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UNITED STATES OF AMERICA
U.S. COPYRIGHT OFFICE
SECTION 1201 STUDY
THURSDAY, MAY 19, 2016
9:04 a.m.

The U.S. Copyright Office Public Roundtable on
Section 1201
James Madison Memorial Building, Mumford Room,
Washington, D.C.

Reported by: Natalia Thomas,
Capital Reporting Company

1 P R E S E N T

2 ALLAN ADLER, Association of American Publishers

3 KEVIN AMER, United States Copyright Office

4 JONATHAN BAND, Library Copyright Alliance

5 BRANDON BUTLER, University of Virginia Library

6 SOFIA CASTILLO, Association of American Publishers

7 GABE CAZARES, National Federation of the Blind

8 KRISTA L. COX, Association of Research Libraries

9 PETER DECHERNEY, University of Pennsylvania

10 TROY DOW, The Walt Disney Company

11 HARLEY GEIGER, Rapid7

12 ANDREW GOLDMAN, Knowledge Ecology International

13 ROBYN GREENE, New America's Open Technology Institute

14 AARON LOWE, Auto Care Association

15 SAM MCCLURE, Institute of Scrap Recycling Industries,
16 Inc.

17 CHRIS MOHR, Software & Information Industry

18 Association

19 ANDREW MOORE, United States Copyright Office

20 ABI MOSHEIM, United States Copyright Office RAZA

21 PANJWANI, Public Knowledge

22 STANLEY PIERRE-LOUIS, Entertainment Software

23 Association

24 BEN SHEFFNER, Motion Picture Association of America

25 JASON SLOAN, United States Copyright Office

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

2 (Continued)

3 GEORGE P. SLOVER, Consumers Union

4 REGAN SMITH, United States Copyright Office

5 BRUCE H. TURNBULL, DVD Copy Control Association and

6 Advanced Access Content Licensing

7 Administrator, LLC

8 REBECCA TUSHNET, Organization for Transformative Works

9 BRIAN WEISSENBERG, Institute of Scrap Recycling

10 Industries, Inc.

11 MATTHEW WILLIAMS, MSK Law Firm; Association of

12 American Publishers, Motion Picture

13 Association of America, Recording

14 Industry Association of America

15 JONATHAN ZUCK, ACT I The App Association

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

2 9:04 a.m.

3 MS. SMITH: Okay. I think we're waiting for
4 one participant who's a couple of minutes away. But
5 we'll go ahead and start and he can join when he gets
6 here. Welcome to the roundtable discussion for the
7 Copyright Office's study on section 1201 of the DMCA.
8 Thank you for being here. My name is Regan Smith.
9 I'm Associate General Counsel of the Copyright Office.

10 As you know, the Office is conducting this
11 study in accordance with a request from the House
12 Judiciary Committee's Ranking Member in response to
13 the Register of Copyright's testimony in a 2015
14 copyright review hearing regarding the impact and the
15 efficacy of section 1201 and the triennial rulemaking
16 process.

17 If you're here, you're probably familiar
18 with 1201. But just -- I wanted to provide a little
19 bit of background into the statute and how it was
20 enacted. 1201 is part of the DMCA enacted in 1998.
21 And in enacting it, Congress recognized that
22 technological protection measures could be employed
23 not only to prevent piracy and other economically
24 harmful, unauthorized uses of copyrighted material,
25 but also support new ways of dissemination of

1 copyrighted material to users digitally.

2 So section 1201 protects circumvention of
3 technological measures employed on or behalf of
4 copyright owners to control access to their works,
5 known as access controls, as well as anti- trafficking
6 provisions preventing trade in either services or
7 tools of access controls or copy controls that protect
8 rights to copyright owners under Title 17.

9 Section 1201 also includes a triennial
10 rulemaking process by which the Librarian of Congress,
11 following a public proceeding conducted by the
12 Copyright Office, in consultation with NTIA, can grant
13 limited exceptions to section 1201(a)(1)'s bar on the
14 circumvention of access controls.

15 The rulemaking is intended as a failsafe
16 mechanism through which the Copyright Office can
17 monitor developments in the marketplace and recommend
18 limited exemptions to protect -- to prevent the
19 restriction of fair and non-infringing uses.

20 The rulemaking has expanded with each
21 successive cycle. In the first rulemaking, the Office
22 received nearly 400 comments and that resulted in the
23 granting of two exemptions. In the sixth rulemaking,
24 which was concluded last October, we received nearly
25 40,000 comments. We considered 27 categories and

1 granted 22 of the exemptions.

2 Some of the categories in the last
3 rulemaking concern the ability to access and make non-
4 infringing uses of works such as motion pictures, e-
5 books and videogames. But others concerned access to
6 copyrighted computer code in consumer devices ranging
7 from cell phones to smart TVs, automobiles, tractors,
8 3D printers and pacemakers.

9 The Register said in her Recommendation that
10 while it's clear 1201 has played an important role in
11 developing secure platforms for digital distribution
12 of copyrighted works, it is also impacting a range of
13 consumer activities that have little to do with the
14 consumption of creative content.

15 It also has become obvious that the
16 regulatory process has become burdensome for
17 participants in these rulemakings, especially when
18 seeking to renew exemptions and that the permanent
19 exemptions, such as for security research, encryption
20 research or privacy, may have not adequately foreseen
21 some of the developments since the DMCA.

22 So this is the genesis for our study.

23 We thank you for submitting your written
24 comments, which we're looking at. And we're hoping
25 that these roundtables will facilitate a deeper

1 discussion. Kevin is going to explain the logistics
2 and then kick off panel one.

3 MR. AMER: Good morning. My name is Kevin
4 Amer. I'm Senior Counsel in the Office of Policy and
5 International Affairs here at the Copyright Office.
6 Before we begin, I'd just like to go over a few
7 logistical items.

8 First, the roundtable sessions will be
9 moderated by us here at the table. We will pose
10 questions or topics for discussion. And we ask that -
11 - to indicate that you would like to be recognized,
12 you please turn your name card vertically. This will
13 be familiar to some of you who've been to WIPO. And
14 we'll then call on you.

15 Just given the number of panelists and the
16 number of topics that we are hoping to cover, we ask
17 that you please try to limit your comments to about
18 two to three minutes. We apologize profusely in
19 advance. If you do go over substantially, we will
20 unfortunately have to cut you off. You know, we
21 appreciate your understanding as we try to accommodate
22 a lot of different viewpoints and hear from a broad
23 range of speakers.

24 We also ask obviously that you focus your
25 comments on the particular topics that we provided in

1 our notice of inquiry or to particular questions that
2 we raise. Also, we've been asked that if at the end
3 of your comment, you could please turn off your
4 microphone because that avoids interference on the
5 sound recording.

6 Second, as you can see, today's event is
7 being video recorded by the Library of Congress.

8 Panelists, we've provided you with a video
9 release form. If you haven't yet signed it, please do
10 so and return it to one of us here at the table. In
11 addition, as you can see, we do have a court reporter
12 transcribing the proceedings.

13 And finally, just before we begin, we'd just
14 like to note that we may seek additional written
15 comments in response to some issues that may come up
16 during the roundtables. If we do, we obviously will
17 provide a formal notice of inquiry.

18 So at this time, I'd like to ask everyone in
19 the audience to please turn off or mute any cell
20 phones or devices that could interfere with the
21 recording. Does anyone have any questions about
22 logistics before we get started?

23 Okay, great. Before we begin, I'd just like
24 to ask my other Copyright Office colleagues to
25 introduce themselves quickly.

1 MS. MOSHEIM: I'm Abi Mosheim.

2 MR. SLOAN: I'm Jason Sloan, Attorney-
3 Advisor in the General Counsel's Office.

4 MR. AMER: And then, if we could just go
5 around the table, if you all could just please
6 introduce yourself and your affiliation, we'll start
7 with Mr. Adler.

8 MR. ADLER: (off mic)

9 MR. AMER: Oh, if you would turn on your
10 microphone, if you would.

11 MR. ADLER: I think it was on, right.

12 Oh, okay. My name is Allan Adler. I'm
13 General Counsel and Vice President for Government
14 Affairs for the Association of American Publishers, a
15 national trade association for the book and journal
16 publishing industry.

17 MR. BAND: I'm Jonathan Band. I'm here on
18 behalf of the Library Copyright Alliance.

19 MR. DOW: I'm Troy Dow, with the Walt Disney
20 Company.

21 MS. GREENE: Robyn Greene, Policy Counsel
22 with New America's Open Technology Institute.

23 MR. LOWE: Aaron Lowe, with the Auto Care
24 Association. We represent manufacturers,
25 distributors, retailers and installers of auto parts,

1 independent and other vehicle manufacturers.

2 MR. PANJWANI: My name is Raza Panjwani.

3 I'm a Policy Counsel at Public Knowledge.

4 MR. PIERRE-LOUIS: I'm Stan Pierre-

5 Louis. I'm the General Counsel of the

6 Entertainment Software Association and we represent

7 the U.S. videogame industry.

8 MR. SLOVER: George Slover, Senior Policy

9 Counsel for Consumers Union, the policy and advocacy

10 division of Consumer Reports.

11 MR. WEISSENBERG: I'm Brian Weissenberg.

12 I'm a law student at Stanford Law School's

13 IP Innovation Clinic, representing the Institute of

14 Scrap Recycling Industries.

15 MR. ZUCK: Jonathan Zuck, from ACT | The App

16 Association.

17 MR. AMER: Great. Well, welcome everyone.

18 So the first session is entitled "Relationship of

19 Section 1201 to Copyright Infringement, Consumer

20 Issues and Competition."

21 And this session will explore the role and

22 effectiveness of section 1201 in protecting

23 copyrighted content and will consider how the statute

24 should accommodate interests that are outside of core

25 copyright concerns.

1 So I think we wanted to start just by
2 getting your view on asking sort of a big picture
3 question and getting your views on the overall role
4 and effectiveness of section 1201.

5 We had a lot of comments noting the
6 different distribution models that TPMs have
7 facilitated. And I think some other comments -- and
8 we had several examples of those.

9 We had some other comments that I think
10 questioned the relationship between the legal
11 protection of TPMs and the effectiveness of those
12 TPMs.

13 So I think we'd be interested just sort of
14 in your general views about the extent to which the
15 legal protections provided by -- for TPMs provided
16 under section 1201 contribute to the effectiveness of
17 technological protection measures in protecting
18 copyrighted content. Mr. Band?

19 MR. BAND: So I think as lawyers, we like to
20 feel that we have an impact on the world.

21 But I have a feeling that in this area, the
22 technological protection measures, to the extent that
23 they've been effective in protecting the rights of
24 copyright owners, it's because the technological
25 protection measures have been technologically

1 effective.

2 We saw early on ineffective measures such as
3 CSS that were very easy to hack. And you know, the
4 technology to hack it, DeCSS, was widely available.
5 There was some hacking of it, some not. But we now are
6 generations way beyond that in terms of the
7 effectiveness of technological protection measures,
8 especially with respect to all kinds of content that's
9 in the cloud and behind very secure paywalls.

10 And I think that the law has nothing to do
11 with the effectiveness of those -- of those systems,
12 certainly to the extent that one's worried about the
13 general public. I mean, I'm sure some people hack
14 into those systems from time to time. But what makes
15 those work -- and they work very well -- is the
16 technology, not the -- not the legal protection.

17 And to the extent one's worried about
18 hacking and this unlawful hacking into these systems,
19 you have the Computer Fraud and Abuse Act and you have
20 -- every state has its own anti- hacking statute. So
21 there's this whole other array of laws that come into
22 effect. So I think certainly as they are in the
23 current form, I think the 1201 protections really have
24 very little to do with the success of these
25 technological protection measures.

1 MR. AMER: Thank you. Mr. Adler?

2 MR. ADLER: I think it was recognized very
3 early on, in fact, because this legislation, as we
4 know, was the result of an international treaty that
5 determined that legal protections were important for
6 technological measures that were used to control
7 access to copyrighted works.

8 And that was not an accident because I think
9 the commonsensical proposition there is that having
10 the ability to use locks, if you will, or
11 technological measures to control access means nothing
12 if there are no legal restrictions against people
13 violating those locks or others in creating the
14 devices or offering services to violate those locks.

15 So when this legislation was enacted, it
16 wasn't surprising that the House Judiciary Committee
17 compared the use of this to, quote, "electronic
18 equivalent of breaking into a locked room in order to
19 obtain a copy of a book."

20 The idea here was all about access. It is
21 to facilitate consumer access to works online because
22 that would be convenient, because it was viewed that
23 that would cut expenses. It would cut against the
24 difficulties people have in finding these works. But
25 the notion of bringing access online meant that access

1 had to be secure in the face of all the ways in which
2 online digital networks are susceptible to having
3 people engaging in unauthorized activities.

4 So we think that the legal protections were
5 a necessary part of the notion that copyright owners
6 could use technological protection measures in order
7 to make their works conveniently and ubiquitously
8 available online and that's been a wild success.

9 MR. AMER: Thank you. Mr. Zuck?

10 MR. ZUCK: Thank you, and thanks for having
11 me here this morning. I may date myself a little bit,
12 but I remember very clearly going to Egghead Software
13 and buying a copy of a piece of software called Copy
14 II PC. And that's how in my younger unruly days I
15 copied software that I wanted to use because it took -
16 - it took creating copyrighted material to respect it,
17 in my particular case.

18 I think the real purpose of the legal
19 allowances and the legal prohibitions that 1201 offers
20 is taking the technology out of the mainstream. It's
21 not an all-or-nothing proposition. There's still going
22 to be hackers.

23 There's still going to be people that gain
24 access to technology.

25 But the widespread acceptability of that

1 knowledge, that I just walk into a Best Buy, for
2 example, and buy software to break encryption is I
3 think what really has changed by the legal provisions
4 that have been put in place. So that's the
5 connection. I think it has to do with numbers more
6 than it does a binary connection between the two if
7 that makes sense.

8 MR. AMER: I think Mr. Panjwani was next.

9 MR. PANJWANI: Thank you. When the WIPO
10 Copyright Treaty was adopted and the United States was
11 considering enacting the Digital Millennium Copyright
12 Act, the consideration I believe at the time -- I
13 wasn't there personally -- was that there was a
14 necessity to provide protections for rights holders in
15 order to encourage them to provide digital goods and
16 to distribute them online.

17 One of the things we have seen is that DRM
18 is not necessary for a number of business models. And
19 business owners are entitled to choose how they wish
20 to distribute. But we've seen the adoption of iTunes
21 taking a DRM-free stance.

22 We've seen CD Projekts, GOG.com, a game
23 distribution platform that sells both classic and
24 newer releases without DRM. The Tor Books imprint also
25 releases e-books without DRM.

1 In the last 7 to 10 years, we've seen a move
2 away from the assumption that DRM is absolutely
3 necessary to have a digital economy.

4 Considering that section 1201 takes that
5 assumption and then burdens the public's rights to
6 engage in non-infringing uses in order to provide
7 these protections, I think it's worth reengaging in a
8 cost-benefit analysis of to what extent do we still
9 need these very high barriers in order to encourage
10 digital distribution.

11 Beyond that, I think it's worth talking
12 about the fact that how effective 1201 has actually
13 been in curtailing digital piracy, which is something
14 that Congress explicitly called out in its legislative
15 history as a reason for enacting section 1201.

16 In our comments, we pointed to a number of
17 statements by various copyright industries decrying
18 the level of piracy that is occurring online and
19 digitally.

20 And while I know some folks have responded
21 by saying that, well, we need to look at the digital
22 markets we've created, the content that has been
23 allegedly made available by circumventing DRM and that
24 is available in these marketplaces is the same. It's
25 not separate. And I think separating these two sort

1 of conflates correlation and causation, that because
2 of DRM, we now have digital markets. I don't think
3 that's necessarily true.

4 MR. AMER: How do we get at that? I mean, in
5 your experience -- in fact, I'll open this up to
6 everyone -- as practitioners, is it your sense that
7 1201 actions are relatively common? Is this -- I
8 mean, I think we had some disagreement in the comments
9 as to how commonplace 1201 actions are. I'd be
10 interested in your thoughts on that or to pick up on
11 the previous question. I think Mr. Pierre-Louis was
12 next.

13 MR. PIERRE-LOUIS: Thank you. In about a
14 month, ESA will be hosting the E3 tradeshow, which is
15 our -- the world's premier videogame tradeshow where
16 you've got consoles with new capabilities, new games
17 and software. All that's made possible because of the
18 twin goals achieved by the DMCA.

19 When it was passed in 1998, the thought was
20 we want to expand consumer access to broadband and to
21 new technologies. And one of the ways we encourage
22 that is by getting copyrighted content online and on
23 other devices. And part of those twin goals involved
24 1201. We've seen that growth, which makes not only
25 our tradeshow, but our industry a growing one, \$23.5

1 billion now, the largest of the media companies --
2 industries. And that happens because we know that our
3 investment in our technologies and in our software and
4 in our copyrighted content will get protected.

5 When we're talking about various companies
6 deciding to issue certain content DRM- free, that's a
7 choice. 1201 doesn't require -- is not a required
8 statute. It's one that says if you implement this
9 technology, it will have the force of law if someone
10 tries to bypass it. But you don't have to use it. And
11 we've seen many models, even within our own industry,
12 with people putting out games that are free to play
13 and freemium models.

14 And so, we've seen the various models win
15 out because different games and different companies
16 have different goals. It doesn't mean one is mandated
17 and certainly there's no tech mandate in it. But I
18 think if companies decide to go DRM-free, that's
19 certainly not only allowable but that's another way to
20 access consumers.

21 MS. SMITH: Picking up on Kevin's question,
22 in your industry, are you aware of instances of using
23 1201 as an enforcement, you know, either in courts or
24 prior to litigation to protect the integrity of the
25 DRM?

1 MR. PIERRE-LOUIS: The good news about our
2 industry is we've had a lot of success particularly
3 with the newer console models in preventing that
4 access. And so, we've not had to rely on it in terms
5 of legal claims. But we know that having it as a
6 backstop protects us. We are a U.S.-only trade
7 association. But we know that internationally we've
8 had that success as well.

9 MR. AMER: Thank you. I think Mr. Dow was
10 next.

11 MR. DOW: Thank you. So Mr. Band talked
12 about that there appeared not to be any direct
13 correlation between the legal protections and the
14 advancement of the goal of making the material
15 available digitally online and that the real value was
16 in the technology itself. And I think that there is
17 real value in the technology itself.

18 And if you go back and you look at the NII
19 Whitepaper that made the recommendations that led to
20 the adoption of the DMCA, it was very explicit in
21 saying that in this new environment, the copyright
22 owners would look to technology to protect their
23 rights and that would be a very valuable tool in terms
24 of helping to promote the growth of digital commerce,
25 but that technology alone would be insufficient to

1 meet that goal and that legal protections alone would
2 also be insufficient to meet that goal. And it was
3 the combination of the two that were going to be
4 required to meet the objective of encouraging people
5 to sort of jump with both feet into a new digital
6 environment in which content, in a very high quality,
7 was put at risk.

8 And I think the experience has been that
9 that's what has resulted from the DMCA, that people
10 have relied on the legal protections, combined with
11 the technological protections, to get into these
12 businesses with both feet perhaps more quickly than
13 otherwise would have been the case.

14 I know that the availability of the WIPO
15 Treaties and their discussions, the DMCA were directly
16 relevant to the adoption of CSS as a protection for
17 DVD. It was what led to the introduction of the DVD,
18 which became the fastest growing consumer platform --
19 consumer electronics platform, up to that time, in
20 history.

21 Jonathan is right that that technology was
22 hacked and that there were tools available to defeat
23 it. But that's also what spawned much of the
24 precedent that we have right now in the DMCA is in
25 enforcement litigation under the DMCA dealing with

1 those things. And it's not -- and the objective was
2 never to say that these technologies would be hack-
3 proof or that there would never be anyone who would be
4 able to access the tools to do it or that would be
5 able to figure out a way to do it, but that you would
6 keep these things out of the mainstream. And that's
7 exactly what that litigation had the effect of doing.

8 And you know, Mr. Zuck talks about going
9 into the Best Buy and being able to buy hacking
10 software. Well, when we were in litigation with 321
11 Studios over CSS hacking technology, that was exactly
12 the issue, that you could walk into Fry's and Best Buy
13 and buy consumer-friendly hacking technology to rip
14 DVDs. And the litigation that was involved there
15 didn't remove the ability to hack DVDs. But it did
16 take that activity and put it on the fringe while
17 leaving a channel in the mainstream that helped
18 promote the availability of new business models.

19 Now, in the last 15 years that I've been
20 involved in this from the business side, I've been at
21 the intersection of the law and sort of the business
22 considerations.

23 And I can tell you that the availability of
24 these legal tools has been directly relevant to the
25 decisions to get into these markets, whether it was

1 the development of AACCS as a next- generation standard
2 for the protection of high definition digital content,
3 whether it's the willingness to get into the market
4 for 4K, whether it's the willingness to get into the
5 market for over-the-top television and authenticated
6 television to allow people to do streaming, the DMCA
7 has been a factor in the willingness to engage in all
8 of those things. And so, I think it, from our
9 perspective, has been both necessary and successful.

10 MR. AMER: Thank you. Mr. Slover?

11 MR. SLOVER: So in our experience here, it's
12 not been the intended uses of the technological
13 protection measures in section 1201.

14 It's the overbroad uses which I think were
15 probably not intended or certainly not fully
16 envisioned in 1998. So you know, we heard the metaphor
17 a minute ago from the House Judiciary Committee of
18 breaking into a house in order to steal a book.

19 I think of another metaphor, which is my
20 wife has baked a cake which she intends to take to
21 church on Sunday. And my teenaged son is hungry and
22 so she can either say, hey, don't touch that cake, or
23 she can say, you know what, I'm so afraid you might
24 touch that cake, I don't even want you setting foot in
25 the kitchen and I'm going to lock that kitchen door.

1 You can't get into the refrigerator. You can't get
2 into the cupboard.

3 You're just going to have to go hungry
4 because I'm worried about that cake on the counter.

5 I think there are -- I'm hoping there's a
6 way to sort of reconfigure and reconstitute what we're
7 doing with 1201 so that we're really focused on the
8 protection against infringement and we're not
9 capturing the interoperability and, in my view, less
10 closely related side benefits to industry of denying
11 access to the software.

12 MS. SMITH: Building -- connecting those two
13 thoughts, Mr. Dow just said that 1201 has been both
14 necessary and successful in the motion picture type of
15 industries. And you've mentioned going sort of
16 overbroad. Has 1201 played a role in protecting or
17 any sort of useful role in the markets for 3D printers
18 or software that anyone's aware of or cars?

19 MR. LOWE: So yeah, we take it to sort of a
20 different place. I mean, what Mr. Slover said is very
21 clear from our industry. The automotive aftermarket
22 is about a \$350 billion industry in this country. And
23 that industry provides choices to consumers in auto
24 parts and where they get those cars serviced. And
25 we're seeing the use of software in virtually every

1 component on a car nowadays.

2 And those components -- some of them, we're
3 not clear whether they're there for functional
4 purposes or simply to make it difficult for people to
5 produce parts to work on their vehicles. And we're
6 seeing the use of the 1201 as a way to keep our
7 industry out of being able to reverse engineer and
8 produce parts and even service vehicles.

9 So we see a pretty broad impact on our
10 industry going forward and even currently. We're
11 seeing more and more parts, which is with chips on
12 them to -- that are making it difficult for our
13 industry to operate in the aftermarket.

14 MR. AMER: So I think we're going to go with
15 Mr. Weissenberg, then Mr. Zuck, Mr. Band and then Ms.
16 Greene and then I think we're going to go on to
17 another question. So Mr. Weissenberg?

18 MR. WEISSENBERG: I just wanted to quickly
19 piggyback off Mr. Slover here and answer your
20 question, Kevin, an example of someone using the DMCA
21 or 1201 specifically to go after someone or to file a
22 claim. Last year, when ISRI was here asking for a
23 1201 exemption for phone unlocking, TracFones -- as
24 you know, we relied on 1201 to protect our business
25 model.

1 And we emphasized that that's not a
2 copyright interest and we're grateful, again, to the
3 Copyright Office for recognizing that fact.

4 And that kind of bleeds into another topic.
5 I don't want to get there just yet. But just in case
6 you need another example, that's one.

7 MR. AMER: Okay. Yeah, and definitely we're
8 going to try to explore some of these competition
9 issues later on in this panel. Mr.

10 Zuck?

11 MR. ZUCK: Thank you. Yeah, I don't want to
12 be accused of two bites of the apple or smuggling a
13 file in a cake or anything like that.

14 But some of the questions have evolved as
15 we've gone along here. And I wanted to address a
16 couple of comments.

17 One is the notion that there's other
18 business models that don't involve DRM, and that's
19 certainly the case. And I think it's important and
20 worth mentioning that the people who make use of DRM
21 don't like it. It's not enjoyable to go through the
22 process of trying to use technological protection
23 measures on your products. It increases consumer
24 support costs and everything else.

25 It's simply been a necessary tool in

1 preventing piracy. And I can say that it's certainly
2 been a very successful tool in the context of software
3 as well. And in the app market that I represent, the
4 distinction between software and content is becoming
5 continually blurred as well. So TPMs are used not
6 only for the software itself but also for the content
7 that's embedded in software where some of the piracy
8 occurs.

9 If I've got an app that's teaching you yoga
10 positions or something like that, sometimes the piracy
11 involves pulling the piracy out of the app and
12 repurposing it in another app. So TPMs have proven
13 useful in the software market.

14 And then, the final point is this notion
15 about it expanding beyond its original intention.

16 And I feel like that comes up over and over
17 again.

18 And in this context, I always remind
19 everyone that I'm not a lawyer. But it's my
20 understanding that where those things have been
21 adjudicated, they've come out in favor of a more
22 restrictive interpretation of the DMCA.

23 So I mean, I -- you know, whether it's
24 garage door openers or printer cartridges and things
25 like that, I think there's some fairly strong

1 precedents in place to suggest that it should be
2 focused on copyright infringement. And the
3 jailbreaking legislation is another example I think of
4 where the system worked to modify the environment in
5 which people are getting overly experimental in the
6 use of 1201. But none of that I think undermines the
7 value that it's played in what has been a very
8 successful market.

9 And I think we should be very cautious about
10 upending that.

11 MR. AMER: Thank you. Mr. Band

12 MR. BAND: Going back to your question about
13 the number of cases, I think you're right. There have
14 been relatively few 1201 cases, certainly relative to
15 the number of, let's say, 512 cases. And it's always
16 important when we're talking about 1201 to also keep
17 in mind that it's part of this bigger construct of the
18 DMCA.

19 But one of the reasons why there's been
20 relatively few 1201 cases, it seems to me, is that
21 it's really broadly drafted. It talks about not only
22 the act of circumvention, but it talks about
23 trafficking. Then there's also 1201(b). Early cases
24 went very strongly in favor of rights holders.

25 And so, there was very -- there just hasn't

1 been a need for the litigation because it's been --
2 it's been so broadly interpreted. So then, the action
3 really has shifted very much to the rulemaking because
4 you have all these people who are adversely affected
5 and if you're adversely affected by the DMCA you have
6 two choices.

7 You could go ahead and engage in the
8 activity and hope that in the event of litigation,
9 that you'll end up with -- you'll end up in the right
10 court, right, that you'll end up in the Federal
11 Circuit, I guess, or the Sixth Circuit, as opposed to
12 the Ninth Circuit. But good luck in making sure that
13 that happens. If you're on the defendant side, you
14 don't really get to choose where the action is filed.

15 And you know, that's one choice, or the
16 choice is to go to the rulemaking. And so, so much of
17 the activity and the energy is on the rulemaking side
18 because, you now, at least there is a rulemaking. So
19 we're glad for that. But that's why, you know,
20 because the DMCA is so broad and has been interpreted
21 so broadly by some circuits, that's pushed all the
22 activity and the focus onto the rulemaking side and
23 that's why so much -- so many of us are so intent on
24 trying to get the rulemaking to work better than it
25 is.

1 MR. AMER: Thank you. Ms. Greene?

2 MS. GREENE: Thank you. I was actually just
3 going to say some of what was just stated with regard
4 to the reason why there is not a tremendous amount of
5 litigation and the fact that there have been favorable
6 decisions in previous court cases.

