible players. One was Sigma Designs and the
24 other one was Intervideo.

25 I tried to do a little bit of research on this and

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1 as far as I know, Sigma Designs is no longer producing their
2 hardware solution. Intervideo is still producing their LIN DVD
3 software solution, but they make that software solution
4 available only for integration by hardware manufacturers like
5 computer manufacturers or setup manufacturers. It's available
6 on an OEM basis rather than as a off-the-shelf software solution
7 to individual users.

8 In going on to -- to the lab, I found -- and it
9 was an excellent public announcement but in a I guess a message
10 discussion group from an IBM engineer, this was in April of
11 2001, announcing that IBM had on its IBM Thinkpad T22 for its
12 Linux model that they had included the LIN DVD software in its
13 model so that now this Linux IBM Thinkpad was able to play DVDs
14 back, you know, which -- in compliance with -- with CSS.

15 So, it's there, but it does not appear to be there
16 as an off-the-shelf solution that you can just buy in a -- you
17 know, at Circuit City as a stand alone consumer software
18 solution.

19 MR. CARSON: So, if I already have a computer.
20 I'm running the Linux operating system. As a practical matter,
21 there's not really anyway I can watch a typical commercially
22 produced DVD on my computer. Is that correct?

23 MR. MARKS: As a practical matter, that probably
24 is correct if all you have is your Linux system just as if you
25 were -- had your laptop computer and all it could run was

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1 Windows whatever version, Windows 98, that could not support a
2 LIN DVD solution. Actually, Intervideo is one of the leading
3 producers of the Windows compatible DVD player software and if
4 your computer was limited such that it could not take the new
5 Windows operating system that was necessary in order to play LIN
6 DVD, yes, you'd -- you'd have to upgrade your computer as well.

7 MR. CARSON: And I gather the only other option
8 I'd have would be to somehow circumvent CSS so that I could
9 watch it on my computer. Is that -- is that accurate?

10 MR. MARKS: The other option would be you could
11 buy a DVD player at, you know, less than 100 bucks or you could
12 load -- you know, decide to load a different operating system
13 and -- and even use a -- if your computer or laptop didn't have
14 a DV drive built into it, buy an external DVD.

15 MR. METALITZ: Or use both operating systems. I
16 mean you could have both operating systems on one --

17 MR. MARKS: Oh, of course, you can have --

18 MR. METALITZ: -- machine and if --

19 MR. MARKS: -- Linux and Windows. Sure.

20 MR. METALITZ: -- and if -- you can --

21 MR. CARSON: Let's assume that I'm stubborn and
22 I'm devoted to Linux and I'm going to watch it on my computer
23 because that's the way I am.

24 MR. MARKS: Right.

25 MR. CARSON: And so, I -- what I do is I

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1 -- one way or another I circumvent CSS and watch it on my
2 computer now. Did I just engage in an infringing use?

3 MR. MARKS: I think you have engaged in a
4 violation of 1201 --

5 MR. CARSON: Well, that wasn't the question. Have
6 I engaged in an infringing use of a copyrighted work?

7 MR. MARKS: Have you engaged in a -- when you have
8 bought the copyright work and you're viewing it just --

9 MR. CARSON: On my computer running Linux?

10 MR. MARKS: -- on your computer and assuming
11 you're not making a copy when you have circumvented and have
12 loaded the computer -- and have loaded the disk onto your
13 computer, assuming that you've not made a copy on the hard drive
14 and I'm not talking about a buffering copy, I mean --

15 MR. CARSON: Right.

16 MR. MARKS: -- a copy that's subject to being
17 further reproduced, I would say as far as a copyright violation,
18 you probably have not violated the copyright law. But, Steve?

19 MR. METALITZ: No, I would agree with that. You
20 violated 1201(a)(1), but you may not have violated the
21 copyright. All those are independent causes of action.

22 MR. CARSON: And ordinarily, there would be no
23 reason for me to make a copy of the motion picture itself if all
24 I want to do is watch it on my Linux-based PC. Right?

25 MR. MARKS: I think that's correct.

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1 MR. CARSON: Okay.

2 MR. MARKS: I mean the problem we've had with that
3 and well, this may not be exactly relevant, but I'm reading the
4 transcript from the folks who were testifying from 321. It
5 appears that often when CSS encryption is stripped away and even
6 when, for example, a backup copy is made, that copy is made in
7 the clear and that's what's of great concern to content owners
8 because you then have a digital clear copy that can be subject
9 to further unauthorized reproduction and distribution.

10 That frankly is really what the fear is for
11 content owners. It's not that an individual circumventing in
12 the privacy of their own home to merely watch the movie on their
13 Linux player is a threat. It's that when that content is
14 circumvented and in digital format in the clear, the fact that
15 it's so easily subject to further unauthorized copying and
16 distribution, is -- is the threat that -- that concerns us.

17 MR. CARSON: Sure. I understand that. But, at
18 least in terms of what 1201 says and what the past we have here
19 brings --

20 MR. MARKS: Right.

21 MR. CARSON: -- help me out here. Because it
22 sounds like what we just walked through is the situation where
23 one can fairly say that the prohibition on circumventing an
24 access control has adversely affected me and my ability to make
25 a noninfringing use of the copyrighted work. Isn't that true?

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1 MR. MARKS: I guess I would say frankly it's mere
2 inconvenience because you have all of these readily available
3 non-burdensome alternative like loading the Windows operating
4 system on your -- on your PC or using a player that's, you know,
5 non-expensive.

6 So, I would really characterize it as a mere
7 inconvenience rather than a substantial adverse harm.

8 MR. CARSON: So, it's an adverse impact but a
9 trivially adverse impact.

10 MR. MARKS: Perhaps. Right.

11 MR. CARSON: Okay. Okay. Okay.

12 MS. GARLICK: Excuse me.

13 MR. CARSON: Oh, yes, I'm sorry. By all means.
14 Yes.

15 MS. GARLICK: I'd just like to make two comments.
16 The first is that this continued presumption of a connection
17 between accessing on an unauthorized player and then further
18 unauthorized copying, that seemed to me a very considerable
19 presumption and sort of describing most of the consumers as
20 pirates which I think we would challenged.

21 And the second is also the description of this as
22 a mere inconvenience. If you've invested in a particular format
23 such as Linux or some other kind of format, it's not a mere
24 inconvenience to not be able to have played DVDs that you've
25 purchased.

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1 MR. CARSON: Well, you can get a DVD player for 59
2 bucks or less now. So, how much of an inconvenience is it?

3 MS. GROSS: Well, if you could write a software
4 player for free, that's a lot of money to a teenager.

5 MS. GARLICK: And also, I mean how many devices do
6 you have to purchase these days just so that you can have the
7 rights that, you know, you otherwise would have? I mean the
8 shopping list is growing at the moment.

9 MR. MARKS: One response here that I think
10 sometimes gets a little bit overlooked when we're talking about
11 the Linux or the open source software operating system issues is
12 that DVD is the first audiovisual format, you know, physical
13 media audiovisual format that's playable in the computer
14 environment in the first place. I mean VHS wasn't playable.
15 Super 8 movies weren't playable. Betas weren't playable. It is
16 the first, you know, physical media on which motion pictures are
17 delivered that is actually playable in the PC environment.

18 My feeling is that, you know, that should be
19 welcomed by PC users and the fact that it may not be playable on
20 every single operating system does not mean that the content
21 industry should somehow be penalized by, you know, allowing the
22 circumvention of what is viewed as a critical access control
23 measure because they've actually made the work available for the
24 PC platform but not for every single operating system.

25 MR. CARSON: I'm glad you mentioned that. Because

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1 that reminded me of an analogy come up with that I wanted to ask
2 you about.

3 You talked about beta versus VHS, LPs versus CDs
4 and let me just try out a distinction on you because it's one
5 that I find myself tempted to make. When we were talking about
6 those old issue VHS, beta, and so on, you're talking about
7 incompatible formats, different formats.

8 It wasn't that the CD was designed not to be
9 played on a turntable. Just that it was a new technology and
10 there was a new kind of device to play. Nobody was going out of
11 their way to make something which might have been played on a
12 turntable unplayable on a turntable and yet, isn't that what we
13 have here. In other words, you've got a DVD. You've got a DVD
14 drive on a computer but with running limits.

15 MR. MARKS: Right. Right.

16 MR. CARSON: The only reason you can't play it on
17 a Linux is not incompatible format, but it's because there are
18 licensing requirements which say if you've going to have DVD
19 drive that is -- that has a technology license, it can't play
20 that. There's no technological reason why it shouldn't be able
21 to play it. A decision has been made to disable it from playing
22 it.

23 Now, isn't there a distinction there?

24 MR. MARKS: I'm glad you're asking the question
25 because, in fact, your premise of if, in fact, the CSS playback

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1 capability was unavailable or blocked from being made available
2 to the Linux operating system, then I think there may be --
3 there
4 -- I don't want to necessarily concede it, but there may be some
5 -- some greater weight to the argument.

6 The fact is that that CSS license is available to
7 folks who want to produce software players for the Linux
8 operating system. The fact that there is a software player
9 available for the Linux operating system, the fact that it is
10 CSS licensed, that it is included regularly on things like IBM
11 Thinkpads that are running the Linux operating system shows that
12 it is possible. There is no blockage here.

13 The fact that the market may not be robust enough
14 for manufacturers to say there's enough economic incentive here
15 for me to go and take a CSS license to produce a software player
16 for Linux -- for the Linux operating system may be a market
17 problem, but it's not a licensing requirement problem. The CSS
18 license is open for anybody running an operating system provided
19 that they conform to the requirements of the CSS license.

20 And the fact that this LIN DVD player is out there
21 in the market and has been out there for quite some time shows
22 that it's perfectly possible to make a DVD software player that
23 is -- that both complies with the requirements of the CSS
24 license and is compatible and can be used on the Linux operating
25 system.

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1 MR. METALITZ: Can I just add to that?

2 I think if you back -- taken it in a slightly
3 broader context, I think you'll see the distinction between
4 things that are designed not to run on particular formats and
5 things that just happen not to run on particular formats isn't
6 quite so sharp.

7 Because if you look historically, copyright owners
8 have in many cases made the decision that they were going to
9 release something. They could have released an LP for example
10 in 1980 or '85. You could decide to release an LP -- recording
11 as an LP and as a CD. It was technologically possible to do it,
12 but there were copyright owners who made the decision not to do
13 it.

14 They might have made the decision because they
15 really wanted to reach the market of CD enthusiasts and they
16 didn't want to reach the market of LP enthusiasts particularly
17 or they thought in the long term it wasn't going in that
18 direction or they could have made the opposite calculation.

19 Many people in the 1980s objected to the kind of
20 sound they were getting from CDs and they thought LPs were
21 better and richer for certain types of music and some labels
22 made the decision we're only going to release this audio file
23 recording on LP. CDs were available. We could make the
24 decision. But, we're deciding no. We don't want this to be
25 played on this platform.

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1 This was a market decision and over time the
2 market evolves and some of these decisions become less viable as
3 a marketplace alternative and we're seeing -- I think yesterday
4 you had testimony about how in the audio field we can look
5 forward to a certain amount of contention along different
6 formats in the years ahead.

7 So, you know, copyright owners may be well faced
8 with this type of decision in the near future, too. But, that
9 has always been a marketplace decision. The law has never
10 dictated what that decision would be. The law has never told
11 copyright owners you must release on all formats, you must
12 release on specified formats.

13 MS. GROSS: Could I make a comment to that point?

14 I think that there's some obfuscation going on
15 here with respect to requiring copyright owners to make
16 something available in all formats that distinction between --
17 with someone who simply owns something and wants to try and
18 access it in another way. Making that a crime to take it upon
19 themselves to make this system work with what they've got.

20 That's a difference between requiring them to make
21 it -- make everything available and somebody simply taking it
22 upon themselves to make what -- to make their property inter-
23 operable with their system and that seems to be a big point of
24 confusion and obfuscation throughout this entire proceedings.

25 If I could go back to this idea of well, you could

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1 just download a Windows operating system onto your Linux box.
2 For a growing number of computer programmers, Linux is sort of
3 a political issue. There's a very -- there's a growing concern
4 about the Microsoft monopoly, the lack of security in the
5 systems and for many people, it's more than a political issue.
6 It's almost a religion. Really a growing number of people.

7 So, if you're telling them to switch your
8 operating system, you're telling them to switch their religion
9 and I think you have to take a -- take a step back and think
10 about that.

11 MR. CARSON: Well, that's not quite what they're
12 saying. I think they're saying, you know, have a dual booting
13 capability. Maybe the only time you ever run Windows is when
14 you want to watch movie. They're not saying you have to switch.

15 MS. GROSS: Well, but they're saying so just use
16 this religion for these circumstances.

17 MR. CARSON: Well, we believe in the establishment
18 class here. So, don't worry about --

19 MR. MARKS: Or -- your religion by buying an
20 updated Thinkpad that has the Linux DVD player in it, you know.
21 Then you're buying from IBM. I'm sure the --

22 MR. CARSON: Anyone else on that topic before we
23 move on? All right.

24 MR. MARKS: Could I -- could I make just one more
25 comment while we're on this -- the -- the licensing of hardware

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1 and playback systems and the rest because I had thought there
2 was a comment made this morning and if I had misunderstood it or
3 misheard it, my apologies.

4 But, that the -- that I thought I heard that
5 content owners derive some sort of financial gain from the
6 licensing of the different platforms for CSS or the different
7 hardware solutions for CSS and I just wanted to make sure that
8 if I correctly heard that comment to just say that that is not
9 the case. The content owners do not gain any financial revenues
10 or any other sort of revenues from the licensing of CSS. The
11 licensing of CSS is conducted by the DVD copy control
12 association which itself is a nonprofit corporation.

13 So, I just wanted to make sure I cleared
14 -- cleared that up.

15 MR. CARSON: Okay. Thanks.

16 Ms. Hinze, you made a reference to -- I think it
17 was Ms. Hinze, yes, to the first sale doctrine, but you didn't
18 really elaborate on it and I was just wondering if it -- I don't
19 think you elaborated on it anyway because I wasn't quite sure
20 what the reference was all about. So, I just want to give you
21 an opportunity to explain what you were talking about.

22 If you want me to pay attention to it, here's your
23 opportunity.

24 MS. HINZE: Well, I think it sort of got taken
25 over by the discussion about how our exemption would actually

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1 work in practice. That's why I haven't -- not worry about it.

2 But --

3 MR. CARSON: You've got to --

4 MS. HINZE: Sorry.

5 MR. CARSON: We're having some access problems
6 here.

7 MS. GARLICK: We can find someone to circumvent
8 those for you.

9 MS. HINZE: My point was that there's nothing in
10 the legislative history of the DMCA that suggests that what
11 Congress was intending to do at the time that they enacted the
12 DMCA in 1998 was rewrite the copyright elements.

13 The particular exemption that EFF has sought
14 relates to essentially what is a private performance issue.
15 It's not one of the rights. Fast forwarding through material or
16 use pressing a button to fast forward on DVD players through
17 material is an issue about private performance. It's not one of
18 the six exclusive rights granted to copyright owners in Section
19 106 of the Copyright Statute.

20 And my point about the first sale doctrine was
21 that we recognize already in --

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1 distribution and that takes the form of the first sale doctrine
2 in the United States as recognized in Section 109.

3 MR. CARSON: But, you're not finding a connection
4 between the first sale doctrine and fast forwarding pass
5 commercials I assume. That's why I was -- that's why I just
6 wasn't following.

7 MS. HINZE: I think the context of my statement
8 this morning was that the rights that are given to copyright
9 owners are circumscribed. We recognize limits on those and the
10 particular activity in question that we had sought an exemption
11 for on the EFF side of the table is an exemption that would
12 govern rights that -- activities that are not exclusive rights.
13 I think my --

14 MR. CARSON: Let me give you just an example of
15 how the rights of copyright owners are limited. It wasn't an
16 example that was tied to --

17 MS. HINZE: In our own comment, we have pointed
18 out that the first sale doctrine doesd (It wasn't an1 4.5833 0 Td (ODr.2 c (of

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1 side of the table on the question of fast forwarding pass
2 commercials.

3 First of advertisements, first of all is it still
4 the case that some DVDs released by some studios still do have
5 the ability to fast forward pass advertisements disabled or is
6 that a -- is that a thing of the past?

7 MR. METALITZ: I'm not aware of any that are doing
8 it. I think the evidence that I gave earlier in the statement
9 -- in the reply comments was that the studio that is involved in
10 many of the titles that are listed there, not all, has stated
11 that 99 percent of its releases do not have that feature at this
12 point in response to marketplace pressures.

13 I can't sit here and tell you that no -- that no
14 motion picture studio has ever released or is not now releasing
15 a single title that disables that feature. I just don't know.

16 MR. CARSON: The statement you just made allows
17 the possibility that 1 percent of

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1 my company and as far as Warner Home Video is concerned which is
2 the video division of AOL Time Warner that releases DVDs, I was
3 informed that they have never disabled the fast forwarding
4 functionality and have no intention to do it.

5 MR. CARSON: I think Mr. Turnbull testified to
6 that in Washington as well.

7 Now, maybe I'm asking the wrong people, but I'll
8 ask it anyway. Why shouldn't consumers be permitted to fast
9 forward pass those ads at the beginning of the DVD? Anyone want
10 to testify to that?

11 MR. METALITZ: It may be that they are. Because
12 as I understand, the claim for exemption here, the feature or
13 the capability, let's put it that way that disables the fast
14 forward button in certain circumstances is not an access control
15 technology.

16 MR. CARSON: Okay. But, that's not my -- my
17 question isn't whether or not it's an -- it's a more -- it's a
18 much more general question which is assuming that at least with
19 some releases consumers aren't able to do it for whatever
20 reason, why shouldn't they be able to do it?

21 MR. METALITZ: Well, one reason that they might
22 not be able -- that maybe they shouldn't be able to do it is if
23 it's against the law and I'm trying to say that from what I hear
24 here it is not against the law. At least, it's not against
25 Section 1201(a)(1) for them to do that if, in fact, the

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1 technology is as it was represented here.

2 MR. CARSON: Okay. Let's talk policy. And assume
3 it is against the law. I don't know whether it is or it isn't
4 yet.

5 MR. METALITZ: Assume it isn't the law.

6 MR. CARSON: If we're trying to figure out whether
7 there is a noninfringing use here that people are being deterred
8 in their ability to engage in, well, I guess the first question
9 is is it a noninfringing use to skip pass the commercials on a
10 DVD or is that somehow an act of infringement?

11 MR. METALITZ: I don't know that it's an act of
12 infringement, but I think the issue that's raised here is what
13 would have to be done in order for them to skip pass.

14 MR. CARSON: Sure. We'll get to that.

15 MR. METALITZ: And that may involve a lot of other
16 things besides this UOP --

17 MR. CARSON: Sure. We'll get to that, but the
18 first thing I'm trying to understand is if we're being asked to
19 permit people to do something that you don't want them to do and
20 if the purpose of our being asked to do that is the argument
21 that people should be able to skip pass these advertisements,
22 what I'm trying to hear is if the people who are saying don't do
23 that -- do you have any arguments as to why people shouldn't be
24 able to skip pass those advertisements or are you just going to
25 abandon the field on that one?

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1 MR. METALITZ: I don't have any arguments as to
2 why they shouldn't be able to do it, but I would note that in
3 other contexts this may be the subject of litigation in public
4 context where -- particularly where skipping through parts of
5 what's on the DVD may result in the creation of a derivative
6 work. It is -- that is -- is potentially infringing.

7 MR. CARSON: Leaving that issue aside, I don't see
8 the -- I don't -- I don't consider this as an infringing
9 activity.

10 MR. METALITZ: Okay.

11 MS. HINZE: May I just --

12 MR. CARSON: Please.

13 MS. HINZE: This -- as I believe Mr. Metalitz is
14 referring to the Clearflix -- I believe Mr. Metalitz' last
15 comment is a reference to the Clearflix case that is currently
16 before the courts.

17 As I mentioned, our exemption doesn't require that
18 it be something done to the DVD itself. That might -- may be
19 one way to do it, but actually as the discussion this morning
20 has proceeded what we have been discussing is a modification of
21 the DVD player. Just to clarify for the record that the
22 Clearflix situation is a different situation to one as an issue
23 in the conversation we had this morning.

24 MR. CARSON: Right. Now -- yes.

25 MR. METALITZ: Just to enter into this policy

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1 debate that you sort of opened up with respect to advertising.
2 I think we have to think of the different windows of
3 exploitation here and I want to be very careful here because
4 this now is purely as a policy matter rather than a copyright
5 matter or a DMCA access control matter.

6 I think there are some concerns from the content
7 industry that if ad skipping in the context, for example, of
8 commercially supported television becomes so frequent that, in
9 fact, the revenue model for commercially supported television
10 where it's available free to the public may not be sustainable
11 and as a policy matter, do we want free over the air broadcast
12 television to go away. I think you could say no, as a policy
13 matter, we do not and, therefore, we want to have certain
14 controls on the ability to completely skip ads.

15 I think, and this is my own personal opinion, in
16 the context of a DVD where there is a price paid for the piece
17 of media, I do not see that same policy argument having as much
18 weight and, therefore, I do not consider it either as a
19 copyright matter or a noninfringing use to be able to fast
20 forward the ads or frankly, I don't see a great policy
21 justification to prevent the fast forwarding of ads on a DVD
22 itself.

23 MR. METALITZ: I would just add on the policy side
24 of this, I have no disagreement at all on the legal side.

25 Mr. Marks is describing the current business model

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1 for distributing DVDs. Someone may have a business model that's
2 different. They may even want to give away their DVDs to have
3 an advertiser supported medium and we've seen this happen along
4 the line in broadcast everywhere else. So, in that sort of
5 sense, it could have a policy implication.

6 MR. MARKS: I agree with him. I agree with that.

7 MR. METALITZ: As to -- as to current models, I
8 don't think it does.

9 MR. CARSON: Nobody's arguing we're paying less
10 for our DVDs because of watching commercials.

11 MR. METALITZ: That's right.

12 MR. CARSON: Okay.

13 MS. GROSS: I just wanted to address the point
14 that we heard earlier that it's a mere inconvenience to have to
15 watch 30 seconds worth of commercials. I think that really
16 doesn't address the main criticism which is that parents are
17 very concerned about the amount of advertising and the type of
18 advertising that their children are exposed to and parents want
19 some kind of control here and these restrictions prevent them
20 from being able to fast forward these -- through these
21 commercials.

22 So, to say oh, it's just a mere inconvenience
23 because you have to sit there for 30 seconds, that's not the
24 point. The point is the information that goes into these
25 children's minds and the impact it has on the children as time

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1 goes on.

2 MR. METALITZ: I would agree that's a legitimate
3 issue. I just don't see that that's a legitimate issue for this
4 proceeding.

5 That whole question of advertising in our society
6 raises a lot of questions and you could get into product
7 placement and every -- a lot of other issues that are legitimate
8 subjects for policy, but in terms of a substantial impact on the
9 availability of this material for noninfringing use, I don't see
10 that the 30 seconds that we're talking here is a substantial
11 impact. That's the only reason I bring it up in this
12 proceeding.

13 MR. CARSON: And -- and while we were going
14 through the testimony earlier talking about the skipping and it
15 is a mere inconvenience or not, I just went through all the
16 comments we got from the members of the public up here just to
17 try to refresh my recollection as to what they were saying and
18 I've got to say most of them use the words inconvenient,
19 annoying.

20 It didn't really sound like a substantial impact
21 to virtually any of these folks. I think two people talked
22 about not wanting their children to watch commercials and I wish
23 we could bring them in here because I'd like to know where their
24 kids watch TV because we're not going to solve the advertising
25 problem in this -- in this proceeding I can assure you.

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1 MS. HINZE: Plus the fact that this responds to
2 the 30 second skip. I actually wanted to put out some concrete
3 information that the Tarzan disk that was the subject of the
4 comments and subject in our comments in December, Tarzan disk
5 has in -- had in fact four minutes of unspeakable material and
6 every single time a parent put that disk -- the Disney disk into
7 the DVD drive, the parents plus the children would have to sit
8 through four minutes of commercials. So, just to inject some
9 reality back into the conversation here, it's not really a
10 matter of 30-second skips. I guess that's the point I would
11 make.

12 The more important point that has to hear I think
13 is that what we're talking about is a noninfringing use.
14 There's issues about burdens of proof and substantial adverse
15 harm, but the second aspect of the inquiry this morning is a
16 focus on whether the conduct that -- for which we are requesting
17 exemption is, in fact, an infringing use of the --

18 MR. CARSON: Nobody here is arguing that it is an
19 infringing use.

20 MS. HINZE: Right.

21 MR. CARSON: It sounds like most of the arguments
22 are over whether there's a substantial adverse impact --

23 MS. HINZE: Right.

24 MR. CARSON: -- on the one hand or a mere
25 inconvenience on the other. I know the folks on your side of

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1 the table have problems with the notion that it has to be a
2 substantial adverse impact. Let's assume for the moment that
3 that's the standard you're stuck with.

4 MS. HINZE: Or a distinct measurable and
5 verifiable --

6 MR. CARSON: Yes. Yes. Okay. Right. Now, if
7 that's the standard --

8 MS. HINZE: Right.

9 MR. CARSON: Just one last chance before I pass
10 the baton onto someone else. Assume that's the standard and
11 tell us why you've met it this time around on this particular
12 issue.

13 MS. HINZE: There are 66 consumers who have files
14 comments with the Copyright Office in this proceeding. They've
15 given direct first-hand experience of their inability to be able
16 to fast forward through things. They may have used the words
17 mere convenience, but their point is they have been upset enough
18 about this incursion into their private living room to go out to
19 the Copyright Office and file comments --

20 MR. CARSON: My God, if that were -- ban
21 everything. We get people upset about all sorts of things. All
22 right.

23 MS. PETERS: All right. Ms. Douglass.

24 MS. DOUGLASS: One question. Mr. Krepick
25 certainly won't feel left out. You don't mind. Right?

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1 I note in your comments and discussions about fair
2 use and it's always kind of refreshing to hear that fair use
3 from content owners and those allied therewith and the -- you
4 talk about perceived tensions with circumvention provisions.
5 Earlier in -- last week sometime, one of our witnesses said that
6 computer science experts really couldn't tell perhaps the to
7 experts couldn't figure out how to actually implement fair use.

8
9 So, I guess to all of you how is fair use going to
10 play out in an access controlled world? Are you going to have
11 to decide what's fair use in the first place and then be your
12 brother's keeper, your user's keeper and decide, you know, are
13 they -- what would they want to do. What kind of access do they
14 want? What is the market telling us? Are you going to have to
15 decide for users what fair use is going to be in the 1201 world?

16 MR. KREPICK: Well, I think that, you know, the
17 technologies that we deal with with regard to rights management
18 in the new world, I guess one of my points was is it seems like
19 a lot of the discussion is still centered around ten years ago,
20 you know, when there was VHS cassettes and there were different
21 formats and I think that, you know, the fact is that we are in
22 a new digital age and we do have technologies which have been
23 used to varying extents so far by both the software publishers
24 as well as the music industry and some -- and the video industry
25 has gotten into it with their movie link and, you know, being

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1 able to distribute content digitally over the Internet.

2 And these rights management technologies actually
3 have a lot of flexibility in them. I mean you can, you know,
4 allow people to use it for a certain period of time. You can
5 allow people to make a certain number of copies.

6 But I think it gets to the point of Mr. Carson
7 which is, you know, why are we in the situation where we take,
8 you know, we tend to take away certain -- it seems we take away
9 certain rights that the consumers have and I think it's because,
10 you know, on the other side of the equation, it's so dangerous
11 to let this material out in pure digital form, unencrypted form
12 that you've got to have some control mechanisms there.

13 And our feeling in these control mechanisms will
14 evolve over time. That, you know, what is out there today may
15 not answer all of the "fair rights", you know, kinds of
16 situations that people may want, but it's not clear that the
17 content owners want to give somebody the absolute right to make
18 copies anywhere, to use it on any platforms, et cetera, et
19 cetera as we talked about this morning.

20 Our position is that these technologies are very
21 flexible. But, the technologies themselves need to be protected
22 because if they're not and if, you know, hackers have the
23 ability to break any of these things anytime they want
24 indiscriminately, then, you know, that's kind of the end game in
25 terms of the content owners being able to distribute this stuff.

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1 So, you know, that's where we are.

2 And I'll describe an example which probably nobody
3 in the room may know, but it's all over the press today and
4 that is we had sold Intuit, basically a DRM solution for
5 TurboTax. Both ourselves and Intuit were taken to task
6 throughout the media for implementing a DRM system which locked
7 the TurboTax software to a particular PC and did not allow
8 people supposedly to move it from one PC to another. Now, I can
9 tell you that our technology does allow you to move it from PC
10 to another.

11 It turned out that probably both Intuit and
12 ourselves weren't as smart as we should have been in
13 anticipating a lot of situations particularly at Christmas time
14 when people bought new computers. They bought new hard drives.
15 They wanted to move their TurboTax application from one to the
16 other and they wanted to do it easily.

17 I can tell you that it can be done. I don't think
18 either of our companies did it in the right way. So, it was a
19 very painful learning experience and Intuit announced yesterday
20 that they're actually not going to use DRM on TurboTax in the
21 packaged retail media software next year. However, they will be
22 using it on the Internet downloads, the electronic distribution
23 and on other of their products.

24 So, again, it's a painful learning experience for
25 all of us because this is all new territory. We are trying as

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1 best we can to give consumers the kind of access rights that
2 they want, the flexibility that they want and I -- and I think
3 it's just premature, you know, to point fingers at the
4 technology and say all you're trying to do is totally control
5 distribution. You're going overboard. You know, you're always
6 accusing the consumer sort of in advance of trying to make
7 copies.

8 Well, the fact is maybe there's 66 consumers who
9 wrote to the Copyright Office and complained about fast
10 forwarding, but in the Intuit case there were 20,000 consumers
11 that tried to gain access to their software for free because
12 they got a hold of a registration number and they tried to hit
13 the website to get free software. So, 66 versus 20,000 gives
14 you some idea of the number of consumers that given stuff is
15 free, you know, they will go after it and given stuff is free,
16 that's end game for all the content owners.

17 So, that's why we're so passionate about saying,
18 you know, don't blame the technology. The technology has a lot
19 of robustness. It's got a lot of flexibility. This is a new
20 era. It's a new age and we have to think a little bit
21 differently than we did back in 1984 when the Bahamax case was
22 around and you said, you know, we're just dealing with a
23 particular physical format.

24 MS. DOUGLASS: Mr. Metalitz wants to say something
25 and then Ms. Gross.

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1 MR. METALITZ: Just I have very little to add to
2 what was just said. Just that technology isn't going to dictate
3 what's fair use. Fair use is determined by the courts on a
4 case-by-case basis and the frustration the technologists feel
5 that was expressed in the testimony you referred to is precisely
6 that. It's very difficult to design something that will give
7 you fair use in every situation and not allow uses that are not
8 fair use.

9 That's not really the whole question here. I
10 think this example demonstrates how market forces have a huge
11 impact on what people do and can do and can't do with
12 copyrighted material without regard to whether it's fair use and
13 the example I would give besides what was just referred to is if
14 you look at the evolution, it's been a very rapid evolution in
15 the -- in the rules or the capabilities of the music downloading
16 services over the last six months or a year that they've been
17 taken off. The legitimate music downloading services and what
18 people -- what capabilities people can get through their
19 services compared to what it was six months ago in terms of
20 saving material to the hard drive, in terms of saving it to
21 other devices, in terms of disseminating it.

22 How, you know, in the absence of an agreement, a
23 lot of those uses would not be fair uses, but the market is
24 impelling the content owners and the distributors to serve the
25 market needs by allowing this -- including this within the scope

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1 of their license. So, I think this is the evolution we're going
2 to see and, of course, the courts will decide whether a
3 particular unpermitted use is a fair use.

4 MS. DOUGLASS: So, the evolution that we see is
5 actually a shift between the user being able to make the first
6 crack at what fair use would be to the copyright owner making
7 the first crack of what fair use is going to be in terms of use.

8 MR. METALITZ: Yes, and then the market ultimately
9 determining where that balance is going to lie.

10 MS. PETERS: Or consumer expectation being met by
11 the market as opposed to fair use.

12 MS. DOUGLASS: Okay.

13 MS. GROSS: It seems like the presumption
14 underlying much of this discussion is that the customers are
15 infringers and the copyright holders will be these benevolent
16 dictators who will permit us fair uses in certain circumstances
17 that they feel is appropriate, but let's remember fair use is
18 lawful, but unauthorized use.

19 So, if we're talking about replacing fair use with
20 a system that only permits authorized use, we're eliminating
21 fair use completely. This is a distinction between liberty and
22 license and it's important to the consumers.

23 MS. DOUGLASS: Yes, Mr. Marks.

24 MR. MARKS: Yes, I just wanted to add just a
25 couple of things to what had been said because I think sometimes

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1 the fair use issues and the access issues get confused.

2 I mean as I understand fair use, there is a
3 presumption with fair use that access to the work in the first
4 place has been authorized. I meant there's always the typical,
5 you know, example that's given that, you know, fair use to quote
6 an excerpt from a book "does not give you the right to break
7 into the bookstore and steal the book."

8 The notion is that there is an authorized access
9 to the work in the first place and then fair use allows you to
10 do just as Ms. Gross said certain unauthorized acts of
11 reproduction, public performance quoting, and things of that
12 nature and so, it seems to me that the advent of access control
13 technologies which in the marketplace end up facilitating a
14 greater availability of works to people in different formats or
15 in different methodologies whether it be on a physical media or
16 on a pay-per-view or on a limited download or a permanent
17 download or a broadcast.

18 In each of those different medias and channels,
19 there may be an opportunity for fair use and so, when we speak
20 of authorized access, I don't think that should necessarily
21 translate into that means the content owners are trying to
22 prevent any unauthorized uses or prevent any fair uses. Let me
23 give some specific examples.

24 A DVD, that's controlled by access technology.
25 Can that DVD be played in the classroom for educational

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1 purposes? You bet. Are the content owners going to object to
2 that being played for? They will not and, in fact, there's
3 already steps towards exemption for that under Section 110.

4 The example that Fritz Attaway was trying to
5 describe, you know, in his testimony in Washington, he was
6 saying assume a child is doing a book report on "Spiderman" or
7 a report to their classroom and they copy an excerpt on a
8 camcorder of a small portion of the movie, Fritz said it and I
9 would agree with him, that's probably a fair use and we are not
10 seeking to prevent that. That's sort of fair use. So, I do
11 think it's important to try and keep this distinction in mind
12 between access and fair use.

13 MS. HINZE: I wonder if I can make a comment here.
14 I appreciate this doesn't actually go to EFF's exemption, but
15 I'm a little disturbed by what I'm hearing because I feel it is
16 perhaps not a completely accurate reflection of the fair use
17 case law in this country.

18 And I just feel it might be appropriate to note
19 here that in the Campbell case the court made it very clear that
20 a fair use does not involve a prior authorization and to the
21 extent that Mr. Marks' comments appear to be suggesting the
22 opposite of that, I just wanted to note the court was quite
23 specific in pointing out that parody and particle fair uses were
24 a clear category of fair uses where the court recognized that it
25 was not necessary to obtain the prior authorization of a

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1 copyright owner in order to make fair use.

2 And while as I said this doesn't directly go to
3 the exemption that we're seeking in this proceeding, I would
4 want the record to reflect what the reality is of the case law
5 in this country regarding fair use and regarding this argument
6 that fair use somehow requires wilful access to be negotiated
7 before a person can make a fair use of a work. I don't believe
8 that that is an accurate statement of the law.

9 MS. PETERS: You going to --

10 MR. MARKS: Yes. Yes, I just wanted to say to Ms.
11 -- is it Hinze? Hinze?

12 MS. HINZE: Hinze.

13 MR. MARKS: I'm sorry.

14 MS. HINZE: Hinze.

15 MR. MARKS: Yes, I agree with her statement and
16 absolutely, you know, in the Acup Rose case the court had said
17 the fact that, you know, the 2 Live Crew had sought a license to
18 parody the Pretty Woman and had denied the license as irrelevant
19 to whether or not the use they made was a fair use. I
20 absolutely agree with that.

21 And what I was trying to say is fair use doesn't
22 mean that you have the ability without authorization to get
23 access to a physical copy of the work.

24 MS. PETERS: Right.

25 MR. MARKS: In that case, they were parodying the

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1 song themselves.

2 MS. PETERS: Right.

3 MR. MARKS: There was no access to the physical
4 copy of the work that needed to be authorized in the first place.
5 So, I absolutely agree in terms of parody, in terms of
6 commentary, criticism. You can, for example, quote, you know,
7 lines from a film without having to have necessarily seen the
8 film itself. Someone could have told it to you. So, yes, there
9 are -- there are definitely times when the -- certain -- for
10 certain types of fair uses that don't involve access to the
11 physical copy of the work at all.

12 MS. PETERS: Right. Thank you. Thank you.
13 Steve.

14 MR. TEPP: All right. Thank you. Mr. Marks, you
15 may have already answered this in response to one of Mr.
16 Carson's questions, but I want to get back to it for just a
17 moment regarding the fast forwarding inhibition, un-skipable,
18 whatever you want to call it. Why is it, and maybe Mr. Metalitz
19 is the right person to ask as well because you've said AOL Time
20 Warner is to do this, why do studios do it? It sounds like it's
21 just a matter of generating advertising revenue. You can
22 guarantee an advertiser that they're going to get eyeballs. Is
23 that what it's all about?

