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SECTION 1201 STUDY

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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

P R E S E N T

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BRANDON BUTLER, University of Virginia Library
SOFIA CASTILLO, Association of American Publishers
GABE CAZARES, National Federation of the Blind
KRISTA L. COX, Association of Research Libraries
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ANDREW GOLDMAN, Knowledge Ecology International
ROBYN GREENE, New America's Open Technology Institute
AARON LOWE, Auto Care Association
SAM MCCLURE, Institute of Scrap Recycling Industries, Inc.
CHRIS MOHR, Software & Information Industry Association
ANDREW MOORE, United States Copyright Office
ABI MOSHEIM, United States Copyright Office RAZA PANJWANI, Public Knowledge
STANLEY PIERRE-LOUIS, Entertainment Software Association
BEN SHEFFNER, Motion Picture Association of America
JASON SLOAN, United States Copyright Office

A P P E A R A N C E S

(Continued)

GEORGE P. SLOVER, Consumers Union

REGAN SMITH, United States Copyright Office

BRUCE H. TURNBULL, DVD Copy Control Association and Advanced Access Content Licensing Administrator, LLC

REBECCA TUSHNET, Organization for Transformative Works

BRIAN WEISSENBERG, Institute of Scrap Recycling Industries, Inc.

MATTHEW WILLIAMS, MSK Law Firm; Association of American Publishers, Motion Picture Association of America, Recording Industry Association of America

JONATHAN ZUCK, ACT I The App Association

A G E N D A

P R O C E E D I N G S

9:04 a.m.

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

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

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

copyrighted material to users digitally.

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

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

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

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

granted 22 of the exemptions.

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

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

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

So this is the genesis for our study.

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

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

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

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

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

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

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

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

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

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

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

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

MS. MOSHEIM: I'm Abi Mosheim.

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

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

MR. ADLER: (off mic)

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

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

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

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

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

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

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

independent and other vehicle manufacturers.

MR. PANJWANI: My name is Raza Panjwani. I'm a Policy Counsel at Public Knowledge.

MR. PIERRE-LOUIS: I'm Stan Pierre-Louis. I'm the General Counsel of the Entertainment Software Association and we represent the U.S. videogame industry.

MR. SLOVER: George Slover, Senior Policy Counsel for Consumers Union, the policy and advocacy division of Consumer Reports.

MR. WEISSENBERG: I'm Brian Weissenberg. I'm a law student at Stanford Law School's IP Innovation Clinic, representing the Institute of Scrap Recycling Industries.

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

MR. AMER: Great. Well, welcome everyone. So the first session is entitled "Relationship of Section 1201 to Copyright Infringement, Consumer Issues and Competition."

And this session will explore the role and effectiveness of section 1201 in protecting copyrighted content and will consider how the statute should accommodate interests that are outside of core copyright concerns.

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

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

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

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

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

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

effective.

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

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

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

MR. AMER: Thank you. Mr. Adler?

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Zuck?

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

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

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

But the widespread acceptability of that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Slover?

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

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

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

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

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

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

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

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

component on a car nowadays.

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

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

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

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

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

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

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

Zuck?

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

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

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

It's simply been a necessary tool in

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Band

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

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

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

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

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

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

MR. AMER: Thank you. Ms. Greene?

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

What I do want to note about that though is that it is impossible to calculate the chilling effect that those previous court cases, even though they were ruled on favorably, has had on the market. Entrepreneurs who are just trying to enter a marketplace may not want to take the risk that all of the efforts that they go to, to develop a new product, to innovate and to launch it in the marketplace may be for naught as a result of litigation, even if they might eventually win that litigation.

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

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

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

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

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

MR. ADLER: (Off mic)

MR. AMER: Oh, microphone, please.

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

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

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

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

The issue of access is not about

infringement.

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

MR. AMER: Thank you. Mr. Band?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. AMER: Oh, microphone.

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

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

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

value is.

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

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

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

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

transitory period.

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

MR. AMER: Thank you. Mr. Dow?

MR. DOW: So Allan is absolutely right.

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

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

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

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

So the ability to access a work, whether it

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

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

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

MR. AMER: Thank you. Mr. Panjwani?

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

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

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

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

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

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

is reproduction, distribution, public performance and so forth.

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

There may be an access to the copy.

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

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

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

counsel.

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

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Slover?