7 What I do want to note about that though is
8 that it is impossible to calculate the chilling effect
9 that those previous court cases, even though they were
10 ruled on favorably, has had on the market.

11 Entrepreneurs who are just trying to enter a
12 marketplace may not want to take the risk that all of
13 the efforts that they go to, to develop a new product,
14 to innovate and to launch it in the marketplace may be
15 for naught as a result of litigation, even if they
16 might eventually win that litigation.

17 And so, that is a great concern. And then,
18 to the extent that it has been pushed -- the
19 litigation has been pushed to the rulemaking process,
20 I do still think there is a chill in the marketplace
21 and a chill specifically in activities that are very
22 clearly not related to copyright infringement such as
23 security research and the burdens of that rulemaking
24 process, which I know we'll be discussing later, I
25 think do oftentimes go outside of the question of the

1 effectiveness of TPMs in helping the marketplace and
2 in fact sometimes favor the chill of that type of
3 competition.

4 MR. AMER: Thank you. So turning from the
5 effectiveness and the role of the current law, I think
6 we wanted to explore a little bit some of the proposed
7 changes to 1201 and really one of the central points
8 of dispute or disagreement that we saw in the comments
9 is this idea that there is or should be a nexus within
10 1201 with copyright infringement.

11 We had a large number of comments supporting
12 the model obviously and the Unlocking Technology Act
13 that's been proposed that would limit circumvention
14 violations to those undertaken for the purpose of
15 infringement. In response, we had several comments
16 saying that accessing a copyrighted work for purposes
17 of consumption alone may not implicate an exclusive
18 right.

19 And indeed, that type of activity is really
20 one of the foundational reasons why section 1201 was
21 enacted. So I'd like to sort of explore that debate a
22 little bit. What are your views as to proposals to
23 incorporate a nexus to infringement within 1201? Mr.
24 Adler?

25 MR. ADLER: (Off mic)

1 MR. AMER: Oh, microphone, please.

2 MR. ADLER: There is a nexus to infringement
3 in 1201. But it's not in 1201(a).

4 1201(a) is about access controls and
5 "access" is not part of the exclusive rights of a
6 copyright owner under 106. But obviously, access to
7 the work is the threshold issue with respect to
8 whether or not uses of the work that implicate the
9 exclusive rights are going to occur.

10 If you look at the way Congress structured
11 1201, 1201(a) was designed to deal with the question
12 of access independent of the issue of infringement
13 because access to the work, again, was the question
14 about whether or not consumers were going to be able
15 to exploit the marketplace and whether there would be
16 a marketplace of these works online to exploit.

17 When you look at 1201(b), 1201(b) doesn't
18 address the question of circumvention of a
19 technological protection measure that protects the
20 rights of a copyright owner under section 106 and
21 Title 17, specifically because it recognizes that
22 those rights are themselves subject to exceptions like
23 fair use. But that's why those two questions have to
24 be looked at differently.

25 The issue of access is not about

1 infringement.

2 And to the extent that Congress did seek to
3 allow copyright owners to utilize technological
4 protection measures to deal with the issue of
5 infringement, that was done in 1201(b), where the
6 balance was struck in recognizing limitations and
7 exceptions like fair use, while still suggesting that,
8 even though there are already remedies in the law to
9 deal with infringement, technological measures can
10 still help a copyright owner to be able to deal with
11 that by at least making sure that, to the extent they
12 do use technological protection measures to protect
13 exclusive rights, that those are not subject to a
14 marketplace that's rife with the availability of the
15 means to circumvent those measures.

16 MR. AMER: Thank you. Mr. Band?

17 MR. BAND: So I think the premise of 1201(a)
18 was -- Allan's right. It's about access.

19 But it's about access -- I think what
20 everyone had in mind and what everyone thought they
21 were talking about was access to something you hadn't
22 paid for, right? I mean, the idea was -- it was like
23 getting -- people were talking about getting access
24 to cable television that -- getting access to the
25 premium channel that you hadn't paid for.

1 That's what it was -- that's what I think
2 everyone really had in their mind, and certainly not
3 the situation that Mr. Lowe is dealing with in the
4 automotive context about a person not being able to
5 access his own software in his own car for the purpose
6 of making sure that he doesn't pay marked up prices
7 for repair parts and that -- and that that was not at
8 all what was contemplated.

9 Now, one can debate what the words say and
10 how they probably should be -- properly should be
11 interpreted. But I think it is fair to say that
12 there's no policy reason within the confines of the
13 Copyright Act or within the confines of section -- of
14 Title 17 for there to be any restrictions on a
15 person's ability to access their own property, their
16 own copies.

17 It's one thing to say I shouldn't be able to
18 access something I haven't paid for. But if I've paid
19 for it and it's in my possession, you know, why -- why
20 should there be a legal framework that prohibits my
21 ability to access that?

22 And so, that's why we think the Unlocking
23 Technology Act makes sense and that's why-- and
24 whether it's through statutory change or through a
25 much more liberal application of the -- of the

1 rulemaking in the case of at least software, where we
2 see this problem most pervasively, we would be able
3 to sort of simplify your work significantly and not
4 have the DMCA basically regulating the entire U.S.
5 economy.

6 MS. SMITH: So earlier we heard about
7 the various types of digital distribution. And is
8 your theory that 1201 should be limited to - -
9 consumers should be able to access what they have
10 paid for? Does that depend on an understanding of
11 ownership of the good as opposed to a rental model?

12 I mean, I think some of the things that come
13 up in the rulemaking is a fear that consumers may have
14 paid for a penny but want to access a pound.

15 Does your theory take -- does it matter
16 whether you actually own the refrigerator or the book
17 as opposed to lending or leasing or a subscription
18 model?

19 MR. BAND: You know, I think there are
20 various ways to slice the loaf. And certainly, if
21 when we're amending 1201(a), I mean, you could -- I
22 think the best way to do it is to simply require a
23 nexus to infringement so that if there's really no
24 possibility of infringement, it's not within the scope
25 of the law.

1 And it's like when you're drafting a
2 statute, you can either draft it -- make it really
3 broad and then start having all kinds of carve- outs
4 and you know you're never going to have enough carve-
5 outs, but it's sort of like who shows up at the table,
6 who has enough lobbying strength to get a carve-out.
7 And that's unfortunately the approach taken in 1201.

8 The alternative is you have a narrower bill,
9 a more tailored bill and you understand that there
10 might be some leakage. And then, if there's leakage,
11 then you maybe make amendments to take care of those
12 leaks. And I think that that's a better way to
13 approach it. But if -- we're not talking about --
14 there's other ways of doing it.

15 I mean, you could certainly simply - you
16 could carve out software or embedded software. I
17 mean, there's all kinds of different ways that -- ways
18 that 1201 could be amended. Again, I think a nexus
19 to infringement would be the best way and the simplest
20 way. But there are certainly other ways that are --
21 that would be less effective. But it would be better
22 than the status quo. Thank you.

23 MR. AMER: And so, could -- just to sort of
24 follow up, so would a nexus to infringement
25 encompass this -- the sort of paradigm scenario that

1 Mr. Adler mentioned where someone is accessing a
2 copyrighted movie to watch it? Would that -- would
3 that be a nexus?

4 MR. ADLER: Yeah, the problem with
5 requiring a nexus --

6 MR. AMER: Oh, microphone.

7 MR. ADLER: The problem with requiring a
8 nexus to infringement for 1201(a), where you're
9 dealing with the issue of access, is that it fails
10 to recognize that access to a work has its own
11 independent economic value, whether or not someone
12 is going to infringe as a result of that access.

13 For example, we hear all the time in the
14 book industry that the difference between the use of
15 printed books and digital books in digital
16 formats, whether they're in e-books that you have
17 -- that you're looking at in a device or whether
18 you're actually reading a book online, is the fact
19 that reading a book is not something that actually
20 exploits one of the exclusive rights of a copyright
21 owner. That's true.

22 But the purpose of putting a book in the
23 marketplace, the purpose of actually creating a work
24 of original expression in book form, is ultimately to
25 have people read it, and that's where the economic

1 value is.

2 So the notion that the only way rights
3 holders can protect access to their works or control
4 access to their works online is if they are able to
5 show that the means by which they do it is directly
6 related to addressing the issue of infringement
7 neglects the whole notion of what the real value of
8 these works is in the way they're used in ways that
9 don't involve infringement at all.

10 MR. AMER: Thank you. Did you want to
11 respond to that quickly or --

12 MR. BAND: Oh, yeah. I don't want to
13 monopolize. But I mean a lot of it could be taken
14 care of conceivably in the drafting.

15 But even if we're not -- it would seem to me
16 that if I, let's say, rent a book, right, and I'm
17 allowed -- entitled to it based on my rental fee to
18 have it for a week, and I fiddle with the software so
19 that I can keep it another week, that seems to me that
20 might get into this area of the kinds of -- what we're
21 -- what we may be talking about, that it conceivably
22 could still be subject to 1201(a), especially to the
23 extent that my -- in order to continue reading it, I
24 need to continue making copies of it, RAM copies and
25 so forth, that are of more than a -- of more than a

1 transitory period.

2 So you know, I think even in that case, it
3 would conceivably -- depending on how you draft it, it
4 would still be within the -- within the scope of what
5 I'm thinking of.

6 MR. AMER: Thank you. Mr. Dow?

7 MR. DOW: So Allan is absolutely right.

8 The absence of a nexus to infringement in
9 the statute is quite deliberate.

10 In fact, proposals like the ones you find in
11 the Unlocking Technology Act are not new.

12 Those were proposals that were made at the
13 time the DMCA was considered and they were rejected
14 for a variety of reasons, including that really to
15 have done that would have made section 1201 rather
16 duplicative of section 106 and that was not the
17 objective of the statute.

18 What Congress saw at the time that they did
19 this was a world in which you had the type of scenario
20 that Allan just described where the value to the --
21 where the benefit to the consumer and the value to the
22 copyright owner is derived from access to the work,
23 not necessarily from the exercise of the section 106
24 rights.

25 So the ability to access a work, whether it

1 be a book or a song or a movie or any other form of
2 expressive work doesn't require you to copy it,
3 doesn't require you to distribute it, doesn't require
4 you to publicly perform it, but that the value is
5 derived from your ability to access it at the time.

6 The thing that was talked about was the
7 celestial jukebox. We've sort of gone to that model
8 across the board for different types of expressive
9 works. And Congress had that in mind.

10 That's what the intended result would be.
11 And the fact that we are quickly and continually
12 moving in that direction is sort of a testament to the
13 way that it was structured. That's it.

14 MR. AMER: Thank you. Mr. Panjwani?

15 MR. PANJWANI: Thank you. We believe that a
16 nexus to copyright infringement within 1201 cures a
17 number of the issues that have manifested over the
18 last 5 to 10 years, such as the issues of access to
19 consumer devices that have software embedded within
20 them and a variety of other competitive issues that
21 have been implicated.

22 But taking this back for a moment to the
23 discussion we've just had on the right of access and
24 where it exists in the copyright law, section 1201 - -
25 it sounds like what we're hearing here is that

1 Congress intended to create an exclusive right of
2 access for authors. And I don't think we should be
3 afraid of considering this in terms of, well, if we
4 have a nexus of infringement in 1201, then what
5 happens to the right of access. And I think we should
6 have a debate on the right of access rather than on a
7 prohibition on circumvention.

8 If Congress wanted to create a right of
9 access, they could have put it in section 106 with the
10 rest of the exclusive rights granted to authors of
11 copyright-protected works.

12 Now, again, looking at some of the
13 legislative history and the text of the statute,
14 there's no discussion of, well, we wanted to create
15 this right of access. It's we want to create
16 incentives to enter digital markets and we think that
17 this is a necessary step to incentivize entry into
18 digital markets. And I don't think that an explicit
19 right of access was contemplated at that point.

20 In fact, the WIPO Treaty says, you know, we
21 want to have adequate protections for technical
22 measures that are employed by authors in the
23 protection of their rights granted under, you know,
24 this treaty which we would then read in the case of
25 the U.S. statute under this title, which is 106, which

1 is reproduction, distribution, public performance and
2 so forth.

3 In particular, I would say, the examples
4 that Mr. Band and Mr. Adler were just discussing I
5 think you perhaps underestimate the creativity of
6 plaintiffs' counsel and their ability to identify a
7 violation of 106 in any of these given particular
8 instances where you're afraid that copyright
9 infringement does not get at the behavior.

10 There may be an access to the copy.

11 Well, where did the copy come from? You
12 know, is the copy lawfully possessed at the time of
13 the access in the case of a rental? Was it sold?
14 Well, it was rented. After the rental expires, do you
15 still lawfully possess that copy?

16 So I think there are a number of ways of
17 solving this issue that don't require such a broad
18 prohibition on circumvention that burdens all other
19 non-infringing uses.

20 MS. SMITH: Can you speak to Mr. Adler's
21 distinction between access control prohibition of
22 1201(a) versus copy controls in 1201(b), the anti-
23 trafficking prohibitions? I mean, that seems like
24 statutorily they've made that difference and we could
25 rely on that as opposed to creativity of plaintiffs'

1 counsel.

2 MR. PANJWANI: It's been our position that
3 the anti-trafficking provisions distinction between
4 copy protection and access protection, as far as
5 implementation, are largely indistinguishable, that a
6 TPM used for access control is a TPM used for copy
7 control often. And we've approached that in the
8 exemption process as addressing them more or less as
9 the same.

10 MS. SMITH: Because you're seeing the merged
11 use of controls in the industry?

12 MR. PANJWANI: Right. In practice, while
13 the statute recognizes those two separate types of
14 control, in practice we see them implemented more or
15 less as the same.

16 MR. AMER: Thank you. Mr. Pierre-Louis?

17 MR. PIERRE-LOUIS: I just wanted to add that
18 in our industry, that's not the case because you have
19 console manufacturers and you have publishers who
20 produce discs. They have to interoperate. But they
21 do have separate types of access and copy controls
22 within them.

23 So in our industry, we've seen the benefit
24 of having both of those available. It's important to
25 recognize that we're not trying to identify

1 infringers. We're trying to identify and cultivate
2 consumers. And so, all of these things help us do
3 that.

4 And so, access to the work becomes an
5 important way of distinguishing between the different
6 uses users want. Some want it on mobile. Some want it
7 online. Some want it on a disc in a console. And I
8 think all of these rules allow us to play within that
9 framework and meet customers where they are.

10 This is not academic for us. This is
11 business. And so making a nexus to infringement in
12 many ways harms the consumers because right now -- and
13 I think this is the correct interpretation of the law
14 -- possession of the work is not what's infringing.

15 It's the various uses some may make and now
16 we're trying to implicate more on consumers there. I
17 think it's important to recognize that that access
18 control allows them to make uses and that's what we're
19 trying to cultivate.

20 MR. AMER: Thank you. Mr. Slover?

21 MR. SLOVER: Yes. I wanted to go back to
22 your earlier question about ownership versus other
23 models of rental or so forth. I think ownership is
24 the core focus. The fights of a consumer who owns a
25 product, to be able to use it.

1 And I think you should be careful, you know.

2 Ownership can be written around by lawyers
3 so that what the consumer thinks is ownership really
4 isn't ownership.

5 So I think it needs to be broader than just
6 a legal definition of ownership. But it's the concept
7 of the consumer's rights and dominion over the product
8 that they've paid for, that they have. And I think a
9 useful starting point is to try to, if possible, clear
10 the smoke around the technology and the complexities
11 of software and everything and try to think of the --
12 when the DMCA was passed, there was sort of a
13 recognition that we need a new legal construct to
14 bring the traditional copyright protections into the
15 digital age.

16 Well, I think on the other side, we need a
17 recognition that the tried and true incidence of
18 ownership should still have value and presence in the
19 digital economy. So for example, taking the auto
20 software situation, if it was something that a
21 consumer used to be able to do in his garage with a
22 screwdriver, that was not a copyright issue.

23 It was not an infringement issue. It was
24 not an inappropriate use. If the same thing in the
25 new world requires getting access to the software in

1 order to be able to make an adjustment, the fact that
2 there's a technological protection measure on top of
3 it should not change the ultimate calculus and
4 objective.

5 MS. SMITH: So the Copyright Office is
6 separately undergoing a study on software in embedded
7 devices. And I'm wondering if what you're saying --
8 or if there could be some consensus around treating
9 software in these embedded devices differently than
10 TPMs protecting expressive works, if that might be
11 another way to slice it rather than a nexus to
12 infringement.

13 MR. SLOVER: Well, I'm not a copyright
14 lawyer and our experience at Consumers Union, our
15 point of entry into all of this was really the mobile
16 phone unlocking effort that we helped lead.

17 So I can't speak too definitively to the
18 broader issue. I do see sort of a big picture
19 conceptual distinction between the core creative works
20 and access to books and movies and songs, on the one
21 hand, and products that you now can't use unless you
22 have software that's functioning inside them.

23 So what's brought us in, the concern that we
24 saw was that Internet software-enabled devices, both
25 in the Internet of Things and then the things that

1 just sort of operate internally. But I wouldn't want
2 to put my finger on the scale of some of these other
3 issues.

4 MR. AMER: Thank you. Mr. Adler?

5 MR. ADLER: Yeah. I just wanted to make two
6 points. One is if I understood Mr. Panjwani
7 correctly, he suggested that an alternative approach
8 by Congress would have been to include access within
9 the exclusive rights enjoyed by a copyright owner
10 under 106.

11 And I would only have to assume that the
12 constituency that he represents and that, for example,
13 Johnathan represents in their criticism of 1201 would
14 oppose vigorously such a notion because that would
15 lend the idea that access itself had the attributes of
16 a property right, which is what exclusive rights under
17 106 really are about, rather than this being a
18 question of whether or not somebody who is going to
19 use their works in a marketplace manner, making them
20 available to people but expecting to be able to assert
21 certain terms for condition of availability and use
22 would be able to control that in the first instance by
23 controlling access to the work.

24 And then, the second point I was going to
25 make is that, just to be clear, I was kind of

1 concerned about seeing the emphasis in the notice on
2 talking about 1201 "outside of core copyright
3 concerns." I'm not sure I have any real grasp of what
4 that phrase, core copyright concerns, actually
5 entails.

6 But it would be a tremendous mistake to
7 equate that with the notion of a nexus to infringement
8 because obviously copyright concerns drive far more
9 than simply the notion of whether one of these
10 specific exclusive rights is violated. We've talked --
11 always talk about the incentives to create works of
12 original expression in the first place, which is
13 driven to a large part by the private incentives
14 involved with the benefits of copyright.

15 And I think the discussion we had a little
16 bit earlier about access relating itself to the value
17 of using a work without infringing it or without in
18 any way implicating the exclusive rights of the rights
19 holder, that is a core copyright concern. And we
20 shouldn't treat that notion very narrowly so that we
21 only think that "core copyright concerns" arise when
22 we're discussing infringement.

23 MR. AMER: And I think that goes really to
24 the point Mr. Slover was making. And I'd be
25 interested in people's thoughts about it. I mean, I

1 think what this debate seems to be sort of struggling
2 with is, is there a way that 1201 could be reformed
3 that would -- that would include things like
4 accessing -- circumventing a TPM to watch a movie
5 for free. You know, so that would be included. But
6 things like garage door openers and printer
7 cartridges would be excluded.

8 One proposal short of a nexus requirement
9 that was raised in the comments is this idea that I
10 think Regan's question asked about, which would be
11 a permanent exemption for software essential to the
12 operation of a device. Is that something that would
13 strike the proper balance? I'd be interested in
14 your thoughts about that. Mr. Zuck?

15 MR. ZUCK: Thanks. And yesterday, at the
16 embedded devices study panel, we had a swear jar
17 whenever we mentioned 1201. So I don't know if the
18 same applies today. But that discussion was quite
19 robust yesterday. And so, I'll only briefly
20 reiterate what I said yesterday, which is that the
21 same kind of dynamism in terms of product offerings
22 and things like that still applies to what is sort of
23 loosely called the embedded software market as well.

24 I mean, and so one of the examples that I
25 used yesterday was TiVo, where the hardware was given

1 away practically as a lost leader and it was the
2 embedded software and the services associated with it
3 which is where the company TiVo actually obtained its
4 value. So I mean, there's some complexity about just
5 having a broad brush approach to software that's
6 embedded in devices.

7 It would have to be a much more complicated
8 wording in order to get at the distinctions that
9 people want to make so that you are excluding, you
10 know, printer cartridges but you're including the
11 ability to have flexible hardware subsidy models, et
12 cetera, that are pretty prevalent in this market.

13 So I don't -- we certainly couldn't support
14 anything that was just sort of a broad exclusion of
15 embedded software into 1201. I think that would be a
16 mistake.

17 MR. AMER: Thank you. Mr. Panjwani?

18 MR. PANJWANI: A permanent exemption
19 directed towards software embedded in consumer devices
20 I think would be a good start. It would address a
21 number of the overhang issues that we've come across
22 in recent years such as cell phones, jailbreaking,
23 tractors, automobiles, 3D printers and so forth.

24 However, I think it overlooks the fact that
25 there are a number of issues that involve, quote,

1 unquote, "traditional media" in expressive works.

2 Leaving aside the fact that one could argue that
3 software code is an expressive work and necessarily
4 must be so to be protected by copyright.

5 In particular, there have been a number of
6 exemptions -- and I guess we're going to go into this
7 more with the process panel -- involving what is the
8 appropriate balance between access for fair use
9 purposes, whether as a documentary filmmaker or
10 narrative filmmaker or educator. And 1201 places a
11 substantial burden on those uses as well, not just
12 those of embedded devices.

13 And I would also caution that any attempt to
14 create a permanent exemption on software-enabled
15 devices would instead turn into a fight over what
16 exactly is a software-enabled device. And I'm sure we
17 have enough creative lawyers here that we could
18 probably spend years hashing out what the appropriate
19 definition of that would be.

20 The end result of litigation would be not
21 whether a copyright interest has been violated but is
22 the thing at dispute in this particular litigation a
23 device within the meaning of the statute. And that
24 opens up a whole can of worms, I think.

25 MR. AMER: Thank you. Mr. Pierre-Louis?

1 MR. PIERRE-LOUIS: I think we have to tread
2 very carefully anytime we're talking about these
3 blanket exemptions. You know, when we're talking
4 about 1201, when we're talking about software used to
5 protect software of an expressive work. In our case,
6 we're talking about software used to protect software
7 of software, right, because we are a software industry
8 that does creative and expressive works. And so, when
9 you're talking about this blanket rule, you swallow
10 the entire industry.

11 On top of that, when we look at how our
12 games are still being played on various platforms, but
13 in particular game consoles, when you talk about
14 consumer devices, game consoles are used for games.
15 They're used for television.

16 They're used for movies. They're used for
17 all manner of distribution now because consumers
18 demand it and our companies meet that demand.

19 So we have to tread very carefully as we
20 think about what that means because it implicates more
21 than just thinking about a tractor. We're talking
22 about the very devices that consumers are using to
23 consume the content that we're making.

24 MR. AMER: Thank you. Mr. Band?

25 MR. BAND: So switching hats from the

1 Library Copyright Alliance to the Owners Rights
2 Initiative I was representing in yesterday's
3 roundtable, I think they would support an exemption
4 along the lines of what you're talking about. I mean,
5 conceivably a nexus or something along a broader
6 limitation would be better. But this would be a next
7 best -- something that really does target the
8 situation where you do have this embedded software.

9 I think the -- and conceivably, you know,
10 there could be exceptions to that exception for Mr.
11 Pierre-Louis' clients. I mean, that's -- and I
12 welcome Raza's suggestion that we could spend years
13 negotiating that. Hopefully I would have a client in
14 those negotiations. So that actually, you know -- my
15 retirement -- that would be a nice trajectory towards
16 retirement.

17 But I think again the bigger point is I
18 certainly don't think that Congress, when it was
19 talking about 1201 -- and I was part of those
20 discussions, as some of the others around the table
21 were as well -- they really were not thinking about
22 tractors.

23 And the fact that we're talking about
24 tractors and that that's been an automobiles and that
25 that's where it's gone to, does suggest that there is

1 a serious problem here. And the fact that we're --
2 that the Internet of Things, we're talking about a
3 world that, you know, all of these devices are going
4 to be connected and they're going to be connected by
5 software and then there's going to be these
6 implications for competition everywhere because of
7 this statute.

8 And so, we need to say, okay, what do we - -
9 unless you want to -- I mean, you're talking about how
10 we went from two exemptions to 22 exemptions. Well, I
11 think next year -- in the next cycle, it's going to be
12 -- it's going to continue to grow at a geometric rate.
13 And you know, it won't take very long before the whole
14 building will be working on 1201.

15 MR. AMER: Thank you. I think Mr. Lowe was
16 next.

17 MR. LOWE: So some of my points have already
18 been taken. But I wanted to emphasize from our point
19 of view, the parts on a car that used to be reparable
20 using mechanical means now are requiring the access to
21 software. So we equate now the software to the parts
22 and once you take away that right to repair those
23 vehicles, that becomes a really difficult issue for
24 our industry.

25 You know, people who modify their cars in

1 their garage should still have the ability to do that.
2 And I think your suggestion is a good one to start out
3 as far as giving that, you know, some usability rather
4 because these are not expressive works. These are
5 mechanical functions that have now been taken over by
6 software, including, you know, windshield wipers now
7 that used to be all mechanical.

8 Now, software might control how that
9 windshield wiper is operating. If it's a patent,
10 that's fine. You know, but a non-copyrightable
11 function should not be allowed to be protected.

12 MR. AMER: Thank you. Mr. Dow?

13 MR. DOW: Just very quickly, I think some
14 have talked about this exemption that you suggested in
15 terms of embedded software. I think that your
16 question actually, if I heard it right, was about
17 software necessary to make a device run.

18 And I just -- to me, I'm not quite sure how
19 to interpret that and I think it just sort of
20 highlights how difficult some of the drafting would be
21 around something like this.

22 What comes to mind and the concern that
23 comes to mind for me is thinking about, even some of
24 the early cases, maybe even the very first case under
25 the DMCA was brought by RealNetworks and what was at

1 issue there was an authentication sequence that in
2 order for you to be able to use your device to stream
3 a RealNetworks file that was protected using
4 RealNetworks' DRM, you had to authenticate the device
5 to ensure that you were talking to a real server that
6 would protect against copying of the content.

7 And somebody had gone in and spoofed the
8 authentication sequence in order to get around that
9 process. And so, in order -- that was really software
10 that was required to make that device work the way it
11 was supposed to.

12 I think in the entertainment field, a lot of
13 what goes on has to do with authentication.

14 If you want to use a DVD player, that drive
15 has to authenticate itself to ensure that it's playing
16 by the rules before you access the content. And so, I
17 just want to urge some caution about how some of these
18 things that we talk about in one context really impact
19 in a totally different context that would be
20 problematic.

21 MS. SMITH: That's a good point, and I
22 wonder if anyone else could speak to whether some of
23 these TPMs or software are running on, you know, both
24 devices or protecting expressive content as well as
25 devices that are not. In the past rulemaking, we

1 talked about jailbreaking a variety of things. You
2 know, and one of the testimonies there said, you know,
3 software is the same no matter what the thing is. So
4 whether 1201 should treat that all as protecting
5 expressive content or whether you can make a
6 distinction if the software is running on multiple
7 types of devices.

8 MR. PIERRE-LOUIS: I think I understand the
9 question. So I will try. So in our industry, there's
10 the software authentication that happens with the game
11 console. There's also -- there are also servers where
12 you're playing online. You could be streaming the
13 content. You could download the content.

14 All of those require different types of
15 software in order to interoperate because we're soon
16 even going to have multi-device-type, you know, where
17 you can go from one type -- or multiplatform playing.
18 All those require a lot of interoperability of
19 software. And I think as Mr. Dow was saying, it takes
20 -- it takes a lot of thinking about how those work
21 before we get into rules.

22 I don't know, for example, whether some of
23 the software that operates the machinery that some
24 others are talking about here has this other
25 copyrightable function in it. You know, I don't know

1 enough about that technology to say, well, that
2 shouldn't count, right? And I think that's where we
3 have to be careful to tread. We know in our industry
4 we're protecting the expressive works and so we can
5 speak very definitively.