24 MR. METALITZ: That may be. I think that's a
25 reasonable speculation, but I don't have any first-hand

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1 knowledge of that.

2 MR. MARKS: And I unfortunately don't either
3 because we don't as studios tend to talk to each other about
4 what our marketing practices are. So.

5 MR. TEPP: Okay.

6 MR. MARKS: I'm sorry. But --

7 MR. TEPP: Then we can ask a follow-up question to
8 give me a chance to follow up on that, but--

9 MR. METALITZ: I would just say as our testimony
10 indicates that one studio at least that had that policy on some
11 of its releases encountered a lot of consumer resistance and
12 either doesn't do it anymore or does it much less than they were
13 doing in the past. So, I just want put that on the record.

14 MR. TEPP: And as Mr. Carson suggested, we're
15 certainly going to follow up on that as well because that's an
16 important question. But, I want to juxtapose that benefit with
17 the concerns that have been raised and most articulately I think
18 recently by Mr. Krepick about the dangers of having in the clear
19 copies of audiovisual works on DVDs and I'm assuming in reaching
20 this question, I'm assuming that it is necessary to circumvent
21 CSS in order to deal with the UOP issue that prevents fast
22 forwarding.

23 We're going to -- more on that as well. The
24 impression I got from Mr. Turnbull in the Washington hearing
25 speaking for the DVDCCA was that pretty much all the

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1 functionality issues coating, fast forwarding, etcetera were
2 encrypted within the CSS umbrella and that the only way to deal
3 with them was to first decrypt under CSS. I'm not saying that's
4 a fact. That was my impression. We'll get information from you
5 later.

6 Let's assume for this question that's the fact.
7 If we have an exemption going forward that allows circumvention
8 for the purpose of turning off the UOP or turning it on
9 whichever is the right phrase so that the consumer's can fast
10 forward, it sounds to me like then studios are going to have to
11 weigh the benefit of the advertising revenue with the danger
12 that people are now going to be able to circumvent the CSS and
13 having their copies.

14 If that's the case, given what has been described,
15 it sounds like the obvious choice will be we're not going to
16 block fast forwarding anymore and so, there won't be the down
17 side and the consumers will get what they want.

18 If -- if that's a reasonable scenario, doesn't
19 that mitigate in favor of an exception and I'm interested in
20 your comment on it.

21 MR. METALITZ: Well, that's an interesting
22 argument. I think it does -- if you assume that it's the role
23 in this proceeding for the office to inject itself into these
24 market decisions and take decision away from the marketplace and
25 by granting exemptions only for the purpose of influencing

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1 behavior in the marketplace.

2 I think this kind of underscores why the solution
3 is so disproportionate to the harm that -- or the substantial
4 adverse impact and this is I think what raises the concern
5 because, again, if you tell people it's okay to clip your
6 fingernails and they start -- they come in with chain saws the
7 next day, you have to be concerned about this and if the only
8 way to clip your fingernails is to use a chain saw, then you
9 have to worry about all the other -- all the other mayhem that
10 may -- that may follow from that.

11 I don't think I have anything to add to that.

12 MS. HINZE: Might I respond

13 to --

14 MR. TEPP: Of course.

15 MS. HINZE: -- that.

16 MR. TEPP: In a loud voice please.

17 MS. HINZE: In a loud voice. As I

18 think I've said a couple of times this morning there are perhaps
19 several ways in which this exemption the Copyright Office and
20 the Library of Congress might consider granting this exemption.
21 There are several ways in which this exemption might work only
22 one of which involves "putting content into the clear" which as
23 I understand the comments that have been made this morning means
24 making -- somehow physically changing a DVD, the physical disk.

25 The vast majority of what we've talked about this

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1 morning is modifying a DVD player. That doesn't involve any
2 modification of any content on a disk and the scope of exemption
3 that a -- the Copyright Office and the Library of Congress could
4 consider in order to affect a remedy if you like for consumers
5 in this situation is a limited exemption circumventing CSS on
6 a player in order to modify, i.e., disable the UOP blocking
7 response on the DVD player or I guess the converse of that
8 allowing consumers to build their own player which doesn't
9 respond to UOP blocking. It's not the case that there would be
10 this vast majority of in the clear works.

11 I just wanted to make it clear that I actually
12 don't think that's what's required as a matter of technology.

13 Secondly, it's already a capability that exists to
14 the extent that there's a concern that I'm hearing about CSS
15 decryption being the source of copyright infringement. I think
16 it would be fair to say and -- that that concern already exists
17 and it's quite separate from the ability of consumers to -- to
18 make a noninfringing use of material they've lawfully acquired
19 which is the subject of the exemption here.

20 To the concern that there is an ability to
21 circumvent CSS and for instance post information in the free and
22 clear to use the words of the other side of this room, that's
23 already going on and it's inappropriate to bring that to this
24 discussion about the exemption. Because as I understand what
25 the Copyright Office's role to be in this process and what the

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1 Library of Congress can do under 1201(d) is only grant an
2 exemption that will cover noninfringing uses.

3 It's not the case that the rest of the Copyright
4 Law regime goes away. The full set of rights and remedies that
5 are available under Chapter 5 to copyright owners will continue
6 to exist and to the extent that the harm is already happening,
7 it's not going to be impacted by granting this very limited
8 exemption that will only apply as I see it to a modification of
9 a DVD player.

10 MR. TEPP: Sure.

11 MR. METALITZ: Could I just add two sentences to
12 my answer? I think the other problem with that which -- that
13 suggestion is that in all the discussions that we've had over
14 the last three years about what constitutes a particular class
15 of works and how you would define it, it sounds as though this
16 would be and I'm oversimplifying here that you could circumvent
17 CSS in order to go in and disable UOP or enable. I don't know
18 which is the right verb there and then get out and make -- don't
19 do anything else.

20 So, it's extremely dependent on the behavior of
21 the user rather than -- and I think it's as the Copyright Office
22 concluded in 2000, that's very hard to fit in the concept of the
23 particular class of works which Congress asked you to identify.

24 But, again I proceed on -- we're proceeding on
25 some assumptions here about what would be required and the

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1 alternative assumption is that what is involved -- since what is
2 involved here is not an access control technology, it may not be
3 within the scope of this proceeding at all.

4 MS. HINZE: Could I just respond one more time?

5 MR. TEPP: Of course.

6 MS. HINZE: Just to be clear, my comments just now
7 were an explanation of the way in which an exemption might work.
8 I am aware that in the 2000 proceeding, the Copyright Office and
9 the Librarian issued a very clear statement about what is
10 required for a class of works.

11 In the comments submitted by EFF and in my oral
12 testimony this morning, I listed a class of works. I identified
13 a class of works which is based on a Section 1002 class and the
14 class of works which we have listed oddly fits within the class
15 definition as identified by the Librarian in a 2000 rule making.

16 The way in which an exemption might work in
17 practice is the point of my conversation this morning and as to
18 the question about whether circumventing CSS which is I
19 understand what would be required in order to turn off UOP
20 blocking in a player. As to whether or not that is, in fact,
21 circumventing CSS is a violation of an access control measure.
22 I think that issue is clear. I think that the issue for which
23 the Copyright Office has sought further information is a
24 question about whether it's necessary to violate CSS in order to
25 turn off UOP blocking on a player.

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1 MR. TEPP: Okay. Yes.

2 MR. MARKS: Can I just add one thing? I think
3 that that's right. There is that question for further factual
4 information as to whether it's necessary to circumvent CSS in
5 order to turn off the UOP function that controls fast forwarding
6 and we will certainly try and investigate that to get an answer.

7 But, I thought I heard a statement that
8 circumvention for CSS was already occurring in order to make
9 fair uses or was necessary to make fair uses and if I heard that
10 correctly, I just wanted to dispute that statement. Because I
11 think part of what we're trying to say and part of what this
12 inquiry is directed towards is whether the prohibition of
13 circumventing and access control technology is adversely
14 affecting the ability of users to make noninfringing uses and I
15 think what some of the testimony Fritz gave and some of the
16 testimony that we're trying to give today is to say, in fact,
17 protecting the integrity of the access control technology and
18 not permitting a circumvention still enables these fair uses to
19 be made.

20 You don't need to circumvent the access control
21 technology in order to make a clip of the movie to use in a
22 documentary. You don't need to circumvent it in order to play
23 it for a classroom. You don't need to circumvent it in order to
24 have comment and criticism.

25 So, I want to be very clear that I do not accept

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1 that premise that circumvention of CSS is already happening as
2 a causal necessity in order to make fair uses.

3 MS. HINZE: I'd just like to make clear for the
4 record in case there was some confusion about what I said
5 earlier.

6 I did not actually refer to fair use. What I
7 pointed out was in response to a comment about a concern that I
8 was hearing in relation to our exemption that somehow there was
9 some causal nexus between our exemption and copyright
10 infringement and that was the context in which I made my
11 previous statement.

12 MR. TEPP: Okay. Let me try and move on a little
13 bit. We spent some time earlier talking about whether the UOP
14 itself was an access control. There was agreement that alone
15 it's not. There is uncertainty or disagreement possibly about
16 whether or not it's necessary to circumvent CSS in order to
17 change the UOP.

18 Again, assuming that it is, just for the sake of
19 argument, is it the position of the content owners that because
20 the UOP is not the access control we can't consider that --
21 can't consider any adverse affects on noninfringing uses by the
22 UOP because it's not the direct affect of the access control.
23 In other words, can we consider indirect adverse affects?

24 MR. METALITZ: Well, actually, I think the
25 statutory charge is to consider the impact of prohibition.

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1 Section 1201(a)(1) circumventing access controls and what's the
2 impact of that on noninfringing uses?

3 If what is preventing people from skipping
4 advertising is not an access control measure, then 1201(a)(1)
5 doesn't apply and, therefore, there could be no impact. If on
6 the other hand the theory is that somehow CSS is preventing this
7 indirectly, then I think you have to look at the -- you have to
8 look at these other questions about how substantial is the
9 impact on noninfringing use and what would be the affect of the
10 allowing the exemption. It says --

11 MR. TEPP: It doesn't get us in the ballpark
12 though.

13 MR. METALITZ: Yes, it gets you into the
14 proceeding.

15 MR. TEPP: Right.

16 MR. METALITZ: And then you have to do the--

17 MR. TEPP: Okay.

18 MR. MARKS: I would agree with that --

19 MR. TEPP: Okay.

20 MR. MARKS: -- analysis.

21 MR. TEPP: Great. Let me come back to this side
22 again and ask about since we do appear to be talking about a
23 noninfringing use, everyone seems to agree with that and we may
24 depending on the -- the technology be talking about an indirect
25 result of the inability to circumvent an access control. We

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1 have to look at the different factors here and one of the
2 factors that we've been asked by the content side to focus on is
3 the fourth, the affect on circumvention on the market for value
4 of the copyrighted works and particularly the potential piracy.

5

6 On this side, we've heard an objection to that
7 saying no, no, consumers are not criminals and just because
8 you've got some works in the clear doesn't mean you're going to
9 have piracy.

10 I generally agree that people are law abiding, but
11 we have to consider things like -- well, let me ask you this.
12 In light of what we've seen on pier to pier networks, for
13 example, Napster, where people infringed copyrights because it
14 was there and because they could. What is your response to that
15 as a model for concern on this side as to how in the clear
16 copies could very well become a source of massive infringement?

17 MS. HINZE: Well, first I think maybe there is
18 some confusion. As I've said, I don't know. There seems to be
19 a focus here. Copies in the free and clear and as I understand
20 what you're saying there, you're talking about somehow making
21 the content in the free and clear and what I have been
22 discussing this morning is a modification of the DVD player.

23 MR. TEPP: Well, you've been discussing both and
24 it's not at all -- it's not a clear answer as to whether or not
25 we can issue an exemption --

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1 MS. HINZE: Right.

2 MR. TEPP: -- that would mandate one versus the
3 other.

4 MS. HINZE: I -- I -- yes.

5 MR. TEPP: And if we can't then don't --

6 MS. HINZE: Right.

7 MR. TEPP: -- we have to consider the potential
8 harm of in the clear copies.

9 MS. HINZE: I guess my response was to point out
10 that it's not necessarily going to involve in -- free and clear,
11 but I do take the point that you're raising here that to the
12 extent that the Copyright Office is able to shape an exemption
13 that may not be within the scope of what is permissible. That
14 may not be within the scope of what is permissible.

15 What I would say in response in response to the
16 concern about digital piracy is this. We've heard a lot this
17 morning that CSS and the legal sanctions of 1201 as applied to
18 the protection of CSS is the reason why we had a rich digital
19 world, why we have more DVDs available.

20 What I'd say is the history of CSS over the last
21 four years does not actually show that the availability of CSS
22 and the legal norms that support it have actually been the great
23 legal protection that the copyright owners presumably had
24 sought.

25 What I mean is this. Since 1998 when DVDs were

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1 first released, the content has been produced and released on
2 CSS protected DVDs. Within several months of CSS protected DVDs
3 going into the marketplace, CSS was circumvented by a groups of
4 hobbyists, most famously a teenager.

5 For a number of years, the MPAA has made the
6 point, the Motion Picture Association of America has made the
7 point that a number of releases which are DVD releases are
8 available in an unencrypted form, on P to P networks and this is
9 notwithstanding the fact that they have had CSS protection for
10 the last four years.

11 What I would say is if as seems to be the argument
12 that I'm hearing that the necessity for legal protection of CSS
13 is the fact that -- is what would be required in order for
14 content owners to continue to feel comfortable about releasing
15 work on DVD format into the marketplace, CSS has been
16 spectacularly unsuccessful in protecting content. That's
17 happened irrespective of whether or not an exemption is granted
18 in this particular proceeding. You would expect if copyright
19 owners were as concerned as they are arguing here about the
20 protection that they require in order to make their works
21 available, that they would have abandoned the CSS format, the
22 CSS protected DVD format as their medium of release. But, in
23 fact, there's a greater move to release things purely on DVD or
24 primarily on DVD in terms of new releases.

25 So, I don't think it's a complete statement of the

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1 motivations of the studios to say that the need for CSS and the
2 need for legal protection for CSS is the full picture here.

3 I guess that's one comment I would like to make
4 probably of a more general nature.

5 The second comment I'd like to make is as I see it
6 the exemption here is a limited exemption. It will apply to a
7 limited number of people, yes. I don't think that means that it
8 will not be a worthwhile exemption, but it will by necessity
9 apply to a group of people who can make the modification of the
10 DVD player or do whatever is necessary to make content available
11 that doesn't have the advertisements in it.

12 It's a limited exemption by its nature and the
13 availability for piracy if that's the words that the other side
14 of the room would like to use is a capacity that already exists
15 and can -- granting an exemption to a limited number of
16 consumers to allow them to make a noninfringing use of the work
17 they've already lawfully acquired, paid money for, doesn't seem
18 to me to be -- there seems to be a disconnect between those two
19 arguments.

20 We're talking about a class of people who by
21 definition have lawfully acquired content and are not in the
22 same category as people who are downloading a movie for free
23 from the Internet.

24 MS. GARLICK: If I could just back up those
25 comments and just briefly point out in -- we always seem to get

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1 back to this threat of Napsterization. That at issue in Napster
2 really was a commercial enterprise that was facilitating mass
3 infringements and as we addressed in our testimony earlier, the
4 nature of -- as Gwen just highlighted, the nature of any
5 exemption is going to be quite personal and limited and not
6 commercial and so, in that respect, we would say that that favor
7 weighs in

8 -- that factor weighs in favor of the exemptions proposed.

9 And also given the widespread availability among
10 many of the DCSS, we've already heard testimony about how
11 fabulous the DVD industry currently is and so, that fact would
12 suggest that the availability of a certain mentioned technology
13 has not actually impaired on the business model of the industry.

14 MR. TEPP: I can see this side wants to respond
15 again.

16 MR. MARKS: I would like to respond to this issue
17 about the hack and not the -- the availability of the hack has
18 not, you know, stymied the birth of the DVD market and,
19 therefore, I think a conclusion that is implied is that
20 circumvention shouldn't be a problem and should be permissible
21 because the existence of the hack of CSS, DCSS has not impeded
22 the growth of the DVD market and what I -- where I think there's
23 a major disconnect there is that absolutely we agree CSS was
24 hacked. Any content protection technology, access control
25 technology or copy control technology runs the risk of being

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1 hacked and almost surely any of them will be. That's the raison
2 d'etre of the DMCA in the first place because technological
3 measures in and of themselves are not bulletproof.

4 What you need to achieve the correct balance is
5 the technological measure and the legal machine and legal
6 protections that go with it.

7 CSS was hacked. The program DCSS was posted on
8 the Internet. Did this content owner sit by and say oh well, no
9 problem? Of course not. He brought a lawsuit against that to
10 establish under the DMCA that DCSS was an illegal circumvention
11 device.

12 Why is that important? We think it's important
13 because people -- we think the ordinary consumers will think
14 twice about downloading and obtaining a product or device that
15 has been found to be illegal by the court -- to engage in
16 activity using that device that is found to be illegal by the
17 court. That's very, very important in establishing these legal
18 norms and principles in terms of whether the circumvention
19 device and activity is permissible or not.

20 So, we believe that, in fact, the fact that DCSS
21 has been found by a court to be an illegal device actually
22 dissuades many ordinary consumers and citizens from obtaining or
23 using it. That's first off.

24 Second of all, it's important to note that DCSS
25 has not had an impact on the DVD player market. DCSS can't be

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1 downloaded into DVD players and, therefore, that has no
2 influence at all in how DVD -- licensed CSS DVD players
3 function. They still decrypt properly and they still protect
4 the works the way they're suppose to do in accordance with the
5 license.

6 Similarly, even though the DCSS hat can be
7 downloaded to affect the U60SS in the computer environment, all
8 the computer ROMs that come onto the market, the DVD computer
9 ROMs that are licensed by the DVD Copy Control Association to do
10 CSS decryption continue to function in the way they are suppose
11 to do under the license. It's only when a hack has downloaded
12 that the encryption is defeated.

13 So, in fact, the existence of CSS technology, the
14 existence of the legal protections of the CSS technology, have,
15 in fact, continued to off a strong degree of protection to the
16 copyrighted works on DVDs themselves. One of the best
17 demonstrations of that is if it were completely useless. The
18 studios would not continue to encrypt their works with CSS and,
19 in fact, all the studios have, in fact, continued to encrypt
20 their movies on DVDs using CSS.

21 And finally, I just wanted to respond to the point
22 about well, if, you know -- if it wasn't a problem with this
23 hack or if the -- I'm sorry, if the hack was really so
24 problematic and the defeat of the technology was so problematic,
25 wouldn't the studios have stopped distributing their movies on

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1 DVD or frankly perhaps a more likely scenario, wouldn't we have
2 changed the encryption method. Well, you know, believe it or
3 not the studios actually have a concern for their customers out
4 there and we would recognize that if we were to start encrypting
5 our DVDs disks with a new encryption system and abandon CSS,
6 those disks would not be playable on the 40 million DVD players
7 that have been sold into consumer households. We think that
8 would not be a particularly consumer friendly proposition and
9 rather than telling consumers go out now and throw away the DVD
10 player that you bought a year ago, a month ago, a week ago and
11 go buy something else, we think it's a much more user friendly
12 and consumer friendly proposition to say, you know, what this
13 circumvention is illegal, the circumvention device is illegal,
14 and it should be kept away from the market as much as possible.

15 MS. PETERS: Thank you. Even though there are
16 additional questions, I think that it is necessary and proper
17 that we take a short break. People here are all, you know,
18 stuck here. So, we need to take a refreshment or whatever
19 break.

20 Why don't we resume at five of 11:00. Take ten
21
22
23
24
25

1 but we're going to go to Rob and then back to Steve. So, Rob.

2 MR. KASUNIC: So, I -- one question for Mr.
3 Krepick who I understand has to leave soon. So --

4 MS. PETERS: Well, he has a phone call.

5 MR. KASUNIC: Okay.

6 MR. KREPICK: At 12:30.

7 MR. KASUNIC: In some of your responses you
8 mentioned don't blame technology and about the painful learning
9 experience with the Intuit situation and my question whether --
10 you also said that one hack has -- can have multiple affects and
11 I wonder isn't that something that is a result of the design of
12 the technology?

13 Is it necessary for instance, the way this may
14 work with CSS in the code, the UOP code, that if it's nested
15 within CSS, then that creates the problem that we may be facing.
16 Isn't there other ways to design this technology so that we have
17 basically distinctions between copy protection measures that
18 control use and copy protection measures that control access to
19 the work so that you could circumvent one without circumventing
20 the other?

21 MR. KREPICK: Well, like there -- I suppose there
22 are a lot of design parameters that you could use. Are you
23 talking specifically about the UOP and the CSS or just sort of
24 in general the way we --

25 MR. KASUNIC: Well, I guess in both. You said

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1 don't blame the technology. Well, why not?

2 MR. KREPICK: Well, I think in terms of the
3 technology, first of all, I think everybody recognizes that it's
4 a very difficult challenge to even come up with technology that
5 can protect digital content. I think everybody realizes that no
6 matter what you come up with that any kind of encryption scheme
7 can be hacked whether it's a simple, you know, two bit kind of
8 solution. In fact, the simpler the solution, obviously the
9 easier it is to hack and I would contend that the simpler the
10 solution the more protection that you need under the copyright
11 law if you believe that it's important to have these kind of
12 technologies to help protect content in this digital world.

13 And I think the whole point is that, you know,
14 every little kind of nick of the blade from the standpoint of
15 gaining access to content no matter how limited the exemption
16 might be, every little nick potentially can put out widespread
17 damage because all it takes is one copy in the clear to be able
18 to proliferate that on a pier to pier network and so, you know,
19 I think we are in an era where the consequences of having, you
20 know, these access control mechanisms or these copy protection
21 mechanisms, the consequence of having exemptions given, having
22 them broken is huge compared to what it might have been ten
23 years ago and that's just because you're getting content in the
24 clear.

25 What I was trying to say before about don't blame

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1 the technology, we are trying to come up with as flexible
2 solutions as possible which will allow, you know, we don't like
3 to use the term fair use because we're technology guys. We're
4 not lawyers. I don't know all the subtleties of fair use.

5 But, I do know that consumers, you know, believe
6 that they have certain entitlements. They look for certain
7 features and so, we try to come up with satisfying as many
8 features as possible and again, space shifting, time shifting,
9 whatever without even getting into a definition of whether it's
10 fair use or not.

11 So, in the process of coming up with that, you
12 have to design a system that is relatively flexible. Usually
13 when you design a system that's relatively flexible, it means
14 there's probably a lot of holes that can get into it for people
15 who
16 -- if they have nefarious, you know, means or intent that
17 they're going to be able to basically break whatever system you
18 come up with. So, at the end of the day, every one of these
19 systems can be broken and that's where the danger is and that's
20 where I think we need not only -- so, I keep arguing for
21 stronger copyright laws because I think it's the only way that
22 you're going to really ultimately, you know, kind of save the
23 content owners.

24 Because at some point -- just look at the music
25 industry. I mean you can compare. Fortunately, video is higher

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1 band width. You know, it's much more difficult to kind of
2 transport video. The music industry is getting killed today
3 because it's low band width. It's easy to transfer files. You
4 know, their revenues have declined while fortunately the DVD
5 revenues have increased dramatically and part of the reason is
6 the size of these files, but part of the reason I believe is
7 also the technology that's been used.

8 I'm not sure if that answered --

9 MR. KASUNIC: Well, partly but not fully. I guess
10 there are certain -- I understand that there's problems out
11 there and we understand that there's a need for protection for
12 copyright owners to put works out digitally, but we also have
13 congressional distinctions for some things that copyright owners
14 can do under the DMCA and some things that are suppose to be
15 left in a separate category under the -- this way there are no
16 prohibitions on the active circumvention under 1202 or 1201(b).
17 There's no prohibition on the conduct there.

18 That would be the situation that I think Ms. Gross
19 was talking about where it's not up to technology companies to
20 decide what is or what isn't a fair use, but for consumers to
21 have the ability to make their own fair use determination and if
22 they're right, they're noninfringing. If they're wrong, they're
23 infringing and that's the way the congressional distinction was
24 made.

25 So, why not have the technology follow Congress'

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1 distinction and the access controls in one place and not have
2 them envelop the copy protection measures in a way that really
3 prevents this act from operating the way it was suppose it?

4 MR. KREPICK: I guess I can't speak to kind of the
5 way it was suppose to operate. I think we believe that we're
6 trying to provide all of the tools possible to the content
7 owners to allow them in essence to control the content, but at
8 the same time to provide some flexibility to the consumers for
9 so-called enablement of features.

10 You know, it is a matter of security. I mean if
11 you can intertwine some of these features, certainly that makes
12 it more difficult to be able to hack them. So, there's a reason
13 why, you know, when some of these features get put together they
14 get imbedded and intertwined because that does make it more
15 difficult to hack them.

16 MR. KASUNIC: Maybe I could put this to Mr.
17 Metalitz and Mr. Marks.

18 In terms of that issue, is it -- certainly the
19 more they're intertwined the more difficult it is. In fact,
20 it's not just difficult but it's impossible because they're
21 prohibited under 1201(a), but there's nothing that would prevent
22 for copy controls from making them as sophisticated as possible.
23 So, it's extremely difficult for any consumer to ever be able to
24 circumvent it, but it's another question to put a wrapper around
25 it of an access control so that you can never circumvent it

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1 without also circumventing the access control which is something
2 that we're faced with here of having to determine whether there
3 should be an exemption in order to be able to accomplish that.

4 MR. METALITZ: I'm not sure what you're asking.
5 Is the question whether there should be some obligation to
6 design the technology in a way that conforms more clearly to the
7 different statutory categories and that if that obligation is
8 not met, then that's a factor weighing in favor of allowing
9 circumvention?

10 MR. KASUNIC: That sounds fair.

11 MR. METALITZ: I think Congress addressed this to
12 a limited extent in this discussion in the legislative history
13 about the importance of not having a congressional definition of
14 which particular type of technology was used. In other words,
15 there were proposals that went before Congress that said well,
16 this only applies to -- the only access control we're going to
17 protect is encryption and Congress rejected that approach and
18 said no, anything that -- and took a functional approach and
19 said anything that does control access to a work is subject to
20 1201(a). Anything that controls or that inhibits the exercise of
21 an exclusive right of the copyright owner comes under 1201(b)
22 and Congress was not going to get in the business of dictating
23 which technological approach should be applied.

24 MR. KASUNIC: But isn't it common sense that if
25 they made that distinction, they were making a distinction that

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1 you should be able to do one but not the other. So if you put
2 one inside the other and you can't do the other, the copy
3 control measures, the act doesn't make sense any more.

4 MR. METALITZ: Are you talking about particularly
5 in the context of CSS or just in --

6 MR. KASUNIC: Maybe. I don't know. We're still
7 trying to figure out how CSS works in order to determine that.
8 If the UOP code or, as we'll get to later, region coding are you
9 can not circumvent them without circumventing CSS, then yes, CSS
10 would apply. But it applies to probably hundreds of other ways
11 things could be done or are being done and that we're, I'm sure,
12 going to be faced with more and more.

13 MR. METALITZ: I'm not sure I understand either of
14 those examples because we know UOP standing alone is not an
15 access control and we know it's not a copy control. We know
16 that region coding -- the Copyright Office found that region
17 coding is an access control. Now, there is a question of how
18 closely it's integrated with CSS and, therefore, what would be
19 the impact of allowing circumvention of region coding? Would it
20 have an impact on CSS? And I assume the same question could
21 arise about UOP, even though that's not an access control. But
22 that's a separate question from this issue of access control
23 versus copy control.

24 MR. KASUNIC: Then let's turn it into a
25 hypothetical where we have a copy control, unquestionable copy

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1 control within an access control. Is that legitimate? Should
2 it be legitimate? Should we able to exempt if we can not
3 accomplish circumvention of that copy control?

4 MR. METALITZ: No, because again, Congress
5 provided certain circumstances in which it was permissible to
6 circumvent access controls, even some circumstances in which
7 it's permissible to make available tools for circumventing
8 access controls. In the hypothetical situation you're talking
9 about, when that occurs, once you arrive at that point, you're
10 able to circumvent the copy control. I don't see how it renders
11 the statute a nullity or makes it not make sense because neither
12 1201(a) nor 1201(b) is an absolute. 1201(b) has no conduct, no
13 circumvention, prohibition -- well, what's wrong with the active
14 circumvention, as you pointed out, the 1201(a) has it with
15 exceptions and when the exceptions apply, then you get to the --
16 in your hypothetical situation, when the exceptions apply, then
17 you get to 1201(b) and you can do your copy control
18 circumvention. So again, I'm treating this as a hypothetical
19 because I think in the instances we're talking about here, UOP
20 and region coding, there's no question there's no copy control
21 really involved in -- but we'll be coming back to that.

22 MR. MARKS: This came up four years ago and was
23 the subject of an exchange between Mr. Carson and myself, and I
24 was trying to explain how CSS worked and I frankly don't think
25 at that time and even as I reviewed my transcript last night

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1 from the hearing I was necessarily that successful and hopefully
2 was more successful in subsequent speeches and presentations.
3 But it's not hypothetical with the CSS system. There is a real
4 example here, and so I want to address it head on, which is that
5 under the CSS system, under the CSS license, there is a
6 requirement for a manufacturer for a CSS license DVD player or
7 CSS license DVD ROM drive that goes into a computer, that when
8 the CSS encrypted content is decrypted and it is sent out an
9 analog output, that if the trigger bits from for Macrovision
10 have been placed into the DVD disk, the CSS encrypted disk, that
11 the player must turn on the Macrovision and, if you will,
12 Macrovide the signal as it goes out the analog output.

13 Macrovision, in my view, is clearly a copy control
14 technology. It is not an access control technology, in my view.
15 If asked the question, and I will just save you the time of
16 asking me the question, is it a violation of 1201(a) if somebody
17 circumvents the Macrovision itself on the analog output to get
18 an analog signal in the clear free of Macrovision, my answer
19 would be it is not a violation of 1201(a). I hope that helps.

20 MR. KASUNIC: The only other question I have for
21 right now is in terms of CSS, one thing that came to mind in Mr.
22 Carson's queries was is CSS a computer program?

23 MR. MARKS: You stumped us.

24 MR. KASUNIC: All right. Okay. Let's assume it's
25 -- it looks to me like when I look at the definition that it may

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1 very well fit that definition. If that's true, then why might
2 not for the Linux situation 1201(f) not be applicable in terms
3 of making one computer program interoperable with another
4 computer program creating a created computer program that would
5 allow interoperability with --

6 MR. METALITZ: That came up in the DCSS case and
7 the court held that it was not because you're not trying to get
8 a computer program to interoperate with another computer
9 program. You were trying to get an audiovisual program to
10 interoperate. At least that's my recollection of Judge Kaplan's
11 decision. So for DCSS, that's been addressed in the courts. I
12 don't know whether Judge Kaplan considers CSS a computer program
13 or not. I'd have to go back and look.

14 MR. KASUNIC: Yes, I'm not sure. I think that's
15 the part that they didn't consider. They were considering the
16 audiovisual work interoperability, and this has come up in our
17 static control LEXMARK issues, and it's an interesting question
18 to ponder. That's all.

19 MS. PETERS: Okay. Thank you.

20 MR. TEPP: I think this should be the last
21 question and we can all take a break.

22 MS. PETERS: No. We're just going to switch
23 panels.

24 MR. TEPP: Sorry. Anyway, to the IP Justice
25 folks, earlier Mr. Metalitz said that we should not assume that

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1 platform shifting is not infringing. If it's infringing, then
2 I think we all recognize that you're not in the ball park with
3 an exemption that we can recommend to the librarian, so I wanted
4 to give you all a chance to respond to that statement and make
5 the case, if you believe it is, that it's non-fringing.

6 MS. GROSS: Sure. Well, reverse engineering for
7 purposes of interoperability has been an exception, fair use
8 exception under copyright for a while. The Diamond Rio case
9 made clear that format shifting, space shifting as the court
10 called it, was exactly the type of fair use, personal, non-
11 commercial use that fair use is supposed to protect. Providing
12 people to have the ability to watch their property, their CDs or
13 DVDs, on the equipment that they own is a non-infringing use.
14 They've paid for the right to view that movie. They never
15 signed any agreement or any restrictions that said they can't do
16 it in this way or the other way.

17 So absent any copyright law principle or other
18 legal principle that would prohibit them from doing those
19 activities, it seems to me it's very clear that it's their
20 property and they're not otherwise infringing the law. They've
21 absolutely got the right to space shift, format shift, time
22 shift, as courts have traditionally held.

23 MR. TEPP: The Registrar -- you cited Diamond Rio
24 earlier and the Registrar pointed out that case was under the
25 Federal Home Recording Act.

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1 MS. PETERS: It's under the Diamond Rio case but
2 with regard to sound recordings, there is no liability when
3 you're using a sound recording player. But when you're using a
4 computer, it's outside of Chapter 10.

5 MS. GROSS: I think we can look at the Betamax
6 case where somebody had to time shift their movie to watch it at
7 a later time. It's the same concept as format shift, space
8 shift, particularly in today's world where there are so many
9 different kinds of technologies that are being created. People
10 have the need, more need now than ever to be able to achieve
11 interoperability between the systems and they will need to be
12 able to space shift, to format shift, in order to do that. It's
13 not an infringing use. If you, in fact, make a copy for that
14 fair use space shifting format shifting purpose, the courts have
15 been clear in saying that's lawful.

16 MR. TEPP: Okay. So you're suggesting that the
17 Sony decision should be extended to format shifting as well as
18 --

19 MS. GROSS: That's what the 9th Circuit Court of
20 Appeals tell us.

21 MR. TEPP: Okay. Is there a response to that?

22 MR. METALITZ: Well, the principle of copyright
23 law that Ms. Gross is searching for is the exclusive right to
24 reproduction, which would apply in many of these cases. I'm not
25 saying necessarily in every case but many instances of format

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1 shifting and platform shifting involve making a complete copy of
2 the work and so you have to look at whether any exception
3 applied, any non-liability exclusion such as in the AHRA applied
4 in limited circumstances. We've cited the MP3 case in our
5 submission. Basically, these are non-transformative uses if
6 they're exact copies and often they would not be within fair
7 use.

8 So I'm not suggesting that in every case an
9 infringement is involved. I don't think we can indulge in the
10 presumption that space shifting, format shifting, platform
11 shifting are inherent in non-infringing uses.

12 MS. GARLICK: If I could just make one comment in
13 relation to the MP3.com case. That was, again, we're talking
14 about a commercial enterprise that was providing a space
15 shifting service to a multitude of people and that's not what
16 we're talking about here. We're talking about individual
17 instances of a legitimate purchaser of a DVD who may want to
18 view that DVD on a variety of different devices that they own,
19 and that's in no way comparable to the MP3.com case.

20 MR. METALITZ: It's quite comparable. It's not
21 exactly the same but, in that case, MP3.com's argument was that
22 the patron, their customer, had bought a copy of the CD already
23 and they were just providing a locker service for them so they
24 can space shift and get at it from different places. So it's
25 not--

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1 MS. GROSS: But the court said had they done that
2 themselves, they would have been within their rights. It was
3 because of this commercial service that's the third party doing
4 it that reached around the legality.

5 MS. GARLICK: Yes.

6 MR. METALITZ: I think the court concluded that
7 that's a fair use.

8 MS. GARLICK: No one has concluded but no one has
9 excluded it either and, in that instance, it was the
10 commerciality of the service which precluded a fair use finding.

11 MR. TEPP: So it looks like we've got to do some
12 more analysis. Thank you.

13 MS. PETERS: Anyone else?

14 Okay. I want to thank this panel very much. It
15 will give us a lot to chew on, and I call the next panel. What
16 we're planning to do is just get the testimony from the next
17 panel, then break for lunch and then come back and do the
18 questions afterwards. So thank you very much, Mr. Krepick.

19 The second panel is going to be looking at
20 ancillary and sole source material and public domain material,
21 and those who are testifying is, once again, EFF with Gwen Hinze
22 and Ren Bucholz. They've been joined with Ernest Miller for the
23 Information Society Project at the Yale Law School. They will
24 be followed by Kathy Garmezy of the Directors Guild of America
25 and then Mr. Marks from AOL Time Warner. Finally, Mr. Metalitz

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1 who is representing a large number of content providers. So
2 let's start with EFF. You're getting your workout today. Just
3 remember to keep your voice up.

4 MS. HINZE: Thank you again for the opportunity
5 to testify at today's hearings. EFF has sought a narrow
6 exemption for audiovisual works and movies that are in the
7 public domain in the United States and that are released solely
8 on DVD format where access to the content is prevented by
9 content scramble system and possibly other technological
10 protection measures.

11 First, I'd like to address the applicability of
12 Section 1201 to these works. EFF believes that Section
13 1201(a)(1) does not apply to public domain works because they
14 are not titles protected under Title XVII. However, there is
15 legal uncertainty about this, particularly as to the application
16 of Section 1201 to compilation DVDs containing public domain
17 works bundled with copyrighted works.

18 Therefore, to the extent that the Copyright
19 Registrar and the Librarian of Congress consider public domain
20 works released on CSS-protected DVDs to be within Section 1201
21 scope, we have requested an exemption for this class of works.
22 The creation of a healthy and rich public domain for the benefit
23 of all society is one of the core principles underlying
24 copyright law, as recognized by the Supreme Court in 20th
25 Century Music Corporation v. Aiekn and numerous other cases.

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1 The public domain is an important source of ideas, information
2 and cultural exchange.