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

And I think you should be careful, you know.

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

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Adler?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Panjwani?

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

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

unquote, "traditional media" in expressive works.

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Band?

MR. BAND: So switching hats from the

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

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

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

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

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

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

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

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

You know, people who modify their cars in

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

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

MR. AMER: Thank you. Mr. Dow?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Zuck?

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

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

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

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

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

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

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

And I think we need to keep that in mind.

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

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

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

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

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

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

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

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

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

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

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

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

next.

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

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

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

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

never gained any real traction.

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

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Slover?

MR. SLOVER: Raza just covered my point.

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

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

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

MR. AMER: Mr. Adler?

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

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

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

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

MR. AMER: Thank you. Mr. Band?

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

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

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

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

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

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

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

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

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

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

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

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

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

I would also just say that because of the

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

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

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

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

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

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

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

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

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

or to enforce 1201 against consumer products.

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

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

MR. DOW: So I guess --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. AMER: Thank you. Mr. Weissenberg?

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

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

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

MR. BAND: So I know Donald Trump thinks

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

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

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

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

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

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

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

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

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

So panel two is called "The Rulemaking Process --

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

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

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

MR. MOORE: Andrew Moore, Ringer Fellow.

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

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

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

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

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

MR. MOHR: Chris Mohr, SIIA.

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

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

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

MR. PANJWANI: Raza Panjwani, Public Knowledge.

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

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

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

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

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

Thank you. Professor Tushnet?

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

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

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

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

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

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

Copyright office about that.

MS. SMITH: Okay. Mr. Turnbull?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

follow-up questions.

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

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

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

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

MS. SMITH: Mr. Mohr?

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

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

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

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

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

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

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

MS. SMITH: Mr. Williams?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So I think it actually makes the logic of

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

MS. SMITH: Sure. Go ahead.

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

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

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

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

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

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

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

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

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

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

MR. PANJWANI: Right.

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

MR. PANJWANI: Sure.

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

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

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

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

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

MS. SMITH: Thank you. Professor Tushnet?

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

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

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

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

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

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

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

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

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

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

MS. SMITH: Mr. Turnbull?

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

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

not opposed to that.

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

MS. SMITH: Mr. Williams?

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

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

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

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

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

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

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

MS. SMITH: Okay. Ms. Cox?

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

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

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

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

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

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

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

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

MS. SMITH: Professor Decherney?

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

So it is a broad exemption.

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

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

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

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

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

Mr. Mohr?

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

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

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

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

rulemaking from that point as it goes forward.

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

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

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

MS. SMITH: Professor Tushnet?

MS. TUSHNET: So I was just going to say

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

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

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

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

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

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

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

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

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

MS. TUSHNET: So --

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

MS. TUSHNET: No, so --

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

separately.

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

MS. SMITH: Yeah.

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

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

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

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

MS. SMITH: Okay.

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

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

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

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

MR. WILLIAMS: Yes.

MS. SMITH: Okay.

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

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

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

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

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

by saying substantial.

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

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

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

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

virtue of the TPM.

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

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

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

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

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

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

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

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

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

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

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

MS. SMITH: So --

MR. PANJWANI: Sorry. Go ahead.

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

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

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

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

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

MS. SMITH: Thank you. Mr. Mohr?

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

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

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

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

MS. SMITH: Thank you. Mr. Turnbull?

MR. TURNBULL: A couple of things.

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

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

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

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

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

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

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

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

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

I think it should be enough to show that

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

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

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

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

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

and from the Manager's Report.

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

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

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

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

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

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

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

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

And it's actually exactly the same here.

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

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

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

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

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

This is about access.

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

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

MS. SMITH: Thank you.

MR. DECHERNEY: Yeah. Back to the

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

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

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

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

Is it working for everyone? Mr. Panjwani?

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

MS. SMITH: Okay.

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

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

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

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

MS. SMITH: Thank you. Mr. Williams?

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

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

MS. SMITH: Thank you. Mr. Mohr?

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

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

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

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

MS. SMITH: Thank you. Ms. Cox?

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

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

MS. SMITH: Thank you. Professor Decherney?

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

MS. SMITH: Can you turn on your microphone?

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

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

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

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

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

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

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

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

MR. DECHERNEY: Sorry, just anecdotally, so

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

They're still helping, but just --

MS. SMITH: Right. Mr. Williams?