6 But in some of these other areas, they are
7 also doing things that are probably copyrightable and
8 whether you want to say it's a high level or a low
9 level, it's not for me to judge that. What is
10 important is to understand that there are rationales
11 behind each of our uses of software, and we've got to
12 be careful in thinking about what we're implicating
13 and what we're tripping over because there would be
14 unintended consequences.

15 And notwithstanding Mr. Band's idea that we
16 just go really narrow and we just fix the "leaks," for
17 us, the "leaks" are the business. You know, once
18 they're out, they're out. And so, it's important for
19 us to be able to monetize that but also to make sure
20 that consumers are getting it in the ways that they
21 want.

22 MR. AMER: Thank you. Mr. Zuck?

23 MR. ZUCK: Thank you. And again, I guess to
24 understand your question, there's certainly software
25 itself is -- I don't know if that constitutes an

1 expressive work. But I mean, that's where we are
2 interested in making use of these protections. And
3 there are a lot of different licensing models for the
4 software itself.

5 And so, sort of protecting that dynamism I
6 think is also really important, that it allows for
7 different kinds of models for making software
8 available to different communities, et cetera, and
9 that kind of so that there's some price discrimination
10 benefits, et cetera, to having dynamic business
11 models. And I think that that's part of what has made
12 my industry thrive so much.

13 I guess I'd rather approach this from the
14 other end. If we're trying to -- since we have the
15 1201 exemption process in place, maybe a better reform
16 is trying to streamline renewals, for example, that
17 once you've identified something that is a clearly
18 acceptable use, make it a lot easier to continue that
19 use somehow, but continue what seems to be a working
20 process through the Copyright Office to determine what
21 are legitimate uses and just -- and streamline the
22 process of their continuation, rather than trying to
23 go through and predict legislatively what -- into the
24 future, that we don't even really know what that'll
25 be.

1 I mean, like right now, cameras -- very
2 often the firmware in the cameras is what determines
3 that functionality of the camera. So different levels
4 of cameras that you buy have different firmware in
5 them and that's what actually determines their
6 functionality because it creates manufacturing
7 efficiencies, right? So the firmware ends up becoming
8 really critical to the operation of the camera. But
9 it also is a distinguishing characteristic of the
10 camera as well. And I think that we want to allow
11 that flexibility and the efficiencies that it creates.

12 So let's look at this from the other end and
13 streamline renewals of exemptions, for example,
14 instead of trying to come up with a legislative fix
15 that I think would be a morass and only enrich
16 Jonathan Band's law firm, right? I mean, to me, that
17 doesn't feel like enough of an incentive to disrupt a
18 system that seems to be largely working.

19 I mean, we're looking at exception cases and
20 most of the litigation around these exception cases
21 has come out in a way that I think we all agree was
22 the right way. And so, that seems to be a system
23 that's working, not one that's broken.

24 And I think we need to keep that in mind.

25 I mean, as a copyright owner, I don't mind

1 the default case being -- the default answer -- I said
2 this yesterday -- I don't mind the default answer
3 being no, right? There's this notion that, wow,
4 people are disincented to start new businesses that
5 might infringe copyright because their lawyers can't
6 assure them that it would be okay that this creative
7 use of getting around copyright law would be okay.

8 And I think it's okay instead that the
9 default answer is no, which it is in most cases.

10 It's not that confusing what's legal and
11 what isn't.

12 And I think that we need to look at the
13 exceptions hard and then find a way to preserve them
14 into the future as a better approach, I think than
15 rejiggering the law.

16 MR. AMER: Thank you. I saw one or two
17 cards go up in response. So I'm sure people have some
18 responses. Ms. Greene?

19 MS. GREENE: Thank you. I just wanted to
20 respond a bit to this idea first about the idea that
21 1201 is meant to limit access and that that is rightly
22 the case and the idea that it's proper that the
23 default answer should be no with regard to exceptions.

24 We spent a lot of time talking about the
25 marketplace implications of the effectiveness or

1 ineffectiveness of TPM measures. We have not spent a
2 lot of time talking about the public safety
3 implications of DMCA 1201, specifically with regard to
4 the chilling effect that it has on security research.
5 It was recently noted that there has been a
6 significant increase and will continue to be a
7 geometric increase in the amount of connected devices
8 in the Internet of Things.

9 And what we see is a tremendous obstacle
10 that security researchers in particular need to
11 overcome to ensure that whether it's cars or airplanes
12 or refrigerators or TV sets or any of the other
13 connected devices that we all use and depend on are in
14 fact secure.

15 And so, when we set access as the threshold
16 and say to security researchers that you can't breach
17 access because that is an infringement of the purpose
18 of 1201 as opposed to protecting the core intellectual
19 property as opposed to protecting against copyright
20 infringement, I think what we say to the public is
21 that market interests are more important than the
22 public safety or the potential public health interests
23 of ensuring that our increasingly connected world is
24 in fact secure.

25 MR. AMER: Thank you. I think Mr. Adler was

1 next.

2 MR. ADLER: Well, I think with respect to
3 those concerns, it's pretty clear that they have been
4 addressed to some extent by Congress through original
5 statutory exemptions with respect to security
6 research, reverse engineering and also every three
7 years we revisit many of those issues in the context
8 of the triennial rulemaking proceeding.

9 But again, it goes back to the question of
10 whether or not ultimately the issue of infringement
11 becomes the tail that wags the dog of 1201. 1201 was
12 a recognition that wholly apart from the issue of
13 infringement, there was value with respect to access
14 to a work that had to be within the ability of the
15 rights holder to control.

16 Otherwise, the rights holder would have
17 little reason to expose that work in an online context
18 for people to be able to access and use it without
19 providing any value to the rights holder in return.

20 And one thing that must be kept in mind as
21 we discuss these issues is that courts have not had
22 any difficulty whatsoever being able to dismiss the
23 notion that fair use contains a right of access to a
24 copy of a copyrighted work. It doesn't. It never
25 has. The arguments in favor of why it should have

1 never gained any real traction.

2 And one can understand why, because again,
3 it would subject the notion of access as an
4 independent venue of economic value to be limited only
5 with respect to how that access related to the use.
6 And if the use was non-infringing, whether fair use or
7 not, but if it was non- infringing, you'd be throwing
8 out the ability to control access. And that's really
9 what 1201 was originally about and continues to be
10 about today.

11 MR. AMER: Thank you. So we have about 10
12 minutes left. So I think we're going to go around the
13 table one more time to respond to this question, to
14 account for the cards that are up.

15 And then, I think we have time for maybe one
16 more question after that. I believe Mr. Panjwani was
17 next.

18 MR. PANJWANI: I wanted to respond to a
19 couple of the prior comments. Regarding Mr.

20 Zuck's comment that the default answer being
21 no is acceptable, I think the discussion that we're
22 having right now about the essential software or
23 embedded software exemption I think highlights the
24 danger of setting defaults at no, that the growth of
25 all of these other issues shows that we thought the

1 default can be no because perhaps this is not going to
2 be such an incredible implication on a vast range of
3 economic activity.

4 But it turns out it is. And I think it's
5 worth reevaluating whether the default being set at no
6 makes sense in light of all of this.

7 I would also say that the examples of
8 successes that have supposedly occurred are, for
9 example, I'm assuming the Chamberlain case and the
10 Lexmark cases. But for each one of those cases,
11 there's a case, for example, like I believe 1201 came
12 up with MDY v. Blizzard and I believe it came up in
13 particular in the RealDVD case, where a court was
14 faced with software that allegedly could be used for
15 supposed fair uses. And the court said, well, I can't
16 get to whether or not the use that's being enabled is
17 a fair use because there's a circumvention happening
18 here. So we never get to establishing case law on
19 core copyright because of 1201.

20 I will also point out that I think that in
21 response to Mr. Adler's comments that access is a
22 right in and of itself, that -- the comments regarding
23 the passage of the DMCA is that we're creating this
24 ancillary right of access for the purposes of
25 discouraging and disincentivizing and preventing

1 infringement of the 106 rights, not access for the
2 sake of access itself. The fear was that digital
3 goods are so easily reproducible, so trivially and so
4 easily distributable in an online format that you need
5 this additional protection to back up 106, not as a
6 right that stands in and of itself.

7 MR. AMER: Thank you. Mr. Slover?

8 MR. SLOVER: Raza just covered my point.

9 MR. AMER: Okay. Thank you. Mr. Zuck?

10 MR. ZUCK: Yes, thanks. I just wanted to
11 respond briefly to the public safety comment made
12 earlier, that the -- I think that it's just as equally
13 important to recognize that there's public safety
14 implications to tinkering with embedded software. And
15 so, again, if we bring public safety into the
16 discussion, security isn't the only component of that.

17 It's also how the software is being used and
18 how the interconnection between the software is being
19 used increasingly in medical devices and other areas
20 where there's an enormous public safety issue
21 associated with allowing people to tinker with
22 embedded software. So I mean, we can have that
23 conversation. But it's going to be much broader and
24 much more complicated than I think people would hope
25 that it would be.

1 MR. AMER: Mr. Adler?

2 MR. ADLER: Well, I would just again point
3 out -- we talked about this at the very beginning,
4 that for the models, for example, in the industry that
5 I represent that are most important, things like
6 library e-lending or subscription on-demand or print
7 on-demand or being able to rent a work on-demand, the
8 issue there is about software being used to provide
9 access to the expressive work that's protected by
10 copyright.

11 And we shouldn't let the difficulties
12 created by the fact that software has a dual identity
13 as both a copyrightable and protected work in itself
14 and the fact that its functionality is used for
15 purposes of controlling access to a separate and
16 distinct expressive work, to place those expressive
17 works in a position that Congress had not intended.

18 I again respectfully disagree with the
19 comments that were made before about the right of
20 access being something that was considered only with
21 respect to the issue of trying to reduce online
22 piracy. It was not. It was specifically the case
23 that Congress sought to be able to create online
24 markets for copyrighted works. And that was the
25 reason why access had to be subject to some degree of

1 control that was separate and distinct from what you
2 intended to do with the work once you acquired access
3 to it.

4 MR. AMER: Thank you. Mr. Band?

5 MR. BAND: So I'll respond to Allan's
6 previous comment, not this last comment. But the
7 issue, at least where I see the big problem with
8 1201(a) is this access point, is again, access to
9 something, whether you have -- it's one thing to get
10 access to something to which you don't have a legal
11 right to access. I mean, you don't have a - - you
12 don't lawfully possess that item, as opposed to
13 something that you've paid for and that you have
14 lawful access to and your ability to get inside that.

15 And this really -- and this really gets to
16 the point about security testing and so forth. So yes,
17 Congress did recognize that, you know, it came up with
18 a few permanent exceptions. And so, there was one for
19 security testing, one for encryption research, one for
20 interoperability and so forth. But there wasn't one,
21 let's say, for the testing of the Volkswagen for
22 purposes of determining that they were committing this
23 enormous fraud on consumers around the world.

24 And you know, and the idea there is that a
25 person, presumably, whether it was a consumer reporter

1 or whoever would hopefully be able to do that kind of
2 research would buy the Volkswagen, right? They're not
3 going to steal the Volkswagen. They're going to buy
4 the Volkswagen and then they should be able to do the
5 testing of all sorts about how the -- how the software
6 in it works.

7 But a lot of that is not covered by specific
8 -- by existing exceptions in the DMCA.

9 And moreover, there is this whole generation
10 of, you know -- yes, there are hackers and there are
11 people who do various kinds of testing sort of in the
12 gray areas of the DMCA. But a lot of people just have
13 decided not to -- that it's not worth it. It's not
14 worth the risk.

15 And in the last -- yesterday we were hearing
16 about how there's this whole -- you have a lot of
17 academic researchers -- I mean, you have some who are
18 willing to get into this area of encryption research
19 and all the other kinds of hacking technologies to
20 figure out how -- you know, how, let's say, Volkswagen
21 gamed the system and to detect those kinds of
22 problems.

23 But if you're -- if you're working at an
24 academic institution and you know there are going to
25 be - there are colorable legal issues or there's a

1 potential of a legal issue and you have to worry about
2 funding, people just don't go into that area of
3 research. It's just not worth it.

4 It's hard enough to get published and tenure
5 to have to worry about the legal issues on top of it.

6 So I think there's -- again, as more
7 software is included in more things, there's all kinds
8 of problems in that software, whether it's consumer
9 protection issues and safety issues that are not
10 covered by exceptions. And to rely on the exemption
11 process to hope that every three years maybe an
12 exemption will be granted to cover whatever you want
13 to do is simply not sufficient to take care of the
14 enormous problems that we could fix probably by
15 relatively simple changes to the DMCA, narrowing its
16 scope a little bit.

17 MR. AMER: Thank you. I think Ms. Greene
18 was next.

19 MS. GREENE: So I was really going to say a
20 lot of what Mr. Band just said with regard to the fact
21 that the current and permanent exemptions are not
22 sufficient to encourage or allow the types of security
23 research that is needed. And there is a chorus of
24 security researchers who will and have said the same.

25 I would also just say that because of the

1 obstacles posed by the rulemaking process and the fact
2 that you have to go through it because the default is
3 no, that serves as a further chill.

4 The last note that I would want to make on
5 this point is that when I was speaking to the public
6 safety concerns and the public health concerns, that
7 not being able to have as robust security research as
8 we might otherwise have, I was not suggesting that
9 that's an equity, that it is appropriate for the
10 Copyright Office to weigh.

11 In fact, it is our position that the inquiry
12 should be limited to whether or not the proposed use
13 is -- would constitute an infringement. And so, we do
14 align ourselves certainly more with Public Knowledge's
15 position on that point. I was merely making the point
16 that by expanding the inquiry beyond whether or not a
17 proposed exemption would constitute an infringement
18 does in fact implicate significant public policy
19 concerns negatively.

20 And then, the last thing that I would note
21 is the idea of access being this threshold and this
22 important protection, when we keep hearing this from
23 industry, it is like sort of the industry trying to
24 have its cake and eat it too because oftentimes, while
25 there are certain industries that are able to protect

1 their products, as the gentleman from ESA previously
2 stated, there are other industries that simply can't
3 and that still want to rely on limitations to access
4 under 1201.

5 And a good example of this is a study
6 conducted by Columbia University which found that at
7 some point 46 percent of Americans engaged in some
8 form of piracy. So clearly piracy is still a
9 significant problem, as many industries themselves
10 say.

11 Yet the study also found that the vast
12 majority of these wound up purchasing individuals more
13 digital products online legally than those who never
14 engaged in piracy at all. And so, I do think that
15 there are some really interesting findings there that
16 it would be worth thinking about in terms of the value
17 of limiting access.

18 MR. AMER: Thank you. So we are just about
19 at the time and I see a couple of other cards. And I
20 just wanted to ask one more question.

21 So in your responses, you might want to -- I
22 invite you to address this in your responses as well,
23 and that's the question of how prevalent, in your
24 experience as practitioners, is it for 1201 to be used
25 for what you might regard as anticompetitive purposes

1 or to enforce 1201 against consumer products.

2 On the one hand we've heard - - we've heard
3 that while you have the Chamberlain and the Lexmark
4 cases, those are several years old. And in any event,
5 the courts rejected the plaintiffs' claims in those
6 cases.

7 On the other hand, we've heard that, in any
8 event, there still is a chilling effect by the
9 prospect of litigation in these areas. So it would be
10 helpful for us just to have your perspective sort of
11 on how commonplace these sorts of claims are in the
12 1201 context. And I think Mr. Dow was next.

13 MR. DOW: So I guess --

14 MR. AMER: And forgive me, we urge you - -
15 everyone to be brief because we're right up against
16 the clock. Thanks.

17 MR. DOW: So in response to your question
18 there, my own firsthand experience is that there's not
19 -- I don't have a lot of firsthand experience with a
20 lot of that type of activity. What I see in that area
21 is largely anecdotal. I see it raised in the context
22 of the rulemaking proceeding. I also see a rulemaking
23 proceeding where, as you said, I think there were 27
24 exemptions asked for and 22 granted in the last round.

25 So I'm not sure that process isn't working.

1 I mean, it was intended to be something that could be
2 flexible and respond to these things. And in my
3 experience, I'm not sure it 00000 00000 isn't.

4 I had my tent up really to respond to Mr.
5 Panjwani's notion that access was not intended to be
6 separate from the rights of the copyright owner. I
7 think that notion just simply isn't correct. It was
8 very clearly discussed, very clearly contemplated at
9 the time.

10 And I just wanted to highlight, just coming
11 out of the House Judiciary Report, where they say the
12 technological measures such as encryption, scrambling,
13 electronic envelopes that this bill protects can be
14 deployed not only to prevent piracy and other
15 economically harmful and unauthorized uses of
16 copyrighted materials, but also to support new ways of
17 disseminating copyrighted materials to users and to
18 safeguard the availability of legitimate uses of those
19 materials by individuals.

20 It absolutely was not limited to protecting
21 access for the purposes of preventing infringement.
22 It was protecting access for the purposes of
23 incentivizing these new business models, many of which
24 don't rely on exercises of the rights of copyright
25 owners.

1 In our business, those are the new business
2 models that we're engaged in. We've got a whole suite
3 of apps that allow you to gain access to our linear
4 television content, whether it's Disney Channel or
5 whether it's ESPN or whether it's ABC, to allow you on
6 your iPhone to watch those things on the go that is
7 controlled -- the access to those things is controlled
8 through authentication to ensure that you have
9 permission to have that access. But it's not
10 contingent upon the exercise of the rights of the
11 copyright owner.

12 MR. AMER: Thank you. And quickly please,
13 Mr. Panjwani?

14 MR. PANJWANI: Just responding to your
15 question about the prevalence of 1201 claims against
16 consumer activities and programs or activities, I
17 would note that that's in part asking for us to prove
18 a counterfactual in that it's our perspective that the
19 existence of -- if we assume that many people are law-
20 abiding and the law prevents engaging in pro consumer
21 activity that would be prevented by 1201, then that
22 activity just isn't out there.

23 I think we have seen the examples that did
24 come out are involving the inkjet printers. And I
25 would point out that we filed to clarify that legal

1 ruling to make sure that it extended to 3D printers.
2 And that attracted a voluminous filing by Stratasys, a
3 major player in the industry, opposing that on the
4 ground that no, no, no, we have this right to lock you
5 into our first party filament.

6 And most recently, another competitor of
7 Stratasys 3D systems just announced end-of-life of one
8 of their printer lines, which had locked in a first-
9 party filament. And I think that underscores the
10 importance of exemptions like this and sort of the
11 effect that 1201 has.

12 MR. AMER: Thank you. Mr. Pierre-Louis?

13 MR. PIERRE-LOUIS: I promise to be brief.
14 First, I think it bears repeating that 1201's been a
15 success story in what it aimed to do, in the twin
16 goals of both getting more broadband out there,
17 getting more devices innovated and getting works
18 online and on devices.

19 So it's been a success. And so, we've got
20 to really think about how we tinker with it, right?

21 There are two types of tinkering here and
22 we've got to be very careful in how we approach that.

23 The other is that we've seen innovation
24 really blossom. It hasn't been chilled. And what
25 businesses like is certainty, both in what they can

1 and can't do. And when they know that they can make
2 that investment and get a return, they will invest
3 more. And they've done that. And I think that's been
4 proven out. And so, we've got to be careful how we
5 think about the exemption process and all of those
6 things.

7 But I think first and foremost, we've got to
8 look at this as a success story that we want to
9 continue.

10 MR. AMER: Thank you. Mr. Weissenberg?

11 MR. WEISSENBERG: Well, I'm not a
12 practitioner just yet. I'll be graduating in a month
13 and taking the bar. But I would again put your
14 attention to the TracFone reply comment from last
15 year's triennial. They list -- they do a great job of
16 listing all the success they've had using the DMCA to
17 protect their anticompetitive lock-in model.

18 Again, we emphasize that's not appropriate -
19 - that's not an appropriate use of 1201 and we urge
20 the Copyright Office to make a statement, a clear
21 statement saying that it no longer has a place in this
22 process. So, thank you.

23 MR. AMER: Thank you. And I think we'll
24 wrap up with Mr. Band.

25 MR. BAND: So I know Donald Trump thinks

1 that unpredictability is a virtue. But when
2 counseling clients, unpredictability is not good.

3 I mean, not my unpredictability but the
4 unpredictability of the law. So after the DMCA
5 passed, looking at a plain reading of 1201(a), it was
6 pretty clear on its plain reading that it could be
7 used anti-competitively.

8 And I had to counsel clients, yeah, you
9 can't -- you know, if you try to circumvent for this
10 purpose or that purpose, to keep competing in the
11 aftermarket, you might have a problem. And then,
12 along comes the Chamberlain v. Skylink case and I
13 said, okay, well, you know, silly me. You know, I was
14 just reading the plain language of the statute and
15 obviously it means something different from the plain
16 language. But that's good. I like Chamberlain
17 better.

18 And so, now you can compete in the
19 aftermarket. And then, along comes MDY and says - -
20 and they said, no, Congress meant, you know, the plain
21 language controls and this interpretation of
22 Chamberlain is wrong. And so, now I have to tell my
23 clients, oh, well you could have -- you used to be
24 able to compete in the aftermarket. Now you can't
25 compete anymore in the aftermarket.

1 And so, that's where we are now. It sort of
2 depends on where you are. I guess in the Sixth
3 Circuit, you can compete in the aftermarket and in the
4 Ninth Circuit, you can't compete in the aftermarket.
5 And just to -- you know, as Raza said and the
6 gentleman here said, you know, you just have to look
7 at who is opposing exemptions to see how it is being
8 used anti- competitively.

9 So we see in the 3D context, the 3D printing
10 context, it's being used anti- competitively. In the
11 TracFone case, and then, of course when all the major
12 automobile manufacturers are opposing it because they
13 basically -- it's clear they're opposing the
14 competition that would be enabled. So it's quite
15 obvious that it has a potential for enormous
16 anticompetitive implications.

17 MR. AMER: Thank you. I think we have to
18 leave it there. I apologize. Thank you to all our
19 panelists. We're a little bit over time, so if I
20 could ask that we limit the break to 10 minutes, if
21 panelists on session two could plan to be back by
22 10:50, that would be great. Thank you.

23 (Whereupon, the foregoing went off the
24 record at 10:38 a.m., and went back on
25 the record at 10:52 a.m.)

1 MS. SMITH: Okay. I think we're about to
2 start for panel two. Everyone's here? Okay.

3 So panel two is called "The Rulemaking
4 Process --

5 Evidentiary and Procedural Issues". So if
6 this is what you're here for, you're in the right
7 place.

8 I'd like to start first with us briefly
9 introducing ourselves. First, from the Copyright
10 Office, I'm Regan Smith, Associate General Counsel.

11 MR. AMER: Kevin Amer, Senior Counsel for
12 Policy and International Affairs.

13 MR. MOORE: Andrew Moore, Ringer Fellow.

14 MR. SLOAN: Jason Sloan. I'm an Attorney-
15 Advisor in the General Counsel's Office.

16 MS. SMITH: And now, if the parties would
17 like to introduce your names and the organizations you
18 represent?

19 MS. COX: Krista Cox, the Association of
20 Research Libraries.

21 MR. DECHERNEY: Peter Decherney, from the
22 University of Pennsylvania.

23 MS. GREENE: Robyn Greene, from New
24 America's Open Technology Institute.

25 MR. MOHR: Chris Mohr, SIIA.

1 MR. WILLIAMS: I'm Matt Williams, from the
2 MSK Law Firm for the Association of American
3 Publishers, the Motion Picture Association of America
4 and the Recording Industry Association of America.

5 MS. TUSHNET: Rebecca Tushnet, the
6 Organization for Transformative Works.

7 MR. TURNBULL: Bruce Turnbull, representing
8 the DVD Copy Control Association and the Advanced
9 Access Content System Licensing Administrator, LLC.

10 MR. PANJWANI: Raza Panjwani, Public
11 Knowledge.

12 MS. SMITH: Great. So this panel is to
13 explore the general operation of the triennial
14 rulemaking process. I see that many of the panelists
15 are participants in the process. And so, they're
16 probably aware that last October concluded the sixth
17 process where the Office received 44 petitions.

18 We grouped this into 27 categories of
19 exemptions. The Register recommended and the
20 Librarian adopted the granting of 22. But through
21 that process, the Office received nearly 40,000
22 written comments and we understand that the comments
23 written in support of this study, you know, for many
24 participants, it was seen as taking a lot of time and
25 perhaps a disproportionate amount of time.

1 The comments and testimony that we received
2 during the last session reflected considerable efforts
3 from individual participants, nonprofit organizations,
4 law firms, legal clinics and industry members.

5 And we're interested in hearing your
6 thoughts about the procedural aspects of the
7 rulemaking as well as the evidentiary standards that
8 are applied. And keep in mind, some of you will also
9 be on panel three. But that topic is whether or not
10 there should be some sort of presumptive renewal or
11 streamlining for renewals of exemptions that are
12 granted. So we're going to try to respect that that's
13 the topic of the next panel, as opposed to this panel.

14 So I think to start out, I'll just ask a
15 very broad question. For those that have participated
16 in the process, how do you find it's working for you?
17 And in the answers, please just tip your placards up
18 if you wish to speak. And if you could please try to
19 keep your response to maybe two to three minutes, we'd
20 appreciate it.

21 Thank you. Professor Tushnet?

22 MS. TUSHNET: So not so well. So we
23 dedicated really probably 500 to 600 hours, if I'd
24 look at my time, which I don't keep with the same
25 regularity you would at a law firm, and several other

1 people, other lawyers volunteering for my organization
2 also dedicated significant time as well as
3 conversations with technical people and other people
4 and some of our members who take advantage of the
5 exemption. So it was a big deal.

6 And there are significant problems with the
7 requirements that the Office currently imposes. I
8 think the Cyberlaw Clinic's comments go into great
9 detail, and I'm largely in agreement.

10 So I won't run through these. I would say
11 one specific issue in particular that doesn't work
12 well -- so for three rounds, we have made the argument
13 that the Copyright Office should consider actual
14 knowledge and behavior among potential users of an
15 exemption when interpreting whether there are
16 alternatives to circumvention.

17 That is, it should consider whether those
18 alternatives are in fact known and used.

19 And frankly, it's quite frustrating that the
20 Copyright Office has not even addressed this argument,
21 much less given a reason why it has rejected this
22 argument, which we could actually then talk about.
23 It's also contrary to the due process principles and
24 the notice-and-comment practice of rulemaking. And
25 you know, I'd just like to hear something from the

1 Copyright office about that.

2 MS. SMITH: Okay. Mr. Turnbull?

3 MR. TURNBULL: My clients have participated,
4 DVD CCA, in all of the prior rulemakings, and AACCS LA
5 in the last couple and I would say in general, we
6 actually find that it works well. I think the basic
7 approach is correct that there is -- that those who
8 seek the exemption have the information that's
9 necessary to bring forward and that's how it has been
10 put forward.

11 I think the -- and the notion that the basic
12 presumption is that the prohibitions are to stand
13 unless there is evidence brought forward sufficient to
14 demonstrate the need for the exemption is the correct
15 approach. I think that there are details about how
16 many rounds of submissions there are, whether the
17 initial round in the last rulemaking was necessary or
18 additionally burdensome.

19 I think from the responding parties' point
20 of view, we wound up with one response -- you know,
21 one opportunity, whereas other participants, the
22 proponents had multiple. And so, again, in the
23 details, I think there are places that could be
24 improved. But as an overall matter, I think we find
25 that it works well.

1 MS. SMITH: If I could ask if you could turn
2 off your microphone when you're done speaking, that
3 will just help prevent feedback noise. And also, a
4 follow-up to Mr. Turnbull, did you feel as
5 participating in the second cycle of comments and
6 there not being a fourth, that there was something you
7 had left unsaid or did you feel that you had the
8 opportunity to express your viewpoint on all issues?

9 MR. TURNBULL: Well, the concern largely was
10 that -- I mean, I understand the inclination of
11 proponents to bring forward evidence or information in
12 response to what was submitted. But we really -- other
13 than through the hearings, which was an imperfect way
14 of doing it, partly because of the time limitations
15 and the questions and that sort of thing, there were
16 things in the responding round from the proponents
17 that one would have liked to have had an opportunity
18 to respond to.

19 I mean, there are different ways that that
20 could be handled. I mean, the Copyright Office could
21 be more vigilant in saying no to submissions of new
22 evidence or giving another round or other ways. But I
23 would say that there were, particularly in this last
24 proceeding, there were times when we would have
25 responded if we had the opportunity.