3 With the transition to DVDs and away from VHS
4 tapes as the predominant medium for releasing and viewing movies
5 in the United States, public domain movies are now beginning to
6 be released only on DVD format. As public domain works, the
7 material is not subject to copyright law and consumers' use is,
8 by definition, non-infringing. However, consumers' use of these
9 works is inhibited where the public domain material is released
10 on a DVD with CSS protection. An exemption is therefore
11 required to allow consumers to exercise the full range of rights
12 in this class of public domain material and preserve the
13 constitutionally mandated copyright balance.

14 Opponents of this exemption have made three main
15 arguments. First, they have argued that EFF is mistaken in
16 arguing that public domain works released on DVDs subject to CSS
17 protection will become less available to the public. The joint
18 commenters argued that the copyright owners will have no
19 incentive to re-release public domain material on DVD in the
20 absence of a legal regime that prohibits circumvention of
21 technological measures governing access to these works.

22 In support of their argument, they quote from a
23 section of the Registrar and Librarian's 2000 final rule
24 discussing the availability of copyrighted content for
25 alternative minority operating systems such as Linux. This

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1 argument is irrelevant to the question of whether copyright
2 owners should be entitled to use technological measures and the
3 legal norms of Section 1201 to preclude access to public domain
4 works. An important, indeed fundamental, distinction exists
5 between the case in issue and the quoted comments on playability
6 on alternative play back systems. Copyright owners do not have
7 copyright rights in public domain works. The joint comments
8 claim to use a facilitation proceeds on the mistaken reliance on
9 copyrights that DVD publishers do not control.

10 If studios choose to release or re-release a
11 public domain motion picture on a DVD, they may do so in order
12 to obtain revenue from the sale of the physical DVD, but they do
13 not thereby obtain copyright in the public domain motion
14 picture. To argue that a major studio is required technological
15 protection measures is backed by legal norms to give them an
16 incentive to release works in which they do not hold a copyright
17 is either factually false or else amounts to an inappropriate
18 attempt to assert private rights over a public asset. It's
19 factually false since motion picture studios are and will
20 continue to re-release these works in order to obtain revenue,
21 as they have done on VHS for many years, and even though it's a
22 public domain work and they don't hold a copyright in it.
23 Studios will continue to release public domain works, as I said,
24 as they have done for many years on VHS format and, in the same
25 way, book publishers have successfully continued to publish the

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1 works of Shakespeare, even though they don't hold the copyright
2 on those works.

3 Granting an exemption to commit circumvention by
4 consumers who have already purchased a public domain DVD has no
5 impact at all on a copyright owner's profit from the DVD and
6 does not impact any copyright they own. The existence of legal
7 sanctions for circumventing technological measures, controlling
8 access to works that they don't own copyright in, can not have
9 any bearing on a studio's decision to re-release a public domain
10 movie on DVD.

11 The situation is no different where copyright
12 owners have a thin copyright. For instance, where they choose
13 to release a compilation DVD with a public domain work bundled
14 with works in which they do hold a copyright. In either case,
15 the copyright owner would obtain, at best, a thin copyright in
16 the non-public domain elements but does not thereby obtain
17 copyright in an uncopyrightable public domain work.

18 As recognized by numerous cases including the
19 Supreme Court's decisions in Harper and Row v. Nation
20 Enterprises, Feist Publications v. Rural Telephone Service and
21 the 9th Circuit's decision in Sega v. Accolade, the public
22 continues to retain the right to access the uncopyable parts of
23 that compilation. An exemption is required to allow consumers
24 to exercise their right of access and to prevent copyright
25 owners from using technological protection measures as a boot

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1 strap to extent their thin copyrights over public domain works.

2 Second, our opponents claim that this exemption
3 confuses access and public controls. This claim was based on
4 two misunderstandings. First, about the merged nature of CSS as
5 both an access and copy control, as recognized by Judge Kaplan
6 in the Corley case, and as recognized by the Registrar and the
7 Librarian of Congress in the 2000 final rule.

8 Second, a misunderstanding about the applicability
9 of Section 1201 public domain works. Even if Section 1201
10 applies to a DVD compilation which includes public domain and
11 copyrighted parts, the requested exemption will permit
12 circumvention only for the purpose of accessing and copying
13 public domain works within the compilation. Since public domain
14 works are not copyrighted or subject to copyright law, there is
15 no prohibition in copyright law on copying a public domain work
16 once access has been granted through a permitted circumvention
17 of the CSS measure which controls access to that work.

18 Third, our opponents have argued that we have not
19 met the burden of proof on proponents of establishing a
20 substantial adverse impact on consumers. I'd like to make two
21 comments in response to this claim. First, as I noted in a
22 previous panel, if interpreted as the joint commenters have
23 suggested, the standard of proof would raise serious questions
24 about the equity of this rulemaking process. It is simply not
25 feasible for consumers to provide an authoritative listing of

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1 every public domain motion picture available only on DVD.

2 As a result of considerable effort by EFF and a
3 team of researchers including reviewing and cross-checking
4 several sources, several databases and including a review of
5 records held by the Library of Congress, EFF was able to
6 identify and provide evidence of nine public domain motion
7 pictures that are currently available as solo works only on DVD
8 and not on VHS format. The joint commenters have not disputed
9 that claim. They have instead argued that this is an
10 insignificant number of titles and that there are alternative
11 sources available for these movies in existing VHS
12 compilations, so an exemption shouldn't be granted.

13 The fact that nine titles have been released as
14 individual works solely on DVD is evidence of current actual
15 harm to the public interest. Whether or not some of them may
16 exist in a compilation in an unprotected format does not detract
17 from the fact that while the evidence before the Copyright
18 Registrar in the 2001 rulemaking was that there was no evidence
19 of works being released solely on DVD format, that is now the
20 case before the current proceeding. Public domain works are now
21 being re-released solely on CSS protected DVDs. Since these
22 works are in the public domain, the public is harmed by the fact
23 that consumers are currently precluded from accessing or using
24 them by virtue of technological means. That harm occurs
25 irrespective of whether there's an alternative unprotected

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1 source. Public domain works are unique. They're not fungible.
2 Precluding the public's access to one version of one of them
3 harms the public interest and upsets the careful copyright
4 balance, and this is true, even if the work might exist in
5 another format.

6 In the next three years, this trend is only likely
7 to increase as DVDs overtake VHS as the most common format for
8 home viewing and as the existing stock of VHS tape deteriorates.
9 My colleague Ren is displaying a graph showing the comparative
10 sales of DVDs versus VHS tapes over the last three years. DVD
11 sales overtook VHS tape sales in 2002. The pie chart that Ren
12 is currently showing is DVD rentals versus VHS rentals for the
13 last three years, and DVD rentals overtook VHS rentals in March
14 of this year.

15 As DVD players continue to penetrate the market
16 and DVDs replace VHS tapes over the next three years, public
17 domain movies will increasingly be released or re-released only
18 on CSS protected DVD format. This is already occurring. Ren is
19 currently showing a slide which quotes a Warner Home Video
20 executive announcing this year that Warner decided in January to
21 phase out releases on VHS because, and I quote, "For us, VHS is
22 dead."

23 Finally, I wish to emphasize that the exemption we
24 have requested is narrow and does not permit widespread
25 copyright violation. If a consumer went beyond the scope of the

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1 exemption and sought to reproduce or otherwise infringe the
2 copyrighted part of the DVD compilation, the copyright owner
3 could bring an action for infringement and we'll continue to
4 have the full range of copyright infringement remedies currently
5 available under Chapter 5 of Title XVII. Thank you.

6 MS. PETERS: Thank you. Mr. Miller.

7 MR. MILLER: Thank you for giving me the
8 opportunity to discuss this exemption. The exemption we've
9 asked for is the ancillary audiovisual works distributed on DVDs
10 using the content scrambling system of access control. I'm
11 going to extend our initial comments and respond to the reply
12 comments in three main arguments.

13 One is to emphasize the distinction between access
14 and copy controls and why this, in the case of CSS, supports an
15 exemption. Secondly, to focus on the limited scope of this
16 rulemaking process and why the reply comments by those opposing
17 this exemption are non-responsive to the scope of this
18 rulemaking and lie outside and should be disregarded. And
19 finally, to look at the balance of harms, the harms to the
20 copyright industry providing this exemption which are negligible
21 and the severe harms that implicate core First Amendment values
22 to consumers without this exemption.

23 First on the question of access versus copy
24 control. This is a critical distinction and the copyright
25 industry has done very much to try to muddy the waters of this,

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1 not only in the reply comments but also in the testimony you've
2 heard here today. They've had some success in confusing the
3 courts in the 2nd Circuit, and I've discussed this in depth in
4 our initial comments. There was no direct rebuttal from any of
5 the reply comments. Furthermore, I gave another option to the
6 Copyright and Librarian of Congress that they could determine
7 that CSS is not an access control device but merely a copy
8 control device and does not, therefore, have to be decided
9 because any use would not be a violation of 1201(b) and would
10 not be a violation of 1201(a) since it's not a 1201(a) device.
11 Again, there was no rebuttal to this in the reply comments and
12 this was an argument that was not brought up in the 2nd Circuit
13 and one that the Librarian of Congress could clearly rely upon
14 to make a separate determination.

15 What is this distinction between 1201(a) and
16 1201(b)? 1201(a) applies to access control devices and you are
17 not permitted to traffic in these devices, circumvention
18 devices, nor are you permitted to use it for whatever purpose
19 with slight exceptions for schools and libraries in particular
20 circumstances. 1201(b) is merely copy control devices in which
21 you're not allowed to traffic but you are allowed to use for
22 non-infringing purposes. If you use it for infringing purposes,
23 you are guilty of copyright infringement which is a separate
24 violation of the 17 USC.

25 What this means is that the intent of Congress is

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1 that there is a clear distinction between these two types of
2 devices. They mean to prohibit illicit access and trafficking
3 in circumvention devices but not to inhibit fair use. In fact,
4 they clearly state that the DMCA is not to change the balance of
5 fair use at all. Let me give you an example of what Congress
6 was thinking about. The analogy that's often used by the
7 copyright industry is that of breaking into a book store. An
8 access control device keeps you from breaking into a book store
9 and then stealing the book.

10 This is not what is happening in the case of CSS.
11 It's more analogous to the fact that you go into the book store,
12 buy a book, the book has shrink wrap on it. You take it home,
13 rip off the shrink wrap. Now, to some extent, the shrink wrap
14 is acting like an access control device. Obviously, you can't
15 access the book without tearing off the shrink wrap. But it's
16 not getting towards the intent of Congress, which is to permit
17 the illicit access in the first place. When you legitimately
18 purchase a DVD, you have gained legitimate access in giving good
19 credit and faith to the copyright owner.

20 Another example would be a database. Congress did
21 not want people to begin to decrypt databases and access them
22 online without paying for them, and that is precisely what they
23 are attempting to do. If you interpret the DMCA in this way,
24 that CSS is not an access control device, the fact that it's an
25 encryption measure is a necessary but not determinant element

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1 of a 1201(a) device, and CSS does not meet that standard. But
2 even if it doesn't, even if it is an access control device, the
3 government recognized and put forward this idea that they would
4 see a separation between the two. The government recognized,
5 the Congress recognized, that there may sometimes be a
6 combination, that access control and copy control devices may
7 sometimes be merged but they thought, according to legislative
8 history, that this would be a rare case. If you hold that CSS
9 is in fact a copy control and access control device, then you
10 are now making what Congress thinks the rare case to be, the
11 pair -- case since CSS on DVDs is probably the most widespread
12 consumer digital protection device.

13 This is the decision that the court made in the
14 2nd Circuit that was made by the judge. It is both a 1201(b)
15 device and a 1201(a) device, which was what was upheld by the
16 2nd Circuit. What this means is that if I try to make a non-
17 infringing copy from a DVD directly copying the bits on the
18 disk, I am making a violation. Maybe I'm doing a five second
19 clip for criticism or commentary. That would not be
20 infringement. It is a violation. Not only is it a violation,
21 but it could possibly have criminal sanctions and heavy civil
22 fines. This was not the intention of Congress. Congress did
23 not intend people who are using non-infringing uses to be sent
24 to jail or to suffer large civil liability.

25 The muddying of the water goes further than just

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1 the courts but to this very testimony and to the reply comments
2 that they provided. The copyright industry wants it both ways.
3 They want to say that CSS is a copy protection device here and
4 that we're not harming the copy protection. You don't need an
5 exemption. But they're calling it an access control device in
6 courts. In fact, in the reply comments from the joint reply
7 comments, they admit that when the Blogcritics are discussing
8 some of these ancillary works on the DVDs, they have access to
9 a works. Well, they don't have access as far as the courts are
10 concerned. The court said this doesn't count as access because
11 if they had lawful access, then there wouldn't be any need for
12 circumvention.

13 They also claim that the activities that we're
14 asking for in this exemption fall under Section 1201(b) of the
15 Act. I concur. However, they also fall under 1201(a). That
16 follows that if CSS is a 1201(a) device, then use of it is not
17 only a 1201(b) violation but also a 1201(a) violation. They're
18 trying to muddy the waters and have it both ways.

19 Now, to the extent that the joint reply comments
20 recognize that there is a right of access, the Blogcritics
21 already have access and they seem to imply that it's legitimate
22 access, then there's also no harm to them in giving an
23 exemption, which is going to be my second point which is going
24 toward the limited scope of the exemption that we're asking for.

25 This rulemaking has a very limited scope. The

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1 reply comments are extremely vigilant with regard to requests
2 for exemption arguments that lie outside the scope of this
3 rulemaking. Were I to make such an argument, they would jump on
4 it in a heart beat and say, outside the scope, can't consider
5 it. But they are not so vigilant with regard to their own
6 arguments. I have discussed this in detail in our initial
7 comments and these were not directly rebutted in any of the
8 replay comments.

9 In the limited scope of this rulemaking, the
10 Library of Congress is not to consider adverse impacts to
11 consumers that flow from sources outside the prohibition in
12 1201(a)(1). These are not to be considered. Similarly, it
13 seems to me and logical and within a wide reading of the statute
14 that adverse impacts on copyright industry that flow from
15 factors outside the explicit exemption are also not to be
16 considered. So when the DVD CCA in their reply comments tells
17 us that the creation and possession of copy control devices or
18 circumvention devices harm the copyright industry, this is not
19 to be considered.

20 First of all, creation and possession of
21 circumventing devices is not illegal at all under 1201(a) or
22 (b). Secondly, any harm that flows from that lies outside the
23 exemption because the exemption says nothing about creation or
24 possession because that lies entirely outside the scope of 1201.

25 Trafficking. If I were to ask for an exemption

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1 for trafficking, there'd be no question you can't provide it.
2 Why then is the copyright industry permitted to claim all these
3 harms that come from trafficking these devices? If you give an
4 exemption that says I can use the device, that doesn't give me
5 the right to then traffick in the device and give it to all my
6 buddies and all my friends who then do illicit things with it.
7 So to the extent that any of the harms that they're claiming
8 come from trafficking, then they should be disregarded.

9 Infringement. Once having given an exemption, the
10 Library of Congress can only give an exemption for non-
11 infringing uses. If you give me an exemption so I can make a
12 non-infringing use of ancillary works on DVDs and I take a five
13 second clip and I put it in my review of the movie, that's
14 perfectly legitimate. That would normally be considered a fair
15 use. However, if I then take the making of documentary and make
16 multiple copies of it and then begin selling them at the local
17 swap meet, that would be a non-legitimate use and would not fall
18 under the exemption. Not only would I be liable for copyright
19 infringement, I would still be liable for a 1201(a)(1) violation
20 since I was given no exemption to infringe. So I'd be hit by
21 the DMCA and by copyright.

22 Finally, the Library of Congress is not in the
23 business of handing out anti-circumvention devices. If you give
24 the exemption, you will have no effect on how many of these
25 devices are available. If people have the devices already or

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1 are able to create the devices or get access to these
2 circumvention devices, an exemption from the library is not
3 going to turn them into pirates. If they're already pirates, if
4 they're already infringers, then an exemption from the Library
5 of Congress, whether you give one or not, is not going to have
6 any impact to it. If they intend to do illegal things, they
7 don't need an exemption. This exemption is only for those who
8 would otherwise have lawful uses but are deterred by the fact
9 that they have civil and criminal liability. So any harms that
10 flow outside of this very limited scope should be disregarded.

11 Finally, let's look at the balance of harms since
12 there's going to be a balancing test. There are negligible
13 harms to the copyright industry. First, as argued above, most
14 harms lie outside the scope of this rulemaking. Second, this
15 exemption is a particularly limited scope. We're not allowed to
16 make non-infringing uses. We already have a fair use. Now, to
17 the extent that any of our uses are going to be non-infringing,
18 they're going to be non-infringing for two reasons. A) they're
19 not a violation of copyright at all. They're not infringing
20 whatever or B) they're going to fall under an exemption which is
21 most likely going to be fair use. Fair use has a balancing
22 test, a four part test, that the courts are supposed to balance.
23 The last part of the test and considered the most important by
24 the Supreme Court is the commercial impact on the copyright
25 industry.

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1 So to the extent that a use is considered a fair
2 use, then by definition that commercial impact on the copyright
3 industry is going to be minimal or outweighed by the other
4 factors such as transformative use, such as the amount copied,
5 etcetera, etcetera. So the Library of Congress doesn't even
6 have to take the commercial impact on the copyright industry at
7 all since the fair use already takes the commercial impact into
8 balance already.

9 Finally, there's no challenge to CSS. The Library
10 of Congress isn't getting rid of CSS. We're not asking you to
11 get rid of CSS. CSS will still be out there, still going to be
12 on DVD players. It's only going to be used for particular small
13 uses for ancillary works.

14 Now for the harms to the proponents of this
15 exemption. First of all, there's no denial by anybody in any of
16 the reply comments that many important works that are absolutely
17 critical to commentary and criticism such as outtakes,
18 commentaries, behind the scenes, alternative endings, are
19 available. They're available on most wide releases. They're
20 becoming increasingly available. In fact, this is a perverse
21 argument in response. They say because these works are becoming
22 increasingly available and more commercially important, that is
23 a reason to deny the exemption. This is perverse to the extent
24 that there's this more important step that we need to comment,
25 we need the criticism. That's more reason that we need the

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1 exemption, not to deny the exemption. Were we to follow this
2 logic, it would mean that they would be encouraged to put out
3 more and more simply to prevent people from commenting on it.

4 Secondly, they make an argument about marketing
5 and that the fact that the CSS exists, it means increased
6 availability of these ancillary works. This is not a good
7 argument for two reasons. First, there are other reasons that
8 they make these works available. It makes DVDs more attractive.
9 It means they want to sell more DVDs. We're not taking that
10 away from them. We're only making fair uses. We're not taking
11 away their ability to sell these outtakes, to sell these
12 commentaries and stuff like that. Were I to start selling the
13 commentaries, I would be guilty of infringement and could be
14 punished.

15 Secondly, Congress was not concerned with the
16 diminution to the market as a whole. Congress was concerned
17 with the diminution of use to individual users of a particular
18 category. So even if we're increasing the amount of ancillary
19 works of the market as a whole, the fact that it's being
20 restricted to particular individual users is what Congress was
21 concerned with, not the market as a whole.

22 Now, when it comes to the fair users we're talking
23 about, there's absolutely no denying that commentary and
24 criticism come under the fair use banner. Not only are they
25 paradigmatic examples of fair use, they are core First Amendment

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1 values. Commentary and criticism are what the First Amendment
2 are all about. Without the ability to do this, this is a severe
3 harm. Furthermore, we have to realize that without an
4 exemption, criminal sanction exists for this and, from a First
5 Amendment point of view, when you have criminal sanction,
6 there's a distinct chilling effect that must be weighed in
7 consideration of whether or not this exemption is to be given.

8 Now, they're going to mention that they don't
9 prevent explicit copying. You can still copy and quote to a
10 certain extent. However, exact quotation is absolutely
11 critical. What they are promoting is that there's a right to
12 paraphrase, not a right to quote, to take something that's murky
13 and not there. It would be as if I'm talking to Shakespeare and
14 I want to quote Shakespeare but I have to say, to exist or not
15 to exist, that is the query. It's a paraphrase but it just
16 doesn't quite get the same punch as "To be or not to be." And
17 so exact quotation is absolutely critical to commentary and
18 criticism.

19 To say that you can get other ways and you can go
20 through an analog digital conversion and convert it back to
21 analog and digital again, that's going to be degradation.
22 That's not going to be exact quotation.

23 Furthermore, they say that there's no explicit
24 right to have it to the most general ability to get the most
25 exact copy and stuff like that. Well, there may be no explicit

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1 right within the First Amendment. That's under dispute because
2 fair use is key to the First Amendment. Copyright law would not
3 be constitutional without a fair use exemption. Now, the extent
4 of that fair use exemption is up in the air and no court has
5 decided that. But to a certain extent, fair use is necessary
6 for copyright law to be constitutional.

7 Finally, they say that there's a di minimis
8 barrier. If you want to make copies, well, are you free to do
9 it, even though there's Macrovision? You can still use
10 videotapes and these digital recorders and record the TV screen
11 and stuff like that. First of all, that's not as easy as it
12 looks or as it sounds. If you've ever tried to videotape your
13 television set, you see those little bars. You have progressive
14 scan and dual scan and interlaced video and stuff like that
15 which creates artefacts. That is an digital to analog, analog
16 to digital conversion which creates additional artefacts in
17 videos on the screen and at some point it's pretty darn
18 expensive. Well, for the people in this room or the people at
19 the other table, maybe buying a \$400 or \$300 video camera is
20 pretty darn cheap but for a lot of the people who are posting on
21 Blogcritics, that's very expensive and you run into a grocery
22 shopping list of things that you have to buy in order to do
23 this.

24 Again, Congress is looking at the impact to
25 individuals of a particular use, not to the mass. Maybe to the

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1 mass market, most people can do it, but there are particular
2 individuals and our initial comments point out these
3 individuals, this is a very large barrier to them. And so this
4 is not merely di minimis.

5 And finally, the copyright industry can't have it
6 both ways. They're claiming these massive harms if you give
7 this exemption. But then they say, well, it's easy to copy it.
8 If it's easy to copy it, then pirates will certainly have the
9 ability to do so. It will certainly be on P to P networks
10 without the exemption, whether you give the exemption or not.
11 But it is a barrier to those law-abiding citizens who don't want
12 to violate the law, who are afraid of the civil liability and
13 the criminal liability. They can't have it both ways. Either
14 it's easy to copy and quote, in which case there's no harm, or
15 it's not. I say that it's not that easy to quote, it is easy
16 enough for the potential pirates to do so, and the critical
17 First Amendment values inculcated here and implicated are
18 absolutely critical which is why we suggest that the Library of
19 Congress provide this exemption in the next three years. Thank
20 you.

21 MS. PETERS: Thank you.

22 Ms. Garmezy.

23 MS. GARMEZY: Madam Registrar and panelists, my
24 name is Kathy Garmezy and I'm the Director of Government Affairs
25 for the Directors Guild of America or DGA, as we're known. I

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1 thank you for inviting us to appear before you today to discuss
2 DGA's position regarding potential exemptions to access control
3 technologies. Having listened this morning, I should say I'm
4 neither an engineer nor a lawyer, but I hope that the
5 perspective of the creators of these works will prove helpful
6 and important in your deliberations.

7 In short, DGA is opposed to any easing of the
8 prohibition on circumvention of access controls with respect to
9 what are called ancillary materials included in DVDs. The
10 Directors Guild represents over 12,600 directors and members of
11 what are called the Directoral Team who work in feature film,
12 television, commercials, documentaries and news. The DGA
13 protects and advances their economic and creative rights working
14 for their artistic freedom and fair compensation for their work.

15 Film and television are indigenous American art
16 forms which filmmakers have raised to their highest quality of
17 creativity and popularity. Our goal is to ensure that this
18 craft continues unabated for the benefit of the millions of film
19 and television viewers world-wide and that our members continue
20 to earn their living giving their talents to a craft they love.

21 Because consumers no have instant access to the
22 content our members create, the debate over this access has
23 often obscured the voice of the creator. In fact, the
24 discussion usually focuses on the rights of those who possess
25 the technology, the transaction between who owns the product and

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1 those who download it, or the cost to the consumer and the
2 consumer's right. This assumes that the creators are not
3 stakeholders in these decisions or that the value to the creator
4 disappears as soon as their work is created. In both instances,
5 nothing could be further from the truth. There are very real
6 economic and creative consequences for our members.

7 It is against this reality that I come before you
8 today. -- measures on DVDs should not be eased or eliminated
9 with respect to ancillary materials. DGA is in a unique
10 position to speak to the importance of these works on DVDs,
11 works which now comprise a highly regarded and increasingly
12 sought making of sequences, discussions and visual explanations.
13 That is because this material in most instances is the work of
14 our members. If access control measures are circumvented, this
15 material, the product of our members' works, will be able to be
16 freely traded over the Internet. Since access is the focus of
17 these hearings, it is our position that this type of material is
18 more readily available to consumers because of technological
19 protection measures, not in spite of them. That is true, both
20 of the exponential growth of DVD availability and the so-called
21 ancillary material which is created by our members.

22 Film makers as the individuals whose creative
23 vision is the film itself has a great stake in how that film is
24 shown in DVD or other re-use formats. First and foremost, they
25 want the film to be shown as they originally intended it to be

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1 seen by audiences in the theater and, secondarily, on well-
2 produced DVDs and videos but not at present over the Internet.
3 Second, since ancillary works are now being incorporated into
4 most DVDs, film makers are rightly concerned that those
5 materials also remain protected.

6 These ancillary works are not simply materials
7 casually tossed out. Whether an interview or a making of film,
8 the director is actively involved in the creation of the DV text
9 and the visual elements that surround the film itself. The
10 director's voice and that of the other collaborators on the
11 film, the other creative talent, is not a mere recitation of how
12 the film was made. It is a communication between the director
13 and the audience. It provides the director's perspective,
14 historical and personal, on what the film maker does with his or
15 her craft. In other words, how they create. It is in effect an
16 oral history, historically enriching and preserved for future
17 generations and, therefore, deserving of protection and
18 encouragement.

19 In fact, as DVDs of older films are also released
20 with these ancillary materials, directors go back and
21 painstakingly review their production materials and the process
22 that went into making the film so that they can document their
23 vision in a way that was not accessible to the public at the
24 time they originally created their work. This is a very unique
25 and exciting process for our members and for audiences and one

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1 that should not be taken lightly. What they're creating is not
2 free material nor do these ancillary materials just exist in
3 thin air. Directors carefully create and produce them. They do
4 so because they want the audience to have the benefit of their
5 knowledge and their insights as film makers. They do not do so
6 so that Internet critics or others can take this material,
7 potentially alter it and post it on their website or use it in
8 any way an individual deems appropriate, even if that was not
9 the use or the image or the context the director intended.

10 The very historical value of these ancillary
11 materials to the public and the care that goes into making them
12 is all the more reason that they deserve the full copy
13 protection afforded by technology. Without the security of
14 knowing that both the ancillary audiovisual materials and the
15 movie itself formatted in digital form will not be available for
16 broad, illegal piracy, the desire of members to make such works,
17 just like the interests of producers in distributing them, would
18 be severely diminished. Our members are all too aware that when
19 their work is not protected, it is easily altered and exploited
20 so that it no longer resembles what they created while it still
21 carries their name on it.

22 The ultimate loser in this equation is not only
23 our members who bring their talent and hard work into putting
24 their creative vision on the screen, it is the public who have
25 shown a very clear appetite for this material on DVD. Their

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1 popularity and that of re-released of DVDs is demonstrated by
2 the fact, as others have said here today, that more material and
3 more film titles are available each year. Who would have
4 believed that the existence of access control measures,
5 copyright protections has fostered the popularity of DVDs and
6 the accompanying wealth of information about film making.

7 In fact, those calling for an exemption, the
8 Internet film reviewers known as broad critics, have amply
9 demonstrated themselves that they can get access to and use this
10 material with the existing technological protection measures in
11 place. It used to be that critics could often only see certain
12 films at film festivals or even then they were only able to talk
13 about a film or write about the filmmaker's perspective. Today,
14 not only the films but the director's voice, the voice of the
15 original creator, and the images they choose to share are widely
16 available to and incorporated into the work of film critics.
17 The burden of proof rests on these Internet critics to
18 demonstrate how their ability to engage in common criticism is
19 hindered just because they can not copy and post these ancillary
20 materials on their websites. We maintain that they have more
21 access to information they need than ever before.

22 Circumvention not only adversely affects the value
23 of the copyright creative work to the producer of the copyright
24 holder, equally important is the fact that this diminished
25 economic value also flows through to the creators. Directors'

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1 economic rights are dependent on the premise that the work will
2 be protected from copyright infringement or unauthorized
3 alteration of their work.

4 In short, our members' compensation and pension
5 benefits depend on residual revenues from the work they create.
6 Residuals are fees paid to them for the re-use of their motion
7 pictures or television production. Our industry residual
8 system, which is over 40 years old, is designed to provide
9 appropriate compensation to our members whose contributions to
10 these works are so fundamental that without them they can not be
11 produced. In 2002, the DGA collected and distributed in excess
12 of \$200 million of these residual to its members. This money
13 represents bread and butter income and that is a reality in our
14 industry made all the more necessary because the creative talent
15 industry operate on the concept of free lance employment. This
16 residual income from the rebroadcast of high end film and
17 television productions is critical to our members because it
18 ensures that their economic interests are protected when they
19 are remunerated for the re-use of a work they created. These
20 payments for the work they completed support their families and
21 go into their pension plans, as I have said. Unfettered access
22 to our members' copyrighted works -- and this includes the
23 ancillary works -- takes this income directly out of our
24 members' pockets.

25 In concluding, the reasoning the Registrar relied

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1 on in 2000 to recommend the rejection of their proposed
2 exemption for these ancillary audiovisual materials is still
3 valid today. Many of these works would never have been created
4 but for the prospect that they would be distributed on a DVD
5 protected by CSS. This increased volume and the sophistication
6 of these ancillary materials just since the 2000 rulemaking is
7 a direct result of the rapid growth of the DVD market and the
8 belief of our members that including these materials along with
9 their feature film enhances the viewing experience of the public
10 and their understanding of the art of filmmaking.

11 We hope our members will be able to continue to
12 provide their vision and insights unfettered by a fear that they
13 will not be protected, and again I thank you for the opportunity
14 to appear before you.

15 MS. PETERS: Thank you.

16 Mr. Marks.

17 MR. MARKS: Thank you. I have no prepared opening
18 remarks for this particular panel and so I wanted to, just if I
19 may, take an opportunity to just very briefly respond to some of
20 the remarks made by Mr. Miller.

21 To the content industry, we share the view that
22 comments and criticism are core First Amendment values. We seek
23 neither to diminish or to prevent comment, criticism and the
24 free exchange of ideas. They're core First Amendment values and
25 studios and media companies I think seek to promote those values

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1 by putting out works and encouraging exchange of ideas and
2 commentary about them. But what this inquiry is going to and
3 what the crux of this inquiry is about is whether there's a need
4 to grant exemptions to the prohibition of circumventing access
5 controls because there's an adverse impact on non-infringing
6 uses.

7 So when we look at the fair use, when we look at
8 fair use in terms of comment, in terms of criticism, in terms of
9 educational use, in terms of quoting, our access control
10 technology is preventing those fair uses and, in particular, in
11 this case, is CSS technology preventing those fair uses? I
12 would argue the answer to that is no. If you make, as Fritz
13 Attaway demonstrated in the Washington hearings, a reproduction
14 of a DVD by camcording it, I believe that is enough to satisfy
15 a fair use concern.

16 Mr. Miller seems to believe that fair use
17 guarantees the right to engage in mechanical copying for a non-
18 infringing purpose that is of identical quality to the original.
19 That may be Mr. Miller's interpretation of what the fair use
20 doctrine requires. It is at direct odds with what the courts
21 have held, and I would like to quote from the 2nd Circuit in
22 Remeirdos where it said we know, quote, "We know of no authority
23 for the proposition that fair use as protected by the Copyright
24 Act much less the Constitution guarantees copying by the optimum
25 method or the identical format of the original."

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1 Mr. Miller may disagree with that interpretation
2 of fair use but that is the law as interpreted by the courts
3 and, therefore, I do not believe that the existence of the
4 access control technology of CSS does cause adverse impact on
5 the various fair uses that Mr. Miller describes which we as the
6 content industry agree are vitally important and should be
7 maintained. Thank you.

8 MS. PETERS: Mr. Metalitz.

9 MR. METALITZ: Thank you. I think my colleagues
10 have covered most of this issue. In the interest of time, I'll
11 just very briefly raise a couple of points.

12 With regard to the ancillary works, I think Ms.
13 Garmezly had demonstrated a lot better than I can why these
14 should have the same protection as the principal feature on the
15 DVD. Back in 2000, you gave this issue honorable mention. You
16 said perhaps the best case for actual harm in this context was
17 with respect to the ancillary works, but you ultimately
18 concluded that it appears that the availability of access
19 control measures has resulted in greater availability of these
20 materials. This is footnote 13 of the 2000 final rule.

21 All I can say is I think that's an understatement.
22 I think what the testimony here today shows is not only has it
23 resulted in greater availability of these materials, some of
24 these materials wouldn't even ever have been created without the
25 availability of the DVD format and the DVD format would

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1 certainly not have achieved the prominence it has without the
2 CSS features. So here we're talking not just about greater
3 availability but actually greater production which I think is
4 what Congress was trying to encourage certainly in the Copyright
5 Act and I would say as well in the DMCA.

6 So availability of these works in the pre-DVD era
7 was zero. Now these works are available to tens of millions of
8 people. I think by any calculation the conclusion that you
9 reached in 2000 remains viable.

10 Mr. Marks has pointed out what the 2nd Circuit
11 said about CSS. The 2nd Circuit also reached some conclusions
12 that CSS was an access control. Congress reached some
13 conclusions about 1201(a)(1) that there could be liability, even
14 the absence of infringement. I think Mr. Miller argues quite
15 eloquently on the other side of all these propositions but we're
16 acting within a context of now that the Congress has enacted and
17 decisions that the courts have made, I think that's really the
18 context within which this proceeding should be operating.

19 Of course, Mr. Attaway's demonstration has already
20 been referred to here as evidence. I'm still a little uncertain
21 as to what era our joint reply comments made when they asserted
22 that the broad critics seem to have access to all of these
23 movies. They're watching them and describing them in great
24 detail in the postings that were included in Mr. Miller's
25 submission, so it seems to me they have access. We're prepared

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1 to assume that it's legitimate access. But if they believe that
2 they need an exception to the access control provisions in order
3 to actually excerpt the material and post it on the site, I
4 think the record here demonstrates that that is not necessary in
5 order to promote values of comment and criticism.

6 Turning very briefly to the public domain. Here
7 again, I think it's a situation where the record clearly shows
8 that over the past three years public domain films have become
9 more accessible to more people with more titles in more ways
10 with more commentary, with more material that will help put them
11 in context and increase people's enjoyment of them than ever
12 before. So it's a little hard to see. I mean we would say, I
13 suppose, the glass is half full. Not every public domain film
14 is available and there are real issues about preservation and so
15 forth that need to be tackled, but it's hard to see that the
16 glass is leaking and draining, which is the viewpoint that EFF
17 has brought to the table here. I think, by contrast, there's
18 been an explosion of this material that's available.

19 And the issue of availability on VHS which was a
20 factor obviously in your footnote 13 and also in the PD area, I
21 think we've already addressed that, that we don't think that's
22 the determinative factor. Many of these titles were never
23 available on VHS and so it's hard to see why, because copyright
24 owners have made the decision and others besides the major
25 studios obviously, have made the decision to put public domain

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1 material out in DVD format, the result of that should be that
2 protection against circumvention is limited. It seems as though
3 that's kind of providing a perverse incentive to making this
4 material available.

5 And, of course, this material, by definition, if
6 it's in the public domain, in many cases, the source material is
7 available, as you all know, within the Library of Congress and
8 if people want to put it out without compilations of public
9 domain material that don't have any CSS protection on them,
10 they're free to do so and the library actively encourages that
11 and makes prints available and so forth and I'm sure for some of
12 these titles there are multiple versions out. I can't give
13 examples but if you look analogously at the print market, we
14 know that there are 100 different versions of Leaves of Grass
15 and many of these other public domain materials are out in
16 multiple versions.

17 I'll just conclude. I don't want to conclude on
18 a picayune note here, but the question of these famous nine
19 titles that the crack research team at EFF discovered that were
20 not available in VHS and we pointed out in our counter-filing
21 that in fact five of them were. We found that. We didn't have
22 a crack team working on it. We had one person go on the
23 Internet for about 45 minutes one Saturday afternoon and we
24 located these. These are mostly Laurel and Hardy titles. Along
25 Came Annie. Actually, it's Along Came Auntie. We gave the

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1 correct title of this work. And many of these other Laurel and
2 Hardy pictures. There was also a very well known documentary by
3 Pier Lorenz, The River. That's out in VHS.

4 So what the EFF filing says is at the date of
5 submitting these comments, the commenting parties were able to
6 identify nine public domain works that are now available only on
7 DVD format and not in VHS format. We agree that there's not a
8 burden on them to identify a republic domain title that is
9 affected by their exemption, but we think that when they list
10 titles and claim they're not available in one format, they
11 should be accurate about it and that's the only reason that we
12 tried to correct that in our reply comments. As I said, I don't
13 think that the availability on VHS is determinative here. What
14 I think should be determinative in this case is that with the
15 advent of DVD, including the CSS functions, the result has been
16 that public domain film material is more available to more
17 people than ever before.