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

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

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

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

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

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

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

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

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

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

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

And so, last cycle, I think in an admirable

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

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

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

MS. SMITH: Thank you. Professor Tushnet?

MS. TUSHNET: So I would again in terms of

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

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

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

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

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

definitely not envisioning the celestial fridge or the celestial tractor.

MS. SMITH: Thank you. Ms. Greene?

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

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

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

such as the FCC.

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

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

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

MS. SMITH: Thank you. Mr. Turnbull?

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

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

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

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

MS. SMITH: Sure. Go ahead.

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

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

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

MS. TUSHNET: Can I quote you?

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

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

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

MS. SMITH: Mr. Williams?

MR. WILLIAMS: Thank you. I agree

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

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

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

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

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

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

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

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

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

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

Mr. Mohr?

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

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

MR. AMER: Mr. Panjwani?

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

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

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

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

I think the car example is a great one in

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

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

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

MR. PANJWANI: I believe hackers will hack

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

MS. SMITH: Sure. Mr. Williams?

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

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

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

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

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

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

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

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

The same thing's true about fair use.

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

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

MS. SMITH: Thank you. Mr. Turnbull?

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

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

MS. SMITH: Thank you. Mr. Panjwani?

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

Mohr were talking about earlier regarding

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

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

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

Thank you very much.

MR. AMER: Thank you.

(Whereupon, the foregoing went off the

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

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

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

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

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

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

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

MS. SMITH: Mr. Band?

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

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

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

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

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

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

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

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

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

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

MR. GOLDMAN: Andrew Goldman, Knowledge Ecology International.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. SMITH: Thank you. Mr. Band?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. AMER: Well, that's fine.

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

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

out the proposal.

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

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

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

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

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

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

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

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

MS. SMITH: Thank you. Professor Tushnet?

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

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

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

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

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

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

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

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

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

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

MS. SMITH: Thank you. Mr. McClure?

MR. MCCLURE: Sure, yeah. Thanks.

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

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

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

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

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

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

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

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

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

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

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

Decherney talked about the differences.

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

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

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

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

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

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

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

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

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

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

MS. SMITH: Yeah.

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

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

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

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

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

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

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

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

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

MR. BUTLER: Oh, absolutely.

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

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

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

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

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

MS. SMITH: Ms. Castillo?

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

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

MR. AMER: A presumption of --

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

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

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

And then, the other issue I've heard is that there seems to be some favoring of an automatic renewal presumption. And the problem with that is that then that would be very similar to having permanent exemptions. And that is something for the panel tomorrow. But for purposes of renewal, I think it's important to take into account that having this proceeding every three years helps to account for changes in the marketplace. And if we have an automatic renewal presumption, then that would sort of take that away.

MS. SMITH: Thank you. Mr. Geiger?

MR. GEIGER: So we hire a lot of security researchers and white hat hackers and we also work with a large number of independent security researchers that we do not employ. And most of these researchers are working either solo or as part of some very small shop. And most of them, the vast majority of them do not possess the requisite legal expertise to even deal with cease- and-desist letters

telling them to stop their research, often making vague claims about DMCA, let alone for engaging in the temporary renewal process.

So from our perspective, we absolutely support a presumption of renewal and it sounds like these are the fault lines, based on what the rest of the panel has been saying, and obviously where we come down on it. When it comes to the burden of the initial filing, Mr. Sheffner had suggested that it should be the proponent of the exemption that makes that initial filing. We would support an automatic renewal. And the idea that it would just be one page I'm not sure is going to hold for very long.

This is one reason why I think that the opponents ought to be the ones who make the filing. That one page could very well expand, unless it's restricted to a single page. And then, every word on that page is going to get litigated and you will once again need legal expertise in order to make a good filing, one that does not trip you up later down the line.

When it comes to the -- losing that presumption of renewal, we've talked about whether there should be meaningful opposition that cancels the presumption of renewal. And I don't think that that's

the right standard because if anybody objects, which is Mr. Sheffner's original proposition, if anybody objects and we shunt into the original process again, but as we have seen in previous rulemakings, the same arguments are trotted out over and over again.

There's no reason why those same arguments would simply just not be trotted out again and then cancel the presumption and shunt you back into the original process. And then, what really is the presumption worth, except for something that is completely unopposed.