1 MS. SMITH: Okay. Thank you. Mr. Panjwani?

2 MR. PANJWANI: There are a number of aspects
3 of the proceeding that we've been involved in that
4 we've highlighted as problematic. In fact, we've
5 filed general comments at the outset of the last
6 triennial process to highlight some of the issues we
7 had, beginning with the identification of classes of
8 works under section 102 for the exemption process, the
9 standard of identifying non-infringing uses as well as
10 adverse effects.

11 I particularly want to focus on the first
12 two, in part, because, as Professor Tushnet mentioned,
13 the Cyberlaw Clinic's comments on the adverse effects
14 I think were very appropriate and addressed that very
15 thoroughly.

16 Currently, the approach to identifying
17 classes of works results in -- as alluded to in the
18 prior panel -- some distinctions that don't quite make
19 sense.

20 So, for example, the difference between
21 tablets and phones that involve the same exact
22 software, thus bifurcating the docket and require
23 filings in both cases. The differentiation between
24 users, educators by differentiating the classes of
25 users as either K through 12 educators or higher

1 education educators, which it's unclear where these
2 distinctions in terms of classes of works come from or
3 the differentiation in granting an exemption between a
4 Blu-Ray disc and a DVD disc as a user.

5 Beyond that, in terms of the burden that we
6 find as problematic in terms of filing -- identifying
7 non-infringing uses is that the expectation that
8 proponents must identify affirmative precedent
9 affirming a non-infringement whereas the dearth of
10 precedent identifying an infringing activity does not
11 satisfy the burden.

12 This is particularly problematic because
13 without an exemption, a party cannot engage in the
14 activity, which means that there is a lack of an
15 opportunity for case law to develop in that space.

16 In fact, I would characterize the lack of an
17 exemption in some areas as effectively denying courts
18 of jurisdiction to define the contours of infringement
19 in that particular area. If you cannot circumvent for
20 purposes of engaging in an activity, there's no way of
21 defining one way or another whether that's actually
22 infringing in a court's eyes, if there is no case law
23 on that point.

24 I have other areas, but I'm going to stop
25 there.

1 MS. SMITH: Okay. I think you've raised a
2 lot of issues and some of those we'll begin to drill
3 deeper into. But I do want to give everyone an
4 opportunity to speak a little bit at the opening.

5 And I think one of the things to consider
6 maybe as we're going around is to what extent are some
7 of these issues that you're raising sort of dictated
8 by the statute, which requires a finding that an
9 activity is likely to be non-infringing. So Ms. Cox?

10 MS. COX: So the Association of Research
11 Libraries has participated in the rulemaking process
12 as part of the Library Copyright Alliance.

13 And it - - the process is just -- it takes
14 an extraordinary amount of time, as Professor Tushnet
15 mentioned like 500 to 600 hours.

16 We're very lucky to have the assistance of
17 some of the clinics that we've worked with and joined
18 in some of their filings because otherwise it really
19 does take an extraordinary amount of time and
20 resources where you have to assemble the evidence, you
21 have to submit the proposal, including the text. You
22 have to basically write a brief on why your use is
23 non-infringing and you have to then respond to any
24 opposition to those proposals, prepare a written
25 reply, participate in the hearings and then do the

1 follow-up questions.

2 And you know, this whole process can take a
3 year or more, which is just an extraordinary amount of
4 time for something that is proposed by public interest
5 groups that often don't have the time and resources to
6 invest in this. And this is why we are very grateful
7 to the clinics.

8 Just on Raza's point about that the lack of
9 exemption denies courts these opportunities, it really
10 does make putting together this evidence very, very
11 difficult. It makes writing these briefs on why it's
12 a non-infringing use -- it can make it -- make it more
13 difficult.

14 And as Mr. Turnbull said he believes that
15 those who want the exemptions have the opportunity and
16 the information necessary.

17 And I would disagree just to the extent that
18 this process really provides an asymmetry of interest
19 where these corporations are usually the ones that are
20 proposing these exemptions whereas it is like these
21 public interest groups that don't have these resources
22 needed to walk through this very complicated and
23 burdensome and very formalistic system.

24 MS. SMITH: Mr. Mohr?

25 MR. MOHR: A couple of just -- I guess a

1 couple of preliminary points. The first thing is I
2 think there's -- I want to be clear in distinguishing
3 between, let's say, problems with the statute and
4 problems with the rulemaking.

5 There are -- from our mind -- in our mind,
6 there are areas where in fact overall the statute is
7 working quite well. And I think in the comments from
8 AAP and the MPAA and also in ours, we've tried to give
9 some examples of how new business models have been
10 encouraged.

11 This was designed to be a failsafe. And it
12 was designed to operate in a certain way. And I think
13 you hit on that. And that is specifically with
14 respect to the statute, that the statute has to be a
15 source of causation of the harm. It can't be
16 alternative distribution models. It can't be the fact
17 that something is inconvenient. It has to be the
18 statute that is causing the adverse effect. And I
19 think, to the extent that the rulemaking has gone off
20 the rails a bit, it might be useful to examine how
21 closely the Library is hewn to that particular
22 standard.

23 MS. SMITH: Can you elaborate, if you think
24 that the rulemaking has gone away from the standards
25 set out in the statute?

1 MR. MOHR: Well, initially, I mean -- you
2 know, it's changed -- the Library has changed its
3 position. I mean, in the initial -- the initial
4 rulemaking, the very first one, there was a fairly
5 large fight over whether or not an exemption should
6 issue to a class of users or to a class of works. And
7 the initial rulemaking tried to stay pretty close to
8 that line. And I think later, it got much more into
9 the class of user and then it got a lot fuzzier.

10 I think there are places where there are --
11 there may be other statutes, for example, that
12 prohibit a particular course of conduct. And so,
13 assuming both statutes are valid, assuming both
14 statutes prescribe the same conduct, there -- the
15 section 1201 can't be prescribed as a cause. It's a
16 way the proceeding is being used of validating some
17 other policy goal that they would like to have but has
18 nothing to do with copyright. In that particular
19 instance, I'm not sure that the issuance of an
20 exemption is appropriate. In other words, tie goes to
21 non-exemption. That's -- those are the sorts of
22 things I mean by statutory causation, if you'd like.

23 MS. SMITH: Mr. Williams?

24 MR. WILLIAMS: Thank you. I'd like to
25 reiterate first what Mr. Turnbull said in the 00000

1 00000 sense that the comments by their very nature
2 kind of contain a lot of criticism of what the Office
3 has done. But I think you guys also deserve a lot of
4 praise for taking a tricky statute and making a
5 proceeding that's overall worked quite well. I think
6 we're in kind of a -- it's not broken, so you have to
7 be very, very careful trying to fix it scenario.
8 Again, it's functioning as it was intended to.

9 We're not always happy with the outcomes.
10 We're frequently unhappy with some of them and we've
11 got a few things in our comments that we think could
12 be improved. One important one I think is we would
13 love to see a draft of the regulatory language in
14 advance of it being published just so that everyone
15 who participated in the hearings at least can comment
16 on the drafting choices. But some of those things are
17 relatively minor improvements that we think could be
18 made. And overall, we think things are working pretty
19 well.

20 On Bruce's point about the one filing versus
21 three from the last cycle, we also felt that there
22 were some things left unsaid. Part of that was
23 because at the hearings, I think, as you should, you
24 gave the proponents a lot of opportunity to explain
25 their cases and then us who were sitting at the end of

1 the table ended up running out of time sometimes. So
2 having one more written filing might have been
3 helpful.

4 I just have a few very brief things in
5 response to some of what's being said. I think Public
6 Knowledge raised the issue of why should we be
7 distinguishing between different types of users. And I
8 think that's something that grew out of what Mr. Mohr
9 was talking about, which is that we've altered the
10 approach somewhat in that a class of users was not
11 something that was initially being looked at. But
12 overall, I think my clients have come to find that
13 that change has been helpful. It's not perfect and we
14 do have some concerns about how it works. But
15 overall, I think we have found it to be helpful.

16 And so, in the previous panel, Jonathan Band
17 was raising the issue of, well, this is going to keep
18 growing and growing and growing and eventually the
19 whole building is going to have to work on it. But I
20 think that is in large part the result of the Office
21 trying to be accommodating to the proponents and
22 trying to let them make their case and expand their
23 approach to allow the class of works definition to be
24 altered. And so, sometimes you have to take a little
25 bit of bad with a lot of good. And so, that I think

1 is kind of why the proceeding has grown the way it
2 has.

3 The last point I wanted to respond to was
4 this issue that 1201 supposedly inhibits the
5 development of normal copyright case law or fair use
6 case law. I don't -- I've never understood that
7 argument and I still don't understand that argument. I
8 understand that there are two different types of
9 liability and when counseling a client, you have to
10 address both. On the other hand, if there are the
11 number of threats that people claim there are of 1201
12 liability, there are lots of ways to pursue
13 declaratory relief actions without connection to the
14 1201 threat and still pursue your copyright arguments.

15 There are lots of fair use cases going on
16 out there. I'm involved in a lot of them on both
17 sides, often on the defense. There are a lot of other
18 types of exceptions-related cases going on that have
19 nothing to do with 1201. So I just -- I don't
20 believe that the case law is being inhibited. Thank
21 you.

22 MS. SMITH: Okay. Well, we did open up with
23 a broad question. I think now we've got a lot of
24 issues to unpack. So I think it might be hopping
25 around a little bit, but on the question of how to

1 define a class of works -- it is true that, as others
2 have mentioned, in that first rulemaking, the Office
3 did not define a class of works by reference to the
4 users but subsequently from the second rulemaking on,
5 it has.

6 And my question is if this were to be taking
7 an opposite approach and not allow refining it by the
8 types of users or uses, would this be likely to result
9 in perhaps less exemptions? What effect would this
10 have on the rulemaking if you need to look at a wider
11 pool in terms of whether an activity is likely to be
12 non- infringing? So, Professor Decherney?

13 MR. DECHERNEY: Yeah. Thank you. So I've
14 been participating in the rulemaking since 2006, when
15 it was -- when the use and users were added to the
16 definition of class of works. I think it's not a
17 question of whether or not it becomes larger or
18 smaller as a class.

19 But it brings the idea of a class much more
20 in line with fair use, which is about use and users.
21 And of course, all non-infringing uses aren't about
22 fair use. There are plenty of kinds of non-infringing
23 fair use, which are about exemptions like 110. But
24 fair use obviously is a really important one.

25 So I think it actually makes the logic of

1 the arguments much cleaner and it brings them into
2 alignment with fair use. We're not talking about
3 videogames that can only be played on obsolete
4 technology. But it's about use by archivists, which
5 is really what that exemption was meant to be used for
6 going all the way back to 2003 and 2006. Could I add
7 a few other comments from the first round?

8 MS. SMITH: Sure. Go ahead.

9 MR. DECHERNEY: So I mean, in some ways, the
10 rulemaking has I think really been effective and, from
11 my own perspective, many, may, you know, thousands of
12 educators and students have been able to engage in
13 non-infringing uses as a result. And there are so
14 many changes that have helped that, including the
15 added addition of use and users and the streamlining
16 of the process. So I'm happy we see that you're open
17 to new changes.

18 I mean, just to bring up two small issues,
19 or two issues, not so small, one is the emphasis that
20 we place on the next three years in each rulemaking.
21 Often we end up debating things that end to be
22 vaporware, technologies that never materialize,
23 licensing agreements which are still being negotiated
24 even 16 years after we first heard about them and if
25 there's a way to keep that to things that are tangible

1 and real and that there's evidence that they exist
2 would be terrific.

3 The other is what we're going to talk about
4 this afternoon, which is the renewal process. And so,
5 I'll put that aside. But you know, I'd love to
6 rethink what de novo may mean and whether or not we
7 need to use that standard at all. But also, maybe
8 something more appropriate for this part of the
9 hearing is how evidence is preserved and used and then
10 maybe reused for the future.

11 MS. SMITH: Yeah, and keeping in mind that
12 the next panel is going to talk about renewals, like
13 if there were some type of reform for renewals, it
14 seems like it might take some of the pressure off of
15 the participants in each of the rulemakings going
16 anew. But Mr. Panjwani? I think I might -- am I
17 saying that right? Okay. Panjwani.

18 MR. PANJWANI: I'd also like to just respond
19 very briefly to some of the points made previously.
20 It was already mentioned the amount of hours that have
21 to be put in by proponents, ranging from 500 by a few
22 of the clinics to as high as I believe 2,000 hours was
23 the number listed in the reply comments by the
24 filmmakers, by the UC Irvine Law Clinic as well as
25 their pro bono counsel.

1 I don't think a system that relies on pro
2 bono counsel and the availability of clinics is
3 sustainable. And Mr. Williams doesn't believe that
4 we're going to have necessarily this proliferation.
5 But one example that came up was consumer appliances
6 and the software embedded in them are not covered by
7 any of the exemptions and we're going to have to wait
8 two years to deal with that. And that's going to be
9 an additional class that's going to require addressing
10 an additional proponent work.

11 In terms of the specifics of the comment
12 periods of the process, I will note that in my limited
13 experience as a litigator in motion practice,
14 typically the party with the burden of proof is
15 allowed to file in favor and a reply brief, and a sur-
16 reply brief in a fourth round is typically not given
17 as of right. I would also note that it's important to
18 realize that the burden, as we often hear from the
19 Copyright Office -- the burden is on the proponents,
20 to the point that there is no such thing as a default
21 judgment in favor of proponents. It is possible to
22 have your exemption denied without anyone actually
23 opposing it, as the Register recommended the denial of
24 the e-book reading exemption back in 2010 without any
25 substantive opposition.

1 I would also note that the problems with the
2 process in terms of the accessibility of the public in
3 understanding what's going on were delineated in the
4 Cyberlaw Clinic's comments that pointed out that there
5 are effectively nine factors that the Office
6 considers. And you cannot find those nine factors
7 listed in one place. But rather, one must parse both
8 the original NOI requesting classes be identified and
9 then the NPRM calling for the rulemaking process. And
10 in combination, one gets this multifactor test that is
11 highly technical and requires all these hours to
12 actually meet.

13 MS. SMITH: Again, I'm just going to move on
14 so we can facilitate this. Again, I think these
15 issues end up being a bit intertwined.

16 MR. PANJWANI: Right.

17 MS. SMITH: But I'm trying to focus it, to
18 narrow it --

19 MR. PANJWANI: Sure.

20 MS. SMITH: I wonder if we can get back to
21 the question of the definition of the class of works.

22 MR. PANJWANI: Yes. So I understand the
23 difficulty the Office has in that they're asked to
24 define classes of works. But exemptions must be
25 granted for non-infringing uses. And then, connecting

1 those two perhaps leads to some of the difficulties
2 that we have.

3 I would say that there is a middle ground
4 between the atomization that currently occurs in the
5 defining of classes and the section 102 classes. I
6 believe that we've veered too far in terms of where we
7 are. I think motion pictures for classes of fair uses
8 as opposed to particular types of formats I think is
9 where we start running into sort of shallow waters and
10 fear of running aground.

11 I think software also presents some
12 difficulties in terms of tying it to a particular type
13 of device whereas perhaps software needs to be treated
14 as its own class that is in fact a narrower subgroup
15 than literary works. So I would urge perhaps a
16 movement away from the level of specificity currently
17 in the definition of classes.

18 MS. SMITH: Thank you. Professor Tushnet?

19 MS. TUSHNET: So what was just said is
20 exactly what I think about the classes too, especially
21 since the burden placed sometimes doesn't inform us
22 exactly how specific we have to be. There's nothing -
23 - right now, we have no reason to think or understand
24 why, you know, the exemption isn't for the University
25 of Pennsylvania instead of for college professors

1 because it's somebody from the University of
2 Pennsylvania who's coming and asking.

3 And we -- so from our perspective, it is
4 hard to understand what the distinctions are when we
5 see someone testifying about the need of teachers
6 across all disciplines. Then, it turns out because
7 they are actually from media studies we only get an
8 exemption for media studies.

9 And so, part of the reason you've seen such
10 an explosion is that we have learned the lesson that
11 we have to bring sort of a kindergarten teacher and a
12 first grade teacher and a second grade teacher and
13 this is -- you know, because -- because in the past,
14 the Office has rejected, for example, when I bring in
15 remix videos, they've rejected the relevance of the
16 National History Day people, who do make remixes, but
17 they make it in an educational context. So they don't
18 count apparently for --

19 MS. SMITH: Well, I do want to push back a
20 little bit on the idea that you need to bring in a
21 kindergarten teacher, a first grade teacher and a
22 second grade teacher. I mean, what would be the
23 alternative?

24 Would it be that Professor Decherney shows -
25 - and the Office has said this is a great example of

1 fair use in cinema studies and so he testifies about
2 his need and an exemption is granted and it is for
3 fair use for all motion pictures. Where would the
4 line be drawn?

5 MS. TUSHNET: So motion pictures in
6 educational context, absolutely, because what he
7 testifies about is pedagogical practice. And
8 certainly the people that we have -- so Renee Hobbs,
9 for example, she's actually not just a media educator.
10 She actually works in the pedagogy of education.

11 And so, that's the kind of thing where the
12 evidence in front of you actually supports the
13 generalization being offered because it's about how
14 pedagogy works, not about how media studies in
15 particular works or language studies or film studies.
16 And we think that a similar level of generality,
17 similar to what you see in fair use cases, right -- so
18 people in fair use cases, they list education,
19 criticism, commentary.

20 They don't say media studies and there's a
21 reason for that. And I think that that kind of change
22 could really help decrease the burden on you as well
23 as align it, as Raza was saying, more with the needs
24 of the statute.

25 MS. SMITH: Mr. Turnbull?

1 MR. TURNBULL: Well, far be it from me to
2 advocate for exemptions, but I really think that the
3 focus on K through 12 or particular types of higher
4 education has enabled the Office to make
5 recommendations for exemptions whereas a much broader
6 category, as had been in the early rounds, resulted in
7 no exemption recommendation and that if you -- if you
8 -- again, if you start out with the proposition that
9 the default is that the prohibition on circumvention
10 shall apply, which is what the statute and the
11 legislative history tell you, unless there is a
12 particular body of evidence saying that a particular
13 use is being frustrated by the particular technology
14 involved, then if you have a broader category, you're
15 much more likely to find that, no, in the broader
16 category, there is not the frustration of the use,
17 whereas if in a narrower category -- I mean, Professor
18 Decherney did a really superb job in 2006 of
19 explaining why it was that he needed what he needed.

20 And I think that the evidence that's been
21 presented in other cases -- while I, again -- with Mr.
22 Williams, I'm not always happy with the result -- I
23 think there has been a reasonable outcome based on
24 what's been presented. And if there are ways to make
25 that a little easier for some of the proponents, I'm

1 not opposed to that.

2 But I think that the way the categories are
3 defined has in fact enabled the granting of certain
4 exemptions that in a broader category would not have
5 been granted.

6 MS. SMITH: Mr. Williams?

7 MR. WILLIAMS: Thank you. Yeah, I agree
8 with Bruce. I think your question was if the approach
9 to class of works changed, would that end up resulting
10 in fewer exemptions. And I think if you followed the
11 approach as you have and only altered that portion
12 that it would, because you, as you said, need to
13 decide that the use is likely non- infringing, I
14 actually think you have to go farther than that. You
15 have to actually decide that it is non-infringing
16 because the statute says likely adverse impact. It
17 doesn't say likely non- infringing use. But that's a
18 disagreement I have.

19 But in order for you to make that conclusion
20 that it's even not a likely non- infringing use, you
21 have to start engaging in some of the line drawing
22 that is being criticized. So you've done things like
23 focus on use of short portions of a work for criticism
24 and commentary in noncommercial sectors. Those things
25 help you get to the conclusion that what the

1 proponents want to do is a lawful use. And you have
2 to get to that conclusion before you can get to the
3 exemption.

4 You also have to get to the conclusion that
5 there are not reasonable alternatives available.

6 So you have to draw the lines that were
7 being criticized between different formats because
8 just because someone who's engaged in a certain
9 activity wants to use DVD-quality footage, that
10 doesn't mean that they have to have Blu-Ray- quality
11 footage. And so, the line drawing that you've engaged
12 in I think has allowed you to craft exemptions that
13 comply with the statutory requirements and that also
14 give the proponents a lot of what they're asking for.
15 So I would be careful playing around with doing away
16 with some of this line drawing.

17 A couple of very quick responses. On the
18 burden of proof issue, I think this was heavily
19 debated in the 2000 rulemaking and then all over again
20 in the 2003 rulemaking. There were a lot of
21 disagreements at that time between NTIA and the Office
22 as to how to read the statute. One thing they both
23 agreed on though was that the burden was on the
24 proponents and that that's a requirement in the
25 legislative history.

1 And Federal Register 65, page 64558 goes
2 through the Office's initial reasoning as to why the
3 burden needs to be on the proponents and I think it's
4 sound reasoning even to today, citing case law and
5 other sources that basically say that when you're
6 dealing with an exception to a general rule, the
7 burden is on the proponent of the exception to make
8 its case. So I'd urge you to go back to that. I think
9 I'll end there.

10 MS. SMITH: Okay. Ms. Cox?

11 MS. COX: So I agree with a lot of what Raza
12 and Professor Tushnet said, that I think -- and
13 Professor Decherney -- that defining based on uses
14 really does make a lot of sense, that it does put it
15 in line with fair use. And I think that
16 distinguishing between the different educational uses,
17 between K through 12 or media studies or other
18 disciplines in college really doesn't make a lot of
19 sense because we are talking about pedagogy. We're
20 talking about educating students.

21 And I would just say that trying to draw all
22 of those distinctions actually makes the actual text
23 of the exemptions not as usable, not as friendly. For
24 example, in the most recent rulemaking process, the
25 exemption for film clubs was 1,055 words long. The

1 2006 exemption was 44 words long. A 44-word exemption
2 is a lot easier for the average teacher or person,
3 user to understand versus having to really parse
4 through the statute and really understand what is
5 allowed or what's not allowed.

6 So I think if you went back to looking at
7 the uses instead of the classes of users, I think it
8 would make it easier for us to understand it and you
9 wouldn't go through such a long and drawn out process.

10 MS. SMITH: Okay. Thank you. Ms.
11 Greene?

12 MS. GREENE: Thank you. I just wanted to
13 respond. This is a little bit off-topic from your
14 question directly, but to what Mr. Williams was saying
15 about the proper interpretation of whether or not
16 something is infringing. And it is our position that
17 the Copyright Office should be uniformly applying a
18 standard that they merely have to find that a proposed
19 exemption is likely non-infringing. We think that this
20 emanates directly from the statute, as the Cyberlaw
21 Clinic at Harvard stated as well in its comments. Our
22 view is certainly in line with that.

23 And we would also urge a narrow
24 interpretation of the question as to whether the
25 proponent of the exemption experiences adverse effects

1 as a result of the TPM. We think that both of these
2 would be in keeping with the intent of the statute and
3 would allow for a better implementation of the
4 rulemaking process.

5 MS. SMITH: Professor Decherney?

6 MR. DECHERNEY: Just to quickly set the
7 record straight, when I'm criticized by Professor
8 Tushnet and praised by Mr. Turnbull -- in 2006, we did
9 actually apply for an exemption for media professors.
10 Immediately, we were criticized by everyone who said,
11 well, what about us, we also need an exemption, and as
12 a result, had evidence from people across the academy
13 and lots of stories from people in many different
14 fields but also support from many different
15 professional organizations, including the American
16 Association of University Professors, the largest
17 organization of academics. And so, who are all
18 represented by me normally in the rulemakings, not
19 today, although they have submitted comments actually.

20 So it is a broad exemption.

21 I just -- one quick point about what Mr.
22 Williams was calling the line drawing and I think this
23 relates to Ms. Cox's comments as well. But we are
24 often talking about these distinctions between DVD and
25 Blu-Ray and it's not about non-infringing uses versus

1 infringing uses, but about the level of need, of
2 quality, when and what constitutes something that's
3 useful for education or for archiving purposes. And
4 it's not clear exactly what the standard is there.

5 I mean, I don't know if you want to be
6 convinced by us that it's something we need. But I
7 think some kind of clearer understanding of what that
8 bar is would be terrific.

9 MS. SMITH: Thank you. So the next area I'd
10 like to tee up is the burden of proof, which some have
11 already sort of spoken about. Mr. Williams has quoted
12 what the Office says in the statute, says the
13 Librarian needs to make a finding of something that's
14 specifically going to happen in the next three years.

15 So I think there's two sides to this
16 question. First is the Office has said that the
17 burden of proof is on the proponent and we've also
18 heard that it's taking legal clinics hundreds of
19 hours. So there's both a substantive and a procedural
20 angle to this question. Should the Office institute
21 reforms that give people less opportunities to submit
22 evidence? Would that hurt the ability for proponents
23 to obtain an exemption or are there specific reforms
24 we should consider?

25 Mr. Mohr?

1 MR. MOHR: I think there's -- I think
2 there's certain things you might be able to do through
3 concepts of administrative notice that would
4 streamline the proceeding. I think it's totally
5 reasonable for someone who has proven an exemption to
6 provide information, in abbreviated form, for example,
7 that they have used the exemption. It would certainly
8 be helpful to say, yes, we've used this and here's a
9 couple of brief examples of the kind of thing that
10 we've done.

11 I'm not talking about a 300-page, thousand-
12 footnote filing, this is what I did with my summer
13 vacation, that kind of thing.

14 And provided that all that's being sought is
15 the exact same exemption from the year before, that
16 should be enough, unless somebody else comes forward
17 and says, no, things have changed, the exemption's
18 being abused, there is some other evidence that there
19 was some flaw in the case beforehand that warrants a
20 revisit of this or something, a rebuttal basically, a
21 rebuttal of that evidence.

22 But the burden -- you're right. The burden
23 has to be on the proponent first. But after that, I
24 think you as an administrative agency as opposed to a
25 court has more flexibility in how you handle the

1 rulemaking from that point as it goes forward.

2 MR. AMER: Just to focus a little bit on
3 this question of what we as the Office can do versus
4 what might require statutory change on this question
5 of the burden of proof, we have said that the proper
6 showing is a preponderance of the evidence standard,
7 which requires a more likely than not showing. Is
8 there agreement that that is the proper sort of
9 baseline framework that we should be applying or do
10 people have a view that we have some latitude in that
11 area? Mr. Panjwani?

12 MR. PANJWANI: I don't think we take -- or
13 at least speaking for Public Knowledge -- take issue
14 with the idea of a preponderance of evidence standard
15 for meeting the burden of proof as a proponent. I
16 think, however, where our disagreement enters in is
17 what does that mean with respect to each of the
18 elements.

19 What is showing non-infringing use by a
20 preponderance of the evidence and what are the adverse
21 effects that the statute contemplated that proponents
22 would be required to demonstrate in order to meet a
23 preponderance of evidence standard?

24 MS. SMITH: Professor Tushnet?

25 MS. TUSHNET: So I was just going to say

1 exactly what -- exactly that. Don't -- we should
2 definitely not change the process to give us less
3 opportunity to make our case. You know, I think there
4 would be serious due process problems with that, among
5 other things.

6 But the real -- the reason these submissions
7 are 150 pages long is because of this question, burden
8 of proof and the preponderance of evidence as to what.
9 And again, I'd direct you to the Cyberlaw Clinic. You
10 know, the burden of proof should be about non-
11 infringing use, adverse effects, not the nine
12 different things that the Copyright Office has come up
13 with over time, which do contribute to the fact that
14 we feel like we have to meet the burden on other
15 considerations that may be added into the process
16 later. And I think adhering to the statutory text
17 could really solve a lot of that.

18 Actually, could I actually respond to
19 something earlier? Because I feel like I don't want
20 to let it go. In terms of the question of 1201
21 interfering with the development of case law, so we
22 heard that that didn't really happen.

23 Let me offer you two pieces of evidence that
24 it does, first of all, as my own experience and that
25 of the OTW as a whole. So we counseled remixers

1 before the exemption happened. Remixers often --
2 well, not often, but occasionally would receive DMCA
3 notices. We'd talk to them about whether they wanted
4 to counter-notice. And we always had to ask them
5 before the exemption, how was this footage made?