18 I think we're in agreement here that 1201(a)(1)
19 would not prohibit the circumvention of access controls when the
20 only thing lying behind the access control is public domain
21 material. That is often not the case and, for that reason, we
22 think an exemption in this area is unnecessary and, in fact,
23 would be harmful. Thank you.

24 MS. PETERS: Okay. Thank you very much.

25 You will all have one hour, and so will we, to

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1 think about the questions when we come back. So see you in one
2 hour.
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:10 p.m.

MS. PETERS: Now to the final session of our, I guess, seven days of hearings.

MR. TEPP: But we're still on the second panel.

MS. PETERS: That's right. But it's the afternoon session. I hope you all had a nice lunch and are ready to answer some questions. We're going to start the questioning with David.

MR. CARSON: I'm hoping we can clear the air on at least one issue. Is there anyone in front of us who would take the position that when a public domain audiovisual work is put on a DVD by itself and is protected by CSS that the circumvention of CSS in order to do whatever one is doing with it to view that public domain work would be a violation of Section 1201(a)(1), to circumvent CSS to access a public domain work when the only thing that's on that medium is the public domain work?

MR. MARKS: No.

MR. CARSON: No, you don't think it is.

MR. MARKS: I do not think that if it's purely a public domain work which is on the DVD encrypted with CSS, I believe the statute by its terms refers only to effectively controls access to a work protected under this title meaning a work protected by Title XVII.

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1 MR. CARSON: Mr. Metalitz, I know you were going
2 to the text. Do you agree with that analysis?

3 MR. METALITZ: I would agree.

4 MR. CARSON: Okay. So I hope that satisfies you
5 folks. That was your position in the first place.

6 MS. HINZE: Yes.

7 MR. CARSON: So whether we say it or not, at least
8 you've got these folks saying it. You may have a chance with
9 us. Who knows?

10 MS. HINZE: That doesn't relieve the question of
11 the compilation.

12 MR. CARSON: Well, that's my next question. That's
13 my next question. Thank you for anticipating it. So how many
14 public domain works are you folks aware of that have been
15 released in combination with other copyrighted material on the
16 same medium and protected by an access control such as CSS?

17 MS. HINZE: I think we looked at the flip side of
18 the coin, so our research was looking at how many works were
19 available on DVD, public domain works were available, stand-
20 alone works, on DVD.

21 MR. CARSON: Right. By their interpretation, you
22 don't have a problem with that. The one you think there's a
23 real problem with is the compilation one, so it would be helpful
24 to know how much of a problem that is and I'm not sure I saw
25 anything in the record thus far that tells us what's out there

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1 in that forum, which is the forum where you really need our
2 help, if in fact you do need our help.

3 MS. HINZE: Right. Perhaps I can give this by way
4 point of quantification. Our comments include the figure of 70
5 -- the best information we were able to obtain in December was
6 that there were 70 public domain works that have been released
7 on DVD. Now, again I would like to point out that as a consumer
8 organization what we had to rely on were not industry sources
9 there but the intimate movie database Proservice which is the
10 largest movie Internet database on the Internet and it listed 70
11 public domain works released on DVD. I'm not aware whether they
12 are in combination or not but that certainly sets sort of the
13 upper limit and, just for the sake of clarification of the
14 record, what I think is on the record -- my clear understanding
15 is this. What we have identified is nine works, public domain
16 works, that are released as pure public domain works on DVD.
17 Mr. Metalitz has clarified that five of those are available on
18 VHS compilations and that four of those are pure public domain
19 works only available on DVD and no other format.

20 MR. CARSON: Okay. Is there any witness in front
21 of us at all who is aware of a single public domain work in
22 audiovisual form that is on the same medium as a copyrighted
23 work?

24 MS. HINZE: I can answer that question. I
25 couldn't answer the question as to the total number.

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1 MR. CARSON: Okay. Good.

2 MS. HINZE: I think both of the comments that were
3 submitted by consumers in support of this exemption dealt with
4 that. One deals with the Lumiere Brothers. They were the
5 French pioneers of movies and the Great Works of Film Title I,
6 Volume I includes a public domain with their work in combination
7 with works which, as I understand it, are still subject to
8 copyright. There is also the example of Charlie Chaplin movie
9 which, as I understand it, is a public domain work that is in a
10 compilation with a series of Charlie Chaplin movies, some of
11 which there is a claim to copyright over.

12 So I can answer that and I don't think it would be
13 hard for me to supplement the record if it would be helpful to
14 the Copyright Office after this proceeding but I don't have an
15 upper limit on that number for today's inquiry.

16 MR. CARSON: I don't know whether it would be
17 helpful to the office. It might be helpful to you to do that.

18 Mr. Metalitz, you looked at one point like you
19 wanted to say something else.

20 MR. METALITZ: I just wanted to make sure that the
21 record is correct. I don't want to beat a dead horse over these
22 nine titles, but I don't even know whether these titles are in
23 the public domain. I was assuming that they were. We found
24 that they were available on VHS. I don't know about the other
25 four titles because we didn't find them so I don't know what

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1 their status is.

2 MR. CARSON: Okay.

3 MS. PETERS: All we know is that there are VHS
4 copies.

5 MR. METALITZ: There are VHS versions of five of
6 them.

7 MS. PETERS: Right, but not the other four.

8 MR. CARSON: Mr. Miller, Mr. Marks actually beat
9 me to the punch on one question I wanted to ask, but at least in
10 setting down the predicate for, but having done so, you recall
11 the passes from the Corley decision and the 2nd Circuit that he
12 recited.

13 MR. MILLER: Yes.

14 MR. CARSON: I gather you would take issue with
15 the 2nd Circuit's analysis there.

16 MR. MILLER: Well, I'd like to address that issue.
17 First of all, I would take issue with the 2nd Circuit's
18 analysis, but that's not the question before this panel. The
19 First Amendment does not, according to the 2nd Circuit, demand
20 mechanical copying. Now, I -- as a First Amendment guarantee
21 now -- I disagree with that, but that's not before the panel.

22 However, this does not mean that the First
23 Amendment is silent on the issue. A First Amendment issue does
24 exist. Whether it rises to the question of unconstitutionality
25 or not is a separate issue. Unconstitutionality is a very high

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1 burden to meet, but that doesn't mean that there isn't a First
2 Amendment issue at stake. The First Amendment may not guarantee
3 a mechanical copying according to the 2nd Circuit but it does
4 not foreclose the fact that mechanical copying may in fact be
5 fair use. And I would argue that in fact it is a fair use. AND
6 the question before this panel is whether or not direct copying,
7 mechanical copying, is a fair use. And in the context of
8 commentary, review, criticism and parody, the answer is most
9 generally yes.

10 Furthermore, we're not asking this panel for a
11 constitutional determination. We're asking this panel to waive
12 a harm of not permitting direct quotation in the balancing
13 between the harm to the copyright industry and in the balance to
14 the harm to the people who want to do direct question. And our
15 argument, which has not been sufficiently responded to, I
16 believe, is that direct quotation is critical. "To be or not to
17 be" (cough). How much are we going to permit these multiple
18 analog copies that create things? Sometimes you want to look at
19 how a lighting director lighted a scene and some of these
20 variations would be very subtle and they could easily be lost in
21 some of these various aspects and so mechanical copying is
22 absolutely critical to certain types of commentary and criticism
23 and it does identify First Amendment rights. It may not rise to
24 the level of constitutionality but that does not mean that this
25 panel must not balance that harm.

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1 MR. CARSON: So there are First Amendment rights
2 that aren't constitutional? I'm not following that.

3 MR. MILLER: There are First Amendment issues,
4 First Amendment values and First Amendment concerns that do not
5 rise to the level of unconstitutionality. Now it may be
6 permissible, for example, for the government, say, to, for
7 example, say that you can't say certain words on television
8 before 10 p.m. That does not mean that there's no First
9 Amendment interest in saying those words. It just means that in
10 the balance between the First Amendment issue of saying
11 particular words before 10 p.m. on television and the balance of
12 protecting children or something, those First Amendment issues
13 are outweighed.

14 So the First Amendment issues of mechanical
15 copying may not rise to the level of constitutionality, but that
16 is a very high burden. It does rise to the point of balancing
17 the harms to the copyright industry which is negligible with the
18 harms to those who want to comment and criticize on ancillary
19 works. So there's a First Amendment issue there. It may not
20 achieve constitutionality by itself but it's still an interest
21 that must be weighed.

22 MR. CARSON: You're talking largely in terms of
23 the First Amendment. Is that what your analysis is based on,
24 the First Amendment as distinguished from fair use or -- I'm a
25 little confused on what you're basing your argument on, I guess.

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1 Just if you could clarify that.

2 MR. MILLER: Well, the First Amendment argument is
3 in response to the 2nd Circuit where they say it doesn't rise to
4 the level of First Amendment.

5 MR. CARSON: They also say it's not fair use.

6 MR. MILLER: Mechanical copying is not fair use
7 but I would argue that -- actually, I don't believe that they
8 make that ruling. They say mechanical copying is not guaranteed
9 by fair use. They don't say that mechanical copying may not be
10 fair use. So, for example, I make a pure mechanical copy and
11 it's a five second clip and it's for purposes of commentary and
12 criticism. I think most courts would rule that that is a fair
13 use. Now, whether that violates 1201(a) or not is a different
14 story, but they would say that this mechanical copy was a fair
15 use. If I mechanically copy Shakespeare, assuming Shakespeare
16 wasn't copyrighted, and I wrote "To be or not to be period,"
17 that's a mechanical copy of Shakespeare because it's an exact
18 absolute perfect copy of it. That would be a fair use.

19 MR. CARSON: So I gather you would say one could
20 reconcile the 2nd Circuit's analysis in Corley with the position
21 you're taking today.

22 MR. MILLER: Absolutely.

23 MS. PETERS: Can I just ask a question because
24 it's related. I don't understand your direct quotation comment
25 with regard to a DVD. Are you basically saying that using a

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1 camcorder or any other means is not a direct quotation, that you
2 have to somehow copy it --

3 MR. MILLER: Absolutely, and I think the comments
4 of the other side would say. In some senses and for some
5 purposes, it may be the equivalent of a direct quotation. But
6 remember, when you're doing a camcorder copy of a DVD, you have
7 the DVD which is purely digital which is then converted to an
8 analog conversion. This is going to create some degradation of
9 the signal to some certain extent. This analog signal is then
10 transmitted to the camcorder which may be digital or analog. In
11 the case of an analog camcorder, it's going to be converted from
12 analog to analog and analog to analog transmissions are going to
13 create various effects and be degraded. I mean that's the
14 argument that the copyright industries make all the time. And
15 then may be converted back to digital so that Blogcritics can
16 then post it on the web. So we have multiple conversions that
17 then create multiple discontinuities and may create different
18 things.

19 If you're looking at certain subtle aspects of it,
20 then you may miss them, whether it's lighting or the sound is
21 not going to be quite right because the television has bad sound
22 and then you're going to the microphone of the camcorder and
23 everybody knows microphones on the camcorder are really not very
24 good. This is assuming everything works perfectly and that,
25 despite any demonstration, is not going to be -- you know, like

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1 I said, have you ever videotaped a party and there's a
2 television in the background. What do you see? You see these
3 bands because you're dealing with different sorts of inter-laced
4 video versus progressive scan video and you have to synch them
5 just right. Otherwise, you're going to have all sorts of
6 defects that will really degrade the signal.

7 So in such cases where there's all these defects
8 degrading the signal, that's not a direct quotation. Like I
9 said, that's like "To be or not (cough).

10 MS. PETERS: But doesn't it relate to what the use
11 is? I mean for many purposes, comment and criticism, it's
12 enough to basically say a comment about the lighting.

13 MR. MILLER: For many purposes, that would be
14 true, but not for all purposes and for many purposes it would be
15 perfectly great to paraphrase Shakespeare and discuss the plot
16 in Romeo and Juliet. I can give you the plot of Romeo and
17 Juliet right now. I can't give you Shakespeare. For some
18 purposes, just giving you the plot of Romeo and Juliet and
19 commentating on that would be fine. But if I really want to get
20 to the language of Shakespeare, I must quote Shakespeare
21 directly. The people on Blogcritics are videophiles. They love
22 movies. They're very much into the detail of movies. And these
23 people really want to get to the very heart of it. In fact,
24 that's why ancillary works are absolutely key because they are
25 showing the subtle distinctions. This isn't just hey, the --

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1 are really cool, let's go see it, dude. This is, you know, look
2 at the decisions that Warchowsky brothers made in the digital
3 option and how the cameras moved and the lighting options that
4 they did here, so they really have a strong need for mechanical
5 reproduction and direct quotation in order to meet their needs.

6
7 For some people, sure, but we have strong evidence
8 that these videophiles demand for the purposes of commentary and
9 criticism. I mean otherwise what we're saying is well, you
10 know, hey, good enough, murky, sound quality is bad, good
11 enough. I think in the balance that's a harm.

12 MR. CARSON: Mr. Metalitz, you had your copy of
13 Section 1201 open. I wonder if you could do it again. Go to
14 the bottom of page 179 in the edition that we all seem to have.
15 Just as an introduction to what I'm about to try to engage you
16 in, I take it that a good deal of what you folks are saying in
17 response to what people like Mr. Miller are saying is not so
18 much that the individual act of circumvention by the individual
19 Blogcritic who wants to get that perfect copy so they can show
20 the lighting just as it was, that individual act isn't
21 necessarily the problem. The problem is that what could happen
22 subsequently with respect to the copy, that the copy is suddenly
23 then free and clear and all sorts of other things might happen
24 to it. You're not so much complaining about that one individual
25 act if it just stopped at the use he's talking about. Am I

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1 right or am I not right, first of all?

2 MR. METALITZ: I think that's basically correct.
3 I mean I think Mr. Miller spent a while demonstrating that a lot
4 of the uses that would be enabled by circumvention would be non-
5 infringing uses, and we're prepared to stipulate that there
6 would be a lot of non-infringing uses. But Congress made the
7 decision, which we very much support, that infringement
8 liability by itself was not enough to deal with the problem and
9 the risks and the uncertainties that are faced in the digital
10 millennium. You don't have to prove infringement in order to
11 show liability under a 1201(a)(1). That, I think, is based on
12 the assumption that many of the things that would happen after
13 a circumvention would be non-infringing but not all.

14 MR. CARSON: Okay. Well, let's turn to
15 1201(a)(1)(d) and what that says in pertinent part is "The
16 Librarian shall publish any class of copyrighted works for which
17 the Librarian has determined, pursuant to this rulemaking, that
18 non-infringing uses by persons who are users of a copyrighted
19 work are or are likely to be adversely affected and the
20 prohibition contained in subparagraph H shall not apply to such
21 uses with respect to such class of works for the ensuing three
22 year period."

23 My question is let's assume we find a particular
24 class of work will be exempted. That happened three years ago,
25 likely to happen somewhere with respect to something this time.

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1 What's the effect of that? As I see it, there are three
2 possibilities you may come up with other but I'd sort of like to
3 get your analysis of it.

4 One analysis would be once a class of works is
5 exempted, anyone is free to circumvent with respect to that
6 class of works. That's one possibility. Another one is once
7 that class is circumvented, anyone who is engaging in a non-
8 infringing use may circumvent but only someone who's engaging in
9 a non-infringing use. Perhaps the most restrictive one that I
10 can imagine would be that once that class is exempted, anyone
11 who is engaging in a non-infringing use that we have identified
12 in this rulemaking as a non-infringing use would be able to do
13 so but nobody else. That's sort of the universe of reasonable
14 or semi-reasonable possibilities I can see. I don't know.

15 I guess I'd like to know if you've got an analysis
16 of what in fact the correct analysis is. Who in fact is able to
17 take advantage of this exemption once a class is exempted?

18 MR. METALITZ: This is a question we've given some
19 thought to and obviously this provision is not a model of
20 legislative clarity.

21 MR. CARSON: Unlike the rest of 1201.

22 MR. METALITZ: Unlike the rest. Right. But I
23 think that the likeliest outcomes would be either #1 or #2 in
24 your list. The key phrase, as I read it, is "Shall not apply to
25 such users with respect to such class of works." "Such class of

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1 works" is the class you've defined, so we know what that is.
2 Such users. Persons who are users of a copyrighted work, if you
3 look at three lines up. I think reading #2, as you said, which
4 is that this only applies to people who circumvent and then make
5 non-infringing uses assumes -- it's almost interpolating such
6 users and such uses. It's almost interpolating the concept of
7 such uses because the statute refers to non-infringing uses by
8 persons who are users of the copyrighted work. A person is a
9 user for all purposes. He or she may be making non-infringing
10 uses and, if the statute said, such users for such uses with
11 respect to such class of works, then it would be clear that I
12 think #2 -- I hadn't thought about #3 because I don't think you
13 really have to comprehensively identify all of the potential
14 non-infringing uses, but if it said that, I think that it would
15 be clear that #2 is the right interpretation.

16 We don't know because there haven't been any
17 (a)(1) cases, at least that I'm aware of. I think the likeliest
18 outcome would be that the courts -- it's likely that the courts
19 would find #2 as to be the correct (a)(1) case.

20

21

22

23

24

25

1 copyright owner to say, but wait a minute. You're not making a
2 non-infringing use. You're making an infringing use and,
3 therefore, that the exception really doesn't apply to you.

4 Now, in that case, there might also be-- obviously
5 the claim of the copyrighter would be that there would be
6 infringement liability also. I think if you had a case where it
7 was just a claim under 1201(a)(1), that would be based on a non-
8 infringement. In other words, in the case where there isn't an
9 exempted class.

10 MR. CARSON: Let's assume for a moment that
11 interpretation #2 is the correct interpretation and nobody
12 disagrees. Let's just indulge in that fantasy for a moment. If
13 that's the case, what's the big deal? We've identified at least
14 some non-infringing uses that are being deterred by CSS. If we
15 come up with an exempted class and maybe these will be corporate
16 ones, maybe not, all that it's really doing is permitting people
17 who are engaging in non-infringing uses anyway to circumvent.
18 So aren't all these risks, all these dangers you're worried
19 about, really not present if that's how you have to interpret
20 Section 1201(a)(1)(b)?

21 MR. METALITZ: First of all, I don't think that is
22 the way you have to interpret it. I think that's one --

23 MR. CARSON: That's my premise.

24 MR. METALITZ: Let's assume for a moment that
25 interpretation is right. Then you have to try to reconcile this

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1 with Congress's decision not to collapse the concepts of
2 circumvention and infringement or act of circumvention and
3 active infringement. Congress obviously -- it's hard to imagine
4 an act of circumvention that couldn't possibly result in a non-
5 infringing use. If your analysis were correct that what's the
6 big deal, that could be said as to just about any claimed
7 exemption. What's the big deal? If people only use them for
8 non-infringing purposes, there's no liability there and if
9 people use it for infringing purposes, you have infringement
10 liability.

11 That was not Congress's approach. Congress said
12 after the two year period and subject to the tri-annual review
13 that we're engaged in now and subject to other exceptions that
14 are in the statute, the act of circumvention itself should by
15 itself be a track viability and the reason I think was to
16 encourage the development and the deployment of technological
17 projection measures with the ultimate goal of increasing
18 availability, maximizing public access to these works.

19 So I think to reconcile this to the structure of
20 the statute, you can't go in with the supposition that as long
21 as the scope of the exception exemption is only limited to non-
22 infringing uses, there's really nothing to worry about. Now,
23 that's a legalistic answer. Let me give the practical answer as
24 well which is we all know that there's a bleed through effect
25 here and there's a very important signalling effect that is

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1 involved here and giving permission to engage in acts of
2 circumvention is going to have repercussions in the real world.

3
4 I think there was some testimony about this
5 earlier and perhaps there will be later this afternoon in the
6 example of video games where the regional coding function is in
7 some instances, at least, very tightly integrated with the other
8 access control functions and, in that case, you have evidence
9 before and I'm sure you'll discuss it in more detail that as a
10 practical matter, if people are going to be circumventing
11 regional coding, they're almost inevitably going to be using a
12 tool that also circumvents the generalized access control and,
13 therefore, the scope of what's actually going to happen in the
14 real world is going to go far beyond what may be within the
15 narrow legalistic confines of the exemption that you've
16 recognized.

17 I hope that answers your question. I think from
18 a legal structural point of view, it can't be enough to say
19 don't worry about it because if you have an infringing use,
20 you'll be able to overcome this exemption by some type of
21 rebuttal or some type of counter-evidence in the case. I think
22 as a practical matter it's very important that the exemptions be
23 drawn as narrowly as possible so that they will, to the greatest
24 extent possible, carry out the congressional purpose which is to
25 deal with a situation where you determine and liability

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1 determines there's been a substantial adverse impact on non-
2 infringing.

3 MR. CARSON: Mr. Miller, I think you had something
4 to say in response.

5 MR. MILLER: Yes. I can imagine several scenarios
6 where you would have a violation of 1201(a)(1) and yet have a
7 non-infringing use. Now, those would not be relevant to the
8 claimed exemption that we're asking for today with regard to CSS
9 for a variety of reasons. The example I would give, for
10 example, would be a database. You have access to a database.
11 You need to use a password. If I create some sort of tool that
12 generates passwords and then gets me access to the database, I
13 may get access then to the database and then make a non-
14 infringing use of that database, but I've gained access where
15 normally I'd have to pay, that I'd have to pay money to walk
16 through that door. But I haven't paid money because I cut a
17 hole. And that's what Congress is trying to get. So even
18 though I only used the database for a non-infringing use, I
19 think you could still find liability there. We're not asking
20 for an exemption for that purpose.

21 I can also give another example. For example,
22 many video games come with certain levels that are public domain
23 on a DVD or a CD and then you have to get a password to unlock
24 the other levels. If I unlock those other levels for fair use
25 purposes, I want to review the game, for example, which would be

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1 a fair use, you could still say that that's a non-infringing use
2 but that it's a non-fringing use, therefore, no violation of
3 copyright but you've violated the access control. You got
4 access to the game without forking over the cash. And this is
5 what I believe Congress actually had the intention of doing.
6 This is a proper reading of the DMCA and that, therefore, and is
7 not applicable to the exemption that we're asking for with
8 regard to CSS.

9 On a second point, as far as the practical answer,
10 well, this is the first time we've heard this argument. It
11 wasn't in reply comments to my initial arguments where I made
12 this argument clear. There's no evidence of this, I think.
13 It's sociological, and I'm not sure that it falls within the
14 scope of this rulemaking that we have to decide, well, are
15 people thieves or not? And I think my argument is to the fact
16 that these tools are already available in the case of CSS. If
17 people want to be thieves, they can be thieves. The Library of
18 Congress isn't suddenly going to flip a switch and say, well,
19 you have an exemption for particular special uses and turn a
20 bunch of people into pirates. I think that's ludicrous.

21 MS. PETERS: Steve.

22 MR. MARKS: I just wanted to make just one sort of
23 very -- maybe it's prosaic -- response to one of the remarks Mr.
24 Miller was making in terms of the example of you have a
25 particular film where the lighting direction was very, very

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1 subtle and perhaps unique, something very worthy of commentary
2 and, in that case, it may well be that you can only see that the
3 best and with the greatest crispness in a theater on a 35 mm
4 print of the film.

5 I think the logical conclusion of what Mr. Miller
6 is arguing is that, therefore, a user who wants to make that
7 sort of fair use to show that clip of the wonderful lighting
8 director should be guaranteed access to the 35 mm film print, go
9 into the studio vault, be guaranteed access of it to take that
10 clip because it's the medium that shows the lighting direction
11 the best. I think just sort of as a practical common sense
12 notion, we would say no, that's not the case. Fair use just
13 doesn't work that.

14 MR. MILLER: Well, my response to that is my
15 argument doesn't lead to that at all. Given that I have a DVD,
16 why shouldn't I be able to make the best use of that DVD? That
17 doesn't mean that you guys have to give me a DVD if no DVD
18 exists. It doesn't mean that you have to give me a 35 mm print.
19 It doesn't mean that I have to be given anything but, given that
20 a DVD exists and it's out there, why can't I use it to the best
21 ability that I can if such subtle destinations are suited to my
22 needs and, in many cases, they will be if I'm a videophile.

23 MR. MARKS: And my answer to that is we do not
24 give you the DVD unconditionally. That's what access control is
25 about. Access control is about you're granted access to the

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1 work under certain conditions like playing it on an authorized
2 DVD player that is authorized to decrypt the work. I think you
3 are making the assumption that when a consumer buys a DVD, they
4 automatically, because they've made the purchase, have access to
5 the work under any conditions they so choose as long as the use
6 that they're making is non-infringing and I don't think that's
7 frankly a correct premise.

8 MR. MILLER: Well, my argument is that, A) I would
9 argue that that is a correct premise and I put a lot of work in
10 and nearly 100 footnotes into making this determination and a
11 proper understanding of the DMCA and trying to analyze it within
12 that harm text. However, I think beyond that, with regard to
13 fair use, we hear a lot about licensing and terms and everything
14 like that and my understanding of copyright law is that we have
15 copyright law in the absence of terms and licenses. Now, when
16 I buy the DVD, I've never seen a license, I've never seen
17 explicit terms, I've never signed anything and if the copyright
18 industry would provide me with these explicit terms that I agree
19 to when I buy a DVD, I'd be more than happy to read them and
20 make a determination.

21 But in the absence of specific contractual terms,
22 then copyright law holds and copyright law holds that there's no
23 reason I can't play it on a different machine. There's no
24 reason that I can't make use of it as long as it's non-
25 infringing. Copyright law says as long as it's not violating

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1 106 or some of the other smaller statutes in there, fine. And
2 so the absence of a license --

3 MS. PETERS: Sort of like your class for
4 exemption. No?

5 MR. MILLER: Say it again.

6 MR. TEPP: Okay. Go ahead.

7 MR. METALITZ: I was just going to say that
8 argument was presented to Congress and that argument may
9 summarize the state of the law prior to October 28, 1998. Now
10 we have an act of Congress that says that if you meet the
11 criteria, if there's circumvention of the access control
12 measure, there may be liability. So I think that's another
13 element.

14 MR. TEPP: As long as we're talking to Mr. Miller,
15 let me continue with you. I have a couple of questions. Mr.
16 Miller, in your submitted comment, you acknowledge that
17 Macrovision can be circumvented consistent with Section 1201 in
18 order to capture a copy of the analog output of DVD use and that
19 that could get you a copy of the ancillary works, similar to the
20 camcorder exempt we've talked about. Granted that involves a
21 copy of somewhat less quality than the digital copy right off
22 the DVD if you circumvent CSS.

23 On the other hand, there are concerns that have
24 been raised by the content industry about copies that are free
25 and in the clear and piracy. I think by any standard Congress

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1 took those to heart when they enacted 1201 so we would certainly
2 be in a tough position to ignore those concerns. The statute
3 says we have to consider things that are going to harm the
4 market. So then we're in the balancing test. So what I need to
5 ask you is can you identify for us -- and perhaps I want to say
6 quantify even though we know that's a difficult thing to do --
7 how much benefit there is to the Blogcritics that you spend most
8 of your time in your submitted testimony talking about to have
9 a perfect copy off the DVD by circumventing versus a copy that's
10 been captured through circumventing Macrovision or via the
11 camcorder route?

12 MR. MILLER: Well, it is very hard to exactly
13 quantify it. I won't be able to give you specific numbers
14 personally, but I will be able to give you some examples to have
15 an idea of it. Many of these Blogcritics are college students,
16 are people with very low resources. So to say for them to go
17 ahead and go get a camcorder is a rather large expenditure for
18 these individuals and it may not seem a lot to the people in
19 this room but \$400 for a minimal quality camcorder is going to
20 be very expensive, so even if they were to do that.

21 Secondly, and thanks to the wonderful efforts of
22 Macrovision, it's not nearly so easy to get around Macrovision
23 as many people think. To get the devices, the video correction
24 devices that strip out the Macrovision and improve, you often
25 have to go through quasi-underground sources, deal with ads in

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1 the back of magazines. You're not sure who you're dealing with.
2 You may in fact be dealing with regular pirates. So I find it
3 odd that the copyright industry is saying, well, you can do it
4 by going around Macrovision so go deal with those people in the
5 back of those magazines.

6 MR. TEPP: You said that.

7 MR. MILLER: But to the extent -- no, no.
8 Obviously I --

9 MR. TEPP: You said that in your testimony.
10 Right?

11 MR. MILLER: Based on -- obviously yes. If
12 Macrovision is a copy protection device only, under 1201(b) it
13 is legal to around it.

14 MR. TEPP: Okay.

15 MR. MILLER: It is not, however, legal to traffic
16 in it and I'm not sure that, as a policy matter, we want to
17 encourage people to get these anti-Macrovision devices or
18 encourage them to deal with these sort of things because it's
19 illegal to necessarily traffic in them.

20 MR. TEPP: Let me interrupt you for just a second
21 because where you're going raises an interesting juxtaposition.
22 You're arguing that it's expensive and possibly against public
23 policy to have people circumvent Macrovision but your solution
24 is to have them circumvent CSS.

25 MR. MILLER: Yes.

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1 MR. TEPP: Which arguably is also not something
2 that we want to have unless we absolutely need it and which
3 normally isn't readily available without going through something
4 very nefarious but there's some sort of means that aren't in the
5 front of the magazine.

6 MR. MILLER: Well, the distinction between CSS and
7 circumventing Macrovision is that CSS or DCSS or the
8 circumvention are computer programs whereas circumventing
9 Macrovision requires actual physical hardware which means you
10 have to have some sort of physical contact with somebody which
11 is going to implicate a variety of different issues that you
12 don't get with just downloading from a site in the Netherlands
13 or in Holland. It's not so easy to buy a Macrovision
14 circumvention from Holland or the Netherlands, but I can
15 download from the Holland and Netherlands sites, and I see that
16 as an improvement, particularly since CSS is not illegal in
17 Holland or Finland and so we're dealing with an entirely
18 separate set of issues.

19 Now, it is a subtle distinction but I think a very
20 critical one. I think the Internet is very different than real
21 space in this sense so I think that it's much preferable to have
22 people downloading CSS if necessary or creating it themselves.
23 CSS is well known, well understood. You can talk to many
24 cryptographic experts who will tell you exactly how it works.
25 I think that's very superior because that's the other way to get

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1 around it is learn cryptography, learn programming, and it's
2 wonderful for our industry.

3 MR. TEPP: Well, that doesn't sound like a cheap
4 way for a college student to get to a movie.

5 MR. MILLER: Well, it's cheap in terms of price,
6 costly in terms of time, and college students usually have more
7 time than they have money.

8 MR. TEPP: But to learn to be a cryptographer
9 sounds like a substantial undertaking.

10 MR. MILLER: Forty bit keys aren't that hard to
11 understand.

12 MR. METALITZ: May I have ask one question?

13 MR. TEPP: Well, no, but if you want to respond,
14 go ahead.

15 MR. METALITZ: I do want to make it clear on the
16 record that the copyright industry is not encouraging people to
17 circumvent Macrovision which is, I think, what I heard from the
18 other side of the room, and it's just kind of odd that as long
19 as you download your hack over the Internet rather than buy it
20 from somebody in a trench coat in a dark alley, it's okay. I
21 mean it's cleaner because it's over the Internet. I don't buy
22 into that thinking and I don't think that's relevant to this
23 proceeding.

24 MR. TEPP: Certainly, while DCSS may be illegal in
25 other countries, it's pretty clearly not here.

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1 MR. MILLER: It's not legal to traffic in it --

2 MR. TEPP: Let me just get the question out. I
3 think you have raised some interesting points about the relative
4 difficulties of using DCSS versus whatever is necessary to
5 circumvent Macrovision. Okay. But what I want to get back to,
6 I sort of diverted you on this and I don't want to spend all the
7 time on it, what I want to ask you is to focus on the relative
8 benefits of having a circumvented digital copy for the
9 Blogcritics that you've discussed as opposed to a copy attained
10 through a camcorder or through circumventing Macrovision so that
11 we can compare in this balancing test that we're instructed to
12 do the relative benefits of the exception you're proposing as
13 compared to the harms that have been--

14 MR. MILLER: Well, again I'll return to the fact
15 that to use anything other than your own hardware, to use a free
16 software program that you download off the Internet or obtain
17 other ways is much cheaper than having to buy and set up all
18 this additional hardware. But secondly, I think again, we're
19 dealing with videophiles. People who are very interested in the
20 quality of the video, who are very attuned to subtle
21 degradations in it, and that this is very important to them. I
22 will use an analogy to music.

23 Many people will not listen to MP3 files which are
24 compressed using a loss in compressions scheme which means they
25 lose some of the high notes and there's a little bit of

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1 tinniness and stuff like that, and they refuse to listen to MP3
2 files. Most people find it perfectly acceptable. They think
3 they're really convenient and stuff, but for them, it just
4 doesn't do it for them. They have to have the higher fidelity.
5 How do you quantify that? For many people, it's worth a lot of
6 money. It's worth a lot of their time and effort and a lot of
7 loss of convenience. MP3s, I can put them in my pocket, take
8 them anywhere. But if I really want the high fidelity, they're
9 not as transportable and they lose these measures and that's a
10 cost to them. And the same thing goes with videophiles. The
11 fact that they have to use these loss E analog, digital analog
12 conversion schemes and stuff is simply not acceptable to them.
13 It's a very high cost to them. And I think for purposes of
14 criticism and commentary, this is important. These people who
15 have attuned themselves to the video, to lose their commentary
16 because they can't get this high quality and provide and share
17 it with us is a loss to all of us.

18 MR. TEPP: So you want us to focus ont the
19 relative harm to the connoisseur rather than the average --

20 MR. MILLER: I think there's harm to all. The
21 harm is obviously higher, I think, with the connoisseur but it's
22 a variable graph.

23 MR. TEPP: Thank you. I just have one or two
24 questions for Ms. Hinze on the public domain issue. I think
25 we've settled with the questions Mr. Carson asked that the pure

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1 public domain work can be circumvented, the CSS on that can be
2 circumvented because it's not a work protected under this title.
3 So now we move into some of the areas of gray about some sort of
4 mix of the same DVD. I'll pick a movie that shows a scene at
5 the Louvre, as one of the commenters suggested, which
6 necessarily have public domain works in the background. Is that
7 the sort that you're suggesting? You're going to see the Mona
8 Lisa there and I'm pretty sure that's PD. So there's a PD work
9 on a DVD. Does that mean, even though the rest of the movie is
10 two years old, you can go ahead and circumvent under the
11 exemption you're asking us to grant?

12 MS. HINZE: I just want to get clear that I am
13 understanding your question. Is your question directed to a
14 public domain element within a movie that otherwise is
15 copyrighted?

16 MR. TEPP: Yes.

17 MS. HINZE: Is it the visualization of a public
18 domain element? Well, no. The class of exemption that we're
19 seeking is for public domain motion pictures. We have asked for
20 an exemption for Section 102 class of motion pictures that are
21 in the public domain.

22 MR. TEPP: Okay.

23 MS. HINZE: Our intention in asking for that
24 exemption was to seek an exemption for the public domain motion
25 picture so in a situation where a compilation DVD includes a

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1 motion picture that is copyrighted and or that there's a claimed
2 copyright over and a motion picture that is clearly in the
3 public domain, our exemption would give consumers the right to
4 access the public domain motion picture.

5 MR. TEPP: I appreciate that distinction. Thank
6 you.

7 MS. HINZE: Could our argument go further? Is
8 that what you're asking or perhaps I'm not understanding your
9 question.

10 MR. TEPP: I'm not sure that others haven't
11 suggested a broader exemption and I guess what I'm trying to
12 find out from you is do you think there's an argument there or
13 did you craft your exemption more narrowly than others?

14 MS. HINZE: Our exemption was crafted to deal with
15 a motion picture that's in the public domain, not an element.

16 MR. TEPP: Did you do that because you felt that
17 the larger exemption couldn't be sustained under the terms of
18 the rulemaking or wasn't necessary?

19 MS. HINZE: I think we actually wanted to present
20 to the Copyright Office narrow exemptions that fit within the
21 classifications and the determinations that the Copyright
22 Registrar and the Librarian of Congress made in its 2000
23 rulemaking. We were conscious in crafting our exemptions to
24 think about the nature of the class that we would need to
25 present and I think -- I haven't actually given -- I guess the

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1 answer to your question is the way we crafted our exemptions was
2 specifically to address a class that would fit within the
3 definition of class as we understood the Librarian of Congress
4 and the Registrar to have defined that term in its 2000
5 rulemaking. That was the reason why we crafted our class the
6 way we crafted it.

7 MR. TEPP: Okay. Thank you.

8 I'm trying to further pursue this line of exactly
9 what it is the class you're proposing would or wouldn't reach.
10 How would you address the following hypothetical? There was a
11 documentary produced about the Wright Brothers first flight and
12 in that there's a 20 second clip of footage of the actual first
13 flight of the Wright Brothers. I don't even know if that
14 exists, but let's assume it does. That footage is clearly
15 public domain so you've got public domain audiovisual work on a
16 DVD. If we issued the exemption verbatim to what you've
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1 that they're independent works?

2 MS. HINZE: Our exemption was targeted at
3 capturing a unit of a motion picture which is in the public
4 domain and by that, I mean something like a Charlie Chaplin
5 movie, a work, a motion picture work.

6 MS. PETERS: You're not talking about parts of a
7 work?

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1 the extent that there's an ability for them to choose to make
2 public domain works -- to release public domain works and bundle
3 them together with copyrighted works and put them all with
4 inside a CSS wrapper so that it now becomes an issue where
5 someone has to potentially violate Section 1201 to access what
6 was otherwise available as a public domain work -- in other
7 words, reasonably available as a public domain work -- I think
8 there's a real chilling effect on consumers there and our
9 exemption is trying to get that particular situation exempted.