When it comes to -- so instead, instead of meaningful opposition, I think a better standard would be whether or not there has been some sort of material change in circumstances.

We've talked about changes in the marketplace, changes in technology and so forth. Those types of changes are different than simply meaningful opposition. I think that that would be a better standard.

MR. AMER: So the -- oh, sorry. Go ahead.

MR. GEIGER: Go ahead.

MR. AMER: So the presumption would kick in automatically and then just the burden automatically would be on opponents to establish a material change

in circumstances?

MR. GEIGER: Yes, that's right. And I'll take it a step further, which is to say that -- two things. One, if we're talking about an expansion above and beyond the original exemption, we think that the process ought to then be about that expansion, as opposed to the expansion plus the original.

And lastly, and this goes to the evidentiary standard for the exemption, not just a renewal, we don't think that non-copyright interests that go beyond protecting copyrighted works or protecting the availability of copyrighted works ought to figure in to the denial of the exemption, including a rebutting of the presumption that you would get the exemption again.

MR. AMER: So I think that leads right into another question. As you indicated, the proposal that Mr. Sheffner outlined, I think, as I understand it, is premised on lack of opposition, lack of meaningful opposition or some variant of that. We have another alternative which would be -- which would provide that the presumption would kick in automatically.

I wonder if panelists have views about which model is preferable? And if the standard is meaningful opposition, what would that mean exactly? Would the

Copyright Office have some sort of discretion to make a determination as to how meaningful an opposition is? We'd be grateful for your thoughts. Mr. Sheffner?

MR. SHEFFNER: Thank you. So we do oppose the idea of a presumption of renewal of previously granted exemptions. And Ms. Castillo touched on some of the reasons. But I want to expand a little bit.

First thing I'd say is don't necessarily listen to my reasoning. But I would just point you back to the Copyright Office's own reasoning back in the rule issued on October 27, 2000. And I won't repeat what the Copyright Office wrote there. But in sum, the Copyright Office looked at general principles of statutory construction and administrative law.

And again, summarizing, essentially what the Copyright Office concluded from looking at the legal authority is that essentially when you have a statute and then you have exemptions to that statute or exceptions to the statute, again, those rules of statutory construction and administrative law say that, one, the exemption should be construed narrowly and, two, that the burden should be on the proponent of those exemptions.

So again, the Copyright Office concluded this based on sound legal reasoning back in 2000.

And I don't think there has been any change in the general principles of statutory construction or administrative law that have changed.

That said, I want to emphasize that the discussion we're having is largely academic for two reasons. One is, as I stated previously, at least in the last round, and I think this is sort of becoming the practice, there is virtually no opposition to previously granted exemptions.

Just as a matter of fact, even those who previously opposed an exemption are sort of looking at the state of affairs once it's been granted and say, you know what, for whatever reason, whether we can't come up with a showing of harm or just a sort of political recognition that the Copyright Office is not likely to reverse a determination they've made in the past, we're simply not opposing that.

And the other thing I want to emphasize is that although the burden should remain on the proponents, we're only talking about a presumption here. So if you had no presumption, you'd assume both sides start at 50/50. If there is a presumption -- if there is a presumption of nonrenewal or not a presumption in favor of renewal, the proponents start at 49 and the opponents at 51.

But again, as long as they make some sort of minimal evidentiary showing that they are entitled to that exemption under the statute, they will overcome that presumption and therefore the Copyright Office would be entitled to get out of their rubber stamp of renewal.

MR. AMER: Mr. Turnbull?

MR. TURNBULL: I think I'd agree with pretty much everything that was just said. But let me just add that, I mean, truly it seems to me that the burden on making the initial statement, yes, we want to renew, I mean, could be -- I mean, it could be a checkbox on a form. And if the Copyright Office emails that form to the prior proponent and says do you want to renew exactly what you got before, and you check the box, I mean, as far as I'm concerned, that would be a sufficient filing.

I really did not mean this to be any kind of a burden. I mean, that's the -- but it seems to me that under the statute, you do need to go through the process of actually getting a request. You can use, as we said before, the prior evidentiary record as the basis for that.

That satisfies the requirement that this be done in a rulemaking, it seems to me. And the

opposition -- I'm sort of trying to come up with - - I understand the point about making the same argument all over again.