6 And because nobody knows about the DMCA,
7 almost all of them made it by DVD ripping because
8 that's what gives you the most effective source.

9 And nobody that I counseled thought, oh
10 yeah, I should go ahead and make my fair use argument,
11 even though I would be willing to go ahead and do
12 that, because I'm definitely going to lose, right?

13 You have to tell them, look, if you made it
14 the wrong way, you're going to lose. It doesn't
15 matter that you have a good fair use case.

16 MS. SMITH: So in that example, I mean, what
17 is -- what is the alternative?

18 MS. TUSHNET: So --

19 MS. SMITH: It seems like it may be
20 statutory reform, since the statute requires --

21 MS. TUSHNET: No, so --

22 MS. SMITH: -- the non-infringing uses exist
23 as opposed to proponent case law. Right? I mean, the
24 earlier panel, we talked about Congress making the
25 decision to protect access to copyrighted works

1 separately.

2 MS. TUSHNET: Well, I'm sorry. Maybe I
3 wasn't clear.

4 MS. SMITH: Yeah.

5 MS. TUSHNET: Before we succeeded the first
6 time in getting the exemption, that's how I had to
7 counsel people. Now, I can counsel people, saying go
8 ahead. I don't have to ask them how the footage was
9 created. Go ahead. Do your counter-notice and if
10 they sue, we'll represent you. And I tell you, no
11 counter-notice that I've worked with has ever
12 proceeded to a case because remixers get takedowns
13 that are unjustified, something that we have talked
14 about in other fora.

15 But at the very least, copyright owners have
16 decided not to pursue claims when we thought there was
17 a very strong fair use case and we were willing to
18 make that, which we couldn't do before our exemption.

19 MS. SMITH: Okay. So it sounds like the
20 exemption in this case and process was working and --

21 MS. TUSHNET: Well, so in terms -- right.
22 Now we are ready to make --

23 MS. SMITH: Okay.

24 MS. TUSHNET: Right? We're ready to
25 litigate some of the issues that before we existed,

1 there was really nobody who would represent a non-
2 commercial -- you know, most non- commercial cases
3 don't end up in court because the defendant can't find
4 a lawyer, right? We're now there to do that. And you
5 know, we're waiting for the right case, which we just
6 couldn't do before.

7 And then, the other thing I would mention is
8 the dicta in the Corley case, which has already come
9 up, opining on stuff that's not before it, about the
10 question of quality, like what -- does fair use
11 require a particular quality? So that's something that
12 has been a real problem. It's explicitly disavowed by
13 subsequent Second Circuit precedent. But it's still
14 haunting us, as you can see by the fact that it's
15 brought up 16 years later about whether you do
16 actually have an entitlement to the right quality for
17 your fair use.

18 MS. SMITH: Okay. Mr. Williams, I think,
19 if you wanted to respond to the initial question about
20 burden of proof and preponderance of evidence?

21 MR. WILLIAMS: Yes.

22 MS. SMITH: Okay.

23 MR. WILLIAMS: On preponderance of the
24 evidence, I think I saw a lot of confusion in the
25 comments on what the standard means. And as you said,

1 it means more likely than not, which is not a terribly
2 difficult standard. It's the standard you're usually
3 dealing with at trial. So if you show 51 percent and
4 the other side's got 49, that's a close call, but you
5 still win.

6 So a lot of the comments seem to think it
7 meant something quite different and I think you could
8 clear that up just by clarifying. You've repeatedly
9 done that in your NOIs every cycle.

10 You've explained what it means. But there
11 still seems to be some confusion. And I think that
12 might be because people get troubled by the
13 substantial adverse impact standard, which is the
14 burden they have to meet is to show that substantial
15 adverse impact by a preponderance of the evidence.

16 And you've also gone out of your way in
17 every cycle to explain that substantial is not
18 something that requires proof that something
19 absolutely terrible has happened to you. It comes out
20 of the legislative history that calls for distinct,
21 verifiable and measurable impacts or that says mere
22 inconvenience is not enough. All of those things were
23 worked through in the 2000 cycle. And then, in 2003,
24 the Office reiterated that it's not imposing any
25 burden that isn't already in the legislative history

1 by saying substantial.

2 It's just saying don't come to us with a
3 hypothetical. Don't come to us with a philosophical
4 objection with the law. Tell us about a real-world
5 issue and we'll consider granting the exemption. So I
6 think the burden has been handled properly and it's
7 not something that should be changed.

8 MS. SMITH: Thank you. I think we'll go to
9 Ms. Greene next. But one question, does anyone want
10 to specifically comment, thinking ahead, on the
11 Breaking Down Barriers to Innovation Act, which would
12 change statutorily and impose a totality of the
13 circumstances test? So, Ms. Greene?

14 MS. GREENE: So I just wanted to respond to
15 Mr. Williams' citation to the Manager's Report and
16 dependence on that as sort of the best source of
17 legislative history. I would call into question
18 whether or not those are actually appropriate
19 standards.

20 I mean, when you look at the actual
21 statutory text, it does not impose any kind of
22 substantial burden requirement. It says merely, as
23 Mr. Williams was citing earlier, that the person be
24 adversely -- sorry, that someone is likely to be in
25 the succeeding three-year period adversely affected by

1 virtue of the TPM.

2 And so, I do think the appropriate standard
3 for inquiry is whether or not someone's proposed use
4 is likely non-infringing, which would also be in
5 keeping with the preponderance of the evidence
6 standard, right, more likely than not.

7 And then, also seek to determine just
8 whether or not quite simply something does impose an
9 adverse effect as a result of the TPM, not imposing
10 some type of heightened standard as to the level of
11 that adverse effect.

12 It's not clear in the statutory language or
13 in the majority of the legislative history, as opposed
14 to the sort of minority report by a single member of
15 Congress that there was contemplated any kind of
16 substantial adverse impact.

17 It seems more likely in fact that the intent
18 was to determine whether or not there is any adverse
19 impact and then to err on the side of granting the
20 exemption, as this was of course meant to be a
21 failsafe for people whose fair uses and other non-
22 infringing uses would otherwise be made impossible as
23 a result of 1201.

24 MS. SMITH: Okay. Thank you. And I know a
25 lot of the written comments do expose a lot of

1 viewpoints on the legislative history too and
2 obviously we're taking those into account. And so, on
3 the totality of the circumstances test, Mr. Panjwani,
4 if you'd like to respond?

5 MR. PANJWANI: Sure. The Breaking Down
6 Barriers to Innovation Act -- as best as I can recall
7 it -- offers a number of amendments by explicitly
8 placing into the statutory factors for granting
9 exemptions a lot of the things that we've talked about
10 here. It is still our position at Public Knowledge
11 that the statute can be interpreted to allow for many
12 of those things, if not all of them. We can disagree
13 on some of that.

14 To focus again on the example you asked for
15 about development of case law, one of the exemptions
16 that we originally asked for -- and this was a bit of
17 a Sisyphean task between ourselves at Public Knowledge
18 and Mr. Turnbull and Mr. Williams -- is the DVD space
19 shifting exemption, which we apply for every three
20 years.

21 I will note that while the Copyright Office
22 disagrees with our analysis of the case law as to
23 whether that is a non-infringing activity, NTIA in its
24 report, looking at the same case law, comes to a
25 differing conclusion. They also reach, I believe, a

1 disagreeing opinion with the Copyright Office as to
2 whether narrative filmmakers are more likely than not
3 to be able to make fair uses of video clips.

4 And I think this highlights the problem that
5 I talked about earlier of a bad jurisdiction for
6 hearing, where you have two competent agencies
7 reaching opposite interpretations of the copyright law
8 and that the appropriate authority to settle that
9 dispute is a federal court. And the only way that
10 gets to a court is if there is an exemption that
11 allows us to settle the copyright issue because --

12 MS. SMITH: So --

13 MR. PANJWANI: Sorry. Go ahead.

14 MS. SMITH: Can I ask how would you reform
15 that? Would it be statutory reform in the statute,
16 that the Librarian makes a determination based on the
17 recommendation of the Register of Copyrights who in
18 turn consults with NTIA and so takes all that into
19 account and puts into a final rule granting of
20 exemptions? Would you -- what would the reform be to
21 that? Would you tip the scales in the case of
22 disagreement or what would you propose?

23 MR. PANJWANI: I think the appropriate
24 interpretation is that a preponderance of evidence
25 standard applied to the non-infringement element is

1 that barring affirmative case law saying that that
2 activity is in fact infringing, that the tie goes to a
3 determination of non-infringement, as to that element
4 because if the Copyright Office grants an exemption,
5 rights holders have the ability to bring a case in
6 court and settle that question and thus close off that
7 exemption by finding of infringement.

8 MS. SMITH: So I mean, just to be clear, it
9 sounds like you're disagreeing with the outcome but
10 perhaps not the process. Is that right or --

11 MR. PANJWANI: In this particular example,
12 I'm disagreeing with both. I think that if the
13 process had worked appropriately, that the fact that
14 there was a disagreement between the two agencies and
15 the fact that there was no affirmative precedent that
16 that activity was infringing should have resulted in
17 that element coming out in favor of an exemption.

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

19 MR. MOHR: A couple of things. The first
20 thing is that -- sorry. The first thing is that --
21 and I think it goes -- it does go kind of to this
22 proof question, is -- and the legislative history --
23 is that my friend to my right must have misspoken
24 because the statute says nothing about being affected
25 by TPMs. That's what it said in the Commerce

1 Committee. It was changed when it went to the House
2 floor. And now, it says prohibition. And in
3 conjunction with that, that's when the circumstances
4 surrounding the issuance of the manager's report.

5 Now, it's interesting that in its
6 submission, that textual change was something that was
7 I don't think mentioned in the Harvard submission.
8 And that is a -- in my mind, at least, was a fairly
9 significant omission.

10 With respect to the -- with respect to the
11 influence of the Manager's Report itself, I would
12 refer you to Sutherland on statutory construction,
13 4814, which has a nice summary and case law and so
14 forth, of the statements by the managing committee
15 member and the deference that is ordinarily applied.
16 Obviously it's statutory construction. So it's not,
17 you know -- it's not absolute rules. But the general
18 rule that, in my mind, the Office properly applied in
19 this case is contained there and you may find it
20 useful.

21 MS. SMITH: Thank you. Mr. Turnbull?

22 MR. TURNBULL: A couple of things.

23 First, I'm also puzzled on the statutory
24 background because -- and recognizing that there were
25 changes made later on, as was just mentioned-- the

1 core of sort of what are the -- what are the - -
2 what's supposed to be the elements of the regulatory
3 proceeding came out of the Commerce Committee. And
4 the Commerce Committee -- I think what Mr. Williams
5 quoted before was straight from the Commerce Committee
6 report, not the statement of managers.

7 And so, I think the distinct, verifiable and
8 measurable impacts, the repeated emphasis in that
9 report on the need for evidence is -- that was the
10 Committee that created the process. Now, the process
11 was changed a bit and moved from the Commerce
12 Department to the Librarian and the Copyright Office
13 and that sort of thing. And in that regard, it seems
14 to me that Congress actually spoke and said that the
15 Commerce Department role was to be advisory and the
16 Librarian, upon the recommendation of the Register of
17 Copyrights, was to be definitive. And so, the fact
18 that NTIA may disagree about something is not
19 dispositive of anything other than the fact that
20 they're an advisor, not the decision-maker.

21 And on the -- so yeah, I think that was the
22 point I wanted to make. Thanks.

23 MS. SMITH: Thank you. Just to give Ms. Cox
24 --

25 MS. COX: So I just want to talk a little

1 bit about the preponderance of the evidence and what
2 that means because in the -- in past rulemaking
3 cycles, when the groups that represented blind
4 organizations, blind individuals who wanted an
5 exemption, they went for it -- I think this was the
6 2006 rulemaking cycle and said, you know, these are
7 the number of books that we have looked at and that we
8 are unable to access via text-to-speech or
9 transforming into some accessible format.

10 And the joint reply comments from rights-
11 holders like AAP, MPAA, RIAA, SIIA and others, Authors
12 Guild, they basically said that the submissions did
13 not give any indication that the exemption had already
14 been used and that it was difficult to evaluate in the
15 absence of any evidence about the extent to which the
16 exemption had made things better.

17 And I think that some of the difficulty
18 around bringing forward this evidence and meeting that
19 evidence burden is a confusion on what evidence is
20 needed. Like do you need to show that by a
21 preponderance of the evidence that the past exemption
22 has made things better? Because it's extremely
23 difficult to get that evidence in certain
24 circumstances such as for the blind.

25 I think it should be enough to show that

1 there are a significant number of literary works out
2 there, that there are literary works that blind people
3 wanted to be able to access and they were unable to do
4 so. So that touches both on what the evidence
5 standard should be but also just going back to this
6 process that it's extremely long and hard to get all
7 of the evidence needed to put these submissions
8 forward.

9 MS. SMITH: And in the example that you gave
10 for assistive technology for the blind, I mean, this
11 might be something where if you had a separate or a
12 different track for renewals, that might resolve that,
13 correct?

14 MS. COX: Absolutely, and the Breaking Down
15 Barriers to Innovation Act would grant renewal of
16 these previously granted exemptions without -- unless
17 there's some showing that things have changed and I
18 think that makes a lot of sense and I know will be
19 discussed in the next panel. So I'm going to try to
20 stay away from that.

21 MS. SMITH: Thank you. I'm going to let Mr.
22 Williams respond to the responses to him, so--

23 MR. WILLIAMS: Thank you. I'm not going to
24 respond on everything, just Bruce and Chris are right
25 that I quoted both from the Commerce Committee Report

1 and from the Manager's Report.

2 And I think the Manager's Report is
3 completely valid legislative history. But even if you
4 don't like that report because it disagrees with your
5 position, there are other reports that take the same
6 position as the Manager's Report and the Office has
7 noted that.

8 On this issue of likely non-infringing, it's
9 two issues. One I've already mentioned, which I think
10 the modifier in the statute, it says likely to be in
11 the succeeding three-year period adversely affected.
12 And then, it doesn't again say in their ability to
13 make likely non-infringing uses. It says in their
14 ability to make non- infringing uses.

15 And you know, a judge doesn't tell you this
16 is likely what the law is. The judge says this is
17 what the law is. And I think that's the standard that
18 was called for here. The Office has taken a different
19 approach. But I don't think there's anything for the
20 proponents to criticize because the Office is already
21 interpreting it to say likely non-infringing.

22 To take it a whole step further and say that
23 the copyright owner needs to come in and show that
24 there is an adverse judicial precedent against their
25 position in order to succeed in the rulemaking just

1 completely upends copyright law because the default in
2 section 106 is that if you're making a copy, if you're
3 adapting a work et cetera, you're committing an act of
4 infringement.

5 You then have an affirmative burden to prove
6 a defense such as fair use or one of the other
7 exceptions. And so, I don't see why the standard
8 would differ in this context. That's all I needed to
9 say. Thanks.

10 MS. SMITH: Okay. Thank you. I think we'll
11 call on Professor Tushnet, then Professor Decherney
12 and then move on to a new question.

13 MS. TUSHNET: So, thanks. I just want to
14 make a comparison to the statutory interpretation
15 issue. Consider copyright preemption in section 301.
16 So there, the statute was changed after the Report
17 came out. And courts have again and again and again
18 agreed that the legislation is not helpful because of
19 the material way the statute was changed between the
20 time the Report came out and its enactment.

21 And it's actually exactly the same here.

22 When you say that Commerce became an advisor
23 and not the decision-maker, it's not a trivial change.

24 That's actually a complete change in not
25 only, you know, what branch of the government is

1 making the law, but also the fundamental underlying
2 orientation of the decision-maker and what it's
3 trained in doing. So I do not think that reports
4 about the statute that isn't the statute we have are
5 actually helpful either way.

6 I think we end up with the text of the
7 statute.

8 And then, also just in terms of what Mr.
9 Williams just said about upending copyright
10 law, I feel like we spent the last sessions saying,
11 but wait, this isn't about copyright law.

12 This is about access.

13 So if in fact the question is, will making
14 access -- or not making access, getting access allow
15 me to make a non-infringing use, there's nothing
16 upending about that at all because at least some of
17 these accesses, like the ones that my -- like the ones
18 that the people I represent have are completely
19 authorized. You know, they bought the stuff. They can
20 play it.

21 You know, and so, I don't think that this is
22 a question of upending copyright law when the whole
23 point is this extends far beyond copyright law.

24 MS. SMITH: Thank you.

25 MR. DECHERNEY: Yeah. Back to the

1 preponderance of the evidence standard, this is about
2 the question about whether or not is a measurable
3 preponderance of the evidence. And I think we just
4 want to acknowledge that often what we're talking
5 about are things that are not measurable. And so, we
6 have anecdotes, but we're talking about the degree to
7 which someone needs one media versus another for the
8 same activity.

9 We might all agree that making a remix video
10 or noncommercial video is non-infringing.

11 But what is the level of quality that's
12 needed for that non-infringing use? I'm not always
13 convinced that it's something we can measure. It's
14 something that we can argue for. But I don't know that
15 it's ever measurable, except with a lot of anecdotes.

16 MS. SMITH: So a new question I want to just
17 take in a different direction is whether or not the
18 triennial nature of the rulemaking is something that
19 should be reexamined. Is three years too long, too
20 short? Any opinions on that?

21 Is it working for everyone? Mr. Panjwani?

22 MR. PANJWANI: So I'm going to go ahead and
23 have my cake and eat it too.

24 MS. SMITH: Okay.

25 MR. PANJWANI: I will point out that it's

1 both too short and too long. In the case of advancing
2 or dealing with advancements in technologies and new
3 issues, as I mentioned earlier, someone had brought up
4 to me the point that consumer appliances aren't
5 covered and they discovered a bug and they weren't
6 sure if they were legally allowed to fix the bug in
7 this consumer appliance based on the current
8 rulemaking and they'd have to wait for two years to
9 bring an exemption.

10 On the flipside of it, as a proponent,
11 having to come back -- and this again is going to the
12 renewability discussion in the next panel -- is that
13 three years, you end up having two years to use your
14 exemption, one year to then again deal with the cycle.
15 And I understand that that places a similar burden on
16 the Office, that one out of every three years, a large
17 number of staff have to be devoted to this one
18 particular project. And you know, I recognize that.
19 But you know, how you square that circle, I'll leave
20 that up to you.

21 I will point out that it is both too long
22 and too short, depending on the particular problem
23 you're trying to address. So I don't think that
24 there's a one-size-fits-all solution here of a
25 particular term.

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

2 MR. WILLIAMS: Thank you. Yeah. I mean,
3 it's a hard number to come up with if you're looking
4 for something perfect. But if you're looking for
5 something that's good that makes sense, I think three
6 years works pretty well. A lot can change in that
7 period of time, especially in this current environment
8 of rapidly evolving technology. But it also doesn't
9 mean that you're ending the proceeding and starting it
10 again the next day.

11 So I think three years has worked pretty
12 well. And I wouldn't shorten it certainly because it
13 really would just mean that we are all constantly
14 working on the proceeding and there's no time for the
15 exemptions to take hold, settle in and let us look at
16 them and see how they're working.

17 MS. SMITH: Thank you. Mr. Mohr?

18 MR. MOHR: Just the current statutory term
19 is -- from our perspective, is fine. And I would just
20 resist the premise that just simply because a change
21 has occurred, that there is some need to tinker with
22 the premise of the statute, because I think that's
23 lurking a lot behind the scenes in a lot of these
24 discussions.

25 There are a lot of folks who don't like the

1 premise of that statute. And that's fine. We do and
2 we think it's worked exceptionally well.

3 There is a safety valve that's this
4 rulemaking and we think the statutory term is an
5 appropriate way to examine any problems that might
6 arise.

7 MS. SMITH: Thank you. Ms. Cox?

8 MS. COX: Once again, I agree with Mr.
9 Panjwani that it can be both too long and too short.
10 But I think a way to kind of resolve this is that when
11 there is a need for -- you could have a shorter period
12 for a new exemption, for exemptions that haven't been
13 considered before or haven't been granted before so
14 that you can keep up with the advances of technology,
15 all of these new technologies where you find that you
16 actually do need a new exemption and it wasn't
17 considered previously or there wasn't enough evidence
18 to grant that exemption.

19 But if you had permanent exemptions or you
20 had this -- a streamlined process where you didn't
21 need to go through these huge de novo proceedings
22 every three years for educational uses, for assistive
23 technology, for persons with visual impairments, I
24 think that shortening that period for new exemptions
25 would make a lot of sense.

1 MS. SMITH: Thank you. Professor Decherney?

2 MR. DECHERNEY: Yeah, so that -- (off mic).

3 MS. SMITH: Can you turn on your microphone?

4 MR. DECHERNEY: That sounds really appealing
5 if there's -- I don't know what it would look like --
6 but if there's a different timeframe for new
7 exemptions versus renewals. I just know towards the
8 end of the last rulemaking, bibliographic scholars
9 came to me with a great problem. And I said, you
10 know, I'm sorry, it's actually four years until that
11 can be addressed.

12 But it's an important one. And in an
13 educational context, that can be a long time. You
14 know, it's the entire education of a lawyer, right?
15 Three years? Or at least the school education.

16 Yeah, so if I can just suggest something
17 that's really, really practical, but I think would be
18 helpful, is to recognize that it's law school clinics
19 which do a lot of the representation for the
20 proponents. And if there were just ways of thinking
21 about that calendar, the academic calendar in the
22 context of the rulemaking, I think it would really
23 help. You know, many, many times I've had -- I work
24 with the American University Law Clinic. But then,
25 the questions we get after the hearing or some other

1 part of it falls outside of the academic calendar. And
2 that complicates things.

3 MS. SMITH: Yeah. And that actually was the
4 next line of questioning. I wanted to bring up and
5 open it to everyone what are -- you know, if we stay
6 within this sandbox, we've obviously talked about ways
7 to change the sandbox - - but if we stay within the
8 sandbox, what are reforms that the Office can do to
9 make the process work better?

10 Believe it or not, we tried to be cognizant
11 of the academic calendar. But academies are not
12 always on the same schedule. But so how would it work
13 for law clinics' schedules? What about issuing post-
14 hearing letters? Are the hearings themselves that we
15 conduct helpful?

16 Should they be in more cities? Should it be
17 handled differently because it creates travel
18 expenses, et cetera?

19 So if you -- if you -- I think originally
20 the last rulemaking we started it in July was when the
21 petitions were due. And then -- is that right -- and
22 then -- or at least if you wanted to suggest a timing
23 that you think would work with the academic calendar,
24 we would be grateful.

25 MR. DECHERNEY: Sorry, just anecdotally, so

1 if this were one week earlier, the AU students would
2 have been in session. But now they're not.

3 They're still helping, but just --

4 MS. SMITH: Right. Mr. Williams?

5 MR. WILLIAMS: (Off mic) Sure. So I think
6 there were kind of two parts to that.

7 First, on the academic calendar, I think it
8 would be great if the hearings could take place when
9 the students who worked so hard on this hearing could
10 appear and make their case.

11 I know we've heard a good bit today about
12 how burdensome the process is and I don't mean to make
13 light of the amount of work that goes into it. But I
14 think it's fantastic that a lot of really great young
15 copyright lawyers are getting to sink their teeth into
16 this during law school and that they got to show up
17 and do some oral advocacy at the hearing and stuff.
18 That would be great.

19 MS. SMITH: Would that be spring or would
20 that be summer? I mean, even more specifically
21 practically, what does that mean?

22 MR. WILLIAMS: Sure. I think the problem
23 now -- and I'm not currently teaching, although I have
24 in the past, is that the hearings come just after the
25 students have left for the year I think is the

1 problem. But I'll let the professors speak to that.

2 The other issue that I think you raised was
3 are there any other ways to improve either the
4 hearings or the process, the post-hearing letters.

5 And I mentioned earlier we'd love to see
6 some kind of drafting approaches at the end of the
7 process.

8 And in the past, when I've raised that, I've
9 been told that there's just no time. And I do
10 understand that's a real concern.

11 But I think, given there is already a period
12 for post-hearing letters built into the process, that
13 if the drafting issues were just presented to hearing
14 -- a group hearing, it could fit into that when we
15 could have a chance to give you some feedback and I
16 think that would be really helpful.

17 And then, on the hearings, I think they are
18 often very, very helpful and I think they really run
19 quite well. One issue that we do run into is, as we
20 said in our comments, if we're preparing a fact
21 witness to come in and give testimony on one issue but
22 it relates to, you know, every way really that a movie
23 studio uses access controls on their content, it's
24 relevant across all of the different proposals.

25 And so, last cycle, I think in an admirable

1 attempt to kind of make sure that each proposal was
2 its own record, it was unclear to us whether the
3 Office could look at the testimony from this proposal,
4 the hearing from that proposal and then use it when
5 considering a different proposal. And I think that
6 harm goes both to our side and the other side where
7 the proponents shouldn't necessarily have to have the
8 same person who might be a small business owner or
9 whatever else show up at multiple hearings.

10 So I think that would be a helpful change
11 across the board. And then, just a little bit of
12 additional clarity on exactly what type of evidence
13 can be presented for the first time at a hearing, I've
14 never quite understood what the rule there is.

15 And it would be helpful to clarify it I
16 think because sometimes during a hearing, a witness
17 will pull out their laptop and say, well, I'm looking
18 at this new website and isn't this a great piece of
19 information. Other times, it's been a little more
20 like, well, if you didn't put that in your comments,
21 you shouldn't be bringing it to us now. I think both
22 approaches have ups and downs to them. But it would
23 be helpful to know just which rule applies. Thanks.

24 MS. SMITH: Thank you. Professor Tushnet?

25 MS. TUSHNET: So I would again in terms of

1 how you can make this better within the current sand
2 box, again point you to the Cyberlaw Clinic's
3 suggestions, which I think are quite detailed.

4 I also want to pick up on something that
5 came up in the first panel, again talking about how
6 access is special. So I think we have to recognize
7 that at this point, access and rights controls have
8 been merged by actors making strategic use of 1201 so
9 that the balance that Congress did intend in
10 distinguishing access from rights controls is now
11 gone. So remixers, for example, and educators have
12 lawful, paid-for access.

13 What they need is the ability to make their
14 fair uses. And the problem of the merged access-
15 rights control, which the Copyright Office has
16 repeatedly acknowledged in these proceedings, you
17 actually could recognize that as another factor. So in
18 the statute, it says other factors that can be
19 considered. The deliberate merging of a rights and
20 access control should count as another factor
21 justifying exemption.

22 And this would work both within the
23 traditional copyright categories and outside them.

24 And I will point out just here, Congress was
25 envisioning perhaps the celestial jukebox. It was

1 definitely not envisioning the celestial fridge or the
2 celestial tractor.

3 MS. SMITH: Thank you. Ms. Greene?

4 MS. GREENE: So one suggestion that we have
5 at OTI that might help to make the rulemaking a little
6 bit more accessible would be to create a process
7 whereby proponents of exemptions would be able to
8 submit confidential versions of their comments.

9 Oftentimes, particularly in the context of
10 security research but also in the context of other
11 proponents seeking exemptions, the proponents of the
12 exemptions will withhold certain critical information
13 because they either fear legal liability, they fear
14 that they may be divulging confidential business
15 information or, as is the case with security research,
16 they fear that they may be divulging information that
17 could lead others to identify and then exploit
18 vulnerabilities.

19 And so, by instituting a process that would
20 enable confidential versions of comments to be
21 submitted, it would not only make that process more
22 accessible and ensure that the Copyright Office had
23 all of the evidence that they needed to make a
24 complete decision, it would also institute a process
25 that's in fact in keeping with other federal agencies

1 such as the FCC.

2 MS. SMITH: And so, would your proposal be
3 that confidential information was entirely just
4 delivered to the Office or would -- you know,
5 sometimes you'll see dual versions. You'll have the
6 public version and the private version.

7 The public version may describe in broad
8 terms but not disclose specifics. Or how would you
9 envision that working?

10 MS. GREENE: Yeah. I think that it's
11 important for there to be full public discussion about
12 the broad parameters of what some of this type of
13 confidential information would touch upon. But in
14 order to really respect the need to maintain certain
15 information as confidentiality, you would need to have
16 that public version that might be more general and
17 then the very specific confidential version that could
18 be submitted directly to the Copyright Office.