10 MR. TEPP: Okay. Let me ask one last thing and
11 I'll stop. I'm not sure -- and maybe I've just missed it. I'm
12 not sure I've heard or seen evidence of this bundling. We had
13 some discussion of the nine or maybe four or five or whatever it
14 is that were strictly PD, subject to CSS. Do you have specific
15 evidence of entire PD motion pictures being bundled with new
16 copyrightable material, of any material that's still in
17 copyright?

18 MS. HINZE: As I stated in response to Mr.
19 Carson's question, I believe that the two consumer commenters
20 actually, the words that they referred to, the Lumiere Brothers
21 and the Great Works of Film category and, as I said, I believe
22 that there is, based on our searches as of December and our
23 comments, that there are 70 public domain works available in
24 DVD. I would welcome the opportunity to supplement the record
25 by providing exact concrete examples. I believe there are two

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1 examples in the record already in this proceeding by virtue of
2 the consumer comments and, with the permission of the Copyright
3 Office, I'd be very happy to supplement the record because I
4 believe that is the situation and that is predominantly the
5 situation.

6 MR. TEPP: Well, we'd certainly like to get those
7 facts if they're out there. Thanks.

8 MS. GARMEZY: I just wanted to say in the case of
9 public domain works, even though the film would be in the public
10 domain, that does not mean that the original creators or the
11 actors in it or their heirs don't have an interest in what
12 happens to the film or how it is utilized or how, particularly
13 for the actors, their image might be used, whether it's in
14 public domain or not.

15 MR. TEPP: Okay. I assume you're not -- well,
16 maybe this comes from -- that I thought we had unanimity on from
17 the question Mr. Carson asked. Are you suggesting that a purely
18 public domain work alone on a DVD protected by CSS should not be
19 circumventable for the 1201(a)(1)?

20 MS. GARMEZY: No, I'm not but I'm just saying that
21 in the case of these compilations, we shouldn't make the
22 assumption that there's not a reasonable protection of these
23 works in the compilation.

24 MS. HINZE: Could we clarify that? I'm not quite
25 certain --

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1 MR. TEPP: Let Mr. Metalitz go.

2 MR. METALITZ: It's not directly on that point.

3 MR. TEPP: Okay.

4 MR. CARSON: You want a clarification of what she
5 said?

6 MS. HINZE: Is there a kind of copyright in public
7 domain works? I'm not clear.

8 MR. TEPP: I thought I heard no but I don't want
9 to put words in anybody's mouth.

10 MS. GARMEZY: No. I said --

11 MR. METALITZ: I was just going to say that in
12 terms of the supplementation of the record, which I agree would
13 be very helpful, we do have to distinguish the fact that a
14 public domain title is on DVD doesn't necessarily mean that it
15 is protected by CSS. I think we heard that this morning that
16 these are two separate standards and so just to say this title
17 is on DVD, we also have to know whether it was protected by CSS
18 to know whether it even came within the scope of what we're
19 talking about here. Whether that's standing alone, although I
20 think we're in agreement that the statute doesn't reach it if
21 it's bundled with other titles. There obviously may be-- that
22 circumstance may exist.

23 MR. CARSON: When you give us that information,
24 will you give Mr. Metalitz a copy and you'll certainly have an
25 opportunity to advise us which of those titles you come up with

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1 are not protected by CSS.

2 MR. METALITZ: I can try but I think the fact of
3 the matter is that most of these public domain titles -- I mean
4 if you look at most of the major motion picture studios, they
5 are not primarily in the business of distributing public domain
6 titles. So this was likely to be small distributors and so
7 forth. We can certainly try.

8 MR. CARSON: Good idea. I mean we've got to get
9 the evidence in front of us. There are burdens of proof here.
10 Sometimes the best we can do is he'll give us the information,
11 you got a chance to respond. We'll do our best.

12 MR. TEPP: Thank you.

13 MS. PETERS: Could I just follow up with your
14 questions. Mr. Metalitz this morning talked about the fact that
15 if in fact the motion picture is in the public domain, then it
16 is possible that maybe you can get access to it through the
17 Library of Congress or maybe the UCLA film archive. But I
18 thought I rememberer saying that's not good enough. If in fact
19 the work is in the public domain and if in fact it is available
20 in public archives, doesn't that respond to your fair use
21 concerns?

22 MS. HINZE: My argument isn't an argument about
23 fair use. My argument is an argument about the nature of
24 copyright protection.

25 MS. PETERS: If in fact you can get a copy of the

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1 work, then where's the problem?

2 MS. HINZE: The problem is that the work is in the
3 public domain. The copyright owner is the public. In that
4 particular category of works, there is no claim to copyright, as
5 I understand it. My concern would be that by releasing
6 something that is in the public domain with a CSS protection on
7 a DVD that there is an assertion of private rights over
8 something that is a public work and that, I guess, the--

9 MS. PETERS: So you're saying that they can never
10 combine a copyrighted work with a public domain work in a
11 package?

12 MS. HINZE: They can never deny the public the
13 right, in my analysis, they can never deny the public the right
14 to -- well, they shouldn't be entitled to use CSS and legal
15 sanctions of Section 1201 to deny the public the right to access
16 the public domain elements of that compilation. That would be
17 my position.

18 MS. PETERS: To access. That means to be able to
19 play it?

20 MS. HINZE: I would actually go further. The
21 public domain works, since they're not subject to copyright, the
22 public is entitled to use the non-copyrighted material in all
23 manner of ways. As I said, by definition, these works are not
24 subject to copyright law and the intent of Congress when it
25 struck the carefully constructed copyright balance was that

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1 consumers would have the ability to use, not just access, works
2 that are in the public domain.

3 MS. PETERS: So an example that you raised this
4 morning. It's a public domain work and now ancillary material
5 has been added to it. People commenting on how it was made or
6 the sets, whatever. That's clearly copyrighted footage. It now
7 is combined with the public domain. How does that play out in
8 your proposed exemption?

9 MS. HINZE: Are there two separate pieces? That's
10 where I'm --

11 MS. PETERS: Well, obviously there's the ancillary
12 material that kind of talks about the film, whatever. Doesn't
13 matter what it is. But it's related to the film but it's new.
14 But with this package, with this DVD, there is also the quote,
15 "public domain motion picture." How does your proposed
16 exemption work in that case?

17 MS. HINZE: To what does it apply?

18 MS. PETERS: Yes.

19 MS. HINZE: It applies to public domain works.

20 MS. PETERS: But you want to be able to circumvent
21 all of it because it's all as a package.

22 MS. HINZE: The only reason that we are seeking an
23 exemption to circumvent all of it is because a copyright owner
24 has chosen to release it combined with a copyrighted work. If
25 it were released as a solo form, I think we all agree, as far as

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1 I can see this afternoon, that there's really no need --

2 MS. PETERS: So you're basically saying you don't
3 put out any ancillary material.

4 MS. HINZE: Don't choose to make your business
5 model dependent upon using a technological protection measure to
6 protect something that's actually something you don't own a
7 copyright in. That might be the other way to phrase it.

8 MR. MARKS: I just wanted to respond a little bit
9 to this with just some practical thoughts perhaps about the
10 access to the public of copies of the work because I think part
11 of the business incentive to take a public domain work and
12 remaster it, restore it, to put it out on DVD, and add perhaps
13 historical information or get the directors back with that work
14 to talk about the work is not simply some nefarious scheme to
15 say, aha, we're going to snatch this away from the public domain
16 but rather to say we're going to make an investment to make this
17 work available to the public and we'd like to get an economic
18 return on that investment.

19 And I think there is, when you look at the overall
20 balancing of availability of works to the public, I think it's
21 important to balance the issue of if you're going to allow
22 circumvention of works that represent compilations of protected
23 works and public domain works, will the end result be greater
24 access to the public of these public domain works, more
25 restoration of these public domain works, or less? And I just

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1 think that's one factor that needs to go into the equation.

2 And another issue I wanted to raise is if you take
3 public domain literary works that are available in print, and I
4 understand, at least in England and I don't know if this happens
5 in the U.S., but some publishers who specialize in publishing
6 public domain works do so on paper that has a certain sort of
7 water mark on it so that if you go to just mechanically
8 photocopy the public domain work, the water mark appears and
9 obliterates part of the text and so the copy that you've made is
10 really not very usable.

11 As far as I know, no one has challenged that
12 that's somehow an illegal activity to engage in because you're
13 trying to frustrate the making of a mechanical copy of a copy of
14 the work. I think some of those same arguments could apply in
15 this case. I think when we speak about public domain works,
16 there does need to be some sort of distinction made between the
17 work itself, which I believe the Registrar was getting to saying
18 hey, the work itself could be available on an archive, could be
19 available at the Library of Congress, available for people to
20 make whatever fair use they want, versus saying that every
21 single copy of the public domain work must be made readily
22 available for any sort of use that a user wants to make. I
23 think that is sort of blurring the distinction between the work
24 falling into the public domain itself versus whether you can
25 take any steps to actually protect the investment that you've

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1 MS. HINZE: I'm not arguing their use. Their use
2 only applies to copyrighted works.

3 MS. PETERS: Right, so it's all straight. In
4 principle, a work is in the public domain and, therefore, it
5 should not have any controls on it whatsoever, whether it's an
6 access control or copyright.

7 MS. HINZE: I'd actually rephrase it from the
8 consumer point of view as going the other way. Consumers
9 shouldn't continue to have the right to access it.

10 MS. PETERS: But if they are, if in fact you go
11 and buy a DVD, you can play it.

12 MS. HINZE: Perhaps I'll finish my thought.

13 MS. PETERS: I don't know where the access issue
14 is.

15 MS. HINZE: Should have the ability to access and
16 to use. That will mean in the case of public domain works that
17 are not subject to copyright, the ability to copy it. That's
18 certainly not true of any of the other three, the other four
19 exemptions EFF requested in this proceeding. But in relation to
20 public domain works which are not subject to copyright law, yes,
21 that would mean both access and a copy. So just to be really
22 clear about that, that is the position for this category of
23 works. And as I said--

24 MS. PETERS: So every copy that gets put out has
25 to have the ability to use that copy in any way.

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1 MS. HINZE: As I understand it, we have complete
2 agreement that if a public domain work were to be released on a
3 DVD subject to CSS protection and nothing else was on that disk,
4 there would be agreement that there would be no violation of
5 1201.

6 MS. PETERS: But if it's the other way. Now it
7 has copyrighted material with it that's entitled to be protected
8 and maybe it's to be beneficial to the public, it also includes
9 a public domain work and now to flip it the other way is they
10 can't protect their copyrighted work if they make the choice to
11 bring the public domain work into that DVD for the benefit of
12 the public.

13 MS. HINZE: I understand the socially beneficial
14 argument. I have heard that several times this afternoon. My
15 concern with that is that it may actually hide an assertion of
16 private rights over a public asset. I'm not a specialist in
17 English law so I don't know what the situation is there.

18 MS. PETERS: I'm just getting it straight. I'm
19 just trying to understand the two sides. You're not going to
20 agree with each other, and we're going to struggle.

21 MR. CARSON: That leads to my question, probably
22 directed to this side although you folks could conceivably know
23 the answer. Is CSS an all or nothing proposition? In other
24 words, if you want to put CSS on that DVD to protect the
25 ancillary material, does it necessarily also have to protect the

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1 public domain material sitting right next to it or can you make
2 a choice, CSS would apply to only this part of the disk which
3 has the copyrighted material and the rest public domain material
4 is free and clear and is not protected by CSS?

5 MR. MARKS: For my part, the answer is I don't
6 know. I just don't know.

7 MR. CARSON: You could probably find out.

8 MR. MARKS: But I will try and find out.

9 MR. CARSON: Anyone else know the answer?

10 MS. HINZE: It's a good question.

11 MR. MARKS: I just don't know.

12 MR. CARSON: Next is not so much a question as a
13 comment. You mentioned the two reply comments you have from
14 members of the public about the compilations.

15 MS. HINZE: Yes.

16 MR. CARSON: I don't think they do it for you.
17 I don't think the record shows anything right now. Fitz Swanson
18 says that the Lumiere Brothers Victorian era film From the Earth
19 to the Moon is on Great Works of Film Volume 1 but from all we
20 can tell from this comment, every single work on Great Works of
21 Film Volume I which could be the first decade of motion pictures
22 is public domain. We just have no information whatsoever to
23 tell us that.

24 The other comment is pretty much the same
25 situation. It's the Charlie Chaplin Marathon. You tell us some

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1 copyrighted works are on that. The comment doesn't, so the
2 record is absolutely barren at this point of a shred of evidence
3 that there are compilations contained in both public domain
4 works and copyrighted works. If you want to persuade us, you
5 haven't begun to meet your burden. You'll get the chance.

6 MS. HINZE: I appreciate the clarification and, as
7 I said, we will be happy to supplement the record in this
8 regard.

9 MR. CARSON: Okay.

10 MS. PETERS: Anything else?

11 MR. CARSON: Nothing. Okay, Bob.

12 MR. KASUNIC: I want to follow up on what David
13 was just asking. I understand we're going to get some follow up
14 on whether you can separate the CSS for the public domain and
15 not have it on the public domain work and have it on the
16 copyrightable work. But just to sort of phrase it in a
17 different way, this seems to be somewhat in line with, at least
18 the way I see it, the harm that you're posing is that this is
19 again another form of nesting where you have the overall
20 protection covering both and it's just being used as a means to
21 broaden the scope of protection.

22 I want to also get clarification here, too. It's
23 not your position, is it, that you think that technology can not
24 be used to protect the public domain work so if, for instance,
25 CSS was put on the new material on a DVD but some other form of

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1 copy protection or some kind of technology alone that would not
2 fall under 1201(a)(1) was put over the other work or that was
3 not prohibited by the law, technology alone could be used on
4 public domain works --

5 MS. HINZE: I think -- sorry.

6 MR. KASUNIC: Go ahead.

7 MS. HINZE: I think it would depend on the
8 particular technology that was used. If there 1201 violation
9 and, for instance, in the situation you've given -- sorry. It
10 would depend on the technology which was used, the particular
11 technology in question. In the example you've just given, there
12 would be no violation as I understand what you've said just for
13 this pure copy protection. There would be no violation of
14 1201(a) in order for a consumer to make use of that work. There
15 might be some issues then outside of 1201 about whether or not
16 there's some sort of burdening of the public interest in
17 prohibiting access to a public work but, as I understand your
18 question, I don't think there would be a 1201(a) issue there.
19 So it would be outside the scope of this proceeding, any
20 concerns that that might raise.

21 To give you a more thorough answer, I think I
22 would need to know a little bit more about the particular
23 technology at issue and what the impact would be. I think that
24 would be my sort of road map to how to analyze that.

25 MR. KASUNIC: Let me move back -- please.

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1 MR. METALITZ: I think it's important to remember
2 that 1201(a) doesn't contain any prohibitions on using
3 technological controls. We're talking about under what
4 circumstances are you liable for circumventing it. Now, 1201(k)
5 may in some circumstances where you can put copy controls in a
6 particular analog situation, and I would not even try to explain
7 what those situations are at this point without looking at
8 1201(k) which I haven't in a long time. But I just wanted to
9 put on the record that in some cases 1201(k) will affect when
10 you can put copy protections on and when you can't.

11 MR. KASUNIC: Moving back just again for
12 clarification on the 1201(a)(1)(d) question about the effect of
13 that in terms of infringing users. I just want to understand in
14 terms of David's option two which would be that only non-
15 infringing users can take advantage of that. Am I right that
16 the result of that would be -- well, first of all, there would
17 be copyright infringement if someone was using it for an
18 infringing purpose but then also that this would be a violation
19 of 1201(a)(1) as well. Is that right?

20 MR. METALITZ: Yes. If that analysis is correct,
21 if that's how the courts read it. Yes.

22 MR. KASUNIC: Is everyone in agreement on that?
23 Okay.

24 Now, Mr. Metalitz, you stated that you're not
25 aware of any 1201(a)(1) cases and I'm quite confident that if

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1 you're not aware of any, no such cases exist. Clearly, even
2 though there have been no cases of that, there's undoubtedly
3 been acts of circumvention. I'm trying to get at what the
4 reality is of 1201(a)(1) and for this I came across a section of
5 an article that was part of the WIPO conference that Mr. Marks
6 and Mr. Turnbull wrote some time ago. If I can just quote a
7 little section. It says, "For several reasons, a conduct only
8 approach is insufficient. Circumvention conduct is generally
9 not public. Individuals usually undertake it in the privacy of
10 their homes or work places. While the results of such activity
11 such as a software utility program that hacks a copy protection
12 measure may be made public, the conduct leading up to that
13 cracking of the protection system is usually private. It is
14 neither feasible nor desirable to undertake systematic
15 monitoring of private conduct to deter circumvention activity.
16 In any event, most people will not undertake the time and effort
17 to crack the copy protection measure on their own."

18 So in light of that, isn't it somewhat obvious
19 from the fact that there hasn't been any enforcement of 1201 in
20 the courts and that the trafficking provisions are really the
21 key to protection for copyright owners? Let me just finish the
22 last part and I'll give you all the time you want. This sort of
23 struck me in terms of Mr. Miller's point, too. Doesn't an
24 exemption that we find or recommend in this rulemaking really
25 only provide a means for honest people to be honest with the

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1 caveat that only such honest users that also have the
2 technological ability to actually accomplish this will be able
3 to utilize it? That's the end of my line of questioning.

4 MR. MARKS: Let me take part of that and maybe
5 other members of the panel will take part of it, since you were
6 quoting from an article that I wrote and I frankly believe that
7 I wrote the passage you quoted from. I can't blame it on Bruce.

8
9 I think the statements that were written from
10 which you quoted were aimed at pointing out the importance of
11 having the prohibition, the circumvention prohibition go to
12 devices and why having just a conduct-based only prohibition
13 would not be adequate for the reasons that I cited. That
14 doesn't necessarily lead one to the inexorable conclusion that
15 conduct, prohibitions on circumvention conduct, are useless or
16 are not of any normative validity in and of themselves. I'd
17 like to draw a real life parallel to that because even though
18 there may not have been any 1201(a)(1) litigations brought to
19 date, that doesn't mean there may not be in the future and what
20 I'd like to do is draw an analogy straight from the copyright
21 law and what's going on frankly with the music industry which is
22 for a long time with the file swapping and the copyright
23 infringement that's been going on on peer to peer activities,
24 the music industry took the course of we would prefer to get at
25 the purveyors of the file sharing software that's allowing this

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1 copyright infringement to take place and put our reliance on
2 contributory infringement cases and vicarious infringement cases
3 and that had been the approach actually for several years.
4 Because that approach may not be yielding exactly as useful
5 results as the music industry may have wished for, the music
6 industry has now begun to actually sue individual uploaders or
7 downloaders for the direct infringement that they are engaging
8 in.

9 I believe the same thing could happen some day
10 with respect to circumvention devices where if in fact there is
11 lots of circumvention activity taking place due to the fact that
12 we are unsuccessful in controlling the trafficking in
13 circumvention devices, we may well feel ourselves forced to
14 bring legal actions against individuals who do engage in such
15 circumvention conduct.

16 MR. MILLER: I would just like to say that this is
17 a very scary proposition and only increases the need for this
18 exemption. What he's proposing is that the movie industry is
19 going to begin prosecute people under 1201(a) without
20 necessarily having an infringement violation necessarily
21 attached to it, that they will begin enforcing 1201(a) whether
22 it's for fair use purposes or not which only increases the need
23 for an exemption and, if the most likely interpretation of
24 1201(d) is part two of Mr. Carson's analysis, then this means
25 that people who are making non-infringing uses will be -- he's

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1 making an argument that people making non-infringing uses -- if
2 I'm making a five second clip violating CSS in order to review
3 in kind, I will be prosecuted for that under the DMCA, and this
4 is precisely what Congress did not intend. So his argument is,
5 to me, a parade of horrors. I could not have made it more
6 clear.

7 MR. KASUNIC: Mr. Metalitz.

8 MR. METALITZ: I think I would say Mr. Marks hit
9 the nail on the head again, as he often does, that this is a
10 tool that may be needed. I would just add really two
11 additional points. First, I think the quote you read -- and I
12 agree with what he said in Geneva four years ago which is that
13 often this would take place in private in the home, etcetera,
14 etcetera. It's easy to conceive situations where it would not.
15 One example I would give is end user piracy of business software
16 applications which can be carried out through the use of
17 1201(a)(1) in a business setting and while I think there might
18 be an argument to be made that if the system's operator of a
19 company were to strip off access controls so that people could
20 have access to unlicensed copies and so forth, arguably there
21 might be an (a)(2) violation but I think it's clearly an (a)(1)
22 violation and, therefore, it's possible that legal tool would be
23 used in that setting which is not private in the home but in
24 fact somewhat more a public sphere.

25 The last point I would make is that the

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1 motivation, one of the motivations for enactment of the DMCA was
2 to bring the U.S. into compliance with the WIPO Internet
3 treaties and those treaties, it seems to me, require that there
4 be remedies against people who circumvent access controls. So
5 obviously that doesn't dictate the scope of those remedies or
6 whether there will be exceptions and so on and so forth, but I
7 think if Congress, because of Congress's goal to implement these
8 treaties, I think it was inevitable that there would be some
9 prohibition of the act of circumvention also.

10 MS. HINZE: Could I just make one comment in
11 response to that? I just would like to be clear for the
12 purposes of the record that there's nothing in the Article 11
13 Copyright Treaty and the Article 18 WIPO Performances and
14 Phonograms Treaty obligations that required the particular scope
15 of implementation that was done by Congress in Section 1201. So
16 just for the record, I would like to make it clear that the
17 wording of those provisions doesn't actually specify a
18 particular form of prohibition. It doesn't actually specify
19 that there needs to be both an act and a -- prohibition in order
20 to satisfy that obligation.

21 MR. KASUNIC: I just have one other question in
22 response to a comment that Mr. Miller made. I just want some
23 clarification. You said that Section 1201 is not concerned with
24 the market as a whole but is only concerned with individual use.
25 I wonder how you can say that in light of, in particular, I

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1 think, Section 1201(a)(1)(c)(iv) that one of the factors that we
2 have to consider is the effect of circumvention of technological
3 measures on the market for a value of the copyright works.

4 MR. MILLER: Actually, my responses to the
5 argument made in the reply comments with regards to the fact of
6 the benefit to consumers, not to the commercial value of the
7 works. I deal with that argument in a separate way. The
8 argument made in the reply comments to my initial comment was
9 that the effect, not on the market but on the availability of
10 copyrighted works. What they claim is that they have, because
11 of the existence of these devices, that we therefore have more
12 available. I dispute this in a number of ways.

13 One of the ways I dispute this is by reference to
14 the House report, #105-551, where it says that the purpose of
15 1201 is the mechanism that allow the enforceability of the
16 prohibition against the act of circumvention to be selectively
17 waived for limited time periods if necessary to prevent a
18 diminution in the availability to individual users of a
19 particular category of copyrighted materials. They're saying
20 well, the availability of having this copyrighted work will
21 create all kinds of stuff but what your focus is on is whether
22 individual users are being harmed by this and you can
23 selectively waive it for particular classes of works for
24 particular users, a particular class of users, and not to focus
25 on the market as a whole but to focus on whether or not

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1 individuals are being harmed, and my argument is that
2 individuals are being harmed here. That's not referring to the
3 commercial market. I have other arguments that I'm basically
4 saying that their commercial market is not being harmed at all
5 by this exemption. By giving me the ability to do a five second
6 commentary or critical clip of their movie does not create a
7 recognizable or cognizable commercial harm. I may say that DVD
8 stinks and the ancillary works are terrible and don't buy it,
9 but that is not a cognizable harm within the scope of this
10 rulemaking to their commercial interests.

11 MR. KASUNIC: Do you have any comments?

12 MR. MARKS: I just can't resist responding to the
13 last comment which is that none of what's at issue today or any
14 of the arguments that we are making today have any bearing or
15 any relation to the notion that we are trying to stop somebody
16 from saying a particular DVD title stinks, don't buy a
17 particular DVD title by AOL Time Warner or any other speech
18 element. Just when remarks like that are made, I can't not
19 respond to them.

20 MR. MILLER: May I just respond to that. If my
21 understanding is correct, the speakers from the Director's
22 Guild of America was making the argument that directors don't
23 want this exemption because Internet critics specifically might
24 alter it or use it in ways that the individual deems appropriate
25 but the directors do not. So I'm being responsive to that.

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1 Thank you.

2 MR. METALITZ: If I could just respond to the
3 first part of his answer about individual users. I'd have to go
4 back and look at the committee report, but I think Congress was
5 saying there that we need to look at what is the impact on the
6 availability of these works for non-infringing uses by
7 individuals. They're not necessarily talking about non-
8 infringing use by other entities. But that doesn't mean that if
9 one individual is harmed or suffers an adverse impact that
10 that's enough to constitute or to justify an exemption. I'm not
11 sure if that's what Mr. Miller was arguing or not, but I think
12 the fact that they use the term individual users doesn't
13 necessarily mean all you have to do is find one person who feels
14 that they're hurt and the exemption should be granted.

15 MR. KASUNIC: I don't think that's what you were
16 arguing.

17 MR. MILLER: No.

18 MS. DOUGLAS: The cause that Mr. Miller was saying
19 in his comment was that what you need to focus on is -- and I
20 suppose you say it in the first place -- I guess I'll just ask
21 it this way. Would motion picture producers be less willing to
22 make material available on DVDs if they knew that the
23 prohibition on the use of circumvention tools would not be in
24 force on the use as opposed to what happens after you let the
25 cat out of the bag? Does that make any sense?

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1 MR. METALITZ: I'm sorry. Could you repeat the
2 question?

3 MS. DOUGLAS: Would motion picture producers be
4 less willing to make material available on DVDs if they knew
5 that the prohibition on the use of circumvention tools would not
6 be in force?

7 MR. METALITZ: I think the answer to that question
8 is yes, that they would be less likely to make material
9 available on DVD if 1201(a)(1) were not applicable. Yes, I
10 think the Librarian has found that to be the case in general.
11 That doesn't mean it applies in every single instance and that
12 there can be no exemptions, but I think as a general rule, the
13 answer to your question would be yes, it would reduce the
14 incentive to make these works available.

15 MS. DOUGLAS: Okay. Yes, Mr. Miller.

16 MR. MILLER: I'd just like to say the question why
17 would it reduce these incentives? The DGA has argued that among
18 the reasons that it would is because directors don't like having
19 people alter their work or criticize it or parody it, and that
20 is not a cognizable harm within the scope of this rulemaking
21 body. The other possible harm that I can imagine which the DGA
22 has offered is that it harms the commercial interests, that they
23 will not get the money from this, and it's hard for me to see
24 how permitting non-infringing uses under the interpretation of
25 1201(d) that we've offered would result in any cognizable

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1 commercial harm to their interests. It's not enough for them to
2 say that they will be harmed. They should state how and
3 precisely where within the scope of this rulemaking that harm
4 applies, and they have not made that case.

5 MR. METALITZ: I think I have to rise to the
6 defense of the DGA here. My problem here goes to the whole
7 thrust of this argument of ancillary works because I can't avoid
8 the suspicion that the reason we're hearing so much about
9 ancillary works is because the Copyright Office said in footnote
10 13 that maybe that's the thing that came closest to arguing for
11 an exemption. Virtually everything that Mr. Miller said in his
12 filing and in his testimony today could be applicable as well to
13 the principal work, principal motion picture that's on the DVD.

14
15 One difference here is that in these ancillary
16 works there tends to be more of an opportunity for the director
17 to speak with his or her own voice and to present something. By
18 the way, there's also more work for directors to direct making
19 of documentaries which many of these have and have a separate
20 director from the director of the principal film. So there's
21 obviously an economic interest here in the creation of these
22 works and these ancillary works wouldn't even exist were it not
23 for this format in many cases. So I just don't see where the
24 economic interest as well as the other interests of the DGA are
25 not very deeply implicated here.

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1 So ancillary works are a target of opportunity
2 here, I think is what I'm hearing. Most of the arguments again
3 that have been made would apply just as much to the principal
4 motion picture. The problem is you rather forcefully closed the
5 door on that in the year 2000 and you left the door open a crack
6 in 2003 and that's why we're hearing so much about these works
7 and there's such great interest in the directors.

8 MS. DOUGLAS: Yes, ma'am.

9 MS. GARMEZY: Could I just clarify for the record.
10 I did not say that directors felt that the reason they have
11 these great concerns about the Blogcritics is because they don't
12 like to be criticized. Clearly, directors are very used to
13 being criticized in print, on TV, in reviews, etcetera. I never
14 said that was the reason for any objection.

15 MS. DOUGLAS: Might even enhance the interest in
16 the movie itself. But that's certainly beside the point here.

17 We've heard a number of times that going back to
18 ancillary works, not talking about anybody's motives, that these
19 ancillary works are an additional bonus and that we really ought
20 not be considering ancillary works because consumers haven't
21 even suffered a diminution of material. In other words, this is
22 just gravy. So we're supposed to look back to 2000 and see what
23 material was available to the public and then see whether or not
24 that material has been diminished. What's wrong with that
25 analysis? What's wrong with saying well, this is just

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1 additional material that we wouldn't have had in the first
2 place?

3 MR. MILLER: Well, it's not clear to me
4 necessarily that the way you construe the statute is always to
5 look back to the year 2000. I think there are several different
6 ways to interpret the statute and I think it makes it clear that
7 the Congress did not intend to set the bar at the year 2000 and
8 any works that appear, new media forms, new forms of work that
9 could be put on DVDs or anything are suddenly just going to be
10 exempt because they never existed before and, of course, the
11 claim will always be well, they never would have existed without
12 DRM. Certainly Congress did not intend that.

13 So I think what we have to do is look at the
14 present and look at what the standard of the present is. Right
15 now the standard is that these works are going to be readily
16 available. DVDs are hardly issued without them. That in fact,
17 there's marketing for them, that people buy DVDs precisely
18 because its ancillary works are available. It's not simply
19 because of DRM. These ancillary works are on there, not because
20 of DRM necessarily but because the directors want it on there.
21 They want to explain more, they want to talk to their audience.

22
23 So we simply shouldn't just take it at face value
24 that well, these works would not exist without DRM. There's
25 plenty of reason and plenty of evidence to show that they would

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1 exist whether or not DRM was available or not.

2 Furthermore, again, I think that what Congress is
3 intending in this statute for statutory interpretation is to
4 look at where bar is at present when you make the ruling, not
5 necessarily what it was. I mean otherwise, a hundred years from
6 now, we'll be asking can we get an exemption for this wonderful
7 new media form of brain imaging? Well, brain imaging never
8 existed back in the year 2000. Therefore, it never would have
9 existed at the year end. Therefore, it shouldn't be considered.
10 So I think we need to set the bar at the present and the present
11 is that this is pretty standard and it's important.

12 Just quickly to address the issue of why we chose
13 ancillary works is because of their importance to commentary and
14 criticism. In the Library of Congress ruling, they said well,
15 they meet the burden closer on ancillary works because they're
16 not available on VHS as opposed to other stuff. But that's not
17 the argument I'm making. I'm making an argument about how
18 important they are to commentary and criticism and how that
19 really is key to understanding and working with the movies.

20 MS. DOUGLAS: Yes, Mr. Marks.

21 MR. MARKS: I just wanted to respond to the last
22 comment of Mr. Miller. One of the reasons why ancillary works
23 are made available on DVD, one of the reasons, is because with
24 that digital format and the ability to compress and place more
25 information on that format, there is room to place both a movie

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1 and the makings of these commentaries, these additional
2 ancillary works whereas VHS analog tape is often a struggle just
3 to fit the movie onto a single cassette. So it's very accurate,
4 I think, to say that the DVD format itself lends to the
5 inclusion of these ancillary works and that these ancillary
6 works are sort of a natural thing for movie studios to do to
7 make the DVD more attractive and to make it something that
8 consumers want to purchase because it's got these added bonus
9 materials. I agree with that completely.

10 Where I disagree with Mr. Miller is the premise
11 that it's not DRM that's the cause or that has any causal nexus
12 to the ancillary works because where I think he misses the point
13 is that but for -- and I really mean but for -- the availability
14 of CSS to be applied to protect motion picture content on DVDs,
15 none of the motion picture studios would have released their
16 movies on DVD in the first place. I know that from firsthand
17 personal knowledge from having negotiated for two years over the
18 CSS license agreement and even with CSS, several motion picture
19 studios were very reluctant to release the motion picture
20 content onto DVD because of the fear of piracy of releasing
21 their films on a digital format. So I can say with absolute
22 personal knowledge that but for the existence of DRM and CSS,
23 you would not have motion pictures released on the DVD format.

24 MR. MILLER: My only quick response to that is
25 that that was back in 1995 and I don't think we have to judge

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1 the but for by the standards of 1995. Otherwise, we'll be
2 trapped in a time warp where our laws becoming increasingly in
3 variance with the forward moving of cultured society.

4 MS. DOUGLAS: Thank you.

5 MS. PETERS: You have one last question. Right?

6 MR. TEPP: Yes. Thank you.

7 Very quick for anyone who wants to answer. Is
8 there an independent market for what we're calling ancillary
9 works?

10 MR. MARKS: Yes.

11 MR. CARSON: That's it?

12 MR. TEPP: That may be enough. Does anyone
13 disagree or want to add to it?

14 MR. METALITZ: An independent market for ancillary
15 works.

16 MR. TEPP: For the offset in the market values, I
17 mean they are a part of the value package.

18 MR. METALITZ: Independent market value?

19 MS. PETERS: Do you mean separate and apart from
20 the --

21 MR. TEPP: Separate and apart from --

22 MR. MARKS: Yes.

23 MS. PETERS: From UOB itself.

24 MR. MARKS: Yes. I can think of a specific
25 example in some of those on some of the films that we've

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1 released. I'm thinking back of Robin Hood, Prince of Thieves,
2 perhaps not our most notable work but there was a very popular
3 music video by Bryan Adams which we included in with the film
4 and I think clearly that that music video, for example, in and
5 of itself, has market value and could be sold independently. So
6 I would say yes.

7 MR. TEPP: And what would the effect on that
8 market value or market be of the proposed exemption?

9 MR. MILLER: I would say it would have zero effect
10 on the market value of these works because again, I believe in
11 the interpretation of 1201(b) which holds that only non-
12 infringing uses and non-fringing uses, as I said before, are
13 going to have no commercial harm or that commercial harm is
14 outweighed by other interests in the fair use analysis of the
15 four part test.

16 MR. TEPP: Anyone disagree?

17 MR. METALITZ: Yes. I would disagree because I
18 think if you establish something as having independent market
19 value, you're basically saying it's got the same kind of value
20 as Robin Hood, Prince of Thieves. It may not be the same dollar
21 amount but it has the same type of value and I think for all the
22 reasons that Mr. Marks has already gone through, CSS and the
23 ability to prevent circumvention of CSS is critical to making
24 those works available.

25 MS. PETERS: We're going to take a 10 minute break

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1 in which people can use any facilities that they need and then
2 the final panel.

3 (Whereupon, off the record for a 10 minute recess
4 at 3:46 p.m.)

5 MS. PETERS: The last panel of the last day of
6 hearings 2003 rulemaking proceeding is a historic event and
7 we'll celebrate. This one is region coding. All of the
8 witnesses have been previously introduced so I'm not going to go
9 there. Can I turn to this side of the table and who wants to go
10 first?

11 MS. HINZE: I can.

12 MS. PETERS: Okay. EFF. Speak up, Gwen.

13 MS. HINZE: Thank you. Thank you for the
14 supportive environment. EFF is requesting an exemption for a
15 limited class of DVDs, foreign audiovisual works and movies that
16 are released on non-Region One DVD format and are not otherwise
17 available on DVD in the United States. Region coding controls
18 on DVDs currently preclude American consumers from playing
19 foreign movies they have lawfully acquired and lawfully imported
20 into the United States on their U.S. DVD players.

21 The exemption we have proposed would permit
22 consumers to play these movies. Playback of a DVD is a non-
23 infringing use of these audiovisual works since private
24 performance is not one of the exclusive rights granted to
25 copyright owners by Section 106 of the copyright statute. As

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1 Mr. Attaway of the Motion Picture Association of America stated
2 in his testimony before this rulemaking on May 2, t
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1 animé works. In terms of actual harm, I note that 124 consumers
2 have filed comments in support of this exemption describing
3 their inability to play numerous lawfully acquired DVD movies
4 that are not available in a Region 1 format. These comments
5 constitute detailed firsthand evidence of non-infringing uses
6 that American consumers are currently prohibited from making due
7 to region coding access controls.

8 The Joint Commenters also argue that in order to
9 meet the substantial adverse impact standard of proof of this
10 exemption, EFF is required to show the numbers of foreign movies
11 released on DVDs that will not play on Region 1 DVD players.
12 This would require a showing for every foreign country of a
13 number of foreign movies that are never released in the United
14 States and a showing that they are released solely on DVDs that
15 are not coded either one or all or zero. If this were the
16 standard of proof that an exemption proponent had to meet, it
17 would negate Congress's intent in establishing this rulemaking
18 process, namely as the Commerce Committee report stated, "To
19 provide a fair, safe mechanism to protect consumers' non-
20 infringing uses."

21 It would also raise serious questions about the
22 procedural fairness of this process. The only parties who could
23 physically gather that data are the parties opposing this
24 exemption. These parties have chosen not to disclose this data,
25 even though by doing so they could presumably refute our claims

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1 if the scope of people affected is as minimal as they suggest.