That does seem to be a waste of everybody's time, except maybe for the lawyer who bills by the hour. But the -- so there is some kind of changed circumstances, changed argument, there was a change in the law that something that people thought was fair use was found not to be fair use or there was an abuse of the prior exemption or somebody actually came forward with a circumvention tool that turned out to be a huge problem in the marketplace.

I mean, those are the kinds of things that I can imagine often as an opponent coming forward and saying, hey, you really ought to look at this again. Those are the kind of changes that I would see as needing to be brought forward.

That's not a matter of presumptions or burden shifting in my view.

It's just a matter of practical -- as has been said -- as a practical matter, DVD CCA has not opposed the previous exemptions that were granted and I don't foresee doing so in the future. Again, absent some specific change.

And there, I think we ought to be able to

come forward and say there's been a change and here it is.

MS. SMITH: Thank you. Mr. Band, do you want to speak following up on this question of whether the ease of showing whether there's changed or unchanged circumstances as sort of a precondition to renewing an exemption?

MR. BAND: Yes. So it seems to me that to some extent this whole discussion of presumptions and burden shifting is not really appropriate to a rulemaking. I mean, those are terms that are much more appropriate to an adjudicatory proceeding.

And this rulemaking has, for whatever reason, has over time taken on more and more of this adjudicatory quality to it. But it's really not necessary. And it seems that, getting back to your earlier question about, you know, yes, the statute would require the Librarian to make a determination that harm is occurring or is likely to occur.

I mean, to some extent, that can, in this renewal context, occur if the checked box says do you want to renew this exemption because you are being harmed or likely to be harmed over the next three years.

And then, that would seem to me, you know,

just on its face, that statement plus the incorporation of the administrative record from the previous rulemaking would be sufficient for the Librarian, on the basis of sort of making -- you know, looking at I think if we just -- the rubber stamp is probably not -- might not pass APA muster, but that the Librarian, based on that record, would say, well, you know, a good case was made three years ago.

There doesn't seem to be any changed circumstances. These people say that they're likely to be harmed. Okay, again, I will approve it. I don't think we need to start getting into burden shifting, presumption, all that kind of stuff. Now, it is conceivable that someone will come out of the woodwork and say, no, I don't want this renewed. And again, we're talking -- now, I agree, if we want an exemption expanded, you know, that's on us to talk about why it should be expanded.

But if we're just talking about, you know, the renewal of -- the renewal of the existing one then conceivably if someone comes in and says, no, it shouldn't be renewed, that's something that the Register would look at in the recommendation to see whether they made a sufficient -- you know, whether what they said was sufficiently compelling about

changes or whatever.

But conceivably, in the notice soliciting comments, you would explain the kinds of things that you would be looking for.

But again, I don't think we need to start talking about evidentiary burdens or anything of the sort.

I mean, these would be things that would be considered in the course of this determination, in a rulemaking context as opposed to an adjudicatory context.

MS. SMITH: Well, so I think with the check the box and rubber stamp, we'd lighten the workload of the Copyright Office. But I think --

MR. BAND: Which is our objective.

That's why we're all here.

MS. SMITH: Well, that's great. But from a rulemaking perspective, I wonder if we can speak a little bit more about whether - - the Office has previously said that a declaration of unchanged circumstances could be considered in renewing any exemption.

Are there ways that we could use that or build upon that to make the renewal of previously granted exemptions easier? So Professor Tushnet?

MS. TUSHNET: So you asked earlier on, and I think this is another version of it, whether a one-page statement could meet the statutory burden as the Office has interpreted it. And I think the answer is absolutely yes, right? If it says nothing has changed. In other administrative proceedings, facts that aren't contested are routinely accepted, even without going back to the bedrock.

I mean, certainly if you do want to look at the PTO as a model, in fact you can rely on things like a statement of five years of uncontested use. The PTO can actually rely on that not just to say that there's been five years of uncontested use, but that that has a legal consequence that the mark at issue has developed a secondary meaning. So it's actually perfectly standard to accept things like that.

Now, I also would like to say a little bit about the meaningful opposition question. So this is just specific to our experience with the remix exemptions. What we hear in the remix exemption proceedings is the statement our arguments about the facts and the law apply to both existing and proposed exemptions, but we do not oppose renewal. And if you go back and look, you'll see that structure in basically everyone's proponent comments.