19 MS. SMITH: Thank you. Mr. Turnbull?

20 MR. TURNBULL: Yeah. I wanted to comment on
21 a couple of points. One, on this last one, on the
22 confidentiality submission, I don't think we'd have
23 any problem with that. We would want to urge the
24 Office to institute something that's done in other
25 agencies, an administrative protective order so that

1 counsel and potentially expert witnesses for the other
2 side could get access to the confidential version.
3 But again, it's done in recognition of the kinds of
4 concerns that were expressed.

5 So it doesn't sort of expose it to the
6 public. But it does allow a response, potentially
7 confidential, as well and there are a number of
8 precedents for that. In my former life, I was a trade
9 lawyer and that happened regularly.

10 I did want to comment -- and if you're going
11 to get to this later, I'll hold, but on the access
12 point that Professor Tushnet has made a couple of
13 times --

14 MS. SMITH: Sure. Go ahead.

15 MR. TURNBULL: A couple of things about
16 that. First, the access that is granted, for example,
17 thinking of DVD or in a Blu-Ray context, is to that
18 content in a particular context, in a particular form,
19 in a particular format and under the rules of the
20 system that are operated.

21 So although the content is, if you will, in
22 the clear when it's presented on the television set,
23 it is not in the clear in a usable way in the system
24 that it is made available to. So to say that, oh, we
25 own it and we have access to it is correct only in the

1 sense that it's visually accessible. And if you want
2 to use a Camcorder or something at the television
3 screen, go for it. But that doesn't --

4 MS. TUSHNET: Can I quote you?

5 MR. TURNBULL -- in the -- in a couple of the
6 -- in a couple of the prior panels, that was used as
7 an alternative for the particular proposals that were
8 made and we represented for the fair uses that were
9 alleged.

10 But that's -- so that's one point. So the
11 access that's granted is not -- is not generic. It is
12 particular. The second point is that in the statutory
13 structure, it's clear that Congress contemplated this
14 rulemaking to deal with the uses of the content once -
15 - in the context of the access control.

16 I mean, that's why the rulemaking is in the
17 1201(a) context and not in 1201(b). And so, the -- it
18 seems to me that the comments that were submitted --
19 and you may hear more about in San Francisco -- but
20 are raised, I think, in Professor Tushnet's comments,
21 are -- mischaracterizes the nature of this proceeding.
22 This proceeding is about uses and in the context of
23 access control.

24 MS. SMITH: Mr. Williams?

25 MR. WILLIAMS: Thank you. I agree

1 completely with what Bruce just said and I think it's
2 wrong to think that Congress did not anticipate that
3 some TPMs would constitute both access controls and
4 copy controls. And that's why we're here for these
5 proceedings.

6 But Congress did not conclude that in every
7 case that means that an exemption should result.
8 Congress created the proceeding to say that if there
9 is an instance where something is both an access
10 control and a use control and a question is raised
11 about whether that inhibits a lawful use, you go
12 through the process that's laid out in the statute.
13 You apply the factors. You see if there are available
14 alternatives, et cetera.

15 And so, I think it's a bit of a red herring
16 to say that some merger of access controls and use
17 controls has created problems that were unanticipated.
18 I think they were anticipated and that's what the
19 proceeding was created to do.

20 I also, like Bruce, would not have a problem
21 with the confidentiality. I think we might also at
22 times benefit from filing some things that we'd like
23 to keep out of the public eye. But I would also urge
24 that counsel and maybe even certain in-house counsel
25 be allowed to see the submissions. Thank you.

1 MS. SMITH: I will say on the
2 confidentiality, that's certainly something we're
3 going to take a look at in the study, especially since
4 it seems there's not an objection to it.

5 But one thing I will say on behalf of the
6 Copyright Office is that a three-year rulemaking is a
7 much quicker pace than what some of the other federal
8 agencies do. So we would want to avoid recommending
9 some change that would cause a year of fighting over
10 the protective order.

11 MR. AMER: I'd just like to switch gears and
12 raise another topic that was the subject of a lot of
13 discussion in the comments. And that's the statutory
14 language referring to such other factors as the
15 Librarian may wish to consider and the role of non-
16 copyright issues as part of the rulemaking.

17 You know, we heard from several commenters
18 arguing that the Copyright Office should not properly
19 consider these types of issues and should leave them
20 to other agencies.

21 I think -- and we also had some discussion
22 about the process that that should involve, whether
23 it's within our authority to affirmatively reach out
24 to other agencies or whether under the statutory
25 language we're limited to consulting with NTIA. So

1 we'd appreciate your views on sort of -- on the proper
2 role of other agencies and how we should go about
3 consulting with them on issues within their
4 jurisdiction.

5 Mr. Mohr?

6 MR. MOHR: Again, I would go back to the
7 concept of the administrative record and the breadth.
8 And I think that so long as the things on which you
9 rely are publicly disclosed, I think you have a fair
10 amount of leeway to amass information from different
11 sources. But when you issue the rule, you have to
12 explain, yes, we saw this and I think there probably
13 has to be some opportunity for public comment on
14 whatever was received.

15 But outside of that, I think that was
16 exactly the right approach was to get information from
17 people who are experts in particular subject matter
18 that the Copyright Office is not and, you know, weigh
19 their views, even if you didn't completely agree with
20 them all the time.

21 MR. AMER: Mr. Panjwani?

22 MR. PANJWANI: It's been our perspective
23 that the "other factors that the Librarian shall
24 consider" factor is directed at the fact that the
25 proponents of an exemption must prove something beyond

1 copyright itself, which would be the non-
2 infringement, in order to justify adverse effects and
3 that allows the librarian to consider additional harms
4 experienced by proponents in determining whether or
5 not an exemption is warranted.

6 In the last proceeding we had of course this
7 interagency process in consideration of many other
8 factors, and it's been our perspective that this is
9 not really necessary in the process of determining
10 whether an exemption is warranted. This is a question
11 of whether copyright liability will attach for certain
12 activity.

13 And I don't think that the technological
14 protection measures were considered a policy panacea
15 for any consideration under the sun, whether that be
16 product safety, whether that be emissions, whether
17 that be medical devices. I think there's often a
18 conflation of, you know, there's software in here that
19 implicates copyright. Therefore, there's something
20 different now, whereas a lot of these devices have
21 existed and these concerns have existed in a
22 mechanical, non-software, non-copyright-implicating
23 way. And law and policy has developed to address
24 those issues historically.

25 I think the car example is a great one in

1 which there's concerns about, well, people could
2 modify the software on their car to allow them to
3 violate emissions standards. People have been
4 modifying their cars for a century, for as long as
5 there have been cars. And there have been rules
6 against that. We have annual inspections of cars to
7 check for emissions and things like that. I think most
8 areas of law have already responded to the concerns
9 that we have brought up.

10 And while I admire the Copyright Office for
11 thinking afar and realizing that a lot of these things
12 are implicated by software now, I don't think that
13 this proceeding is the appropriate venue for
14 addressing those concerns.

15 MS. SMITH: So just to be clear, taking the
16 last rulemaking as an example, we got a petition that
17 referenced -- I think this was sort of more broadly to
18 the Internet of Things and it wasn't a lot of
19 specifics as to what they wanted to do, but examples
20 of: I'd like to hack the subway system, I'd like to
21 hack the nuclear power grid, I'd like to hack
22 automobiles. I mean, should the Copyright Office
23 entirely ignore whether or not there is a potential
24 public safety concern?

25 MR. PANJWANI: I believe hackers will hack

1 those things if they are malicious, regardless of
2 whether or not there's a 1201 exemption for it.

3 MS. SMITH: Sure. Mr. Williams?

4 MR. WILLIAMS: Thanks. I just quickly
5 wanted to reiterate what Allan Adler and Troy Dow said
6 in the last panel, that you have to be really, really
7 careful about what constitutes a core copyright
8 concern.

9 That term, it would have to be very
10 carefully defined to have any real benefit and that
11 there is this distinction, as Professor Tushnet
12 articulated, between access controls and copy
13 controls. And it's clear that Congress did intend to
14 protect access controls for their own purpose as
15 access controls to prevent unauthorized access to
16 works that are available for subscription or on-demand
17 availability.

18 And one fact pattern that I think
19 demonstrates the importance of that clearly is if
20 you've got a work that is available and it's protected
21 by an access control and it's also protected by a
22 completely separate copy control, if you were to hack
23 the access control and gain copy -- and gain access to
24 the copy, you could watch the movie, you could listen
25 to the song, you could read the book. If the copy

1 control remained in place, theoretically there's no
2 nexus to even a possible infringement. And then,
3 there would be no violation. I think Congress clearly
4 intended to prohibit that conduct.

5 So I'd just urge you to be careful not to
6 undo the current statutory construction if you start
7 thinking about ways to address so-called not core
8 copyright issues.

9 MS. SMITH: Okay. Thank you. I think we
10 have about two more minutes. So this will be last
11 call. Professor Decherney?

12 MR. DECHERNEY: Really quick point. The one
13 that was made in the last panel is that all of these
14 determinations often will cut both ways.

15 When talking about public health, we thought
16 that hacking your own devices was the issue about
17 public health during one of the hearings last round.
18 And it turned out later we found out, very quickly
19 afterward, that actually it was the companies that
20 made the cars that may have been causing the public
21 health by not allowing hacking.

22 The same thing's true about fair use.

23 We always think commerce is going to favor
24 the people who want stronger TPMs. But actually,
25 there's a tremendous amount of commerce which is

1 enabled by fair use and hacking TPMs forever,
2 bypassing TPMs, yeah.

3 MS. SMITH: Thank you. Mr. Turnbull?

4 MR. TURNBULL: Yeah, I just wanted to say
5 quickly that as the representative of two of the TPMs
6 in wide use, our interests -- and I think the
7 Copyright Office has taken those into account under
8 this other factor -- have to do with the integrity of
9 our licensing system, which is not necessarily
10 copyright, whether the particular thing is a copyright
11 infringement or fair use or whatever it is.

12 It has to do with whether the overall system
13 can continue to exist and the benefits from that are
14 to the copyright system and the user -- using public
15 as a whole. And so, as a more generic point, I'd say
16 that as you address the things which are sometimes
17 called not core copyright, you need to be really
18 careful because, again, sort of eliminating other
19 factors would potentially eliminate things that we
20 think are important for you to consider in the context
21 of expressive works.

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

23 MR. PANJWANI: I just wanted to return very
24 quickly to something that Ms. Greene and Mr.

25 Mohr were talking about earlier regarding

1 the importance of the role that legislative history
2 has played in the interpretation of how we go about
3 this rulemaking, which is that, while Mr. Mohr is
4 correct that there are certain approaches for
5 interpreting legislative history more generally, in
6 the specific case of the House manager's report for
7 the DMCA, there have been specific criticisms as to
8 how or what value it adds to the interpretation of the
9 law.

10 Her use of the word substantive I think was
11 a reference to the substantive diminution language
12 from that report. And in particular, I would just
13 point out that Professor Nimmer, in his law review
14 article generally on the importance of legislative
15 history, taking the DMCA as an important case,
16 specifically calls out the Manager's Report as a
17 report that actually does offer very little from his
18 perspective in terms of how to appropriately interpret
19 section 1201.

20 MS. SMITH: Okay. Thank you. I think with
21 that, we're concluded. We'll take a break for lunch
22 and come back at 1:30 for panel three.

23 Thank you very much.

24 MR. AMER: Thank you.

25 (Whereupon, the foregoing went off the

1 record at 12:22 p.m., and went back on
2 the record at 1:31 p.m.)

3 MS. SMITH: Hello. Welcome back, if you're
4 back. And if not, welcome the first time to the third
5 panel on the Copyright Office's roundtable for its
6 study on section 1201 of the DMCA. This topic is
7 about renewal of previously granted exemptions.

8 And before we get into the meat of the
9 discussion, I just want to remind everyone, sort of
10 logistically, if you would like to speak, turn your
11 placards up and we'll call on you. If you can try to
12 limit your comments to two to three minutes, that will
13 help us make sure everyone gets a chance to speak and
14 we can all engage on the issues.

15 And the microphones, when you're done
16 speaking, please turn it off to prevent feedback and
17 we also got a request from AV in the last hearing to
18 make sure everyone speaks into the microphone because
19 it's being videotaped and that will help it be picked
20 up on the video. So to start, I think we should go
21 around and say our names. I'm Regan Smith, the
22 Associate General Counsel of the Copyright Office.

23 MR. AMER: I'm Kevin Amer, Senior Counsel
24 for Policy and International Affairs at the Copyright
25 Office.

1 MR. MOORE: Andrew Moore, a Ringer Fellow at
2 the Copyright Office.

3 MR. SLOAN: Jason Sloan. I'm an Attorney-
4 Advisor in the Office at the General Counsel's Office.

5 MS. SMITH: Mr. Band?

6 MR. BAND: I'm Jonathan Band, here on behalf
7 of the Library Copyright Alliance.

8 MR. BUTLER: And I'm Brandon Butler, here on
9 behalf of the University of Virginia Library.

10 MS. CASTILLO: I'm Sofia Castillo. I'm a
11 Staff Attorney at the Association of American
12 Publishers.

13 MR. CAZARES: Hi. I'm Gabe Cazares,
14 Government Affairs Specialist for the National
15 Federation of the Blind.

16 MR. DECHERNEY: Peter Decherney, from the
17 University of Pennsylvania.

18 MR. GEIGER: I'm Harley Geiger, Director of
19 Public Policy at Rapid7, which is a cybersecurity
20 firm.

21 MR. MCCLURE: I'm Sam McClure. I'm with the
22 Stanford Law School IP Clinic and I'm representing the
23 Institute of Scrap Recycling Industries.

24 MS. TUSHNET: Rebecca Tushnet, the
25 Organization for Transformative Works.

1 MR. TURNBULL: Bruce Turnbull, the DVD CCA,
2 Copy Control Association and the Advanced Access
3 Content System Licensing Administrator, LLC.

4 MR. SHEFFNER: Ben Sheffner, Vice President,
5 Legal Affairs, Motion Picture Association of America.

6 MR. GOLDMAN: Andrew Goldman, Knowledge
7 Ecology International.

8 MS. SMITH: Okay. Thank you. I'm thinking
9 for today's panel, we'd like to roughly divide the
10 discussion into the first half focusing on the need
11 for some sort of renewals, whether this is a
12 presumption of renewal, a burden shifting towards
13 someone opposing a renewal, a general streamlining of
14 a process, whether it's administrative or statutory
15 reform and then getting into specific models if
16 possible.

17 I realize for this topic, I think it might
18 be a case where the devil's in the details.

19 The Register has stated both in her
20 recommendation to the last rulemaking and in her
21 testimony to Congress that the public record supports
22 amending section 1201 to make it easier to renew
23 exemptions. She recommended congressional action to
24 provide a presumption in favor of renewal in cases
25 where there's no meaningful opposition.

1 And in the comments that the Copyright
2 Office has received, there seems to be, you know -- I
3 hate to jinx myself by saying it -- but some consensus
4 that doing something would be permissible and
5 advisable to deal with repeated exemption requests.

6 But the comments definitely diverge as to
7 what that would look like and how the concerns would
8 be -- so again, I'd like to open up with a pretty
9 broad question of what your proposal would be or what
10 are your concerns with doing something to make it
11 easier to facilitate the renewal of repeated requests
12 for an exemption. Mr. Sheffner?

13 MR. SHEFFNER: Yes. First of all, I just
14 want to agree with you. I don't think it'll jinx the
15 panel to say that there actually is a remarkable
16 degree of consensus that, as to previously granted
17 exemptions, there should be some sort of streamlined
18 process. There's too much of a -- it's really a waste
19 of time and effort and burden on both the proponents
20 and the Copyright Office itself to have to go through
21 a full process when there's really no meaningful
22 opposition.

23 So again, broad consensus that something
24 should be done. And even within the details, I don't
25 think there are dramatic differences. As Bruce and I

1 were talking over the lunch break, we were wondering
2 exactly how even a group of opinionated lawyers are
3 going to be able to fill up a full hour-and-a-half on
4 this particular topic.

5 But just a couple of points as to how we
6 think this should work and why we think that our
7 particular proposal makes sense. As we see it, the
8 way it would work is that proponents of a previously
9 granted exemption who seek renewal should file some --
10 make some very simple filing.

11 We're talking a page or so stating that they
12 would like the exemption to be renewed and essentially
13 to show why they think it should be renewed.

14 Again, we're talking about a very simple
15 one- or two-page filing.

16 Then, there's a period of time where if an
17 opponent wants to come forward and say, well, actually
18 we do wish to oppose this and briefly here are the
19 reasons, we think there's still a substantial debate
20 about whether this would -- the exemption should be
21 renewed, then it would go -- sort of spin it off back
22 into the regular process.

23 But again, if nobody came forward to offer
24 any meaningful opposition, the Copyright Office, under
25 the existing statute, could then just go ahead and

1 say, you know, get out their renewed stamp and be done
2 with that particular request for an exemption.

3 The one thing I'll say before ending is we
4 do think that this proposal should be limited to
5 renewal of the particular exemption that has been
6 granted. And in practice, that is actually what's
7 happened. It's been the exceptional case - - almost a
8 rarity where there have been opponents to previously
9 granted exemptions.

10 I know from our perspective in particular,
11 this last round, there were previously granted
12 exemptions that we had opposed in the past. Some of
13 those we lost on. But if people came back and asked
14 for these renewals of a previously granted exemption -
15 - as a matter of fact, this is no secret. You could
16 just look in the filings.

17 We did not oppose any of those exemptions.
18 We would not want a proposal, however, to apply to
19 requests for expansions of previously granted
20 exemptions. If there are new things that people are
21 wanting to do, we should go through the regular
22 process. And again, the burden should remain on the
23 proponent of the exemption to make their case.

24 MS. SMITH: Okay. Thank you. Mr. Goldman?

25 MR. GOLDMAN: Sure. Thanks. So KEI, we

1 believe that there should be presumptive renewal of
2 previously granted exemptions. I think what we'd say
3 just in response to that is it doesn't make sense to
4 continue to put the burden on the party that's already
5 received the exemption. Once the exemption exists,
6 the burden should shift to the copyright holder.

7 And I think in the previous panel, we heard
8 a lot of examples of just the waste of time, the
9 difficulty of understanding the process for the
10 parties that are seeking the exemption and then to
11 continue to have to go through that process just seems
12 wasteful and confusing, especially where you have
13 exemptions that have been granted that have been
14 unopposed, as has been the case with the exemption for
15 literary works distributed electronically to be
16 associated by persons who are blind, visually impaired
17 or print- disabled.

18 The exemptions -- think we've seen over time
19 and I think this was referred to by Krista Cox in the
20 last panel -- we've seen them get increasingly complex
21 and lengthy. In 2010, there was a 100-word exemption
22 for audiovisual works which then went to 752 words in
23 2013.

24 And I don't think that this process should
25 be -- and KEI does not think that this process should

1 be so complicated and so burdensome for people who are
2 trying to make non-infringing use. And you know, this
3 is a complicated segment of the law, even if you have
4 a JD. And you should not have to have a JD in order
5 to have the exemption and continue to have it.

6 Thanks.

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

8 MR. BAND: So I'd have to study what Mr.
9 Sheffner's proposal in greater detail. But I think in
10 broad strokes, there's a lot of -- you know, I would
11 agree with a lot of what he said.

12 At the highest level, I agree that there's
13 an awful lot more that the Copyright Office can do
14 itself right now without any amendment of the
15 Copyright Act.

16 I think way too much deference has been
17 placed on one sentence in one committee report that
18 actually was directed to a different rulemaking, okay?
19 It was a rulemaking that was going to be conducted by
20 NTIA, not this rulemaking. And so, there's no need
21 for you to pay any deference at all to that one
22 sentence.

23 But even to the extent that you want to pay
24 some deference to the de novo sentence, you know, it's
25 about a de novo determination, which is sort of like

1 what you guys have to do or actually what the
2 Librarian has to do, not what we have to do.

3 I mean, you could easily say, okay, if you
4 want a renewal, you could just have the whole
5 administrative record from the previous rulemaking
6 just incorporated by reference and then, you know,
7 then the process in terms of the -- what the
8 Register's recommendation and the NTIA advice and the
9 Librarian -- I mean, that may have to be somewhat de
10 novo, whatever that really means.

11 But again, I don't even think you need to
12 pay that much deference to that one sentence.

13 But I think, that really could streamline
14 the process dramatically and so I agree with Mr.
15 Sheffner's idea that if we want a renewal, we can just
16 do maybe not even a page, even maybe a paragraph or a
17 sentence. And then, if we would disagree that -- if
18 there is an opposition, then it kicks back into the
19 normal process.

20 I think it should be still somewhat of a
21 truncated process. I mean, think all of the evidence
22 that was previously submitted should be incorporated
23 so that no new evidence needs to be submitted.

24 And so -- and then, you know, if we if we as
25 a proponent want to propose additional information, we

1 can. And if the opponents want to propose additional
2 information, they can. But still, the whole record
3 should be included and considered by the Register and
4 the Librarian going forward.

5 MR. AMER: And I think just to kind of pick
6 up on that and follow up, we'd be interested, as
7 others answer this question, if you agree that under
8 current law, there is some flexibility for the Office
9 to, for example, consider evidence from the prior
10 proceeding, is anyone aware of any other sort of
11 administrative processes that might provide an analog,
12 where the evidentiary record from a prior proceeding
13 could be incorporated?

14 That would be helpful for us. I think
15 Professor Decherney?

16 MR. DECHERNEY: (Off mic) -- answer that
17 specific question.

18 MR. AMER: Well, that's fine.

19 MR. DECHERNEY: I was just going to say that
20 it's actually very -- time doesn't stand still.
21 Technology doesn't stand still. Uses of technology
22 doesn't stand still. So it's very unusual to have a
23 renewal that would look exactly the same as the
24 exemption looked three years ago.

25 But I don't think that's a reason to throw

1 out the proposal.

2 There may be another way of saying we want
3 to start where we left off last time and then think
4 about additions or changes. I'm not always sure that
5 there are even additions or expansions.

6 So sometimes it's just an updating of the
7 existing exemption so that it accounts for current
8 states of technology and the way that it's used.

9 And so, maybe there's just another way of
10 doing it so that we don't have the same conversation
11 from the beginning. We don't start at the beginning
12 line. You know, we start where we left off last time.

13 MS. SMITH: Thank you. So I think there's
14 two issues, what Kevin has followed up on and also
15 what you've just raised in terms of expanding the
16 exemption.

17 But I wonder if we could stick first to see
18 if there's some consensus around roughly what Mr.
19 Sheffner proposed in terms of a short form filing
20 prior to the rulemaking proper. And I wonder. Mr.
21 Cazares, is that something that would work for your
22 organization?

23 MR. CAZARES: Sure. So I think that that
24 proposal would definitely have to be flushed out even
25 more because, as everybody has already stated, what we

1 have now is burdensome and time consuming,
2 particularly for the community that I represent,
3 people who are blind and print- disabled. If you take
4 a look at the label of the last comment period, how
5 many comments were submitted by organizations or
6 groups representing people with disabilities.

7 And it's demonstrably lower than some of the
8 other groups. And it's because of the burdensome
9 evidentiary requirements, the inconsistencies that
10 there have been throughout the triennial cycles. And
11 I think that coming up with a sensible proposal like
12 the one that has been proposed would be an interesting
13 conversation to have, I think particularly for the
14 disability community, who really does rely on these
15 exemptions.

16 MS. SMITH: Thank you. Professor Tushnet?

17 MS. TUSHNET: So I want to agree with Mr.
18 Band and Mr. Goldman. I think they're right about the
19 current law. There's flexibility and it's not just
20 because of the legislative history.

21 So for example, even if you wanted to take
22 de novo, as if it were in the statute, de novo
23 actually has a perfectly respectable meaning for
24 courts that doesn't actually require any additional
25 factual development. It just means de novo, right? We

1 don't do new fact-finding when courts do de novo
2 review. And I would think that at the very least,
3 that would be free for you to do.

4 And one thing that I have often thought
5 about actually in this connection is, you know, what
6 is the difference between saying we would like to
7 incorporate by reference our submissions from the past
8 three rounds? I mean, surely that's a legitimate way
9 of submitting evidence. I mean, you have it. I can
10 give you another copy if you want. But it seems like
11 it's still evidence to me.

12 And so, I see absolutely no barrier under
13 the current regime to formalizing that and
14 acknowledging it rather than requiring us to go
15 through, because what we did, we just reprinted
16 everything and stuffed it in the appendix, just
17 because what else can we do?

18 MS. SMITH: And then, you also -- you also
19 updated it too. I mean, do you think that the statute
20 does require some sort of showing of freshness of
21 evidence?

22 MS. TUSHNET: Absolutely not. We did it
23 because of the current interpretation of de novo.

24 And we feared, I think, that the Office
25 would not see it as sufficient if we just -- the other

1 thing I want to point out here is there's interaction
2 here with the proper definition of classes.

3 So this is something that Professor
4 Decherney talked about, that if you get a definition
5 right in certain ways, it may not need to be updated
6 as often, and therefore there can be less serious
7 around the edges.

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

9 MR. MCCLURE: Sure, yeah. Thanks.

10 Definitely broad agreement with what's been
11 said, especially with what Professor Tushnet said I
12 think about how the renewal process can be streamlined
13 through both the legislative history and the statute.
14 There are definitely arguments for that. I think
15 there's a lot of latitude there.

16 Two maybe small points that I think would be
17 really helpful to have a discussion about, one, the
18 filing, the showing by the proponent, we actually
19 believe that it should just be presumed renewed, that
20 there shouldn't necessarily be a burden on a party to
21 file some kind of statement. I don't know if that's
22 serving some kind of notice principle.

23 But I think there's sort of enough notice
24 throughout the rest of the process, that if we just
25 say that this exemption is presumptively renewed, then

1 we can move forward with maybe some sort of process
2 that mirrors the existing exemption process for --
3 where opponents would be filing opposition -- a
4 meaningful opposition.

5 And then, with regard to the meaningfulness,
6 I think there was some statement made that as soon as
7 an opponent files an opposition and is sort of kicked
8 back into the original process, and we just wanted to
9 clarify and ensure that there's some sense that the
10 opposition is meaningful, of course, and that maybe,
11 to the point that was made by Professor Tushnet, if
12 there is a prior evidentiary record that is just
13 getting kind of copy/pasted into the new process, that
14 the opponents of the old exemption would have to say,
15 okay, something significant has changed in the facts
16 here, you know, to support an overturning of that
17 exemption.

18 MS. SMITH: So you've raised this other
19 idea, which is as the Register also suggested looking
20 at, that there should be a presumption of renewal that
21 would just become automatic. And before we get
22 comments on that -- or maybe people can kind of sort
23 of compare and contrast to what Mr. Sheffner's
24 proposed, which would be that the proponents would
25 make a very short filing.

1 But it would still be a mandatory filing
2 from the proponents to show very briefly why an
3 exemption was still needed. So Mr. Turnbull?

4 MR. TURNBULL: Yeah. I think I'm in
5 agreement with my colleague, Mr. Sheffner, on this.
6 And to expand a little bit and capture some of the
7 other comments that have been made, I think the notion
8 of bringing forward the evidence from the record or
9 referring to it, you all have maintained the online
10 capability to go back and see previous comments and
11 previous hearings and that sort of thing.

12 And I -- I mean, I don't know that we'd even
13 need to put people to the burden of copying it with
14 their current filing. So I mean, we'd be okay with
15 that. I do think under the current statute, you would
16 need to have a filing to say, yes, we want the renewal
17 of the exemption as opposed to the presumption. And
18 it seems to me that that's a minimal enough thing and
19 whether it's a sentence or a paragraph or a page,
20 we're -- none of us are talking about anything
21 terribly --

22 MR. BAND: (Off mic) -- Billing by the hour.

23 MR. TURNBULL: Yeah, right. By the word, by
24 the word. But so, I don't think that's a big burden
25 at all. And I think the other point, Professor

1 Decherney talked about the differences.

2 Again, we're not -- I think the notion, at
3 least as far as we're concerned, would be that with
4 regard to exactly what was done before, if there's no
5 opposition, no meaningful opposition to that, that
6 simply goes forward.

7 And the argument then becomes about the
8 difference, not about -- not about what was -- you
9 don't -- you don't go back to the whole issue if
10 there's opposition to the difference. And I think,
11 again, that would help both to streamline the process
12 and also minimize the burden on either party in terms
13 of bringing evidence forward.