2 EFF submits that the data on the record in this
3 proceeding in EFF's comments and in the over 124 comments filed
4 by consumers is sufficient to prove a present substantial
5 adverse impact on users' ability to make non-infringing uses of
6 their lawfully applied works.

7 Our opponents also argue that this exemption
8 should not be granted because American consumers can acquire a
9 VHS version of the relevant foreign movie. As DVDs continue to
10 overtake VHS as the preferred movie distribution medium, this is
11 not a feasible alternative address the likely harm to consumers
12 in the next three years.

13 Previously we have provided some information, a
14 printout of the slides that we showed in our previous panel that
15 we would otherwise show but will not due to time constraints
16 this afternoon which addresses the volume of sales of DVDs
17 versus VHS. As I noted in the previous panel, DVD sales
18 overtook VHS sales in early 2002 and DVD rentals overtook VHS
19 rentals in March 2003. The availability of VHS sources of these
20 works is likely to decrease in the next three years for two
21 reasons.

22 First, as in the United States, foreign movies are
23 increasingly being released only or predominantly on DVD and
24 retailers are ceasing to carry or reducing their stock of VHS
25 tapes in response to consumer demand. For instance, our

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1 submission cites the 2002 decision of Japanese animé company
2 Bandar Entertainment to release only on DVD. And as previously
3 quoted in the slide from this morning, Marylou Bono, Vice
4 President of Home Video Marketing for Warner Strategic Marketing
5 in the United States stated that Warner decided in January of
6 this year to phase out VHS releases because, as she put it, "VHS
7 is dead."

8 I'd also point out on the slide that we showed
9 this morning that Circuit City ceased carrying VHS tapes in June
10 2002 and in September 2001 Blockbuster reduced their stock of
11 VHS tapes by 25 percent.

12 The second reason is as VHS tapes degrade, the
13 existing stock of older works on VHS tapes will diminish.
14 Unless an exemption is granted to allow American consumers to
15 view their lawfully acquired DVDs, they will increasingly be
16 rolled off from the benefits of cultural exchange offered by
17 foreign movies.

18 The Joint Commenters second major argument this
19 exemption is that consumers are not actually denied access to
20 their lawfully obtained DVDs because they can purchase
21 alternative DVD players. There are two options available to
22 consumers here. First, consumers can buy a multi-region or all
23 region player. Apart from the fact that these are not easy to
24 find since neither amazon.com nor any of the five major U.S.
25 consumer electronic stores sell these any more, the Joint

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1 Commenters have taken the position in several lawsuits that
2 playing a DVD on one of these players violates Section 1201(a)
3 because it goes beyond the scope of the authority granted by a
4 copyright owner.

5 In the appellate brief in the Universal v.
6 Remeirdos case cited in our submission and most recently in
7 their May 2003 summary judgment papers in the pending 321
8 Studios litigation, the Motion Picture Association of America
9 and several of the movie studios have argued that the scope of
10 authority given to consumers is limited to playing the DVD on a
11 DVD CCA licensed DVD player. Since the DVD CCA's multi-tier
12 licensing system requires DVD players to respond to DVD's region
13 coding, multi-region players are not DVD CCA authorized and
14 playing a DVD on them therefore violates Section 1201, according
15 to the Motion Picture Association and its member studios.

16 I should note here that I was sincerely surprised
17 to see a statement by Mr. Attaway in his May 2 testimony
18 responding to a question from Mr. Carson which appeared to
19 present a completely contrary position to the public position
20 taken by MPAA and its members in the two lawsuits I've just
21 mentioned in relation to the construction of Section
22 1201(a)(3)(b). Assuming for a moment that the copyright owners
23 are still believing that the playing of a DVD on a multi-region
24 player violates Section 1201, which is what I understood this
25 morning's discussion to be, that leaves consumers with a second

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1 option of purchasing up to three region specific players from
2 the relevant foreign countries, paying associated shipping
3 costs, and purchasing a more expensive multi-standard television
4 or a PAL or TSCM to NTSC converter to overcome any questions
5 about incompatibility of broadcast standards and conversion of
6 electricity standards.

7 I'd like to make two points here. First, this is
8 a significant capital equipment cost to ask a consumer to bear.
9 Playback of a second and, more importantly, the consumers'
10 desire yes here is a non-infringing use. Playback of a DVD is
11 a private performance. It is not one of the exclusive rights
12 granted to copyright owners under Section 106 of the copyright
13 statute. It is also clearly lawful for consumers to import
14 foreign movies on DVD for personal, non-consumer use under
15 Section 602 of the copyright statute. On closer inspection
16 then, the Joint Commenters' arguments distill down to the claim
17 that it is appropriate to impose a significant cost burden on
18 American consumers to enjoy what is a non-infringing use of
19 lawfully acquired media in order to preserve an existing
20 marketing system for these works.

21 The third argument made by our opponents or by
22 some of our opponents against granting this exemption is that
23 the system of geographic region coding is part of the exclusive
24 right of distribution granted to copyright owners under Section
25 106 and, therefore, granting an exemption would violate this.

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1 This is not accurate. Copyright law does not grant copyright
2 owners unfettered control over distribution. The copyright
3 statute recognizes a number of limitations on copyright owners
4 distribution right. Two of these limitations, the first sale
5 doctrine which is recognized in Section 109 and the right of
6 personal importation recognized in Section 602 for noncommercial
7 purposes both support the exemption we have sought here. This
8 exemption would only extend to DVDs that consumers are lawfully
9 allowed to import into the United States under Section 602 of
10 the copyright statute.

11 The Joint Commenters have argued in relation to
12 one of the examples cited by EFF that allowing consumers to play
13 a lawfully imported DVD movie that was currently in U.S.
14 theatrical release would undermine box office profits. However,
15 this is already permitted by Section 602 of the copyright law.
16 The same argument could equally be leveled at imported foreign
17 VHS tape movies. Congress has already drawn the balance in
18 favor of permitting exactly this behavior and it should not make
19 a difference whether the consumer is trying to play a foreign
20 movie purchased on DVD or VHS.

21 Nothing in the legislative history of the digital
22 -- copyright act indicates that Congress intended to override
23 Section 602 or Section 109 or otherwise to extend the rights
24 granted to copyright owners under Section 106 by enacting
25 Section 1201.

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1 The fourth argument made by opponents of this
2 exemption is a claim to user facilitation and a corresponding
3 warning of reduced availability should an exemption be granted
4 for region coded works. The Joint Commenters state at pages 26
5 and 27 of their comments that the use of region coding helps
6 preserve the market opportunity for U.S. distributors to make
7 foreign works available and that foreign titles would become far
8 more widely available to American viewers through U.S.
9 distributors, and I quote, "so long as a distributors can be
10 assured that region coding access controls are respected in the
11 United States." End of quote. The same argument was made by
12 testifiers at the May 2 hearings in this proceeding.

13 In response I'd like to point out first that we
14 are seeking this exemption precisely because many foreign movies
15 are not and have not been released in the United States despite
16 the existence of region coding on DVDs and CSS for the last
17 three years. U.S. copyright owners can control the scope of
18 this exemption by choosing to release a foreign work in region
19 one. Second, there is no sense in which this exemption would
20 deprive U.S. distributors of an economic benefit. U.S.
21 distributors have not lost any profits because the work was not
22 available in the United States. Copyright owners' foreign
23 distributors have also not been harmed economically because they
24 have received the designated purchase price.

25 Third, the threat that copyright owners will not

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1 release content unless there is absolute legal protection for
2 technological protection measures is not actually borne out by
3 the last three years experience of the content scramble system
4 protection on DVDs. Prior to the introduction of the DVD
5 format, copyright owners argued that their required legal
6 protection for technological protection measures to overcome the
7 threat of illegal copying and to provide incentives to make
8 digital content available. As a result, content released by the
9 major motion pictures on DVD has been protected by CSS since
10 1998. However, as I mentioned in this morning's hearings, CSS
11 has not been effective at preventing large scale commercial
12 reproduction of DVDs. It was defeated almost immediately by a
13 group of hobbyists and the tools for circumventing CSS are
14 widely available on the Internet and from commercial vendors in
15 the United States.

16 As the MPAA frequently points out, large numbers
17 of unauthorized copies of motion pictures are widely available
18 for download on the Internet. Given the copyright owners stated
19 concerns about the need for protection against digital piracy
20 you would expect the copyright owners to have abandoned, at
21 least in content, on CSS unprotected DVDs. But exactly the
22 opposite is true. DVD sales overtook VHS sales in early 2002,
23 as I mentioned, and Warner Home Video is moving to release
24 movies only on DVD.

25 My point here is that motion picture studios have

1 continued to make their copyrighted works available on DVD,
2 notwithstanding the ease of defeating CSS, granting an exemption
3 for circumvention for a limited class of movies owned by
4 consumers who have paid for these works and are locally imported
5 into the United States will not have any bearing on copyright,
6 on decisions to make content available.

7 Finally, I'd like to emphasize that this limited
8 exemption does not open the floodgates to widespread copyright
9 infringement. First, the exemption is limited to non-infringing
10 play back of movies and does not immunize infringing behavior.
11 It doesn't include reproduction.

12 Second, Section 1201(a)(1)(d) makes clear, any
13 exemption granted by the Librarian of Congress cannot be
14 interpreted to authorize infringing behavior. If anyone were to
15 go beyond the scope of the exemption and make an unauthorized
16 reproduction or distribution of the DVD work, copyright owners
17 would continue to have the ability to bring suit for
18 infringement and the full range of remedies currently available
19 to them today under copyright law, and based on what we have
20 discussed this afternoon, it would be likely they are in
21 violation of 1201(a) in that situation.

22 Thank you very much.

23 MS. PETERS: Thank you.

24 Any opening testimony?

25 MS. GROSS: Mia will present the testimony.

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1 MS. PETERS: Okay.

2 MS. GARLICK: Good afternoon. IP Justice welcomes
3 this opportunity to testify to the Copyright Office about the
4 adverse impacts on the ability of users to enjoy fair access to
5 DVDs.

6 Region code restrictions significantly interfere
7 with non-infringing access to and post sale uses of DVDs. The
8 magnitude of this harm warrants the recommendation by the
9 Copyright Office of the exemption proposed by IP Justice in its
10 submission comments.

11 We wish to make initially four procedural
12 comments, and then we'll make four substantive comments.
13 Although we have touched on these procedural comments earlier
14 today, we feel it is important to remind the Copyright Office of
15 these points in consideration of the region code exemption,
16 because they again impact on the substantive findings and also
17 they address the reasons given by the Copyright Office for
18 rejecting such an exemption during the first rulemaking.

19 Firstly, IP Justice would like to again remind the
20 Copyright Office that its obligations in this rulemaking are to
21 the users. Moreover, the Office's duty is to ensure access to
22 works by users, not the availability of works by copyright
23 owners.

24 Congress introduced the anti-circumvention
25 measures to encourage copyright owners to make their works

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1 available digitally, or in the words of the last rulemaking,
2 "The measures were designed to be use facilitating." The
3 responsibility of the Copyright Office in this rulemaking is not
4 to repeat Congress' logic, but to protect users and ensure
5 access to individual DVDs, not the availability of DVDs
6 generally.

7 Second, the structure of this rulemaking, as
8 interpreted by the Copyright Office, effectively precludes it
9 from achieving its purpose. The Copyright Office insists that
10 exemptions be defined according to class of work, adequate
11 protection of user rights requires that exemptions be drafted
12 with reference to the type of user and circumstances of use.
13 For example, if a person imports a DVD for personal use, they
14 are not infringing a on a copyright owner's right to control
15 imports, but if the person imports commercial quantities of DVDs
16 they are.

17 Third, the Copyright Office has set an impossibly
18 high evidentiary standard, given it requires evidence of
19 substantial harm or likelihood of harm. However, the adverse
20 effects experienced by users are likely of their very nature to
21 be individual and personal, difficult to measure and quantify.
22 For example, it is extremely difficult to measure all of the
23 Americans who travel each year and purchase DVDs overseas
24 intending to play it when they get home. This difficulty does
25 not detract from the prevalence of such harm, it does mean that

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1 the Copyright Office should accept as evidence news reports and
2 principal analyses of likely harm which take account of the
3 interaction of the anti-circumvention measures with the
4 limitations and exceptions for users under traditional copyright
5 principles.

6 Fourth and finally, IP Justice urges the Copyright
7 Office to be mindful in conducting the second rulemaking of two
8 important facts. Firstly, the first rulemaking was conducted
9 when the prohibition on active circumvention had not yet taken
10 effect, and three years later the trend of digital lockup is
11 more apparent. Thus, the extent of the impact on users must be
12 greater because the anti-circumvention measures are broader than
13 copyright.

14 The second important factor is that the impact of
15 any exemption will necessarily be limited. This is something
16 that the Copyright Office failed to take account of in the first
17 rulemaking, circumvention of access controls are, by their
18 nature, inherently non-commercial and personal, and as we've
19 discussed earlier today, that arises from the fact that in order
20 to be take advantage of an exemptive act of access
21 circumvention, which is a bit of a tongue twister, a person must
22 be highly technically literate.

23 Turning now to our substantive comments, of which
24 we have four. I would firstly like to note that it is extremely
25 important that the Copyright Office act now and grant the

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1 exemption before users are misled into thinking that they do not
2 have the right to watch foreign purchased movies on U.S. coded
3 DVD players, and before users effectively lose the right to
4 watch foreign purchased movies.

5 Section 603(a) of the Copyright Act specifically
6 carves importation of movies for personal, non-commercial use
7 out of the copyright owners monopoly. Access controls should
8 not be allowed to eliminate this consumer right and prevent
9 users from taking advantage of this intentional statutory carve
10 out.

11 Whatever a user doesn't know to use they will
12 lose. Failure to grant an exemption now will set this process
13 of mis-education in train irreversibly and will render Section
14 603(a) meaningless for DVDs.

15 In its first rulemaking, the Copyright Office
16 incorrectly relied on the fact that by purchasing additional
17 equipment a user could watch an overseas coded DVD. This misses
18 the point. Such an attitude entrenches a de facto extension of
19 the copyright owners right to dictate technology. Only the most
20 determined and informed consumers are likely to do so, and then
21 only if they have the disposable income to buy the necessary
22 equipment. This precludes opportunity for demand for and
23 competition in technology design. This overturns Section
24 603(a)'s right of personal importation, since it effectively
25 bars such activity. In essence, DVD copyright owners are again

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1 dictating the technology preferences over consumers and usurping
2 individual rights in the digital media they purchase.

3 Second, we would note that region coding impedes
4 cultural exchange. At a time when technology could enable
5 greater cultural exchange through the ability of the American
6 consumers to purchase foreign films through foreign websites,
7 region coding enforces cultural separation. If people are
8 forbidden to bypass these controls we cut ourselves off from the
9 opportunity for worldwide cultural exchange.

10 The technology has the potential to collapse the
11 distance between people, but the business model of DVD copyright
12 owners seeks to erect artificial walls in order to receive
13 extreme maximized profits.

14 The Copyright Office should not assist in this
15 process at the expense of users. The framers originally
16 intended copyright to facilitate cultural exchange, but after
17 centuries of manipulation extending both the scope and breadth
18 of copyright it is now being used to justify perpetuating
19 cultural separation.

20 Third, there is no evidence that the movie
21 industry will suffer harm as a result of a region coding
22 exemption. Just because profits are not maximized in the
23 extreme does not remove the incentives for copyright owners to
24 make content available.

25 In addition to the highly personal and non-

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1 commercial nature of access circumvention mentioned above, it is
2 the fact that this exemption will expand the global market for
3 DVDs, rather than the market simply being domestic it will be
4 international. Each person who takes advantage of the region
5 coding exemptions will be a legitimate purchaser in that global
6 market.

7 Fourth and finally, region coding defeats the
8 first sale doctrine as it applies to DVDs. Without a region
9 coding exemption there is no resale market for foreign purchased
10 DVDs in the U.S. Similarly, there can be no overseas resale
11 market for American DVDs.

12 At exactly the time when the internet opens up the
13 opportunity for people to sell their second-hand DVDs throughout
14 the global village, region coding segments and shrinks the
15 village bazaar. This will further discourage people from
16 purchasing DVDs overseas once they experience these
17 restrictions. It further entrenches the copyright owner's
18 ability to control private enjoyment of all DVDs. It is the
19 user's right to access and freely dispose of DVDs wherever
20 purchased, which the Copyright Office has a duty to safeguard.

21 Thank you.

22 MS. PETERS: Thank you.

23 On this side, who wants to go first?

24 MR. MARKS: Again, I don't have any formal
25 introductory remarks for this part of the panel. Let me just

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1 try and respond by the following.

2 First of all, in the rulemaking conducted in 2000,
3 the Copyright Office and the Librarian did find that there were
4 legitimate reasons for the motion picture companies to employ
5 regional coding on DVD discs, and I would just like to summarize
6 again some of those rationales for the employment of regional
7 coding.

8 One is that the rights to exploit a film on video
9 and DVD are frequently granted to different parties in different
10 territories, and, therefore, regional coding assists in the
11 enforcement of this legitimate licensing of copyrights and of
12 distribution rights. And, this particularly happens quite
13 frequently in the motion picture industry, particularly for
14 independent motion picture producers where rights are often
15 sold, pre-sold, before the first frame of film is ever shot, and
16 those rights are often sold to different third parties for
17 exploitations in different territories. So, regional coding
18 really assists in the proper exploitation of those distribution
19 rights.

20 A second reason, and one that the Copyright Office
21 and Librarian refer to in the rulemaking, is the fact that there
22 are staggered release windows for the exploitation of a film
23 through ~~through~~ windows of theatrical, home video, DVD, pay for
24

25

1 So, the regional coding on DVD helps preserve the integrity of
2 those windows so that, for example, if a film has not yet been
3 released in Europe in theaters, but is already on DVD in the
4 United States, that DVDs don't just get simply transshipped to
5 Europe playable and, therefore, destroy the theatrical window of
6 distribution.

7 A further reason is the fact that as we distribute
8 our movies in various territories overseas we have to comply
9 with certain local censorship or local version requirements, and
10 the regional coding helps us to make sure we are complying with
11 those requirements.

12 And finally, there are variations in television
13 formats, NTSC, and PAL, and CCAM, which exist, and the regional
14 coding helps ensure that the discs that are distributed in the
15 regions with those formats are playable on television sets.

16 And, I just want to stop there for a moment,
17 because even if you have, for example, acquired a DVD of a
18 French movie in France, and even if hypothetically you can
19 circumvent the regional coding of that movie to play it on your
20 DVD player, if the movie on the DVD has been placed on that
21 French DVD only in PAL or CCAM format, and if your DVD player
22 does not have the ability to transcode the PAL format into NTSC,
23 it will not necessarily play on your television set.

24 CSS has nothing to do with that. CSS has no
25 requirements as to whether a particular regional DVD player can

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1 or cannot have the ability to transcode PAL into NTSC and vice
2 versa, but the fact of the matter is, some DVD players do and
3 some DVD players don't. So, just defeating regional coding in
4 and of itself doesn't necessarily guarantee that the disc is
5 going to play on the particular DVD player that you have in your
6 home.

7 On the effect of regional coding in general, that
8 was part of the reason I wanted to emphasize the growth in
9 foreign titles that have occurred in terms of their distribution
10 in the United States. Far from there being a paucity of such
11 titles, there's been an actual threefold growth in terms of just
12 foreign language feature films, and I believe almost a fivefold
13 growth in terms of anime titles that are released now and
14 distributed in the U.S. market on Region 1.

15 I know Ms. Hinze was speaking about Bande, that
16 Bande was, perhaps, going to stop releasing its anime titles on
17 VHS, but the fact is, Bande, which is included with Pioneer, in
18 this description of the suppliers who supply the U.S. market
19 with anime on DVD, Pioneer, including Bande, is actually the
20 number one supplier of anime titles to the U.S. market on DVD,
21 and currently they are supplying 427 titles. So, I think, in
22 fact, regional coding is not the end result that it's depriving
23 U.S. users and consumers of foreign titles, there have been a
24 dramatic increase in those foreign titles distributed in the
25 U.S. market.

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1 Finally, for me, one of the big reasons here about
2 why we should not seek to create an exemption to defeat regional
3 coding to allow people who are individually purchasing foreign
4 DVDs abroad and bringing them home to be able to watch them, is
5 because I think there is a less risky and less burdensome
6 alternative which is, not only perhaps the purchase of a DVD
7 player which may cost \$100, and which legitimately you may have
8 to import or purchase off the internet, but the fact that you
9 can also do it via a DVD ROM drive, and any DVD ROM drive that
10 is purchased the regional coding, even if you buy that DVD ROM
11 drive here in the United States, and it's coded for Region 1,
12 the CSS license allows, and the DVD ROM drive facilitates
13 consumers being able to reset the regional code five times.

14 And, the way it works, and I apologize because
15 it's a little bit complicated, the consumer can set it five
16 times. After the fifth time that they've reset it, they do have
17 an ability to reset it again, but they have to bring the drive
18 to an authorized dealer or an authorized service representative,
19 who can then authorize an additional set of five changes, and
20 then they can bring it back again for a second, for a third,
21 fourth, and fifth set of authorized changes. So, you can change
22 it 25 times in total, but you have to go back for each set of
23 five. You only get the first five when you buy the ROM drive
24 itself.

25 But, the point is, is if you are - some of the

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1 commentaries I've read, I believe one of them was, was it David
2 Miller - David Carroll, he kept on referring, for example, to
3 Japanese titles. He referred to no other titles but Japanese
4 titles. All that would require him to do would be to purchase
5 a \$40 DVD ROM drive, set it to Region 2, which he could do
6 himself, then he's set, he can view all of those Japanese Region
7 2 coded titles here in the U.S. And, it seems to me that if the
8 users have enough disposable income to be traveling abroad to
9 acquire titles to bring back into the United States, it's not
10 very burdensome to ask them to spend \$50 to buy a ROM disc to
11 enable their viewing of those titles, particularly, now when the
12 players and the ROM drives cost no more than maybe two, three or
13 four DVD titles in and of itself.

14 I wanted to also just touch briefly on the Indian
15 language film issue. This had come up in the prior rulemaking,
16 when I made an inquiry through Warner Home Video, where we made
17 inquiries into the Indian market. The information that we were
18 given was that Indian films are, when they are released on DVD
19 are generally coded all region, multi-region, so that they are
20 playable here in the U.S.

21 Interestingly, in the DVD release report, which is
22 where I've gathered all these facts and figures about the number
23 of foreign language feature films that are released on DVD, none
24 are listed for the Indian language. Apparently, there are no
25 U.S. distributors who are in the market selling Indian language

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1 DVD titles for the U.S. market. So, you have Chinese, French,
2 Spanish, Japanese, Italian, German, Russian, Korean, Hebrew,
3 Portugese, but no Indian foreign language titles.

4 However, I went on to Netflix, which I don't know
5 if the panel is familiar with Netflix, but Netflix is an
6 internet-based rental service for DVDs. It is a legitimate
7 service. Netflix purchases authorized, you know, DVDs, and I
8 don't know, I think they only rent DVDs, I'm not - actually, I'm
9 not positive about whether they deviate, but I believe they only
10 do DVD rentals. A subscriber pays, I believe it's \$20 a month,
11 and they are able to get three DVDs at a time, request titles,
12 get three DVDs at a time. They are mailed to them with a self-
13 addressed stamped mailer to return the discs, and when they
14 return the discs they get their next three titles. And, it's a
15 very, very popular service. Everybody I know who uses it
16 absolutely loves it.

17 I went on to Netflix to see if there were any
18 Indian language titles, film titles available, and there are, in
19 fact, over 380 Indian language film titles available. I cannot
20 say here that they, with absolute certainty, that they are
21 playable on Region 1 DVD players for the U.S., but because
22 Netflix is a service that serves the U.S. market my presumption
23 is that, in fact, they are playable. We plan to - I mean, we'll
24 probably subscribe, order some, try them on a DVD player to just
25 check it out. I actually sent an e-mail to the Netflix folks

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1 saying, gee, I'm interested in subscribing and only have a
2 Region 1, you know, DVD player, will these Indian foreign
3 language titles that you are making available, will they play on
4 it, I didn't get a response. But, I think it's important to try
5 and test that out.

6 All that is to say is that I do not see regional
7 coding as a big impediment to this cultural exchange and to the
8 growth of foreign language product and titles being made
9 available in the U.S. market, and I fear that if circumvention
10 of region coding is permitted what it may do is allow both
11 people who are very sophisticated and know how to defeat
12 regional coding to be able to do so with respect to their titles
13 that they buy abroad, but the net effect may be that it
14 discourages distribution of the titles by U.S. distributors here
15 in the market, and the net effect could be actually less access
16 to foreign language works than more.

17 MS. PETERS: Thank you.

18 Mr. Metalitz.

19 MR. METALITZ: Thank you, and before the hearing
20 draws to a close I just want to take this opportunity to thank
21 the members of the panel for your attention, your consideration
22 of our views, and the questions that you've posed to us, and
23 also to your fortitude as I speak at 4:30 p.m., on the last day
24 of the hearings.

25 Just briefly on the regional coding issue, in the

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1 decision or recommendation that you rendered in the year 2000,
2 and that was approved by the Librarian, there were really four
3 main points, and you actually discussed this issue in some
4 detail. First, you concluded that regional coding on DVDs is an
5 access control. Second, you concluded that it encourages the
6 distribution and availability of DVD titles in the United
7 States. Third, you characterized the problem of - or rather,
8 the call to circumvent regional coding as confined to a
9 relatively small number of users. And fourth, you noted that
10 there are options available for those users and you listed VHS
11 resetting the regional coding on the DVD player, and obtaining
12 an out-of-region player or player set, where it could be a ROM
13 drive set, to a region other than Region 1.

14 I would submit to you that your first two
15 conclusions remain just as true today as they were three years
16 ago, and Mr. Marks has already talked about some of the reasons
17 for regional coding.

18 Your third point, I think the evidence is that
19 this, perhaps, is even a smaller problem than it was three years
20 ago, or rather it affects fewer people, because of for the very
21 reason that Mr. Marks cited, the growth, quite impressive
22 growth, in the number of foreign titles released in the United
23 States on DVD, and particularly strong growth in the area that
24 I think on this record right now is most documented, and that
25 has to do with Japanese anime titles. Some of the submitters

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1 have given you a wealth of examples of Japanese anime titles
2 which they wish to circumvent regional coding, but I think we
3 also have evidence now that there's been a dramatic growth in
4 the licensed authorized distribution of anime titles in formats
5 that will play on Region 1 players. So, I think that has to be
6 taken into account.

7 And, on your fourth point, as to the options that
8 are available, I think it is definitely a - those options are
9 more available today than they were two and a half or three
10 years ago. VHS is still available in many cases. I don't
11 gainsay the evidence that VHS is declining, but as I said
12 earlier today I think reports of its demise are greatly
13 exaggerated and in many cases it will be an option.

14 Second, the regional code resetting function that
15 Mr. Marks talked about remains available, and I do want to take
16 issue with the characterization that the joint commenters have
17 ever said that obtaining a multi-region player, a player that's
18 been modified without the authorization, or at least potentially
19 in violation of the obligations of the distributors, to play
20 DVDs from any region, I don't believe we've ever suggested that
21 that's an option because we believe, at least in the United
22 States, that trafficking in that is probably a violation of
23 1201.

24 In any case, I've gone back and looked at my
25 submission, and I don't believe we have ever said that, so I'm

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1 not sure, perhaps, Ms. Hinze was talking about one of the other
2 comments.

3 And finally, the option of purchasing an out-of-
4 region player, a player that's set to Region 2 if you are
5 interested in the Japanese titles, or whatever region you are
6 most interested in, I think as Mr. Marks has already pointed
7 out, the cost of that is much less than it was a few years ago.
8 If you can solve this problem by buying a \$40 or \$50 piece of
9 equipment and then using it indefinitely to play these titles,
10 it's hard to see the substantial adverse impact on your ability
11 to play titles that may themselves cost almost that much for
12 each individual one, or close to it.

13 I think looking at the congressional goals here in
14 the context of regional coding, if the congressional goal is to
15 increase the availability for non-infringing uses of, in this
16 case, foreign titles, anime titles and so forth, on DVD, there
17 are really two models to choose from here. One is the model
18 that the proponents of the exemption argue for, I would call
19 that the drip drip model, you can bring in these titles one at
20 a time under Section 602(a) of the Copyright Act, which we don't
21 have any problem with, run off imports, and then you can take
22 them home and on your Region 1 player you can circumvent the
23 regional coding, this would be the effect of the exemption if
24 it's granted, and then you can watch these titles, anime titles
25 or other foreign titles.

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1 And, if you have the connections to either go
2 overseas, or are savvy enough to buy from overseas, and you know
3 how to circumvent this control, then you'll be able to achieve
4 this objective. That's the drip drip approach.

5 The alternative approach is what I think we are
6 seeing now, which is at least building up the pressure so we get
7 an honest trickle of these titles into the United States, and
8 the way you do that is to attract U.S. distributors, to
9 encourage people to take on, or rather entities to step in and
10 distribute these titles to people that want to watch them on
11 Region 1 players, get Region 1 titles and distribute them in the
12 United States.

13 Region coding is very important to achieving the
14 honest trickle solution, because if you are someone
15 contemplating being a distributor for a Japanese title, or
16 Indian title, or another foreign title in the United States,
17 it's certainly more attractive if, in fact, you are only
18 competing against the drip drip, you are only competing against
19 people that are able to circumvent. In other words, your market
20 is there, except for a few isolated cases, a very small niche of
21 people that are maybe circumventing, or illegally bringing these
22 in under 602(a).

23 So again, if the goal is to encourage the
24 availability, increase the availability in the United States,
25 you want to have a system that encourages the creation of

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1 authorized distribution relationships, regional coding helps to
2 do that as it preserves the market in the United States. And,
3 allowing circumvention of regional coding would discourage that.

4 If the anime market is as big as many of the
5 submitters say it is, I think it will prove attractive and I
6 think we already see evidence that it is proving attractive to
7 U.S. distributors.

8 Now, I can't say this based on personal knowledge,
9 we are shadow boxing a little bit here, I have to say, because
10 these decisions are not made by members of the Motion Picture
11 Association, or of AFMA for the most part, they are made by the
12 producers of Japanese anime titles or of Indian producers, and
13 so we don't have - this is not a situation necessarily where we
14 have all of this information, and before I attract a question
15 from Mr. Carson as to whether my grade and evidence was better
16 than Steve Marks grade and evidence, which I'll take the 5th
17 Amendment on, I don't know that we have this information, but as
18 I say, we can certainly try to obtain it, but I think the
19 evidence that Mr. Marks has pointed to here, that Dean Marks has
20 pointed to, shows that there's a robust market for - there are
21 an increased number of distributors of Japanese titles, foreign
22 titles generally, and Netflix is getting them from somewhere and
23 sending them to customers all over the United States, and I have
24 to presume that those Indian titles are playable on Region 1
25 players.

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1 Before I conclude, I want to just say a word about
2 the application on the regional coding issue for video games,
3 especially console games, and I think it's easy to confuse the
4 issues here but they are somewhat distinct. It's easy to
5 confuse them first because some of the reasons for regional
6 coding in the audio visual area, the film area, also apply in
7 the video game area, such as the regional status of licensing
8 and the need for localization and so forth. The video game
9 industry doesn't really have the windows issue, the time-related
10 windows issue, at least not to the extent that the movie
11 industry does, and it doesn't have the PAL, CCAM and NTSC
12 issues, but otherwise the reasons are the same, and, to further
13 confuse matters, an increasing number of consoles can serve both
14 as DVD players for DVDs that have CSS, or that have the regional
15 coding that is compatible with CSS, and for video games that are
16 on DVD that are subject to a different kind of access control
17 and use a different kind of regional coding. The same machine
18 does both these things. So, it's a little bit confusing.

19 But, I think the analysis would be similar in this
20 case. I would cite one additional factor that militates against
21 - well, two additional factors that militate against recognizing
22 a regional coding circumvention exemption for video games. One
23 is that there's virtually no evidence in the record of the need
24 for it, as contrasted with, as I said, some of the very
25 extensive evidence you have about Japanese anime titles and

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1 other things in the film area. And second, in at least some of
2 the console systems the regional coding technology is very
3 tightly integrated with the platform specific access control
4 technology that's used that prevents the playing of pirate
5 games. And again, there is evidence in the record about this,
6 the statement from one commenter that the easiest way to
7 circumvent regional coding in video games would be in a manner
8 that also allows the playing of pirate games. They also have
9 some evidence from Sony Computer Entertainment of America that
10 one of the defendants in their cases said he tried to interest
11 people in a product that would only circumvent regional coding
12 and no one was interested. They really wanted to play the
13 pirate games. That's where the money was, and that's where the
14 demand was.

15 But, I think the practical result would be that if
16 an exemption were recognized in the console video game area for
17 this, it would very quickly mutate into circumvention, not just
18 of regional coding, but of access control generally. And, I'm
19 not really making a slippery slope argument here, I'm making
20 kind of a quick sand argument. I think if you put your foot
21 down in that area you will sink up to your hips very quickly,
22 because the technology is such that it doesn't make much sense
23 to circumvent regional coding without circumventing the entire
24 shebang. That, again, is another distinction I believe that you
25 should take into account here.

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1 Thank you very much.

2 MS. PETERS: Okay, thank you.

3 Let's start with you, Bob.

4 MR. KASUNIC: Mr. Metalitz, I've got another
5 question for you.

6 You said in, I think, the last session or in your
7 statement, that we said that CSS is an access control in our
8 last recommendation. The way you said that makes we wonder were
9 we wrong? Is that your position as well?

10 MR. METALITZ: Yes, CSS is an access control.

11 MR. KASUNIC: I guess region coding.

12 MR. METALITZ: Region coding, yes, is an access
13 control.

14 MR. KASUNIC: Okay.

15 So, everyone is in agreement that region coding is
16 an access control. Okay.

17 Regarding, this mostly is in terms of players, and
18 as a result of a follow-up question that we had going back in
19 time again to three years ago, a follow-up question we had about
20 exactly what was involved in the license.

21 And actually, before I go any further, is the
22 licenses available for DVD Copy Control Association and the
23 various licenses that we've been hearing about, or is that all
24 restricted information?

25 MR. MARKS: I believe, but it would be best to

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1 check with the DVD Copy Control Association itself, but I
2 believe that the licenses are available from the DVD Copy
3 Control Association on their website. You may have to send them
4 an e-mail, giving them, you know, contact information, before
5 they will send you a copy of the license, but I believe the
6 license itself, both from the - I'm trying to remember if there
7 is a separate content participant license for DVD, an adopter
8 license, I can't, frankly, remember for CSS, but I believe the
9 licenses themselves are available. The specification as to how
10 the technology works, there's both a procedural specification
11 and a more detailed technical specification, those are not
12 publicly available. You actually have to sign a license
13 agreement, as far as I know, before you get either the
14 procedural specification or the detailed technical
15 specification, but the documents are separate and I believe the
16 license agreement, in and of itself, is available.

17 I suggest if you want a complete accurate answer
18 to that question, that should be directed to the DVD Copy
19 Control Association, because they will know the best.

20 MR. KASUNIC: Okay, Gwen.

21 MS. HINZE: I appreciate you've already had
22 testimony on a number of these issues on May 2 from Mr.
23 Turnbull. My understanding is that the region playback control
24 provisions and your robustness rules are actually not a matter
25 of public record, and that they are actually - there's a claim

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1 to trade secret protection for the specifications, which
2 actually would clarify some of these issues.

3 So, the answer is, no, they are not publicly
4 available.

5 MR. MARKS: Yes, and I agree, and that's probably
6 the case. I was drawing a distinction between the license
7 agreements and the procedural specifications and technical
8 specifications. And so, yes, I believe the license agreements
9 themselves discuss the regional coding requirements, but the
10 certainly don't discuss how they are implemented.

11 MS. HINZE: I believe the relevant information is
12 in the robustness rules, which is not public information, but
13 I'm sure that the record from May 2, and the statements made by
14 Mr. Turnbull, will provide better information about that.

15 MR. KASUNIC: Well, we may have a follow-up
16 question then for Mr. Turnbull on that.

17 Regarding the letter, though, we had asked for
18 some follow-up information after the last hearings in Stanford,
19 and in response you stated that, "The CSS license contains no
20 prohibition on licensed manufacturers of playback devices from
21 selling any device in any country around the world. Thus, for
22 example, an equipment manufacturer that makes DVD players coded
23 for Region 1 is not prevented by the CSS license from selling
24 such Region 1 players in Europe, which is Region 2."

25 One question that comes up --

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1 MR. MARKS: I was just saying, that language
2 sounded familiar.

3 MR. KASUNIC: Oh, good.

4 MR. MARKS: Sorry.

5 MR. KASUNIC: I wasn't making it up.

6 MR. MARKS: Sorry.

7 MR. KASUNIC: Does the CSS license, and I think
8 we've sort of heard this, but does the CSS license permit
9 manufacturers to sell region free or all region players?

10 MR. MARKS: That I can say the CSS license does not
11 permit.

12 MR. KASUNIC: Okay.

13 Then, does that mean that Region 3 players are -
14 well then, they are unlicensed players to the extent they exist,
15 and I think it's safe to say that they do, and therefore have no
16 authority to circumvent CSS?