And one question I would have for this meaningful opposition standard is how are we going to interpret a claim like that? Does that represent meaningful opposition to the existing exemption? Since it's an argument against it, would we just not take it to its logical conclusion? And let me just with my law professor hat on, so if the evidence is relevant to both the existing and proposed expansions, then an adjudicatory model does allow you to ignore that fact because parties are allowed to make strategic concessions, right?

But a rulemaking model might not. And so, one thing at issue here is to decide what this proceeding would be. And once we have a better grasp on that, some of the answers will follow.

But I think right now, we actually are, as Jonathan was saying, we go back and forth. Some is adjudicatory. Some is rulemaking. You know, and that's part of what makes it difficult.

And then relatedly, just again for the remix specifically, in terms of meaningful opposition, as a practical matter, I expect that the opponents will always come back saying, hey, there's a new screen cap program out, you know, there's a new processor. It's faster and it's better. And, you know --

MS. SMITH: But you've heard next to you --

MS. TUSHNET: Yeah.

MS. SMITH: -- the general opponents saying they won't do that. They don't oppose the existing ones.

MS. TUSHNET: But I encourage you then to go back and look at the comments because they're absolutely right. They're saying they don't oppose it. But the arguments they make -- and they say this too -- the arguments they make apply to both the existing and the proposed extension. But they are not opposing. And so, one question for you as decision-maker is what consequences ought that concession, if it is a concession, have? Right, does that count?

MS. SMITH: Sure, and just since our goal is to build consensus, I think in the past the Office took them at their word when they said they were not opposing and held them to that as opposed to saying, well, some of your arguments on the expansions would apply to the existing.

MS. TUSHNET: Well, so, and I understand, and my point is simply that that makes sense in an adjudicative model. But if you're really thinking about this as being a rulemaking fact-finder with independent fact-finding obligations, then that is an

intrusion into the model. And at the very least, we should talk openly about that. And this is somewhat a statement against one's interests, I admit. But again, I'd like to know the answer.

MR. AMER: Mr. McClure?

MR. MCCLURE: I'd just like to make one more quick comment maybe about the idea of presumptive renewal, which is that it's -- an organization is tied to this -- if you don't presumptively renew, then you have one organization, the original proponent perhaps, being tied to this exemption, process after process. And I think the point was made by Mr. Butler and Mr. Geiger that once the exemption's granted, it's something that benefits the public at large who falls within that class, right?

It shouldn't have to be one organization that comes back and year after year, you know, sort of lives in fear that someone is going to present meaningful opposition and they're going to go back into this hundred-hour, thousand-hour process. So to the extent that an exemption would be presumptively renewed, the burden on that particular organization would be relieved.

MR. AMER: Thank you. Mr. -- Professor Decherney?

MR. DECHERNEY: I just want to expand a little bit on Professor Tushnet's point. The structure of the comments I've seen from the DVD CCA, the MPAA is always, in theory, we're not opposed to the renewal. But we think it could be limited in these 10 ways, 20 ways. And we actually spend a tremendous amount of time refuting each of those ways in which it would be limited. And much of the hearing time is spent discussing those.

So even though it says it's not in opposition, it is in fact opposition. Just one other structural issue, which I know -- we mentioned it in comments but it hasn't come up here and I just wanted to bring it up is, you know, if you do a brilliant job drafting the previous exemption, then you've actually eliminate this problem for three years.

And so, it's hard to show that the harm that existed three years prior still exists because the problems have been solved. You can show that the exemption has been made use of or caused problems, led to infringement. But you can't show the exact same -- the exact same harm that was there before.

MS. SMITH: So you think you can't show unchanged circumstances because you made the --

MR. DECHERNEY: I mean, that's true in life,

yes.

MS. SMITH: Thank you. Mr. Turnbull?

MR. TURNBULL: I think the point's been made about the nature of the filing in the comments -- fair points. And I think the Office has appropriately taken those, as was indicated.

I think the procedure that we're now talking about would probably eliminate that approach to the comments because you'd be forced up front to either say there are meaningful differences and there are changes or not. And so, I think that the procedure would naturally eliminate that sort of problem.

I think the -- and then, would force us to say, gee, was there really a change that we want to argue here with regard to the old exemption or is it something where we want to say no, that we're only going to argue with whatever the change is. And I understand that that -- and the points that have been made are fair on that.