14 MS. SMITH: Okay. Thank you. I think next
15 we'll hear from Mr. Butler. And I think to put some
16 more gloss on the question, the statute requires that
17 the Librarian makes a determination in a rulemaking
18 proceeding that persons who are users of a copyrighted
19 work are or are likely to be in the succeeding three-
20 year period adversely affected by the prohibition on
21 circumvention.

22 So when I hear questions of we could have
23 just one sentence or one paragraph, I wonder is that
24 enough under the current statute, taking Mr. Band's
25 comment, he thinks there's perhaps more flexibility

1 permitted to say is that enough to say this is a
2 determination in a rulemaking proceeding. And also,
3 generally what are your thoughts to what Mr. Sheffner
4 has proposed?

5 MR. BUTLER: Great. So I just wanted to
6 raise a couple of points. One is I think that this
7 process should be very -- I mean, as it has been and
8 as we've heard a few times today -- cognizant of who
9 are the participants and how are they represented.

10 And so, you know, there's big collective
11 action problems on the proponent side oftentimes.

12 You know, for example, in my clinic, it's a
13 different student team every three years. And the way
14 that we structure our retainers with our clients is
15 that representation ends the minute we -- this process
16 ends.

17 So there's not a student attorney that you
18 could -- that is continually responsible I guess or
19 faculty and then faculty turn over and staff at
20 nonprofits turn over. And so, there's a kind of a
21 trap for the unwary problem I'm worried about in terms
22 of having to even file a one-pager, if you're a small
23 nonprofit or if you're someone who had the help of a
24 clinic. You know, what will you do in three years if
25 the person who supervised that student team is at the

1 University of Virginia instead of here? And so, so
2 I'm just worried about that.

3 MS. SMITH: Yeah.

4 MR. BUTLER: And one option, I think, is we
5 file trademarks, for example. And our trademark
6 clients operate under the same system, where we
7 represent you for x amount of time and then we need to
8 let you go because our students leave.

9 But we still have a kind of institutional
10 email address that's on file with the PTO. And when
11 events happen that might be relevant to the clients,
12 we make sure that we get -- we're on that notification
13 list.

14 So maybe there could be a notification
15 system that is where the -- when the three years comes
16 up, you let -- you let the representatives of past
17 proponents know, hey, the three years are coming up,
18 and that can be an address that everyone would keep
19 alive. I would think that would be fairly simply and
20 there's no good reason to not try.

21 MS. SMITH: Right. So the Office could say,
22 give me your email address if you want to for the form
23 and send out something in advance.

24 MR. BUTLER: Yeah, exactly. Yeah, and then
25 the other thing I just wanted to point out is there's

1 substantial reliance on these exemptions in pretty big
2 institutions. You know, at this point, the
3 educational exemption has been granted and renewed for
4 long enough that we've -- you know, at universities,
5 they've been buying DVDs and part of the value
6 proposition of a DVD is that we will be able to cut
7 clips.

8 And so, that's an investment. I'm told that
9 UVA spends about \$30,000 a year buying DVDs.

10 So in three years, that's almost \$100,000,
11 where the hope every time we buy that DVD is that
12 faculty and students can make lawful uses in accord
13 with the exemption. So that's another great reason to
14 do the renewal is that there's so much reliance built
15 up.

16 MS. SMITH: Is that a reason to do the
17 renewal or is that a reason to perhaps participate in
18 our fifth panel and say there should be a permanent
19 exemption for education?

20 MR. BUTLER: Oh, absolutely.

21 MS. SMITH: But the reason I ask is that
22 Congress is pretty clear that this is intended to
23 be a failsafe mechanism, that it's intended to allow
24 the Office to keep their pulse on technological
25 developments and react. And so, it cuts both ways,

1 that an exemption granted might become ossified or
2 overtaken by market events.

3 MR. BUTLER: Yeah. No, I mean, make no
4 mistake, this is sort of a third best solution,
5 right? First best is the Unlocking Technology Act.
6 Second best is a permanent exemption. But third best
7 is a renewal. And I agree that the concerns that
8 educators have in particular don't tend to actually
9 become overtaken.

10 So for example, VHS tapes, there are tens
11 of thousands of VHS tapes that have never been issued
12 on a subsequent format. And those tapes are actually
13 still being used lawfully under fair use. They're
14 being digitized and used in clips in the same way
15 that DVDs are. I'm sure, like morally certain
16 because of the way media works, that the same thing
17 will happen with DVDs.

18 And so, we will always, I think, need to
19 decrypt DVDs in order to make clips. I think that's
20 just -- that's in the nature of things, the way
21 media grows and changes.

22 MS. SMITH: Ms. Castillo?

23 MS. CASTILLO: Yes. I have three points to
24 discuss. The first one is, in general, AAP is open to
25 some form of streamlined proceeding or in general we

1 are in agreement with most people in the room, seem to
2 be so far in terms of favoring some form of -- yeah,
3 oh, I'm out of words --

4 MR. AMER: A presumption of --

5 MS. CASTILLO: No, not exactly a
6 presumption, but some form of improving the renewal
7 process so that it's easier. But one of the things
8 that I think might be problematic is the suggestion
9 that there should be a complete burden shifting, so
10 that it is the opponent who has to oppose an exemption
11 that has been already granted for renewal. The problem
12 with that is that the opponent doesn't necessarily
13 have all the evidence necessary to show that the
14 exemption is no longer necessary -- is no longer
15 necessary, or has been used in the past three years or
16 what the likelihood of adverse impact will be in the
17 next three years.

18 The other thing is that for any form of
19 streamlined proceeding of previously granted
20 exemptions, the exemptions that are -- that are
21 renewed should be the exact same exemption that was
22 approved before. If there are any changes, of course
23 there can be some form of middle proceeding. And I
24 think it has been suggested before that it's not
25 exactly kicked back to what we have today, but

1 something we have in between for additions or changes
2 to previously granted exemptions. So I think it's
3 worth it for the Copyright Office to sort of
4 contemplate having several tracks or something along
5 those lines.

6 And then, the other issue I've heard is that
7 there seems to be some favoring of an automatic
8 renewal presumption. And the problem with that is
9 that then that would be very similar to having
10 permanent exemptions. And that is something for the
11 panel tomorrow. But for purposes of renewal, I think
12 it's important to take into account that having this
13 proceeding every three years helps to account for
14 changes in the marketplace. And if we have an
15 automatic renewal presumption, then that would sort of
16 take that away.

17 MS. SMITH: Thank you. Mr. Geiger?

18 MR. GEIGER: So we hire a lot of security
19 researchers and white hat hackers and we also work
20 with a large number of independent security
21 researchers that we do not employ. And most of these
22 researchers are working either solo or as part of some
23 very small shop. And most of them, the vast
24 majority of them do not possess the requisite legal
25 expertise to even deal with cease- and-desist letters

1 telling them to stop their research, often making
2 vague claims about DMCA, let alone for engaging in
3 the temporary renewal process.

4 So from our perspective, we absolutely
5 support a presumption of renewal and it sounds like
6 these are the fault lines, based on what the rest of
7 the panel has been saying, and obviously where we come
8 down on it. When it comes to the burden of the
9 initial filing, Mr. Sheffner had suggested that it
10 should be the proponent of the exemption that makes
11 that initial filing. We would support an automatic
12 renewal. And the idea that it would just be one page
13 I'm not sure is going to hold for very long.

14 This is one reason why I think that the
15 opponents ought to be the ones who make the filing.
16 That one page could very well expand, unless it's
17 restricted to a single page. And then, every word on
18 that page is going to get litigated and you will once
19 again need legal expertise in order to make a good
20 filing, one that does not trip you up later down the
21 line.

22 When it comes to the -- losing that
23 presumption of renewal, we've talked about whether
24 there should be meaningful opposition that cancels the
25 presumption of renewal. And I don't think that that's

1 the right standard because if anybody objects, which
2 is Mr. Sheffner's original proposition, if anybody
3 objects and we shunt into the original process again,
4 but as we have seen in previous rulemakings, the same
5 arguments are trotted out over and over again.

6 There's no reason why those same arguments
7 would simply just not be trotted out again and then
8 cancel the presumption and shunt you back into the
9 original process. And then, what really is the
10 presumption worth, except for something that is
11 completely unopposed.

12 When it comes to -- so instead, instead of
13 meaningful opposition, I think a better standard would
14 be whether or not there has been some sort of material
15 change in circumstances.

16 We've talked about changes in the
17 marketplace, changes in technology and so forth. Those
18 types of changes are different than simply meaningful
19 opposition. I think that that would be a better
20 standard.

21 MR. AMER: So the -- oh, sorry. Go ahead.

22 MR. GEIGER: Go ahead.

23 MR. AMER: So the presumption would kick in
24 automatically and then just the burden automatically
25 would be on opponents to establish a material change

1 in circumstances?

2 MR. GEIGER: Yes, that's right. And I'll
3 take it a step further, which is to say that -- two
4 things. One, if we're talking about an expansion
5 above and beyond the original exemption, we think that
6 the process ought to then be about that expansion, as
7 opposed to the expansion plus the original.

8 And lastly, and this goes to the evidentiary
9 standard for the exemption, not just a renewal, we
10 don't think that non-copyright interests that go
11 beyond protecting copyrighted works or protecting the
12 availability of copyrighted works ought to figure in
13 to the denial of the exemption, including a rebutting
14 of the presumption that you would get the exemption
15 again.

16 MR. AMER: So I think that leads right into
17 another question. As you indicated, the proposal that
18 Mr. Sheffner outlined, I think, as I understand it, is
19 premised on lack of opposition, lack of meaningful
20 opposition or some variant of that. We have another
21 alternative which would be -- which would provide that
22 the presumption would kick in automatically.

23 I wonder if panelists have views about which
24 model is preferable? And if the standard is meaningful
25 opposition, what would that mean exactly? Would the

1 Copyright Office have some sort of discretion to make
2 a determination as to how meaningful an opposition is?
3 We'd be grateful for your thoughts. Mr. Sheffner?

4 MR. SHEFFNER: Thank you. So we do oppose
5 the idea of a presumption of renewal of previously
6 granted exemptions. And Ms. Castillo touched on some
7 of the reasons. But I want to expand a little bit.

8 First thing I'd say is don't necessarily
9 listen to my reasoning. But I would just point you
10 back to the Copyright Office's own reasoning back in
11 the rule issued on October 27, 2000. And I won't
12 repeat what the Copyright Office wrote there. But in
13 sum, the Copyright Office looked at general principles
14 of statutory construction and administrative law.

15 And again, summarizing, essentially what the
16 Copyright Office concluded from looking at the legal
17 authority is that essentially when you have a statute
18 and then you have exemptions to that statute or
19 exceptions to the statute, again, those rules of
20 statutory construction and administrative law say
21 that, one, the exemption should be construed narrowly
22 and, two, that the burden should be on the proponent
23 of those exemptions.

24 So again, the Copyright Office concluded
25 this based on sound legal reasoning back in 2000.

1 And I don't think there has been any change
2 in the general principles of statutory construction or
3 administrative law that have changed.

4 That said, I want to emphasize that the
5 discussion we're having is largely academic for two
6 reasons. One is, as I stated previously, at least in
7 the last round, and I think this is sort of becoming
8 the practice, there is virtually no opposition to
9 previously granted exemptions.

10 Just as a matter of fact, even those who
11 previously opposed an exemption are sort of looking at
12 the state of affairs once it's been granted and say,
13 you know what, for whatever reason, whether we can't
14 come up with a showing of harm or just a sort of
15 political recognition that the Copyright Office is not
16 likely to reverse a determination they've made in the
17 past, we're simply not opposing that.

18 And the other thing I want to emphasize is
19 that although the burden should remain on the
20 proponents, we're only talking about a presumption
21 here. So if you had no presumption, you'd assume both
22 sides start at 50/50. If there is a presumption -- if
23 there is a presumption of nonrenewal or not a
24 presumption in favor of renewal, the proponents start
25 at 49 and the opponents at 51.

1 But again, as long as they make some sort of
2 minimal evidentiary showing that they are entitled to
3 that exemption under the statute, they will overcome
4 that presumption and therefore the Copyright Office
5 would be entitled to get out of their rubber stamp of
6 renewal.

7 MR. AMER: Mr. Turnbull?

8 MR. TURNBULL: I think I'd agree with pretty
9 much everything that was just said. But let me just
10 add that, I mean, truly it seems to me that the burden
11 on making the initial statement, yes, we want to
12 renew, I mean, could be -- I mean, it could be a
13 checkbox on a form. And if the Copyright Office
14 emails that form to the prior proponent and says do
15 you want to renew exactly what you got before, and you
16 check the box, I mean, as far as I'm concerned, that
17 would be a sufficient filing.

18 I really did not mean this to be any kind of
19 a burden. I mean, that's the -- but it seems to me
20 that under the statute, you do need to go through the
21 process of actually getting a request. You can use,
22 as we said before, the prior evidentiary record as the
23 basis for that.

24 That satisfies the requirement that this be
25 done in a rulemaking, it seems to me. And the

1 opposition -- I'm sort of trying to come up with -- I
2 understand the point about making the same argument
3 all over again.

4 That does seem to be a waste of everybody's
5 time, except maybe for the lawyer who bills by the
6 hour. But the -- so there is some kind of changed
7 circumstances, changed argument, there was a change in
8 the law that something that people thought was fair
9 use was found not to be fair use or there was an abuse
10 of the prior exemption or somebody actually came
11 forward with a circumvention tool that turned out to
12 be a huge problem in the marketplace.

13 I mean, those are the kinds of things that I
14 can imagine often as an opponent coming forward and
15 saying, hey, you really ought to look at this again.
16 Those are the kind of changes that I would see as
17 needing to be brought forward.

18 That's not a matter of presumptions or
19 burden shifting in my view.

20 It's just a matter of practical -- as has
21 been said -- as a practical matter, DVD CCA has not
22 opposed the previous exemptions that were granted and
23 I don't foresee doing so in the future. Again, absent
24 some specific change.

25 And there, I think we ought to be able to

1 come forward and say there's been a change and here it
2 is.

3 MS. SMITH: Thank you. Mr. Band, do you
4 want to speak following up on this question of whether
5 the ease of showing whether there's changed or
6 unchanged circumstances as sort of a precondition to
7 renewing an exemption?

8 MR. BAND: Yes. So it seems to me that to
9 some extent this whole discussion of presumptions and
10 burden shifting is not really appropriate to a
11 rulemaking. I mean, those are terms that are much
12 more appropriate to an adjudicatory proceeding.

13 And this rulemaking has, for whatever
14 reason, has over time taken on more and more of this
15 adjudicatory quality to it. But it's really not
16 necessary. And it seems that, getting back to your
17 earlier question about, you know, yes, the statute
18 would require the Librarian to make a determination
19 that harm is occurring or is likely to occur.

20 I mean, to some extent, that can, in this
21 renewal context, occur if the checked box says do you
22 want to renew this exemption because you are being
23 harmed or likely to be harmed over the next three
24 years.

25 And then, that would seem to me, you know,

1 just on its face, that statement plus the
2 incorporation of the administrative record from the
3 previous rulemaking would be sufficient for the
4 Librarian, on the basis of sort of making -- you know,
5 looking at I think if we just -- the rubber stamp is
6 probably not -- might not pass APA muster, but that
7 the Librarian, based on that record, would say, well,
8 you know, a good case was made three years ago.

9 There doesn't seem to be any changed
10 circumstances. These people say that they're likely
11 to be harmed. Okay, again, I will approve it. I
12 don't think we need to start getting into burden
13 shifting, presumption, all that kind of stuff. Now,
14 it is conceivable that someone will come out of the
15 woodwork and say, no, I don't want this renewed. And
16 again, we're talking -- now, I agree, if we want an
17 exemption expanded, you know, that's on us to talk
18 about why it should be expanded.

19 But if we're just talking about, you know,
20 the renewal of -- the renewal of the existing one then
21 conceivably if someone comes in and says, no, it
22 shouldn't be renewed, that's something that the
23 Register would look at in the recommendation to see
24 whether they made a sufficient -- you know, whether
25 what they said was sufficiently compelling about

1 changes or whatever.

2 But conceivably, in the notice soliciting
3 comments, you would explain the kinds of things that
4 you would be looking for.

5 But again, I don't think we need to start
6 talking about evidentiary burdens or anything of the
7 sort.

8 I mean, these would be things that would be
9 considered in the course of this determination, in a
10 rulemaking context as opposed to an adjudicatory
11 context.

12 MS. SMITH: Well, so I think with the check
13 the box and rubber stamp, we'd lighten the workload of
14 the Copyright Office. But I think --

15 MR. BAND: Which is our objective.

16 That's why we're all here.

17 MS. SMITH: Well, that's great. But from a
18 rulemaking perspective, I wonder if we can speak a
19 little bit more about whether - - the Office has
20 previously said that a declaration of unchanged
21 circumstances could be considered in renewing any
22 exemption.

23 Are there ways that we could use that or
24 build upon that to make the renewal of previously
25 granted exemptions easier? So Professor Tushnet?

1 MS. TUSHNET: So you asked earlier on, and I
2 think this is another version of it, whether a one-
3 page statement could meet the statutory burden as the
4 Office has interpreted it. And I think the answer is
5 absolutely yes, right? If it says nothing has
6 changed. In other administrative proceedings, facts
7 that aren't contested are routinely accepted, even
8 without going back to the bedrock.

9 I mean, certainly if you do want to look at
10 the PTO as a model, in fact you can rely on things
11 like a statement of five years of uncontested use.
12 The PTO can actually rely on that not just to say that
13 there's been five years of uncontested use, but that
14 that has a legal consequence that the mark at issue
15 has developed a secondary meaning. So it's actually
16 perfectly standard to accept things like that.

17 Now, I also would like to say a little bit
18 about the meaningful opposition question. So this is
19 just specific to our experience with the remix
20 exemptions. What we hear in the remix exemption
21 proceedings is the statement our arguments about the
22 facts and the law apply to both existing and proposed
23 exemptions, but we do not oppose renewal. And if you
24 go back and look, you'll see that structure in
25 basically everyone's proponent comments.

1 And one question I would have for this
2 meaningful opposition standard is how are we going to
3 interpret a claim like that? Does that represent
4 meaningful opposition to the existing exemption? Since
5 it's an argument against it, would we just not take it
6 to its logical conclusion? And let me just with my
7 law professor hat on, so if the evidence is relevant
8 to both the existing and proposed expansions, then an
9 adjudicatory model does allow you to ignore that fact
10 because parties are allowed to make strategic
11 concessions, right?

12 But a rulemaking model might not. And so,
13 one thing at issue here is to decide what this
14 proceeding would be. And once we have a better grasp
15 on that, some of the answers will follow.

16 But I think right now, we actually are, as
17 Jonathan was saying, we go back and forth. Some is
18 adjudicatory. Some is rulemaking. You know, and
19 that's part of what makes it difficult.

20 And then relatedly, just again for the remix
21 specifically, in terms of meaningful opposition, as a
22 practical matter, I expect that the opponents will
23 always come back saying, hey, there's a new screen cap
24 program out, you know, there's a new processor. It's
25 faster and it's better. And, you know --

1 MS. SMITH: But you've heard next to you --

2 MS. TUSHNET: Yeah.

3 MS. SMITH: -- the general opponents saying
4 they won't do that. They don't oppose the existing
5 ones.

6 MS. TUSHNET: But I encourage you then to go
7 back and look at the comments because they're
8 absolutely right. They're saying they don't oppose
9 it. But the arguments they make -- and they say this
10 too -- the arguments they make apply to both the
11 existing and the proposed extension. But they are not
12 opposing. And so, one question for you as decision-
13 maker is what consequences ought that concession, if
14 it is a concession, have? Right, does that count?

15 MS. SMITH: Sure, and just since our goal is
16 to build consensus, I think in the past the Office
17 took them at their word when they said they were not
18 opposing and held them to that as opposed to saying,
19 well, some of your arguments on the expansions would
20 apply to the existing.

21 MS. TUSHNET: Well, so, and I understand,
22 and my point is simply that that makes sense in an
23 adjudicative model. But if you're really thinking
24 about this as being a rulemaking fact-finder with
25 independent fact-finding obligations, then that is an

1 intrusion into the model. And at the very least, we
2 should talk openly about that. And this is somewhat a
3 statement against one's interests, I admit. But
4 again, I'd like to know the answer.

5 MR. AMER: Mr. McClure?

6 MR. MCCLURE: I'd just like to make one more
7 quick comment maybe about the idea of presumptive
8 renewal, which is that it's -- an organization is tied
9 to this -- if you don't presumptively renew, then you
10 have one organization, the original proponent perhaps,
11 being tied to this exemption, process after process.
12 And I think the point was made by Mr. Butler and Mr.
13 Geiger that once the exemption's granted, it's
14 something that benefits the public at large who falls
15 within that class, right?

16 It shouldn't have to be one organization
17 that comes back and year after year, you know, sort of
18 lives in fear that someone is going to present
19 meaningful opposition and they're going to go back
20 into this hundred-hour, thousand-hour process. So to
21 the extent that an exemption would be presumptively
22 renewed, the burden on that particular organization
23 would be relieved.

24 MR. AMER: Thank you. Mr. -- Professor
25 Decherney?

1 MR. DECHERNEY: I just want to expand a
2 little bit on Professor Tushnet's point. The
3 structure of the comments I've seen from the DVD CCA,
4 the MPAA is always, in theory, we're not opposed to
5 the renewal. But we think it could be limited in
6 these 10 ways, 20 ways. And we actually spend a
7 tremendous amount of time refuting each of those ways
8 in which it would be limited. And much of the hearing
9 time is spent discussing those.

10 So even though it says it's not in
11 opposition, it is in fact opposition. Just one other
12 structural issue, which I know -- we mentioned it in
13 comments but it hasn't come up here and I just wanted
14 to bring it up is, you know, if you do a brilliant job
15 drafting the previous exemption, then you've actually
16 eliminate this problem for three years.

17 And so, it's hard to show that the harm that
18 existed three years prior still exists because the
19 problems have been solved. You can show that the
20 exemption has been made use of or caused problems, led
21 to infringement. But you can't show the exact same --
22 the exact same harm that was there before.

23 MS. SMITH: So you think you can't show
24 unchanged circumstances because you made the --

25 MR. DECHERNEY: I mean, that's true in life,

1 yes.

2 MS. SMITH: Thank you. Mr. Turnbull?

3 MR. TURNBULL: I think the point's been made
4 about the nature of the filing in the comments -- fair
5 points. And I think the Office has appropriately
6 taken those, as was indicated.

7 I think the procedure that we're now talking
8 about would probably eliminate that approach to the
9 comments because you'd be forced up front to either
10 say there are meaningful differences and there are
11 changes or not. And so, I think that the procedure
12 would naturally eliminate that sort of problem.

13 I think the -- and then, would force us to
14 say, gee, was there really a change that we want to
15 argue here with regard to the old exemption or is it
16 something where we want to say no, that we're only
17 going to argue with whatever the change is. And I
18 understand that that -- and the points that have been
19 made are fair on that.

20 The other thing is, I mean, throughout - -
21 sending an email to a previous applicant with a
22 checkbox, I wouldn't rule out somebody else coming in
23 and saying I've been taking advantage of this and I
24 want this renewed, even if the organization that
25 originally filed -- I didn't mean to preclude that. I

1 was just trying to be helpful in making it easier.

2 So I think anybody who can represent that
3 they are taking advantage of the exemption and believe
4 it should be renewed as previously stated ought to be
5 able to make that application. And then, we would have
6 to decide whether there's a reason to oppose.

7 MR. AMER: Mr. Cazares?

8 MR. CAZARES: So from the perspective of
9 people with disabilities, I know that the National
10 Federation of the Blind fully supports presumptive
11 automatic renewal. I think many at this table
12 remember the 2010 cycle when another disability
13 organization, the American Foundation for the Blind,
14 was very -- came very close to losing the exemption
15 that they had previously renewed because of
16 evidentiary requirements.

17 So I think there's something to be said for
18 taking into account the points that have already been
19 raised by the Copyright staff and other panelists
20 about the statute and the limitation that the
21 Librarian has to keep in mind.

22 I think it's safe to say, particularly for
23 blind and print-disabled individuals, that within
24 three years, our status as blind and print- disabled
25 people really isn't going to change and that it can be

1 argued that we would be adversely affected by not
2 having an exemption.

3 So I think that NFB fully supports what Mr.
4 Goldman and others have already brought up.

5 But there is something to be said about
6 finding some mechanism where we can simply say we're
7 requesting an exemption under the given rules.

8 Now, not to bring up another point, I think
9 it's important to consider where the burden of proof
10 is right now.

11 I think Mr. Band made a really good point
12 that this is more of an adjudicatory issue.

13 But that's because these are the
14 circumstances that we have now. I think there is
15 something to be said from shifting the burden from the
16 proponent to the opposition. So I just wanted to make
17 sure that that was clear, at least for people with
18 disabilities.

19 MR. AMER: Thank you. Mr. Geiger?

20 MR. GEIGER: So it sounds like we've heard
21 some more consensus than perhaps we had originally
22 thought on what meaningful opposition ought to look
23 like and perhaps it should be something more like a
24 change in circumstances.

25 So I want to draw back to an earlier comment

1 that I had made, which I know relates also to the
2 panel on the evidentiary standard, which is that in
3 thinking about whether to renew a temporary exemption,
4 it's our position that interests that do not have
5 anything to do with protecting rightsholders or making
6 copyrighted works available, we do not think that
7 those should be considered for denying the exemption.
8 In addition -- you know, or at least have them as a
9 very clearly carrying much lower weight.

10 From the perspective of security
11 researchers, most of the opposition that we have seen
12 so far to the exemption that we had asked for relates
13 not at all to copyright. It is about safety largely.
14 So we have, for example, a vehicle practice and we're
15 looking at cybersecurity flaws in vehicles with the
16 goal of making those vehicles safer. We saw opponents
17 talking about the possibility that owners of cars
18 would circumvent emissions controls or modify their
19 vehicles in a way that is not safe.

20 These things are already illegal. In the
21 last panel, it was brought up, well, what about the
22 hacker that says they want to hack the nuclear power
23 plant. That's also illegal. That's all illegal under
24 the Computer Fraud and Abuse Act. By in large, the
25 DMCA we're talking about are computers that the

1 security researcher already owns.

2 And copyright law, and 1201, are not the
3 appropriate tool to use to protect these non-
4 copyright interests. There are already specific
5 government agencies with greater expertise and in many
6 cases already regulations on the books prohibiting
7 these very same kinds of acts. So that is our
8 position, not accommodating non- copyright interests
9 for denying the exemption.

10 MS. SMITH: In the specific case of security
11 researchers, 1201(j) is a permanent exemption. And I
12 know you're going to speak tomorrow. I mean, is that
13 perhaps a better even to perhaps just sort of update
14 that to the extent that it needs updating so that
15 security researchers can rely on it as opposed to, you
16 know, tinkering with the whole mechanism of the
17 rulemaking process?

18 MR. GEIGER: One hundred percent, yes.

19 And I mean, I'm in the same position as --

20 MS. SMITH: Mr. Butler.

21 MR. GEIGER: -- Mr. Butler. We think that
22 this is less preferable than updating the permanent
23 exemption. Part of the problem with even a change in
24 circumstances is that technology will evolve.
25 Security research will also evolve. It will present

1 new circumstances, probably not new circumstances
2 related to making copyrighted works available, but new
3 circumstances, new safety dangers, things like that.

4 And those safety dangers should be dealt
5 with by the agencies that are directly responsible for
6 working on safety. So yes, 100 percent, the permanent
7 exemption. We have specific ideas on how to change it
8 and we can talk about it tomorrow or now if you wish.

9 MS. SMITH: Let's save it for tomorrow.

10 MR. GEIGER: Sure.

11 MS. SMITH: Go ahead.

12 MR. SLOAN: I just have a quick question
13 going back to relying on the prior record from when
14 the exemption was originally granted. Is there some
15 point in time when relying on that old record would
16 get stale?

17 You know, it seems like maybe if you're
18 relying on the argument from three years ago, it might
19 still be okay. But what about when you're 10 years,
20 20 years, because it keeps getting renewed without
21 opposition? At least working within the current
22 statute, it says that the determination is whether
23 users are or are likely to be adversely affected.