17 MR. MARKS: Let me give a little bit more detail on
18 that. First of all, because this can be a confusing area, I
19 wanted to before I answer your question back up a little bit,
20 because --

21 MR. KASUNIC: Just don't make it more confusing.

22 MR. MARKS: Pardon?

23 MR. KASUNIC: I said just don't make it more
24 confusing.

25 MR. MARKS: I'll try not to. I'll try not to, but

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1 I think it's important to draw the distinction, and I frankly
2 wanted to do this even to correct my esteemed colleague, Mr.
3 Metalitz. There are differences in the way you, under the CSS
4 license, regional coding is treated for DVD players, which are
5 the stand alone consumer electronic devices and the DVD ROM
6 drives, which are, basically, configured for computer use. For
7 the DVD players the regional coding is set and it is not
8 permitted to be adjusted by the consumers, it's supposed to set
9 in a robust way, such that the consumer cannot adjust the
10 regional code setting on a DVD player. That contrasted with a
11 DVD CSS license, DVD ROM drive, whereas I described there is an
12 ability for the consumer to reset the regional coding setting on
13 that.

14 So, I just wanted to make that point of
15 clarification.

16 On your question, specifically, that does the CSS
17 license permit the manufacturer of DVD players, CSS licensed DVD
18 players that are multi-region, the answer is no. What is then
19 the source of a lot of these players that actually are in the
20 marketplace, which are multi-region players, as far as I
21 understand it the majority source is players that leave the
22 manufacturing plant that are, in fact, properly manufactured in
23 compliance with the CSS license agreement, such that they are
24 set for a single region, and then the third party after market,
25 I don' even know what you would call them, but I will call them

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1 tamperers for the sake of this hearing, take those, purchase
2 those machines, reconfigure them so that they are multi-region,
3 and then resell them on the market, so that, in fact, for the
4 majority of activity which is occurring, which is causing these
5 devices to be region free instead of properly conforming to the
6 CSS license, that activity is being undertaken by third parties
7 who have no contractual privity with the DVD CCA and, therefore,
8 have no license obligations under the CSS license agreement.

9 MR. METALITZ: And, I stand corrected to the extent
10 that I suggested otherwise. I defer to Mr. Marks.

11 MS. HINZE: And, if I could just add for the sake
12 of clarifying for everybody here my statement, my statement to
13 the effect that the joint commenters had a position that
14 playback on a multi-region player was unauthorized under Section
15 1201 goes like this, (1) a multi-region player, for the reasons
16 that Mr. Marks has just identified, is a non-DVD CCA licensed
17 player, and I'm quoting here from the statement from the reply
18 brief of the plaintiff/appellants in the Remeirdos case, which
19 the short quote is, "Authorization by the studios upon ...,"
20 I'll add here, "... upon purchase of a DVD, has been limited to
21 accessing DVD content by authorized equipment. In other words,
22 playback of a DVD on a non-authorized player is a violation of
23 1201." That's my understanding.

24 MR. CARSON: What you just read didn't say to me at
25 all that it's a violation of 1201. That's your gloss on what

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1 they said, isn't it?

2 MS. HINZE: I'm reciting why I said that my
3 understanding of their position was that playback of a DVD on a
4 non-DVD CCA authorized player was a violation of 1201, I was
5 explaining my statement, based on the two pieces of information.

6 MR. METALITZ: Mr. Carson, if it helps, I wouldn't
7 disagree with that characterization. My concern that I raised
8 was that I thought that Ms. Hinze had said that in this
9 proceeding we had said that one option that's available to
10 people that want - it's in lieu of circumventing regional coding
11 was to acquire and use a multi-region DVD player.

12 MR. CARSON: Let me make sure I understand what you
13 just said. Are you saying that you agree that it's a violation
14 of 1201(a)(1) to use a multi-region player?

15 MR. METALITZ: Yes.

16 MR. CARSON: Okay. Okay, good, great. Now we
17 understand it.

18 MR. MARKS: If it helps for the record, I agree
19 too.

20 MS. HINZE: I would just like to clarify.

21 MR. CARSON: Please.

22 MS. HINZE: My agreement was agreement that was
23 what - that was the proposition I was making, not that I agree
24 with that legal composition, but that's my understanding.

25 MR. MARKS: No, that's understood, and I thought,

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1 I don't know if this is helpful, but I thought it might, you
2 know, and maybe I'm trying to do a preemptive strike against Mr.
3 Carson here and I'm sure it won't work, I'm sure it won't work,
4 but let me just run through, at least in my mind, my analysis as
5 to why I believe that the use of a multi-region player can
6 constitute a violation of 1201(a)(1), and my analysis goes as
7 follows, is that 1201(a)(1) is a prohibition on circumvention
8 conduct. I believe that circumvention conduct includes conduct
9 that is based on the use of a circumvention device, even if that
10 circumvention device is available in legitimate channels of
11 commerce. I do not believe that the 1201(a)(1) prohibition is
12 limited to conduct that you undertake completely confined to
13 your skill set and your hands or knowledge. That, I believe, is
14 too narrow of an interpretation of circumvention conduct.

15 I believe circumvention conduct also includes the
16 use of a circumvention device. So, if one accepts that premise,
17 I'm not saying you necessarily do, but if one accepts that
18 premise, which I do, then the question is, is a multi-region DVD
19 player a circumvention device?

20 In my view, because a multi-region player, for the
21 part or component that deals with regional coding, that part or
22 component is designed, primarily designed, to defeat, avoid,
23 bypass regional coding, and because I think regional coding is
24 an effective access control measure I conclude that the multi-
25 region DVD player is, in fact, a circumvention device, and that

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1 is how I arrived at the conclusion that the use of a multi-
2 region player does, in fact, constitute a technical violation of
3 1201(a)(1).

4 MR. METALITZ: I would not necessarily follow that
5 reasoning, but I would reach the same result.

6 MR. CARSON: Could you repeat your question on
7 that, Rob? Maybe I'm not recalling clearly, maybe I'm
8 incorrectly recalling what I thought I heard at the hearings in
9 Washington, but I thought one of the arguments that I heard
10 against an exemption that would permit people to circumvent CSS,
11 for example, if they needed to, in order to get to the region
12 coding to do what they needed to do to get around the region
13 coding, with the availability of multi-region players, and you
14 can always do that, so why do you need to circumvent. Am I
15 wrong in that?

16 MR. KASUNIC: I thought that's what we heard Mr.
17 Attaway say.

18 MR. MARKS: Well, I believe, I mean I read the
19 transcript recently, I didn't necessarily hear that exact
20 explanation, but what I did read in the transcript was when the
21 question, I believe you posed the question, Mr. Carson, to Mr.
22 Turnbull, is the use - when an individual uses a multi-region
23 player, are they violating Section 1201(a)(1), and I believe Mr.
24 Turnbull responded, "No, I believe they are not violating
25 Section 1201(a)(1)."

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1 I would say 80 to 90 percent of the time I agree
2 with Mr. Turnbull on things, but I happen to disagree with him
3 in this particular instance.

4 I will say I think it's a difficult argument, and
5 I can see arguments on both sides. I don't think it is as
6 clear-cut a case as, for example, the studio 321 software, which
7 I think clearly is a circumvention device.

8 MR. KASUNIC: Well, since we have a slight
9 difference of opinion there, and, Mr. Metalitz, you said you
10 would agree with the result, but I'd like to hear how you get
11 there.

12 MR. METALITZ: Section 1201(a)(1) is not dependent
13 on the use of a circumvention device. Section 1201(a)(1) covers
14 the act of circumvention. And, even if the thing that you use
15 to circumvent is not a circumvention device under 1201(a)(2) it
16 doesn't matter.

17 So, I'm not troubled on this question about
18 whether a multi-region player is a 1201(a)(2) violation.

19 MR. KASUNIC: Okay. It doesn't matter whether the
20 device is a violation.

21 MR. METALITZ: That would be my interpretation. If
22 you are just looking at (a)(1).

23 MR. KASUNIC: Correct. Right, right, okay.

24 Well, going back then into - are you finished,
25 Dave?

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1 MR. CARSON: No, I was not finished.

2 MR. KASUNIC: No, I know you have more.

3 MR. MARKS: I'm sure you do.

4 MR. KASUNIC: Dean, you said that there's no
5 privity then with the manufacturer, or with the, I guess,
6 tamperer, was that it?

7 MR. MARKS: Yes, a third party modifier.

8 MR. KASUNIC: Okay, no privity, so when they modify
9 that licensed player then they are creating a device and anyone
10 who sells a copy. Okay.

11 Does - now this - this has been a long day, so
12 excuse me if this - does CSS - is this one of the questions
13 we're going to get further information on, does CSS need to be
14 decrypted in order - or maybe this actually goes along with the
15 UOP, it has been a long day, does CSS need to be decrypted in
16 order to get to decrypt the region coding?

17 MR. MARKS: Right. I knew this question was
18 coming, and we are not sure, to tell you the truth. I believe,
19 from talking with some of our engineers, that, in fact, the
20 regional coding codes are examined prior to decryption of the
21 content on the DVD disc, so that you insert the disc into a DVD
22 player and one of the first things it checks for in the header
23 or information is, what's the regional coding, and if you have
24 a Region 1 player only, and it's some disc that's coded only for
25 Region 2, it goes, okay, well I won't play this, and it doesn't

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1 even get to the point of beginning to decrypt the motion picture
2 content on the disc.

3 What I do not know, and this is why, and I'm not
4 an engineer, obviously, but what I don't know, and what we will
5 try and find out is, is the regional coding flags themselves
6 also encrypted with the CSS, and I just don't know the answer to
7 that question, and we will try and find out.

8 What I can say, with a fair degree of certainty,
9 is the way Mr. Turnbull described the implementation of regional
10 coding, and how the regional coding functionality is separate
11 from the CSS encryption functionality, is accurate, and the fact
12 that the license, CSS license, does not dictate exactly the
13 manner in which regional coding must be implemented or - well,
14 must be implemented, it rather only says it must be implemented
15 in a robust fashion, but DVD player manufacturers, ROM drive
16 manufacturers, have a variety of different methodologies by
17 which they implement regional coding recognition, and that is
18 accurate.

19 MR. KASUNIC: Okay. So, you are going to get us
20 more information.

21 MR. MARKS: I'm hoping DVD CCA will do that, but I
22 will certainly do all I can as well.

23 I have a lot of homework assignments from this
24 hearing.

25 MR. KASUNIC: Does anyone else have any other

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1 information on that? Okay, let me just plow through.

2 I think, actually, this might be something that
3 Mr. Tepp is going to get into more, but it's in my list so let
4 me - if you don't need to - well, it's your position that the
5 region coding then as an access control you would need in order
6 to, if you have a device that would not read that that would be
7 bypassing or avoiding an effective technological protection
8 measure that protects access to work. Okay.

9 What is region coding enhancement, and how does
10 that differ from standard region coding?

11 MR. MARKS: Frankly, I've not heard of region
12 coding enhancement, so I don't know what it is.

13 MR. KASUNIC: It looks like somebody has.

14 MS. HINZE: Region coding enhancement is a server
15 layer of protection that is currently being deployed, mainly on
16 Region 1 titles, and what it does, as I understand it, it's a
17 query response system that - sorry, it's a query response system
18 that a DVD player will - this will be a very untechnical
19 description because I am not a technologist, clearly, that as I
20 understand it, basically, the DVD player, the exchange of
21 information between a DVD disc for a particular region and a DVD
22 player. And, in simple terms, if the DVD disc asks the DVD
23 player what region it is, and sequentially asks the same
24 question, and if the DVD player comes back and multiple flags
25 are turned on in the DVD player allowing it to play the six

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1 relevant regions, then a region code enhanced disc will not
2 play.

3 As I say, primarily, as I understand it, it's
4 being used on Region 1 titles at the moment, and again as I
5 understand it based on a statement actually made by several
6 motion picture companies, my understanding is it was introduced
7 primarily to stop Region 1 discs being played in other countries
8 outside of the United States.

9 MR. KASUNIC: Mostly on these multi-region players?

10 MS. HINZE: Mostly in Europe, as I understand it.

11 MR. KASUNIC: Okay.

12 Why don't I pass it on for now. I think that's
13 all I have right now.

14 MS. HINZE: Perhaps, I could just clarify, what
15 that means in practical terms is, if you have a multi-region or
16 a full region, however you want to describe it, if you have a
17 player that would play multiple regions, a disc which has, as I
18 understand it, a disc which has RCE on it will not play. So,
19 there is no - it's not the case that there is - because as I
20 understand it there are ways to reset a region if you have a
21 player that is able to manually reset to a single region, even
22 it's been previously tipped, for instance, to be six regions, if
23 you can reset it back to one region then the disc will play.
24 But, as I said, as I understand it, it was introduced as a
25 challenge to multi-region players.

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1 MR. KASUNIC: So, is what you are saying - I'm
2 sorry, if you have this on the DVD ROM drives, you have the
3 ability to change a limited number of times, and now I didn't
4 realize 25 times the region, will that - to your understanding
5 is that going to be affected? If you switch that, is the region
6 code enhancement going to be picking up those changes and may be
7 fooled by it?

8 MS. HINZE: I will be honest here and say that I
9 don't think so, but I'm not sure. It would be misleading for me
10 to say that I have the answer to that 100 percent under my
11 control.

12 MR. KASUNIC: Okay.

13 Well, any information you could - further
14 information, some more homework, that you could get about region
15 coding enhancement would be helpful.

16 MR. MARKS: Okay.

17 MS. PETERS: Mr. Tepp.

18 MR. TEPP: Okay, Mr. Marks and Mr. Metalitz, I want
19 to go back and roll up our sleeves a little bit on this
20 question, whether or not region coding is an effective
21 technology or protection measure that controls access to a work,
22 because I'll be very blunt, I'm not sure it is.

23 Let me start by asking this. What happens if I
24 have a DVD disc with a Region 1 flag on it, I put it into a DVD
25 player that does not look for that flag, simply doesn't look for

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1 it, will I be able to watch the content on the DVD?

2 MR. MARKS: Yes.

3 MR. TEPP: Okay, that's what I thought.

4 Given that --

5 MR. MARKS: I mean, but for this region code
6 enhancement stuff that I frankly don't know anything about.

7 MR. TEPP: Okay, I saw that mentioned in one of the
8 comments as well, and that's an interesting next step, and it's
9 an interesting counterpoint to region coding.

10 MR. MARKS: Right.

11 MR. TEPP: We haven't talked about that in the
12 past.

13 Let me focus on traditional region coding, if I
14 can use that term -

15 MR. MARKS: Okay.

16 MR. TEPP: - for the moment.

17 If a DVD player that doesn't look for and
18 recognize a region coding flag will play the work, how can it be
19 said that that flag, in the ordinary course of its operation,
20 requires the application of information for process of treatment
21 in order to gain access to the work? You just told me if I have
22 a device that doesn't supply any information I gain access to
23 the work.

24 MR. MARKS: Right, right, and the reason why I
25 think it still qualifies is that the key is in the normal course

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1 of its operation, because in the normal course of its operation
2 regional coding flags are responded to by devices that are
3 licensed authorized devices. I think if the standard that you
4 need to meet is that, for an access control technology to be
5 effective, is that it has to be effective in unauthorized
6 devices and circumvention devices, then I think you'll never
7 meet the standard.

8 MR. TEPP: If I have a DVD player that doesn't
9 decrypt CSS --

10 MR. MARKS: Correct.

11 MR. TEPP: - doesn't recognize CSS --

12 MR. MARKS: Correct.

13 MR. TEPP: - and I put a CSS encrypted disc in
14 that player, can I watch the content?

15 MR. MARKS: No.

16 MR. TEPP: Okay, so there's an example where there
17 would be an effective technology or protection measure that
18 controls access.

19 MR. MARKS: Correct, but let me give you a counter
20 example. If you had an unlicensed DVD ROM drive, and you loaded
21 a CSS encrypted DVD on that ROM drive, and you applied DCSS to
22 the CSS encrypted DVD, then you would be able to access the DVD
23 on that unlicensed ROM drive hooked up to a computer operating
24 system.

25 MR. TEPP: Okay, well then, we're almost going to

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1 get metaphysical on this I fear, but where does region coding
2 reside? Is it on the disc?

3 MR. MARKS: It is - well --

4 MR. TEPP: Is it on the player?

5 MR. MARKS: - yeah, yeah, good question. The flag
6 for the region coding that says I am a Region 1 disc, or I'm a
7 multi-region disc, or I'm a Region 2, 3 and 4 disc, that resides
8 on the DVD disc itself. The response to that flag is a response
9 mechanism that is built into the player or the ROM drive. So,
10 the player or the ROM drive, as an obligation of the CSS
11 license, an obligation that's undertaken as part of the
12 authorization to decrypt the CSS encrypted protected disc in the
13 first place, looks for the region code flat that's on the disc
14 and abides by it.

15 MR. TEPP: Okay.

16 So, it's an obligation of the CSS license to
17 recognize and respect the region coding.

18 MR. MARKS: Correct.

19 MR. TEPP: The broadcast flag.

20 MR. MARKS: Correct.

21 MR. TEPP: Dare I go there.

22 MR. MARKS: Do we have another day?

23 MR. TEPP: But, does Section 1201 require that a
24 DVD player respond to the region coding flag, because you've
25 already said that the third parties who modify players into

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1 multi-zone players are not in privity with DVD CCA.

2 MR. MARKS: Right.

3 MR. TEPP: So, there's no contract claim there.

4 MR. MARKS: Right.

5 MR. TEPP: And, you've asserted that they are
6 violating 1201, and I'm trying to figure out how that is if you
7 are hooked for saying that it's a 1201(a)(1) violation is that
8 the region coding system is mandated by the contract, the
9 license with DVD CCA.

10 So, if we're talking about a third party that has
11 no contractual or license relationship with DVD CAA, where is
12 the 1201 violation, and then I think that boils down to, is a
13 third party required, that manufactured or modifies DVD players,
14 required under Section 1201 to recognize a region code?

15 MR. MARKS: Right, and I believe that the region
16 code flag and system itself is an effective technological
17 measure, because I believe in the ordinary course of its
18 operation it does require a processor treatment with the
19 authority of the copyright owner to gain access to the work and,
20 therefore, I think that the manufacturer, the third party
21 modifier, who modifies the compliant DVD player to be non-
22 compliant does actually circumvent the technological measure
23 because it's avoiding bypassing, deactivating, impairing the
24 regional code system. So, that's how I proceed to that
25 conclusion.

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1 MR. TEPP: Okay.

2 Let's change the hypothetical just a little bit
3 and say, you've said that your understanding is that most of the
4 DVD players that are multi-region and multi-zone are these
5 modified versions.

6 MR. MARKS: Yes.

7 MR. TEPP: Presumably, it's possible to create from
8 scratch a DVD player that never recognizes region coding.

9 MR. MARKS: Correct.

10 MR. TEPP: And so you are not talking about
11 modifying, you are just creating a player that never is ever in
12 its life going to look for a region code.

13 MR. MARKS: Correct.

14 MR. TEPP: When it sees a DVD with a region code on
15 it it's going to play that disc. I think you've already told me
16 that.

17 MR. MARKS: Well, there's a catch there, okay, you
18 create a DVD player that never looks for a Region code, is that
19 DVD player licensed by the DVD CCA to be able to decrypt CSS, or
20 is that player not licensed by the DVD CCA to decrypt CSS, and
21 does that player, in fact, decrypt CSS or doesn't it decrypt
22 CSS?

23 MR. TEPP: Okay.

24 MR. MARKS: These facts are very, very relevant to
25 your question.

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1 MR. TEPP: Okay, that's a fair clarification.

2 Let's say, for the purposes of this hypothetical,
3 there's no license with the DVD CAA, but they've got CSS
4 decryption on there.

5 MR. MARKS: Okay, then my answer is, if the DVD
6 player decrypts CSS without a license, and doesn't recognize the
7 regional coding that's on the disc, yes, it will play the disc
8 but it is in violation of the license and I think, clearly, you
9 know, in terms of decrypting CSS without authorization, clearly
10 falls into --

11 MR. TEPP: But, there's no license.

12 MR. MARKS: - there's no license, so I believe it
13 clearly falls into the category of a circumvention device.

14 MR. TEPP: That was the easy one.

15 Now, flip it.

16 MR. MARKS: Okay.

17 MR. TEPP: They have a license and they are
18 breaking it, there's clearly a license violation, I'm
19 stipulating that.

20 MR. MARKS: That's right.

21 MR. TEPP: Is there 1201 violation?

22 MR. MARKS: I believe yes.

23 MR. TEPP: Can you give me the analysis there?

24 MR. MARKS: And again, the analysis is that the
25 regional coding technology, granted that it's on the basis of a

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1 flag and a response, I grant you that, I grant you that, it is
2 not the same, to the same degree self protecting that encryption
3 and scrambling is, I grant you that. Okay. But, I do not
4 believe that to qualify as an effective access control measure
5 that it must be completely self protecting the way scrambling
6 and encryption is.

7 I believe, as Mr. Metalitz was testifying, that
8 there was discussion as to whether an access control technology
9 should be limited to scrambling or encryption, and Congress
10 decided, no, it shouldn't be, and there was discussion about
11 passwords being access control technologies, and, in fact, the
12 statute 1201 refers to, you know, the application of
13 information, a process or treatment, with the authority of a
14 copyright owner. And, therefore, I believe this regional code
15 system, which involves a combination of a flag on the disc, plus
16 a response from the player, that in the ordinary course of
17 operation it qualifies as an effective access control measure.

18 MR. TEPP: Okay.

19 Let's take it out of the CSS realm, because that's
20 complicating the analysis, I won't go there. You've just got a
21 regional code, don't have CSS, okay? I've got a DVD player, it
22 doesn't have DCSS on it, you don't need it to play this.

23 MR. MARKS: Okay, right.

24 MR. TEPP: It doesn't recognize the region code.

25 Is it a 1201 violation?

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1 MR. MARKS: This is definitely a harder case, I
2 think that's a definitely harder case. If you are saying that
3 you've put content out in the clear. Let me make sure I
4 understand your hypothetical.

5 MR. TEPP: Okay.

6 MR. MARKS: Just I want to be very clear, Mr. Tepp,
7 you are saying you have content in the clear on a DVD disc.
8 You've chosen not to encrypt it with CSS, is that right?

9 MR. TEPP: No CSS, that's correct.

10 MR. MARKS: No CSS on the DVD disc.

11 MR. TEPP: I won't say in the clear because it's
12 not, I don't know what region coding is.

13 MR. MARKS: Okay, I'm sorry, right, with no CSS
14 encryption, the U.S. content owner has decided to put that piece
15 of content out without CSS encryption, but you have put a
16 regional code flag on the disc, and there is a player out there
17 which can play the content, it doesn't have a CSS license so it
18 can't play CSS encrypted content, but it can play this
19 particular disc because it's not encrypted with CSS in the first
20 place.

21 MR. TEPP: Right.

22 MR. MARKS: And, that particular player does not
23 recognize the regional code flag that's on the disc, I would
24 say, frankly, it's a much harder case to say that that
25 particular player is circumventing.

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1 MR. TEPP: Okay, let me take it to the next step
2 then, because I - well, I think we are making some progress and
3 I'm interested in where we are going next.

4 We have, someone makes a Region 2 player, turns it
5 into a multi-zone player, I buy it. I use it to play a Region
6 1 disc. Am I violating 1201(a)(1)?

7 MR. MARKS: I think that goes back to the - again,
8 if we're assuming CSS encrypted discs?

9 MR. TEPP: Yes, we are back in CSS.

10 MR. MARKS: If we are back in CSS land, I think it
11 does, because I think the manufacturer of the multi-region
12 player that is a CSS licensee is violating the CSS license, they
13 are violating the obligation to respond to the regional code.
14 I believe in the context of CSS encrypted discs, because in the
15 ordinary course of their operation on players and ROM drives the
16 regional codes are, in fact, responded to because license
17 devices are obligated to respond to them, in that set of
18 circumstances I believe the threshold is met for the regional
19 coding to be an effective access control technology, and,
20 therefore, I believe that this device, which avoids, bypasses,
21 deactivates, defeats that effective access control technology,
22 qualifies as a circumvention device, and then again my analysis
23 that if an individual is using that circumvention device to
24 defeat regional coding they are engaged in 1201(a) prohibited
25 conduct.

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1 By the way, I want to say for the record just that
2 I also agree with Mr. Metalitz that to engage in 1201(a)
3 prohibited conduct you don't necessarily have to use a
4 prohibited device.

5 MR. TEPP: Okay.

6 MR. MARKS: But, I think if you are using a
7 circumvention device to defeat an access control technology, I
8 think it does qualify as circumvention conduct under 1201(a),
9 but I don't believe that's the only methodology to run afoul of
10 1201(a). So, I think we are in agreement, actually.

11 MR. TEPP: Okay.

12 So, it sounds to me, from all of this, that in
13 isolation region coding is not really an effective technological
14 protection measure that controls access to a work. You've told
15 me that's a tough case to make.

16 MR. MARKS: You mean in isolation of the CSS
17 license?

18 MR. TEPP: In isolation of CSS.

19 MR. MARKS: I think it's a harder case.

20 MR. TEPP: Okay.

21 MR. MARKS: I agree.

22 MR. TEPP: Do you want to give it a try? Do you
23 want to sustain that, because the next step is for me to ask the
24 folks at EFF and IP Justice if they want to make the case that
25 it's not.

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1 MR. MARKS: I think it's borderline. I mean, and
2 I don't mean to totally punt on this, but I'd be curious as to
3 what my colleague, Mr. Metalitz, thinks.

4 MR. METALITZ: I agree with Mr. Marks that this is
5 a tough case, because it turns on the operation of really two
6 provisions in the statute. One is in the ordinary course of its
7 operation, and the other is no mandate provision in 1201(c)(3),
8 which doesn't apply if the product otherwise falls within the
9 prohibitions of (a)(2) or (b)(1). So, if you have the CSS, you
10 know, the, if you will, CSS non-compliant player, then that
11 clearly does otherwise fall within the prohibitions of (a)(2)
12 and (b)(1), and, therefore, you don't have to worry about
13 whether all it's doing is failing to respond to a particular
14 technological measure.

15 When you take that out of the equation, then I
16 don't know what the bottom line answer would be. I do think
17 it's relevant that this whole - and again, I'm not 100 percent
18 sure about the chronology, but the use of regional coding within
19 the context of CSS I think was something that was clearly known
20 at the time of the enactment of the DMCA, and I think it would
21 be very difficult to make the argument that Congress did not
22 intend that regional coding within the context of CSS would not
23 qualify as a technological measure that effectively controls
24 access to a work.

25 As Judge Newman and Judge Kaplan have pointed out,

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1 the fact that it can be circumvented doesn't rob it of its
2 status as an effective technological measure, and as Mr. Marks
3 mentioned and it's extensively documented in the legislative
4 history Congress did not want to dictate what types of
5 technologies would - particular methods would or would not
6 qualify as long as on a functional basis it had the functional
7 result of controlling access to a work.

8 So, I think you could argue that the regional
9 coding, even in the absence of CSS, in the ordinary course of
10 its operation would meet that test, the functional test, but I'm
11 not sure that isolated from CSS, I'm not sure how that would
12 come out.

13 MR. TEPP: Well, okay.

14 This is obviously a key analysis, because if we
15 recommended an exemption that says it's okay to circumvent CSS
16 for the purpose of defeating region coding, we are taking CSS
17 out of the analysis. And so, that's where I'm going with this,
18 and as I promised I want to turn to the other table and give you
19 all a chance to say what your analysis is of region coding in
20 isolation from CSS, as to whether or not is an effective
21 technological protection measure that controls access to the
22 work, as the statute describes.

23 MS. HINZE: I think in the absence of some clear
24 information about exactly where RPC sits in relation to CSS,
25 I've read through the May 2 testimony as well, and I'm not a

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1 technologist. I have my understanding of how RPC works, but I
2 think the relevant question that we haven't actually had
3 answered here is whether RPC is part of the content that is
4 scrambled within CSS. So, in terms of a practical response I
5 think that's the key question.

6 MR. TEPP: Well, let's go to the hypothetical I
7 gave these gentlemen. There is no CSS on a given DVD, just a
8 region coding flag for a given region, and I have a player that
9 plays that doesn't have DCSS on it, but I don't need it to play
10 this particular disc, since there's no CSS on the disc. And,
11 the player does not recognize region coding. Does either the
12 player, the manufacturer of the player violate 1201(a)(2) or do
13 I violate 1201(a)(1) by building or using the player?

14 MS. HINZE: Let me say this. First, I'm very happy
15 to engage in hypothetical speculation, but since I'm on record
16 what I'd like to say is, I don't think that for our exemption to
17 be granted I need to have a definitive answer to this.

18 The reason I say that is that I don't think the
19 exemption that we are requesting here requires us to have a
20 clear answer to that. From our point of view, the fact that
21 there is an inability for consumers to play foreign region, non-
22 Region 1 DVDs, that they have lawfully acquired, and lawfully
23 imported into the United States on a Region 1 player without
24 some sort of modification is the reason why we have sought an
25 exemption.

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1 So, to the extent that you are asking me to
2 speculate on a hypothetical, I'm not sure that it actually
3 speaks to our exemption. So, from that point of view, before I
4 speculate, and I would be happy to speculate, I guess, after
5 this proceeding is over, on the basis of some more information
6 about exactly how it works in practice.

7 I'm not a technologist, and my understanding is
8 that RPC is inside the CSS envelope. That was certainly my
9 understanding of how it works.

10 MR. TEPP: That's what Mr. Turnbull said. That's
11 my understanding of what Mr. Turnbull said in Washington.

12 MS. HINZE: Right, that's my understanding as well,
13 in which case in order to change the RPC control on a player it
14 would be necessary to violate CSS, on a disc or a player for
15 that matter, the response mechanism.

16 Now, I'm aware that that's probably not an answer
17 to your question, but --

18 MR. TEPP: That's true.

19 MS. HINZE: - in the absence of clear information
20 I'm not sure what value there is in my speculation. I'd be
21 happy to do it, but, perhaps, on the basis of some more
22 information so that I could actually make a meaningful analysis.

23 I'm not adverse to looking at this in further
24 detail with some further information. As I said, I don't think
25 it's necessary, I don't think this question has to be reached in

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1 order to make the consideration for our exemption that we have
2 sought.

3 MR. TEPP: Well, it does seem like the central
4 question, because if region coding, you are asking for an
5 exception to 1201(a)(1), to defeat the access control of region
6 coding.

7 MS. HINZE: Specifically, the way that I think this
8 would work from the point of view of our exemption, and I'm
9 aware that there's a slight difference in what's being requested
10 here, is that a user may be able to modify their Region 1 player
11 in the absence of Section 1201(a) that wouldn't - with Section
12 1201(a)(1), it would potentially be a violation for a user to
13 modify the player. I think that would be the legal liability
14 point of view.

15 So, we would be requesting an exemption that would
16 allow consumers to do that, so that they could play back their
17 devices.

18 DOCTOR REEVES: But, the line of questioning I'm
19 pursuing goes to the very heart of that, as to whether or not
20 there is liability under 1201(a)(1) for defeating a region
21 control. And so, I'm at a loss as to how to address your
22 exemption without tackling this issue as well.

23 MS. HINZE: Well, I'm not sure that I can provide
24 you with more technical information, which I think is what you
25 probably need to have a correct legal analysis.

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1 As I said, I would be happy to speculate, but it
2 will only be speculation. In order to answer this question in
3 a meaningful way, I think better information is required, and to
4 the extent that the entertainment companies and movie studios
5 have made that their position, the response to that is, if that
6 is, indeed, the case then an exemption is required.

7 MR. TEPP: But, you are not willing to state a
8 position one way or the other for yourself.

9 MS. HINZE: It's difficult for me to actually state
10 a conclusive answer when I've never actually seen the spec on
11 exactly how the robustness rules work, and exactly how RPC is
12 implemented.

13 It's not that I'm adverse to speculating, but it's
14 mere speculation, and in order for it to be a meaningful legal
15 analysis I, too, would be interested in seeing some further
16 technical analysis of how this is actually implemented, and I
17 would be very happy to supplement our response based on that
18 information.

19 MR. TEPP: Well, that's likely that you'll get a
20 question on that then.

21 MS. HINZE: Great.

22 MR. TEPP: Was there something else on this point?

23 MR. METALITZ: Yes, the only thing I wanted to say
24 is that my understanding was that, and I mean in a lot of the
25 comments that we made here were about regional coding in the

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1 context of CSS, not in the context of no CSS, which I also
2 understood to be the exemption that she was seeking.

3 MR. TEPP: Okay, well -

4 MS. HINZE: Just to clarify, we have sought
5 exemption of whatever - ours is whatever it would take in order
6 to get a playback type exemption. So, I don't know the answer
7 to your question, it's a matter of technology, I said that.

8 If it's the case that RPC is a separate technology
9 and a separate access measure, and if there's a violation of
10 1201(a)(1), for circumventing RPC without - and there's no
11 necessity for circumventing CSS, then I think we would still
12 require an exemption from 1201(a)(1), is my understanding, in
13 order for consumers to playback lawfully acquired foreign DVDs
14 on a U.S. Region 1 DVD player.

15 MR. TEPP: And, if the region code flags are within
16 CSS, so that they cannot be altered unless you first decrypt
17 CSS, are you asking for an exemption to be able to do that as
18 well?

19 MS. HINZE: To circumvent CSS?

20 MR. TEPP: To circumvent CSS, so that you can then
21 do whatever needs to be done to the region coding.

22 MS. HINZE: If it's necessary to circumvent CSS in
23 order to modify the Region 1 DVD player to make it play back
24 non-Region 1 DVDs, then yes, by definition that would be part of
25 the scope of our exemption.

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1 MR. TEPP: Okay, that's what I thought, but I
2 wanted to confirm it.

3 Thank you.

4 MS. HINZE: Thank you.

5 MS. PETERS: Thank you.

6 David?

7 MR. CARSON: Yes, I'd like to pursue Steve Tepp's
8 line of questioning for one or two more questions. Let's pull
9 our Circular 92, and go to page 180. I'd like to focus on the
10 definition of circumventing a technological measure.

11 Now, let's go back to the hypothetical. If I
12 recall, one of Steve's hypotheticals was, I buy a multi-region
13 DVD player, you folks would assert that that multi-region DVD
14 player is a violation of 1201(a)(2), I believe, correct?

15 MR. MARKS: Yes.

16 MR. CARSON: Now, I'm trying to understand how my
17 use of that multi-region player is in itself an act of
18 circumvention as defined in 1201(a)(2)(b). No, I'm sorry, gosh,
19 (a)(3)(a), sorry. This is hard to track, but it's right there
20 on the middle of that page, so to circumvent a technological
21 measure means to descramble a scrambled work.

22 MR. MARKS: Right.

23 MR. CARSON: I don't think I've done that.

24 MR. MARKS: Right.

25 MR. CARSON: To decrypt the decrypted work, have I

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1 don't that?

2 MR. MARKS: No.

3 MR. CARSON: Okay, or otherwise to avoid, bypass,
4 remove, deactivate or impair technological measures. Have I
5 done that?

6 MR. MARKS: Ding, ding, ding, ding, ding, ding.

7 MR. CARSON: Okay, how did I do that?

8 MR. MARKS: Because this is the analogy I would
9 draw, Mr. Carson, when you download DCSS, you know, you -

10 MR. CARSON: I didn't.

11 MR. MARKS: No, no, no, I'm using an analogy.

12 MR. MARKS: Oh, I'm sorry.

13 MR. CARSON: If you download DCSS or if you use a
14 Macrovision stripper, you know, you've bought the thing, or
15 you've obtained the thing, you yourself, necessarily, by your
16 own hands and conduct, aren't stripping off the encryption or
17 stripping off the Macrovision, it's the device that's doing it.

18 MR. MARKS: Yes.

19 MR. CARSON: I say it's the same thing here, you've
20 bought the multi-region player, it's the multi-region player
21 itself which is avoiding that bypass saying the regional code
22 treatment, the disc is treated with a flag, there is supposed to
23 be a response to the flag, in the ordinary course of operation
24 there is a response to the flag. This device has been modified,
25 Jimmy, so there's no response to the flag. Therefore, I think

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1 it qualifies as circumvention.

2 You may disagree with that, but that's the
3 argument.

4 MR. CARSON: No, I honestly don't know where I am
5 on it, I'm just trying to parse the language of the statute and
6 figure out whether it works.

7 MR. KASUNIC: The question is, is your problem
8 with the verb here or with the object? Are you wondering
9 whether -

10 MR. CARSON: Now we're really getting
11 metaphysical.

12 MR. KASUNIC: Are you asking about the situation
13 with the Streambox, the real networks in the Streambox case to
14 a certain extent?

15 MR. MARKS: I knew I should have reread that case
16 last night. I have it with me here, and I think there is
17 something relevant in that decision about it. But, I guess I've
18 got to - I think there was something, frankly, in the Streambox
19 decision about down, if you'll forgive the pun, downstream
20 controls or measures that were somehow linked to the initial
21 encryption. So, I guess at the risk of giving myself another
22 homework assignment, can I come back to you on whether Streambox
23 has any relevance to this issue?

24 MR. CARSON: I don't care, but he does. All right.

25 So, maybe Mr. Tepp hasn't found us a way out of

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1 this dilemma, I don't know. Let's assume we are dealing with an
2 access control, and let's assume that what these folks want to
3 be able to do is to circumvent a technological measure that
4 effectively controls access to the work.

5 Now, I think it was you, Mr. Metalitz, who said
6 that if you exempt this class of works it's going to - it's
7 likely to dissuade the legitimate marketing of foreign films on
8 DVDs in the United States. Is that an accurate
9 characterization?

10 MR. METALITZ: It certainly discourages that.

11 MR. CARSON: Okay.

12 I'm trying to figure out why that's the case if
13 the class by definition is limited to works that are not
14 released in the U.S. I mean, wouldn't, in fact, that be an
15 incentive for people to start distributing them here so that you
16 couldn't qualify for the exemption?

17 MR. METALITZ: Well, I'm actually a step earlier in
18 the analysis. At the time that a company like the ones that are
19 listed in Mr. Marks' list, Pioneer, Bande and these others, are
20 deciding what's the value of obtaining the exclusive
21 distribution rights in the United States, I think it would
22 matter to them whether that would be compromised by the
23 widespread, and, obviously, it would depend on how widespread it
24 was, the existence in the hands of their market of circumvention
25 devices that would enable people to circumvent their regional

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1 coding and thereby obtain access to this material. Those
2 people, therefore, are excluded from the market that's the
3 potential market for that distributor.

4 Although I will agree that anime titles, and I
5 think this is mostly what we are talking about here, may have a
6 growing viewership, this is still a niche market, and if your
7 most devoted fans are already able to get this, because after
8 the Copyright Office announced that it was not a violation of
9 the law to circumvent regional coding there was a sudden upsurge
10 in the availability of multi-region players, or the chips that
11 were needed that you could solder yourself to make these into
12 multi-region players, and that if that became widespread
13 suddenly the most devoted part of your fan base might be gone.
14 And, therefore, it would be less likely that you, the
15 distributor, would want to get into that business. There's less
16 money to be made.

17 Now, there would be some titles where you might do
18 it anyway, because you think you can break through out of that
19 niche market, cross over and really get a mass market. So, you
20 know, you may try that a few times. And, if you are
21 successfully maybe that would - and, you know, the hoopla about
22 the latest anime release is approaching the hoopla around the
23 release of Matrix II Reloaded, then this could really change the
24 economics of the marketplace.

25 But, as I understand it now, this is a niche

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1 market, and if you are going to lose, or there's a threat that
2 you will lose a lot of your most devoted fans, then that
3 distributorship is not going to be worth that much to you, and
4 you are just going to be reluctant to give in to that market.

5 MR. CARSON: Well, aren't the only people who are
6 going to be able to take advantage of this people who actually
7 go abroad and buy them and bring them back in? And, if that's
8 the case, you are not talking about a big part of the fan base,
9 are you?

10 MR. METALITZ: Well, some of those people, the 124
11 people, wherever it was, that wrote in seemed to do a lot of
12 shopping outside the United States for these titles, and I don't
13 know how many of them already have shopped outside the United
14 States for a multi-region player, but I'm sure that would
15 increase once this exemption were granted.

16 MR. CARSON: Well, if the concern is that there are
17 all these devices that are going to be out there, once people
18 are given our blessing to circumvent to their heart's content,
19 you've still got 1201(a)(2) to stop the trafficking in those
20 devices, don't you?

21 MR. METALITZ: Yes, I think it would still be in
22 violation of 1201(a)(2), but again, I think that the concern is
23 that once the (a)(1), and this is really repeating some of what
24 you heard at the hearings earlier this month in Washington,
25 these are not airtight compartments between (a)(1) and (a)(2).

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1 They are legally, but I don't think they are practically.

2 MR. CARSON: Okay.

3 Now, I think it was you, Mr. Marks, who talked
4 about the fact that even if you can circumvent, with respect to
5 some of these foreign DVDs, that may not be the answer because
6 some of them may be only - may only have PAL or CCAM on them --

7 MR. MARKS: Correct.

8 MR. CARSON: - and at least some players here
9 can't read PAL or CCAM.

10 MR. MARKS: Correct.

11 MR. CARSON: The flip side of the coin is, some
12 players here can read PAL and CCAM.

13 MR. MARKS: Yes, absolutely.

14 MR. CARSON: So, if at least if you are lucky
15 enough to have one of those players you are home free, right?

16 MR. MARKS: Yes, or you may, if you don't have to
17 upgrade to a different player that will do the transcoding.

18 MR. CARSON: Okay.

19 MR. MARKS: Yes, I agree with you.

20 MR. CARSON: Do you have any sense of the
21 proportion of, let's say, European DVDs that have the content
22 only in PAL or CCAM?

23 MR. MARKS: I don't.

24 MR. CARSON: Okay.

25 MR. MARKS: I don't.

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1 MR. CARSON: Anyone else? Okay.

2 MS. HINZE: Could I just point out, just by way of
3 clarifying here, a PAL or a CCAM to NTSC converter is not
4 illegal in the United States.

5 MR. CARSON: Is not what?

6 MS. HINZE: Is not illegal, and costs approximately
7 \$20.

8 MR. CARSON: Yes.

9 MS. HINZE: It's not a difficult issue to make that
10 conversion.

11 MR. CARSON: Okay.

12 MS. HINZE: The issue here is whether or not
13 there's a 1201(a) violation.

14 MR. CARSON: Okay.

15 MR. MARKS: I want to just, let me just put a
16 marker down there. I absolutely agree with Ms. Hinze, I'm sorry,
17 I don't know why I can't get your name pronounced correctly. I
18 really apologize for that. I absolutely agree, there is nothing
19 illegal about converting from, you know, CCAM and PAL to NTSC,
20 or back and forth, and again, I emphasize there's nothing in the
21 CSS license that prohibits player manufacturers or ROM drive
22 manufacturers from doing those conversions.

23 What I would like to say is that, you know, as she
24 has just mentioned, you can buy a converter on the open market
25 here in the U.S. for \$20, if, in fact, that is your problem. It

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1 really goes to the heart of the argument that I was trying to
2 make about regional coding, which is that if you want to play a
3 Region Code 2 disc here in the United States you spend maybe \$30
4 or \$40 and buy a ROM drive, set it to Region 2, and do the same
5 thing. It's practically the same amount of financial burden.

6 So, to do the one is really not very burdensome,
7 I think to do the other isn't very burdensome either. And, just
8 coming back to sort of from the metaphysical to the practical,
9 that's what I urged the Copyright Office to consider in this
10 analysis, is the balance here, and the balance of burdens to
11 users, and I believe there is a very non-burdensome way for
12 users to, in fact, be able to play the non-Region 1 discs here
13 in the United States that they acquire abroad. And, I believe
14 that that burden and inconvenience is less than the potential
15 harm to copyright owners by granting them exemption to the
16 regional code system.

17 MR. METALITZ: The other panelists here are
18 actually much more expert on this PAL/CCAM/NTSC issue than I am,
19 but our viewpoint was that that's a fixed cost, no matter
20 whether you circumvent or whether you go out to get a Region 2
21 whatever DVD ROM drive, if you have that problem you have that
22 problem.

23 I think the reason we addressed this in our
24 comments was because of what's said on page 21 of EFF's
25 comments, which said that it's not feasible for someone to

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1 purchase and use a DVD player from one of the foreign regions
2 without also purchasing an expensive multi-standard television
3 or signal converter, due to the incompatibility between the
4 three main video display standards, and they contend that
5 imposing this burden on consumers is a substantial adverse
6 effect.

7 So, I don't know, maybe - I don't know if the
8 price has gone down a lot in the last few months, but they were
9 characterizing these converters as expensive at the time of the
10 initial filing, and now they are \$20.

11 MR. CARSON: So, Ms. Hinze, do you want to retract
12 that statement?

13 MS. HINZE: Let me explain that statement, one,
14 expensive TV multi-standard, or signal converter \$20.

15 MR. CARSON: So, we don't really have a problem
16 there, do we? All right, never mind, that's not terribly
17 important.

18 MS. HINZE: Can I, however, address one of the
19 earlier statements about the ease and convenience of doing this
20 from the consumer point of view, you just buy a DVD --

21 MR. CARSON: With what?

22 MS. HINZE: From the consumer point of view, just
23 buy a DVD ROM, put it into your computer.

24 MR. CARSON: Right.

25 MS. HINZE: In fact, if you actually want to watch

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1 where it's from, for instance, Region 2, Region 3 and Region 4
2 where I'm from, you actually have to buy three different DVD ROM
3 drives, you have to install them on your mother board, if that's
4 a possibility, and then you have to find the ability to make
5 your BIOS, your operating system, recognize the three different
6 DVD ROM drives all to different regions, and then you have to
7 have some sort of software that will do a conversion of the PAL
8 to NTSC for a playback to display on your VGA monitor.

9 That, one, involves three sets of drives, and,
10 two, is something that will be difficult technically to do.
11 It's not trivial.

12 MR. CARSON: More difficult than circumventing CSS?

13 MS. HINZE: To modify a Region 1 player, as I
14 understand it, from information that's available on the
15 internet, so this is information that exists that I have heard
16 about, I understand can be as simple as pressing a series of
17 buttons. However, it does violate Section 1201(a)(1) according
18 to the views of my opponents, and, therefore, an exemption would
19 be required.

20 MR. CARSON: Okay.

21 Mr. Marks --

22 MS. GARLICK: May I - I'm sorry, I just wanted to
23 make one comment in relation to the harm that's being claimed.
24 I'm getting some conflicting senses of what's going on here in
25 relation to region coding.

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1 On the one hand, we are told that region coding is
2 necessary to incentivize distribution structures and to enable
3 people to comply with local laws. On the other hand, it seems
4 to be, from the testimony that you read earlier, that it's okay
5 to sell Region 2 players into the U.S. market, and it's okay for
6 people to run around and buy all kinds of equipment in order to
7 be able to circumvent these region codes.

8 So, I'd just like to pose a question for others to
9 consider, is, you know, how valid is this claim of harm,
10 particularly, against the history of people being able to import
11 for personal use previously.

12 MR. CARSON: We'll get there, have patience.

13 Mr. Marks, I'm a little puzzled by the suggestion
14 you made, in your last round of comments, that you can just go
15 out and get the DVD ROM drive. Now, if I'm not mistaken, we've
16 been talking about limits. You've been saying, why do you ever
17 watch it on the a computer, just get a DVD player and watch it
18 on TV, better to watch it on TV anyway. Now you are saying, why
19 should we watch it on a TV, watch it on a computer, get a DVD
20 ROM drive. I mean, which is it?

21 MR. MARKS: You can do both.

22 MR. CARSON: Well, no, apparently not, because in
23 this particular case you can't watch it on a TV.

24 MR. MARKS: Whoa, whoa, whoa, hang on.

25 MR. CARSON: I'm hanging on just barely.

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1 MR. MARKS: You may not put words in my mouth. You
2 can do a lot, but not that.

3 I said, I specifically said in this letter that I
4 submitted on June 23, 2000, that there's no restriction in
5 purchasing and importing a DVD player coded for Region 2. So, if
6 you would prefer to play it on a DVD player and watch it on your
7 television set, assuming - well, in the case of Japan and Region
8 2 stuff they are NTSC, we are NTSC, so you won't have an
9 NTSC/PAL conversion problem there, so let's stick with that and
10 put the NTSC/PAL conversion, because that happens whether
11 there's an exemption, no exemption, regional coding, no regional
12 coding, it's kind of a moot factor because it exists
13 irrespective of regional coding or not. So, let's stick with
14 Region 2 for a second, Japan, U.S., both NTSC format countries.

15 You can buy that DVD player, and, you know, hook
16 it up to your television and play it. That's a more expensive,
17 and I acknowledge, more expensive proposition that you would
18 have to engage in, because you may find difficulty in finding a
19 Region 2 DVD player here in the U.S., and you may, in fact, have
20 to import it from Japan. And, I acknowledge that.

21 What I was saying in the ROM drive circumstance,
22 it's easier because you can buy any ROM drive here in the United
23 States and change the regional setting yourself.

24 So, the point I was trying to make is that's a
25 less burdensome method of being able to actually view the Region

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1 2 DVD discs here.

2 MR. CARSON: Okay.

3 MR. MARKS: But, I certainly wasn't arguing, and I
4 apologize if I gave the impression, that that was the exclusive
5 method by which you could do it.

6 MR. METALITZ: I would just say also on the DVD ROM
7 example, first of all, I guess it costs a little more if you do
8 the player, but maybe you don't have to, you know, make all the
9 steps that Ms. Hinze talked about for bringing your new DVD ROM
10 drives on line.

11 The second is, as I recall the comments, and I
12 can't swear that all of them fit in this category, but the vast
13 majority of the comments really seek to view DVDs that are
14 coming from one market, either an Indian market, Japanese
15 market, Australian market. I know some people, we have an
16 increasing number, let's say, of global citizens who actually
17 are interested in watching DVDs that aren't released in the
18 United States, but they come from all over the world, but I
19 think that does shrink considerably the number of people who
20 would need three or four additional DVD ROM drives. I think for
21 most of the people who have spoken up in this proceeding, their
22 problem could be solved if they got one.

23 MR. MARKS: Can I have just one more point also?
24 In terms of that issue of somebody who, you know, has a global
25 cultural interest and has a voracious appetite for foreign

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1 titles from all sorts of different regions of the world, it
2 seems to me the best way that that can be satisfied is for those
3 different variety of foreign titles to be made available in the
4 U.S. on discs that are coded either for Region 1 or coded for
5 multi-regions, so that, therefore, you don't have to get into
6 all of this problem of multiple players and multiple ROM drives,
7 or ROM drives where you are resetting the region coding player.
8 And, it seems to me we need to try and figure out what is the
9 best way to incentivize this.

10 I would maintain that for the last three years the
11 regional coding system has been legally protected, you know, in
12 tact, in terms of there not being an exemption granted, and the
13 result has been a very strong proliferation of foreign language
14 and foreign works available on DVD in the U.S. market.

15 I believe if there was not that proliferation, and
16 if there was a diminution, in fact, of foreign works available
17 in the U.S., on Region 1 or multi-region DVD discs, we might be
18 in a more difficult position here today.

19 But, I think, you know, the evidence is showing
20 that there's actually quite a dramatic increase in the
21 availability of these foreign language titles, and I think
22 that's ultimately the result we all want.

23 MR. METALITZ: I think we also have to assume,
24 based on what we know about, again, going back to the Japanese
25 situation, that for whatever reason the producers of those

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1 titles have decided that the way they want to reach the U.S.
2 market is through distributorship in the United States, and the
3 Region 1 version, rather than originally producing their titles
4 either in all region or in Region 1 and 2 at least, so that they
5 could directly export it into the United States.

6 You know, they may change their mind, they may
7 decide that this niche market is never going to be more than a
8 niche market, and there will be enough people out there ordering
9 by mail order from Japan, and so let's enable these discs on
10 Region 1 and 2.

11 But, they haven't made that decision, unlike, for
12 example, the Indian film makers who appear to be releasing an
13 all region, there could be a variety for reasons for this, but
14 I think the most logical one is that they also figure this is
15 the way to reach the U.S. market. And, if we want to encourage
16 distribution, continued increased distribution of these titles
17 in the U.S. market, regional coding is part of that picture.

18 MS. HINZE: Could I address that?

19 MR. CARSON: Sure.

20 MS. HINZE: The precise reason EFF is seeking this
21 exemption is because in the last three years there are a number
22 of works that have not become available in the U.S. market, and
23 the reason we are seeking this exemption is because for whatever
24 reason these works have not become available.

25 MR. CARSON: Yes, we understand that.

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1 MS. HINZE: I just want to make it clear from the
2 point of view, for instance, Region 4 works, there are numerous
3 titles that are not new titles, that have not become available.
4 It's been more than three years since some of these titles have
5 been released, and they are not in existence in Region 1 format.
6 They are not existent in any format in the United States, and
7 the only way that a consumer could actually have access to play
8 those titles here would be to buy a Region 4 version of the disc
9 and, hopefully, find some way to play it, that would presumably
10 require an exemption. That's specifically why we sought the
11 exemption, because these works simply are not available, and to
12 the extent that there's an incentive structure the incentive
13 structure would be to actually encourage people to distribute
14 these works. We believe our exemption will actually have the
15 effect of encouraging U.S. distributors to make these works
16 available.

17 We would certainly welcome that, if that were the
18 case, but the reason the exemption is being sought is because
19 our experience is that that has not been the case.

20 MR. CARSON: Right.

21 Now, should someone who goes abroad and buys a DVD
22 from another region - well, let's start over - does someone who
23 goes abroad and buys a DVD from another region, and then brings
24 it here and wants to try to succeed in playing it here,
25 notwithstanding region coding, are they engaging in an

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1 infringing use of the work?

2 MR. MARKS: I don't think so.

3 MR. CARSON: Is there any reason why they shouldn't
4 be permitted to view the DVD that they purchased abroad?

5 MR. METALITZ: They are.

6 MR. CARSON: Pardon?

7 MR. METALITZ: They are permitted to do that, as
8 far as the copyright law is concerned, I believe.

9 MR. CARSON: Right, but the region coding is
10 preventing them from doing that, correct?

11 MR. METALITZ: No, the region coding is making them
12 go a different route to do that, rather than circumventing the
13 region code they need to get a - use one of the other methods
14 that we've talked about, resetting their DVD ROM drive or
15 getting a --

16 MR. CARSON: None of which is necessarily a very
17 easy way of doing it, right?

18 MR. METALITZ: Right.

19 MR. CARSON: So, there are impediments to their
20 engaging in what we all agree are non-infringing uses.

21 MR. METALITZ: The adverse impact in this situation
22 is not zero.

23 MR. CARSON: Right, okay, so let's go through the
24 cost of benefits then, because, obviously, I think your argument
25 is the benefits of this region coding system far outweigh the

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1 costs to these people who are facing difficulties in doing it.

2 MR. MARKS: Correct.

3 MR. CARSON: So, I think I was given four
4 justifications by Mr. Marks. First of all, rights are
5 territorial. Does that have any effect when we are talking
6 about an individual who purchased a DVD abroad and wants to look
7 at it here?

8 MR. MARKS: No, it doesn't for the most part. I
9 think we're looking at the - and I'm glad you are asking that,
10 because we are looking at the consequence of if there could be
11 an exemption to regional coding will there be, you know,
12 parallel importation of these discs, and not just the one off
13 that is permitted by Section 602.

14 MR. CARSON: Okay.

15 Now, of course, the exemption wouldn't in any way
16 extend the parallel importation. That's understood, isn't it?

17 MR. MARKS: I do understand, but I'm just talking
18 about the practical reality spillover versus the scope of
19 necessarily the exemption itself.

20 MR. CARSON: Have we had any problem thus far with
21 parallel importations?

22 MR. MARKS: We had a lot of problems with parallel
23 importation, but they've generally been from the U.S. out,
24 rather than --

25 MR. CARSON: Exactly.

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1 MR. MARKS: - into the U.S.

2 MR. CARSON: Well, of course, this exemption, if it
3 existed, would apply only to the U.S. So, I gather there's not
4 really any record of a problem of parallel importation into the
5 U.S., of foreign media.

6 MR. MARKS: So far, no, but, you know, that sort of
7 begs the question as to whether that's because of the regional
8 coding or not.

9 MR. METALITZ: And, I'm not sure that we know
10 enough about that, because again, let me emphasize that the
11 major studios are not generally the - I mean, there are some
12 exceptions, but the major studios are not generally the
13 authorized distributors of these titles, and it may be that
14 parallel importation is occurring in violation of the exclusive
15 distribution rights of the distributors who tend to be
16 independent.

17 MR. CARSON: So, that leads to a very interesting
18 question. I mean, you are here representing the major studios,
19 why on earth do you care?

20 MR. METALITZ: Well, I'm not just representing the
21 major studios, number one.

22 MR. CARSON: Okay.

23 MR. METALITZ: And, we're representing AFMA, for
24 example, and of course some of the major studios are involved
25 here as well.

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1 But, obviously, regional coding, as you know, is
2 a global system.

3 MR. METALITZ: Right, but we are not going to
4 effect it elsewhere, we are only talking about here.

5 MR. CARSON: I agree. This proceeding cannot
6 directly affect it anywhere else. So, for U.S. copyright
7 owners, whether or not this exemption is granted is, I would
8 think, a trivial thing, isn't it?

9 MR. METALITZ: No, I don't think it's a trivial
10 matter, both because to the extent that there's a growing market
11 for foreign language DVDs and others in this category, it's
12 certainly a market opportunity that they would want to exploit
13 as distributors, and all of these companies are distributors of
14 other people's product, to some extent.

15 And, the second reason, of course, is because they
16 want to maintain the integrity globally of the regional coding
17 system, and they don't want the United States setting the
18 example of permitting circumvention of regional codings.

19 MR. CARSON: Okay.

20 MR. MARKS: And, in fact, on these foreign language
21 feature films, at least according again to this DVD release
22 report, the fourth largest distributor distributing 91 of the
23 1700 titles was Columbia Tri Star, distributing 91 foreign
24 language releases in the U.S.

25 So, they probably would have an interest. They

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1 may be able to better answer some of these questions, whether
2 they have parallel importation problems of the foreign language
3 films or not. I just don't know.

4 MR. CARSON: Okay.

5 MR. METALITZ: Again, these are niche markets for
6 the most part, so you wouldn't expect a huge flood of parallel
7 imports, but it might be enough to affect that market.

8 MR. CARSON: All right.

9 Well, let's move on to the second justification,
10 the theatrical window. That's, obviously, not an issue here, is
11 it? We are talking about viewing foreign DVDs here, as a
12 general proposition I don't think we're -

13 MR. MARKS: Only to the extent, I would say, if, in
14 fact, there was a U.S. distributor who gained theatrical
15 distribution rights to the foreign film here in the U.S., it
16 certainly could affect it.

17 MR. CARSON: Yes, there is certainly the
18 possibility, do we have information about how often that arises?

19 MR. METALITZ: We have the example in our
20 submission, the Rabbitproof Fence.

21 MR. CARSON: Yes, you've got that one.

22 MR. METALITZ: I agree with you that this is not
23 the typical situation.

24 MR. CARSON: Right, and we certainly heard out of
25 your mouths plenty of times that when you come up with one

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1 example that's just one example, it doesn't mean much. So, so
2 far we've got one example on that side of the equation I gather,
3 that's all we can say.

4 MR. MARKS: One example where the theatrical
5 distribution in this country occurred after the DVD release.

6 MR. METALITZ: In a non-Region 1 setting.

7 MR. MARKS: There could well be other examples, I
8 just don't know of them. It wouldn't surprise me.

9 MR. METALITZ: I mean, it really depends on how
10 much of the U.S. theatrical market is of titles that are first
11 released outside the U.S. That would be the likeliest source of
12 this, such as Rabbitproof Fence, and, obviously, that's not a
13 high proportion, but it's not insignificant either. There are,
14 you know, foreign films that do quite well in the United States.

15 MR. CARSON: Right, but --

16 MR. METALITZ: And, some of those may have been,
17 you know, I'm speculating here, that some of them may have been
18 released on DVD with region coding that didn't allow playing in
19 the United States prior to the time of their theatrical release
20 in the United States.

21 MR. CARSON: Right, I'll agree, that's the
22 question, and we just don't have a clue what the answer is, I
23 guess.

24 MR. METALITZ: I think the answer is that it's not
25 unheard of, but I would agree with you, it's probably not going

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1 to be a major part of the market.

2 MR. CARSON: Okay.

3 Let's move on to the third justification, local
4 censorship, not an issue here, I assume, correct?

5 MR. METALITZ: Well, not censorship, but it could
6 be for ratings.

7 MR. CARSON: For ratings, okay.

8 But again, we are talking about people who acquire
9 these abroad and are bringing them here so they can watch it.
10 Are we really concerned about them being deceived by ratings or
11 having a problem with ratings?

12 MR. METALITZ: I don't know the extent to which
13 there's - you know, it's certainly more in the video game area
14 that this is an issue, but I don't know the extent to which it's
15 an issue in the audio visual.

16 MR. CARSON: Okay.

17 Well, even with the video games, I mean if I go
18 to Japan and buy a Japanese video game and bring it back here
19 and it's a lot more violent than what people are used to here,
20 I knew what I was buying, didn't I? Are you going to tell me
21 that I shouldn't be able to play it here because it's too
22 violent for me?

23 MR. METALITZ: I'm certainly not telling you that,
24 but I'm sure there are state legislators around the country who
25 would tell you exactly that.

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1 MR. CARSON: No doubt.

2 Okay, finally, the fourth and final justification
3 you gave, Mr. Marks, and all I've got on my piece of paper, you
4 are going to have to elaborate for me, is, I just wrote down
5 CCAM and PAL, and I'm not quite sure what that means.

6 MR. MARKS: Oh, yes, well, what I was referring to
7 there is that, you know, some of the justification for doing
8 regional coding in the first place was to try and replicate
9 those divisions in PAL in CCAM markets, PAL, CCAM and NTSC
10 markets, that certainly the division in regional coding isn't
11 completely analogous to the division of foreign territories vis-
12 à-vis PAL and CCAM.

13 But, for example, Region 2, which is generally
14 Western Europe and part of Central Europe, is generally a PAL
15 territory, although Region 2 also includes Japan, which is an
16 NTSC territory. But, in general, we try to make any territory
17 like Europe, which is generally PAL and CCAM, all subject to one
18 region, to sort of minimize the problem of the NTSC/PAL
19 transcoding problem.

20 MR. CARSON: Okay.

21 I can following what you say as a matter of fact,
22 but I'm not sure I understand how that is a justification for
23 region coding, and why we should be - why we should hesitate
24 before coming up with the exemptions because of this
25 denominator. Why does that matter?

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1 MR. MARKS: Well, why it mattered initially is, we
2 wanted to be sure that, you know, when somebody bought - that we
3 could say, okay, these just are destined for Europe and for, you
4 know, Region 2 players in Europe, that we will know to put on
5 the PAL/CCAM version of the movie so that they will be playable
6 on the television sets that are in Europe.

7 If you, you know, exempt, do an exemption for
8 regional coding, people may, in fact, you know, bring in discs
9 that are not NTSC discs, expect, okay, with this exemption I'm
10 going to be able to clearly play this on my DVD player and
11 television set, and, in fact, they may not be able to do so.
12 So, it can add to confusion.

13 MR. CARSON: Is that a problem you care about?

14 MR. MARKS: I care about it to the fact that I
15 believe if you create an exemption for regional coding, and if,
16 in fact, what ends up becoming the de
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1 care that someone who buys something abroad and takes it home,
2 thinking, oh great, I've got an exemption I can play it, and
3 then they are not able to because of the PAL and CCAM issue.

4 MR. MARKS: Well, what I'm trying to --

5 MR. CARSON: What do you care about that?

6 MR. MARKS: - I care about that because I think it
7 goes to the issue of how much utility and value are you actually
8 giving to users by granting that exemption.

9 MR. CARSON: Okay, and we certainly had a
10 conversation on that before.

11 MS. HINZE: Could I just quickly add a quick
12 statement of clarification there?

13 MR. CARSON: Sure.

14 MS. HINZE: I have a number of Region 4 DVDs that
15 I currently cannot play. Each of them are labeled as to being
16 PAL.

17 MR. CARSON: What?

18 MS. HINZE: PAL, which is the Australian standard.

19 MR. CARSON: Right.

20 MS. HINZE: It's clear that any consumer who buys
21 a foreign region - it's on the label, they know exactly what
22 they are getting, I don't think there's any issue of confusion
23 on the part of consumers.

24 And, as I said before, I'm a little puzzled about
25 Mr. Marks' statement, because as I understand it, a \$20 PAL to

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1 NTSC converter is all that's required in order to address that
2 particular concern.

3 One, I can't see how consumers will be confused
4 because it's clearly labeled on a foreign DVD, and second, it's
5 not illegal to have a PAL to NTSC converter or to use one, and
6 three, it's a matter of a \$20 PAL to NTSC converter.

7 MR. MARKS: And, I guess I would answer, and the
8 discs are clearly labeled that they are playable on Region 4, so
9 there's no consumer confusion, and it's not a burden to get a
10 Region 4 player here in the U.S., and then play the disc. I
11 think it's quite equivalent.

12 MR. CARSON: Well, you know, I've heard two
13 different things about that, and I would like clarification on
14 that. On the one hand, at times I've heard you say it's easy to
15 get a player from another region, and other times I've heard you
16 acknowledge that maybe it's not so easy. I mean, which is it?

17 MR. MARKS: Okay, well, let me say, you can import
18 a player and it's certainly easy to get a ROM drive, you know,
19 here in the U.S., and set it to Region 4.

20 MR. CARSON: Okay.

21 MR. MARKS: So, if the issue is viewability of the
22 disc, and the consumer's ability to view the disc, there's an
23 easy alternative that doesn't involve circumvention.

24 MR. CARSON: Okay.

25 Well, how easy is it to import the player?

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1 MR. MARKS: I haven't tried, so I couldn't tell
2 you.

3 MR. CARSON: Okay.

4 I've heard \$40 or \$50 bandied about as the price
5 of a player from another region.

6 MR. MARKS: No, no, no, you've heard bandied about
7 \$40 or \$50 for the price of ROM drives.

8 MR. CARSON: Oh, okay.

9 MR. MARKS: And, I have listings here of many, many
10 different ROM drives that are in that price range.

11 MR. CARSON: Okay.

12 Do you have any information on what the cost would
13 be for an American citizen living here to get - to acquire a DVD
14 player for Region 4 or Region 2?

15 MR. MARKS: I don't have that information.

16 MR. CARSON: Does anyone have any information on
17 that? No, all right.

18 Okay, finally, just one question about the video
19 game issue.

20 Mr. Metalitz, you mentioned that one difference
21 between the region coding issue for video games that may not be
22 there with respect to motion pictures is that in some console
23 systems the region coding is closely integrated with the access
24 control technology that prevents playing of pirate games. So
25 that, if you permit people to circumvent the region coding in

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1 the video game area, you may also be permitting them to,
2 basically, commit piracy. Is that more or less an accurate
3 summary of your testimony?

4 MR. METALITZ: Yes, your exemption won't say that
5 if you granted it, it won't say you are allowed, but I think
6 that would be the fact. And, I think the emphasis in the
7 contrast is on May after the interrogation we had from Mr. Tepp,
8 we are not 100 percent, at least I'm not 100 percent sure of the
9 degree of integration between CSS and the regional coding, but
10 I know that in at least some of the console systems it is
11 closely integrated.

12 MR. CARSON: Even if that's true, though, isn't
13 that just the result of a choice made by video game
14 manufacturers to integrate the two of them, and aren't you just
15 penalizing the user because of that choice that was made by the
16 providers of this stuff?

17 MR. METALITZ: Well, it is true that they chose
18 this system, and, in fact, they have different systems. I mean,
19 the major console manufacturers don't all have the same system.
20 So, I hesitate to generalize.

21 But, they are - if you are asking for the reasons
22 why video game companies do this, I think as I said they are
23 similar to, although not identical to, the reasons that movie
24 studios use regional coding, the main ones being licensing
25 restrictions, because their licensing this region for the most

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1 part, and localization, which is I think a big issue not only
2 because of the cultural issues as far as the level of violence
3 that's allowed, but language and other factors. That's why they
4 do it, that's why they have regional coding.

5 You are asking why they have a system in which the
6 two are closely integrated?

7 MR. CARSON: Well I'm not even sure I care why, I'm
8 just wondering whether we should care about it, when it's a
9 choice that was made by the people who were saying don't do it
10 to us. Well, it was their choice to do it that way, it was
11 their choice --

12 MR. MARKS: Well, no, but wait one second. You
13 could be putting us in sort of a catch-22, you know. If you
14 don't integrate it closely with an access control methodology,
15 and there's absolutely no connection to an access control
16 methodology at all, and it's a flag with a response, then you
17 are saying to us, well, it may not be an effective access
18 control method at all. And then, if you do try and hook it into
19 a licensing scheme, like CSS which is an access control
20 methodology, then you are saying, well, wait a second, you are
21 somehow, you know, illegally bootstrapping two access control
22 methodologies together.

23 So, what's our choice?

24 MR. CARSON: We'll have to decide that.

25 MR. MARKS: I'm glad I stumped you. Sorry.

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1 MR. METALITZ: Again, Mr. Carson, I think in terms
2 of the real world impact of this, I think the video game
3 companies experience is colored to a great degree by the Section
4 117, I don't it's too strong a word to say debacle, where a
5 provision that's been enacted by Congress has been widely abused
6 as an excuse for piracy, and the same thing we fear will happen
7 again in this situation.

8 So, I think the video game industry is living with
9 a very high level of piracy right now. It's a huge problem in
10 which their losses are quite extensive, and in many countries
11 they virtually don't have a market because of piracy, and this
12 would simply exacerbate the problem.

13 MR. CARSON: But, what's the connection between
14 that and region coding?

15 MR. METALITZ: Because allowing the circumvention
16 of region coding, as I said, would I think step you into the
17 quick sand of promoting the circumvention of access controls,
18 generally the playing of pirate games on video game consoles.

19 MR. CARSON: Okay, I get it.

20 MR. TEPP: You know, I just want to react to
21 something that just got said very quickly, because you didn't
22 stump me.

23 MR. MARKS: I was afraid of that. I was really
24 afraid of that. I was hoping you'd be too tired to continue,
25 but, oh, well.

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1 MR. TEPP: Oh, no, if you think that was an
2 interrogation, I think what we are trying to figure out is
3 precisely whether what's going on is bootstrapping something not
4 protected by 1201, by merging it with something that is. And,
5 if so, whether we should respond in the affirmative to a request
6 for an exemption to deal with that, to allow non-infringing
7 uses.

8 MR. MARKS: Right, and I think that's a very fair
9 question, and what I was trying to say, and maybe I didn't
10 articulate it clearly enough, is that if you accept the premise,
11 and you may not, but if you accept the premise that it's
12 legitimate for a copyright owner to employ technical measures in
13 order to enforce - help enforce their distribution rights,
14 including their right to decide how to market their works, where
15 to market their works, when to market their works, if you accept
16 that premise that it's legitimate for copyright owners to do
17 that, then one of the technologies to do that is this regional
18 coding technology, which, as I mentioned before, in and of
19 itself is not self protecting to the degree that scrambling and
20 access control - that scrambling and encryption are, but still
21 constitutes an access control technology.

22 If your goal as a copyright owner is to say, I
23 want to try and ensure that that access control technology truly
24 is effective, so that it qualifies for protection under the
25 DMCA, one way of accomplishing that may be to link it, you know,

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1 as we have done in CSS, as an obligation of an encryption
2 scrambling technology, which, perhaps, more clearly qualifies
3 for protection under 1201.

4 And so, that's actually a more, I think,
5 reasonable explanation, perhaps, the flippant question I posed
6 to Mr. Carson.

7 MR. TEPP: I'm certainly not trying to pass
8 judgment on what's legitimate for a copyright owner to do in
9 terms of the distribution market. I'm not aware of any
10 violation of the law by attaching region coding in the first
11 place, that's not the question we're faced with. The question
12 we are faced with is, once it is in place is it a 1201 issue,
13 and if so should there be an exception. And, in spite of my so-
14 called interrogation, I still haven't heard, I don't believe, an
15 argument or an analysis of region coding in isolation that it is
16 within the definition of an effective technology or protection
17 measure that effectively controls access to works.

18 MR. METALITZ: I think one of the reasons that you
19 may not have heard that is because it doesn't exist in isolation
20 from CSS. I mean, theoretically it's possible for someone to
21 release the disc that you talked about, that doesn't have CSS,
22 but does have region coding. At least I think that's
23 theoretically possible, but I'm not aware that that ever
24 happens.

25 What at least happens in the vast majority of

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1 cases is that it is - they are both there, and I think we've
2 explained our view why in that circumstance I don't think
3 there's much doubt that as the Copyright Office and the
4 Librarian found three years ago, region coding is an access
5 control technology that's protected by 1201.

6 And then the question, quite properly, is, have
7 proponents met the burden of showing that it would be adverse
8 impact on non-infringing uses, which we concede is not zero, but
9 is it sufficiently significant weighed against the value that
10 you recognized three years ago of region coding to justify an
11 exemption.

12 MS. PETERS: Okay.

13 We could go on forever, it is now --

14 MS. GROSS: I'm sorry, can I just make one comment
15 before we conclude?

16 MS. PETERS: Sure.

17 MS. GROSS: Thank you.

18 I just wanted to raise a point that we had
19 discussed in an earlier panel with respect to Linux users being
20 able to play their DVDs. And, Mr. Marks had a press release
21 talking about the IBM Think Pad, the press release is about two
22 years old. It was my understanding that once that press release
23 went out, announcing this Think Pad Linux DVD player that there
24 was a good deal of controversy, threat of litigation, and it was
25 immediately withdrawn from the market.

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1 So, before you conclude that there is a Linux box
2 available, I think you need to see a little bit more
3 information, because it's my understanding that that particular
4 Think Pad is not available for Linux playing today.

5 MR. CARSON: Who threatened that litigation?

6 MS. GROSS: I'm not sure. This is two years old,
7 this story, so I'm just saying, I think we need to have a little
8 bit more information about the existence of this box.

9 MR. CARSON: Well, you're welcome to pass it on to
10 us.

11 MS. GROSS: I will do that.

12 MS. PETERS: Okay.

13 It's 6:18, we've been at this for more than nine
14 hours. Many of you have been here all day, and contributed. I
15 want to thank all of you, you've given us a lot to think about,
16 and at least for now, except for you, Mr. Marks, who have many
17 things to do for homework --

18 MR. CARSON: And, Ms. Hinze.

19 MS. PETERS: - and Ms. Hinze, but I do thank you
20 for all of your efforts, both to what you've filed with us and
21 as well as your participation here. So, this hearing is
22 concluded, all the hearings are concluded, and enjoy your
23 evening. Thank you.

24 (Whereupon, the above-entitled matter was
25 concluded at 6:18 p.m.)

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