24 So at what point -- is there some point when
25 relying on that old record and a checkbox, does that

1 become problematic within the current statute? Mr.
2 Band?

3 MR. BAND: So what I would imagine that even
4 after checking the box, that those of us -- someone in
5 Washington will show up at the hearing.

6 And so --

7 MS. SMITH: I think we don't have the
8 hearing if you check the box, though. I think that's
9 what we're --

10 MR. BAND: Well, no, I'm --

11 MR. DECHERNEY: (Off mic) -- right hearing --

12 MR. BAND: Right, or you -- it can be -- we
13 can meet for lunch over in the cafeteria. And you
14 know, but it could be something very -- if there's a
15 sense that there needs to be revising of the record,
16 that can easily be done. It doesn't need to be -- the
17 point is it doesn't need to be - - we don't need to
18 make this more complicated than it needs to be. Let's
19 keep this simple.

20 And so, I think the idea of, if you want to
21 say, okay, let's have a quick hearing, I'll come in on
22 behalf of the education community or I can work on
23 behalf of the blind. I mean, someone can come in and
24 we can talk about it and say are you still using this
25 exemption. Yeah, we're still using it.

1 You know, Rebecca can come in and say are --
2 are people still making remixes? Yeah.

3 They're still making remixes. It doesn't
4 need to be -- and the possibility -- so there's
5 someone who can come in. It's just a question of does
6 Rebeca have to come forward with all these examples of
7 remixes that have been made in the last three years or
8 does the NFB have to come forward with statistical
9 data on the number of blind people who are making use
10 of the exemption. I mean, it's that kind of burden.
11 But you know, it's a problem that can easily be
12 addressed down the road if necessary.

13 MS. SMITH: I mean, the only thing I will
14 say is given that we have to have these as a triennial
15 rulemaking, which means every three years, to have the
16 short and then the medium and then the long I think
17 could get complicated very quickly. So any reform I
18 think the Office would want to make sure that it's not
19 increasing the complexity of an already complex
20 rulemaking.

21 So I don't know if you wanted to speak to
22 that, but --

23 MR. BAND: Just to --

24 MS. SMITH: Yeah.

25 MR. BAND: Related to that, I mean, the

1 other way -- not only is it a matter of these
2 renewals, but you could -- again, in my interest of
3 reducing your workload, you can reduce the number of
4 categories or number of classes. So you know, we've
5 had -- we've grown from one class that basically
6 covered all educational uses and documentary films and
7 remixes and noncommercial works and now there's
8 probably like, I don't know, eight or nine classes
9 covering that.

10 You know, we could go back to -- or at some
11 point come up with one class and just keep things
12 simple. Certainly in the case of if you look at the -
13 - of the 22 exemptions granted in this past
14 rulemaking, more than half dealt with embedded
15 software. We don't need to have 11 or 12 exemptions.
16 You could have one, you know, properly crafted would
17 take care of that problem.

18 And you won't have to worry about regulating
19 the automobile industry. You know, let someone else
20 do that. That's not your job. And so, but the point
21 is these things can work in tandem to really
22 streamline this whole process.

23 MS. SMITH: Professor Tushnet?

24 MS. TUSHNET: So Jonathan -- sorry.

25 Jonathan covered almost exactly what I

1 wanted to say. But let me just reinforce that by
2 linking it with Mr. Cazares' point, which is it's not
3 just patterns of protected use -- of classes that
4 persist over time, but patterns of uses persist over
5 time, which is why we talk about things that are non-
6 infringing or categories of fair use. So people have
7 really mapped those pretty well, Pam Samuelson,
8 Michael Madison, they've done it. And those can be
9 expected to persist over time.

10 In terms of, you know, don't complicate an
11 already complicated rule, I think what we are saying
12 is, you know, if you change the definition so that
13 they're 44 words long, again, like they used to be,
14 then you wouldn't -- then even having a short, medium
15 and long form -- which I don't think you should do --
16 would actually represent a substantial improvement.

17 MS. SMITH: Thank you. So I'll call on Mr.
18 Sheffner next and I wanted to just tee up the next
19 question, which is how should we separate -- whether
20 there's an administrative or statutory change dealing
21 with new exemptions, you know, or new technologies,
22 the expansions versus the renewal of the previously
23 granted exemptions.

24 Because I think, again, some of it is that
25 technology does evolve and this rulemaking process is

1 supposed to be able to accommodate those evolutions.

2 MR. SHEFFNER: Right. So I just wanted to
3 address briefly Mr. Sloan's question about sort of
4 stale, old evidence. I mean, like Mr.

5 Turnbull, we would not oppose the ability of
6 proponents to incorporate by reference evidence that
7 has been submitted in previous rulemakings.

8 So is it possible that evidence could get
9 stale?

10 Yes. It is. But I think that it's largely
11 a self-correcting mechanism. I would envision a
12 revised system and it's this.

13 So if a proponent goes in there and files
14 their one-page or one-checkbox form, however it turns
15 out, and they say, you know, and we hereby incorporate
16 by reference all the stuff that we filed in the
17 previous rulemakings, the potential opponents of that
18 exemption will look at that.

19 And in deciding whether or not they're going
20 to oppose this previously granted exemption, one of
21 the things they will ask themselves is has the
22 situation on the ground changed. It could be a change
23 in the case law. It could be a change in business
24 models. It could be that there's new technology that
25 enables you to do what you want to do without

1 circumventing DRM. And it could be that the evidence
2 that was submitted truly is stale and doesn't reflect
3 the current situation on the ground.

4 And if it is -- again, what I think is going
5 to be a rare instance of opposing a previously granted
6 exemption, they would have the opportunity to do it
7 and say, you know what, we actually do have meaningful
8 opposition here. We think the situation has changed
9 for the following three reasons. And you know,
10 actually the evidence they incorporate by reference is
11 indeed stale.

12 MS. SMITH: Thank you. Did you also want
13 to comment on the second question, which should be
14 what about a new technology, for example, if there is
15 a petition for an exemption for 4K versus we're
16 renewing something for DVDs? How should the
17 rulemaking process deal with renewal of the previous
18 exemption as well as consider some of the issues with
19 a new petition?

20 MR. SHEFFNER: Sure. I think I touched
21 on this in my answer to your very first question this
22 afternoon, and it's this. We would support a
23 streamlined process for dealing with sort of renewal
24 of the exact same exemption.

25 To the extent people want to expand that

1 exemption, I think they're -- in practice, it may be
2 streamlined because the part of the renewed --

3 I mean, if you have an exemption -- a
4 previously granted exemption asks for this. And then,
5 the requested new exemption is this, what I'm saying
6 is we don't have to fight again over this. But to
7 the extent that they ask for this much more, yes, we
8 think the burden should remain on the proponents of
9 the exemption.

10 And you know, we'll go through the regular
11 process about that. It'll be a lot smaller fight
12 than having to fight over the whole thing. It will
13 just be fighting over this much.

14 But again, the sort of streamlined part
15 should only technically apply to exactly what was
16 previously granted.

17 MS. SMITH: Thank you. Mr. Butler?

18 MR. BUTLER: Yeah. So I think -- I think
19 that's largely true, that certainly the presumption of
20 renewal that we've all sort of agreed on would not
21 apply in the same way to an incremental increase. So
22 going from the existing DVD and Blu-Ray to 4K.

23 But on the other hand, I would hope that
24 some of the logic that underwrites that presumption
25 logic that we've all sort of come to agree to would

1 mean that that process would -- that the arguments
2 about 4K or whatever the new format is could be a
3 little shorter because we would all already agree that
4 the planned use is lawful, right? Like if it's fair
5 use with a DVD, it's also fair use with a Blu-Ray,
6 it's also fair use with a 4K. So that would already
7 be established.

8 And the adverse effect, some of the sense of
9 what is the pedagogical use of media in a media class,
10 right, all of that stuff would already be on the
11 record. So hopefully it would be a much shorter
12 argument about why, if anything -- what, if anything,
13 makes 4K different from DVD or Blu-Ray in terms of
14 meriting an exemption or whatever.

15 MS. SMITH: Mr. Turnbull?

16 MR. TURNBULL: Actually, I think I agree
17 with most of what you just said. I think from the
18 technology provider, however, there is a substantial
19 difference between a technology that is 10 years old
20 and a technology that has just been launched and the
21 considerations.

22 And we think that the Copyright Office
23 should and has made with regard to new technologies
24 and the harm to the development of the market --
25 again, going back to the original purpose of the

1 circumvention provision of the DMCA, which is -- which
2 is not merely to stem piracy, but also to enable new
3 markets.

4 And so, the enabling of the new market for
5 4K may have a different dynamic than the situation
6 with regard to Blu-Ray, which is now 10 years old. So
7 I think that -- so I think -- I do think that there's
8 a substantial difference between -- and you can't just
9 sort of automatically apply whatever the reasoning was
10 with regard to DVD and then Blu-Ray and then, you
11 know, whatever.

12 MS. SMITH: Okay. So Mr. Band, it seemed
13 like Mr. Butler and Mr. Turnbull at least agreed on
14 something. Do you want to undo that or --

15 MR. BAND: Oh, no. No, no. I just want to
16 basically -- and this is kind of very difficult for me
17 to be in the situation of agreeing so much with Mr.
18 Turnbull and Mr. Sheffner.

19 But the -- I just think getting back -- one
20 of the things that you can do in building on the
21 issues that Bruce has identified is that in this
22 process the Copyright Office can help manage -- and
23 again, with the aim of reducing your workload -- okay
24 by now what the issues are in general terms with this
25 whole DVD/Blu-Ray, educational use, remix use and so

1 forth.

2 So you know, one can easily imagine that
3 there's going to be -- we'll make -- say we want to
4 renew plus we want to expand. And then, they'll say,
5 well, we have no problem with renewal. Okay. We have
6 this issue with expansion. And then, you know, there
7 could almost be like a pre-hearing conference where
8 you guys say, okay, this is what we think. We want to
9 hear this, we want to -- you know, where you can sort
10 of iron out, figure out what it is that you need to --
11 what you need to know from us. And that way, it could
12 ultimately reduce our burden with respect to -- but
13 the point is it could reduce your burden as well.

14 You know, we're talking -- in terms of
15 what's being renewed, we're talking about a relatively
16 small universe of things that we know now have been --
17 so that this cluster of the motion picture- related
18 issues, the issues with respect to the screen readers,
19 maybe one or two others.

20 And so, there's nothing -- I don't see why
21 you can't have at some point in the process a meeting
22 with us where we kind of say, okay, this is -- what is
23 it that you need more and what is it that we're going
24 to give you more. And so, that way it will just --
25 instead of, again -- sort of reinventing the wheel, we

1 can really move the process along dramatically.

2 MS. SMITH: So it sounds like you're saying
3 short of a statutory reform, if the Office provided
4 some guidance as to what quantum of information we
5 thought would be useful for the Register to make the
6 recommendation to the Librarian in advance or maybe
7 sort of iteratively working with the parties, that
8 that could be helpful to streamlining this and
9 avoiding for the renewals, the type of rulemaking
10 process we had for the new petitions.

11 MR. BAND: Yeah. No, I think that that's
12 right. But again, it's -- I'm trying to push you to
13 be a little more informal. And I think that that
14 could make the process work a lot better.

15 MS. SMITH: Thank you. Mr. Butler, anything
16 to add or --

17 MR. BUTLER: I just wanted to add that the
18 flipside of what Mr. Turnbull was saying about when a
19 format is young, the market realities about that
20 format will be thus and such. And there will be a
21 similar -- there will be, of course, a mirror image on
22 the side of the proponents.

23 When a format is young, the kinds of harms
24 that we've typically shown for young formats are, you
25 know, there are these titles that are not available

1 on the -- you know, right -- and we're told, well,
2 that's just one or two titles. Well, it's because
3 it's a young format. So there's an interesting mirror
4 image thing that happens here and maybe these young
5 formats really will benefit from getting their own
6 kind of hearing where all of that stuff can sort of
7 come out.

8 MS. SMITH: Thank you. Mr. Sheffner, did
9 you want to add something? Oh, nope? Okay.

10 Mr. Turnbull, good?

11 MR. TURNBULL: Yeah. I mean, I -- we're
12 having this wonderful agreement session here. And
13 I think that what Mr. Band was talking about would
14 make sense and would be helpful in streamlining.

15 I mean, I think that, again, the -- and
16 getting and having some kind of process with the
17 Office to sort of work with the parties to say,
18 okay, what makes the most sense to have a hearing
19 about would make sense.

20 I did want to comment just briefly on the
21 nature of the rulemaking. And this has -- this has
22 always been sort of a hybrid in a lot of respects
23 between sort of the adjudicatory model and the notice-
24 and-comment rulemaking model.

25 And it seems to me that that's sort of

1 inevitable in the process because I think it's
2 unrealistic nor do I think Congress thought that it
3 was going to happen, that the Copyright Office would
4 go out and know what 200 million people might be doing
5 with any given copyrighted work.

6 And so, the people who have the need to use
7 something are the people with the information to come
8 forward and say this is how we want to use it and this
9 is why this is a problem for us. And you know, at the
10 end of the day, the Copyright Office has the
11 obligation to come out with a rule that reflects the
12 evidence and, notwithstanding the comments about the
13 Commerce Department report, I think that is very
14 instructive still.

15 You know, they talk several places about
16 evidence and about a record and that sort of thing. So
17 I think that having evidence in the record is an
18 important element of this rulemaking.

19 But it is -- in other respects, it doesn't
20 have the sort of adjudicatory feel to it.

21 One of the comments that was made earlier, I
22 think by Mr. Williams, about the possibility of then
23 having a proposed rule, you know, put forward would
24 then sort of maybe complete the cycle. That would
25 then feel more like the notice-and-comment rulemaking.

1 But all of the rest of it leading up to it
2 would be fact-finding that the Office would need in
3 order to know what to put forward in a proposed
4 rulemaking. And we would be okay with that as a
5 process and we're okay with the process mostly as it
6 is. But --

7 MS. SMITH: Thank you. So the next question
8 I feel will probably spark dissent. One of the
9 participants -- ESA is not on this panel -- had
10 suggested a streamlined process for rejecting a
11 proposal, saying, you know, just as we renew
12 exemptions, we also will end up rehashing the same
13 proposals over and over again that are consistently
14 recommended against.

15 Should we have a similar streamlining
16 proposal for, you know, a second bite at the apple for
17 something that was denied.

18 MS. TUSHNET: So, a couple of things. I
19 mean, in general, no, in part because the copyright
20 owner always retains the ability to go to court and
21 hash that out and win either on contributory
22 infringement or infringement, depending on what the
23 activity is. And that would end the exemption and end
24 it next time, whereas if you lose, you just don't get
25 that chance. So it's structurally unequal in the way

1 that makes mirror image treatment inappropriate.

2 The other thing though is that considering
3 this rule again requires you to consider the way that
4 all these little additions have been piled on to
5 specific exemptions over the years. So does that
6 mean, for example, are you proposing that we could not
7 go back to the 44-word initial educational exemption?
8 That seems to me like a bad idea, just because it's
9 been loaded with other things doesn't mean that the
10 initial exemption was inappropriate, even though in
11 some sense it's been rejected.

12 And I think the kind of line-drawing that
13 you would end up doing would be contrary to the goal
14 of simplifying things.

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

16 MR. BAND: I guess I would add to that that
17 a problem with sort of like a streamlined objection is
18 that the circumstances do change.

19 And I suspect also that rightsholders get
20 more comfortable with certain kinds of activities.

21 And so, just to -- if a proponent is willing
22 to go through the work of amassing new evidence, then
23 the rights holder, if they're confident that their
24 arguments were sound before, they can -- I mean,
25 certainly they can always incorporate by referenc and

1 say all the argument -- these people haven't said
2 anything new.

3 So it's not -- you know, we're not
4 streamlining the process. But you know, once you
5 make it clear it's okay to incorporate things by
6 reference or, if they want to resubmit the same thing,
7 if it really is just the same thing all over
8 again, then the arguments as to why it wasn't valid
9 before would apply now, whereas in our situation, it's
10 -- it's different because we have to -- right now
11 you're basically telling us that we have to de novo
12 show that we're going to be adversely affected.

13 So we have to come up with sort of new
14 examples of how we've been using it in the last
15 three years as opposed to previously. So that's why
16 the symmetry -- it is an asymmetrical situation. And
17 you know, So certainly it could be done in a way --
18 you could make it clear that there are ways, you know,
19 where they can, if they want to, incorporate stuff by
20 reference. That's fine. But still, the need for a
21 streamlined process I think is very different.

22 MS. SMITH: Mr. Butler, do you agree?

23 MR. BUTLER: Largely, yeah. Yeah. I think
24 the key thing is just the incentive to -- the
25 difficulty rather of seeking an exemption that has not

1 been previously granted is high enough I think to
2 deter folks from -- you know what I mean? That's
3 enough of a burden, that you had better really want it
4 and really believe it.

5 And so, you know, I think at that point,
6 those folks should be able to get into the process.
7 And the people who don't have enough of an interest
8 will be deterred by the difficulty in doing it.

9 MS. SMITH: I mean, you would be surprised
10 sort of. We do get a lot of repeat players.

11 MR. SLOAN: I have a quick question. I just
12 want to go back to the issue of meaningful opposition
13 and what that would mean and what would need to be
14 shown in those circumstances.

15 So we had talked about showing something,
16 either that it's -- the exemption is not being used,
17 there have been changed circumstances or harm or
18 something to that effect. But I wanted to get your
19 positions on how much evidence -- how much opposition
20 would be needed. It seems that if you had something
21 like a preponderance standard and the proponent is
22 just checking a box saying unchanged circumstances, it
23 would be a -- could be a pretty minimal showing to
24 oppose that.

25 So I just wanted to get your viewpoints on

1 where the line should be that would make the
2 presumption -- the presumption of meaningful in that
3 the opposition needs to have something fairly
4 substantive, but not also -- but then, on the other
5 side, not be a huge burden then on the opponent such
6 that you could never really oppose the presumption
7 where that line might be best drawn.

8 MR. MCCLURE: Sure. Well, I think -- and
9 you can correct me if I'm wrong, but you were saying
10 that the proponent, short of a very short showing, is
11 going to just say like the check the box of the
12 opponent, to kick that back is just to have to
13 overcome the check the box.

14 MR. SLOAN: Right, to get to more likely
15 than not against a checked box would seem pretty
16 minimal. So I'm just trying to see where the line
17 might be to give both sides a chance --

18 MR. MCCLURE: Absolutely. And I think
19 certainly ISRI and I'm sure many other people on this
20 panel would want the Copyright Office to be
21 considering the past evidentiary record and have that
22 form the basis of whatever determination of
23 meaningfulness the Copyright Office comes to.

24 So I think it's really hard to decide this
25 question without having a super clear idea of how much

1 of that evidentiary record is kind of just pulled into
2 this new discussion versus the proponent having to say
3 affirmatively we've shown this before. You know, here
4 it is again.

5 But I think our position would definitely be
6 that the meaningful opposition would have to show some
7 kind of significant change in circumstances such that
8 the prior evidentiary record is overcome to some
9 degree.

10 MS. SMITH: Thank you. I think we're going
11 to try to do one last round. In the spirit of
12 efficiency we've been talking about, we can maybe end
13 a couple of minutes early. Mr. Band?

14 MR. BAND: Well, I guess the way I would
15 respond to that question is I'm not sure you really
16 need to specify the exact precise level of how
17 material the opposition is or how significant it is.
18 If, you know, Mr. Turnbull or Mr. Sheffner's client,
19 if they make a submission as to why something should
20 not be renewed, you'll look at it and you'll decide
21 whether it is material or whether it has weight or
22 not. And then, you'll decide whether to kick it over.

23 You know, because this is all going to be --
24 and I'm not sure how there would ever be a possibility
25 of us challenging your decision whether or not to kick

1 it over, right, whether to put it in the streamlined
2 process or the other process. I think it would be
3 very hard for us to come up with a court challenge.

4 So given that you're going to have a fair
5 degree of discretion, it's going to be very hard for
6 us to somehow show that you abused your discretion
7 going one way or the other - - I mean, it would have
8 to be pretty blatant, like, oh, there Band goes again,
9 let's screw him.

10 You know, but barring that, I don't think --
11 I think it would be very -- so I don't think -- again,
12 I think let's keep it simple.

13 Let's not make it so complicated that we get
14 tied up in standards and burdens such that we don't
15 move forward. I think we're in a position where we
16 could move forward pretty easily and not worry about
17 those nuances.

18 MS. SMITH: Mr. Sheffner?

19 MR. SHEFFNER: Yeah. I largely agree with
20 what Mr. Band just said. And just to respond to Mr.
21 Sloan's question about sort of what meaningful
22 opposition would look like we were not terribly
23 specific in our own written comments about exactly how
24 the process should work. But let me just sort of
25 spell it out how I envision in kind of non-legalese.

1 I mean, what I envision is essentially a
2 sort of prescreening process that the Copyright Office
3 would employ before delving into sort of the regular
4 process that we've all gotten used to over the last
5 six cycles or so. So the initial step would be the
6 proponent of a previously granted exemption filing
7 something short. We can argue about whether it's a
8 page or a checkbox or a paragraph or whatever.

9 And then, the -- essentially what the
10 Copyright Office is going to be asking itself, or
11 should be asking itself, is do we have a real fight
12 here. Do we have a real fight between sort of two
13 sets of arguments or do we have essentially an
14 unopposed request for an exemption? So the opponent
15 of the previously granted exemption, again in this
16 rare case where someone is actually going to come
17 forward and oppose a previously granted exemption,
18 I would just say, again, it's going to be a one-page
19 form and they're going to identify why there is
20 meaningful opposition here.

21 Is it because there is -- you know, a short
22 description -- there is a change -- they've
23 discovered that there's actually great harm or
24 significant harm from the previously granted -- from
25 the exception to the prohibitions in the DMCA? Is

1 there changed case law that would touch on whether
2 or not the use at issue was non-infringing? Is there
3 new technology that would -- that would make possible
4 what the proponents want to do without circumventing
5 the DRM? That kind of thing.

6 Again, a short form that allows the
7 Copyright Office to look at it and say, you know, do
8 this prescreening and say do we have a real
9 substantial fight on our hand or is this essentially a
10 no-brainer where there's no significant -- no
11 meaningful, whatever the right word is -- opposition.
12 And if there is, then again, it just gets shunted back
13 into the regular process.

14 MS. SMITH: And then, would you think if the
15 Office in its prescreening determined it was sort of
16 insufficient under administrative law principles or
17 something, we could go back and say give us a little
18 more, like Mr. Band was saying, or --

19 MR. SHEFFNER: Yeah, again, I mean, we
20 haven't -- we haven't specified a whole set of
21 processes. And like Mr. Band, I wouldn't want to make
22 it too complicated. But I mean, I think at a high
23 level, that's what -- I mean, I just explained what I
24 think the Copyright Office should be trying to do is
25 screen out -- okay, are we -- do we have a real fight

1 here or do we not?

2 And again, in the vast, vast majority of
3 cases where somebody has gotten an exemption already,
4 there is not going to be a real fight.

5 There's not going to be an opponent who has
6 shown up. And they're not going to bother to show up
7 unless they really, really have a good reason, that
8 I'm sure they'll be able to identify in a page or two.

9 MS. SMITH: People will probably hold you to
10 that. Just kidding. Mr. Turnbull?

11 MR. TURNBULL: I would -- I would agree with
12 that and only add that I think that the nature and
13 quantum of evidence that would need -- or argument
14 that would need to come forward would depend a bit on
15 what the previous grant was.

16 If the previous grant is this is really a
17 close case, but we think that it's okay and we'll --
18 you know, we'll go forward, then you may not need as
19 much to come back and say, yeah, there is a real
20 argument here.

21 If the previous was -- if it's already been
22 granted three times and this is the - - the fourth
23 time around and it's just - - it's just clear as a
24 bell that -- and the opinion, the recommendation is
25 really clear, then it's going to take more to come

1 back and say, no, there's really now -- there really
2 now is a new argument. There really now is new
3 evidence or whatever. I just -- and again, I think
4 that -- I mean, agreeing that it'll take -- it'll be
5 in your discretion.

6 But you know, I think that that -- the level
7 is going to be -- it'll be pretty apparent in any
8 given case. And your question about if somebody
9 submits something and you go, well, on its face, that
10 really doesn't do it, but we're not quite sure what
11 you're getting at, yeah, I think you ought to have the
12 discretion to go back and say, you say that there's
13 new case law or you say that there's some new
14 technology. But you're really not describing that.

15 If we're going to reopen this into a full
16 evidentiary hearing, we need more than that. And you
17 know, maybe not giving -- not extending it out a long
18 time or giving, you know, repetitive. But it seems to
19 me you would have the discretion to do that. I would
20 hope that the lawyers representing the opponents would
21 come forward and do well in the first instance. But
22 if there was a question, I think it's within your
23 discretion to ask for more.

24 MS. SMITH: Thank you. Professor Tushnet?

25 MS. TUSHNET: So just briefly, I wanted to

1 talk about the characteristic or the characterization
2 of checking a box as somehow not meeting your burden.
3 I mean, I don't think that's just checking a box any
4 more than when you check a box saying you've submitted
5 truthful information on your tax return, that that's a
6 meaningless or trivial act. It's an affirmation that
7 the conditions at issue continue to exist, or exist in
8 the case of the tax return.

9 So it seems to me that in order to refute
10 the box, the checked box, you should have to show
11 those conditions and laws have changed, just like the
12 IRS would want to show that in fact that wasn't your
13 income. You know, and if you want me to, I will
14 submit the entire record from the last three
15 rulemakings as attachments so you can consider them
16 submitted. But that seems kind of trivial.

17 I mean, I would be happier if you considered
18 the checkmark to be me making that submission. If we
19 all agreed that that was what I was doing, then it
20 seems to me that we -- that we then have a full
21 submission. It's just one that's already in your
22 books.

23 MS. SMITH: Thank you. Mr. Geiger?

24 MR. GEIGER: So in this renewal process that
25 we're talking about here, we've talked about having a

1 one-page of why we -- of meaningful opposition of why
2 circumstances have changed. And if the Copyright
3 Office then, in its discretion, decides that it is in
4 fact meaningful, then they kick it over to the normal
5 process. I would -- unfortunately, it would be a more
6 complex process.

7 But I would suggest that in between those
8 two actions, you actually give the proponent the
9 opportunity to respond, the proponent the opportunity
10 to say, no, the meaningful opposition is not
11 meaningful and here's why because, you know, otherwise
12 -- and hopefully that will inform the Copyright Office
13 to better exercise its discretion before beginning the
14 long and laborious process of going through the whole
15 temporary exemption again.

16 MS. SMITH: Thank you. Mr. Butler, I think
17 you may have the last word.

18 MR. BUTLER: Yeah. So it's getting
19 complicated now, isn't it? The one-pagers are
20 proliferating, which is good for those of us who bill
21 by the hour.

22 But I don't anymore, so -- and I wonder --
23 ultimately, I think -- I guess this may be too obvious
24 to say. But ultimately the folks who oppose I think
25 are going to have to come forward with some real

1 information to explain why they think circumstances
2 have changed.

3 And so, I don't know -- I just wonder how
4 useful it is, unless the Office is willing, I think,
5 to say based on a one-pager and the opponents are
6 willing to be judged based on a one- pager, like no,
7 we're going no further. That's just not enough. We're
8 not going to listen.

9 Then perhaps the opponent should just go
10 ahead and come forward with whatever reasons they
11 have, like the full bore, because otherwise how do we
12 know what those reasons are and how do the proponents
13 respond, right?

14 So if there is information that the
15 opponents have, maybe they should go ahead and
16 disclose it or else, again, maybe we can all agree
17 that sometimes that one page will just be on its face
18 lame and you can reject it. And then, maybe the one-
19 page thing is a good idea, as long as everybody's okay
20 with being killed at that stage and not going forward
21 to the full thing.

22 MS. SMITH: Thank you. Well, we are two
23 minutes early. So I'll consider that a minor victory.
24 And this panel is concluded. Tomorrow, we start again
25 at 9:00 in the morning talking about the anti-

1 trafficking prohibitions.

2 (Whereupon, the foregoing adjourned at
3 3:00 p.m.)

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