The other thing is, I mean, throughout - - sending an email to a previous applicant with a checkbox, I wouldn't rule out somebody else coming in and saying I've been taking advantage of this and I want this renewed, even if the organization that originally filed -- I didn't mean to preclude that. I

was just trying to be helpful in making it easier.

So I think anybody who can represent that they are taking advantage of the exemption and believe it should be renewed as previously stated ought to be able to make that application. And then, we would have to decide whether there's a reason to oppose.

MR. AMER: Mr. Cazares?

MR. CAZARES: So from the perspective of people with disabilities, I know that the National Federation of the Blind fully supports presumptive automatic renewal. I think many at this table remember the 2010 cycle when another disability organization, the American Foundation for the Blind, was very -- came very close to losing the exemption that they had previously renewed because of evidentiary requirements.

So I think there's something to be said for taking into account the points that have already been raised by the Copyright staff and other panelists about the statute and the limitation that the Librarian has to keep in mind.

I think it's safe to say, particularly for blind and print-disabled individuals, that within three years, our status as blind and print- disabled people really isn't going to change and that it can be

argued that we would be adversely affected by not having an exemption.

So I think that NFB fully supports what Mr. Goldman and others have already brought up.

But there is something to be said about finding some mechanism where we can simply say we're requesting an exemption under the given rules.

Now, not to bring up another point, I think it's important to consider where the burden of proof is right now.

I think Mr. Band made a really good point that this is more of an adjudicatory issue.

But that's because these are the circumstances that we have now. I think there is something to be said from shifting the burden from the proponent to the opposition. So I just wanted to make sure that that was clear, at least for people with disabilities.

MR. AMER: Thank you. Mr. Geiger?

MR. GEIGER: So it sounds like we've heard some more consensus than perhaps we had originally thought on what meaningful opposition ought to look like and perhaps it should be something more like a change in circumstances.

So I want to draw back to an earlier comment

that I had made, which I know relates also to the panel on the evidentiary standard, which is that in thinking about whether to renew a temporary exemption, it's our position that interests that do not have anything to do with protecting rightsholders or making copyrighted works available, we do not think that those should be considered for denying the exemption. In addition -- you know, or at least have them as a very clearly carrying much lower weight.

From the perspective of security researchers, most of the opposition that we have seen so far to the exemption that we had asked for relates not at all to copyright. It is about safety largely. So we have, for example, a vehicle practice and we're looking at cybersecurity flaws in vehicles with the goal of making those vehicles safer. We saw opponents talking about the possibility that owners of cars would circumvent emissions controls or modify their vehicles in a way that is not safe.

These things are already illegal. In the last panel, it was brought up, well, what about the hacker that says they want to hack the nuclear power plant. That's also illegal. That's all illegal under the Computer Fraud and Abuse Act. By in large, the DMCA we're talking about are computers that the

security researcher already owns.

And copyright law, and 1201, are not the appropriate tool to use to protect these non-copyright interests. There are already specific government agencies with greater expertise and in many cases already regulations on the books prohibiting these very same kinds of acts. So that is our position, not accommodating non- copyright interests for denying the exemption.

MS. SMITH: In the specific case of security researchers, 1201(j) is a permanent exemption. And I know you're going to speak tomorrow. I mean, is that perhaps a better even to perhaps just sort of update that to the extent that it needs updating so that security researchers can rely on it as opposed to, you know, tinkering with the whole mechanism of the rulemaking process?

MR. GEIGER: One hundred percent, yes.

And I mean, I'm in the same position as --

MS. SMITH: Mr. Butler.

MR. GEIGER: -- Mr. Butler. We think that this is less preferable than updating the permanent exemption. Part of the problem with even a change in circumstances is that technology will evolve. Security research will also evolve. It will present

new circumstances, probably not new circumstances related to making copyrighted works available, but new circumstances, new safety dangers, things like that.

And those safety dangers should be dealt with by the agencies that are directly responsible for working on safety. So yes, 100 percent, the permanent exemption. We have specific ideas on how to change it and we can talk about it tomorrow or now if you wish.

MS. SMITH: Let's save it for tomorrow.

MR. GEIGER: Sure.

MS. SMITH: Go ahead.

MR. SLOAN: I just have a quick question going back to relying on the prior record from when the exemption was originally granted. Is there some point in time when relying on that old record would get stale?

You know, it seems like maybe if you're relying on the argument from three years ago, it might still be okay. But what about when you're 10 years, 20 years, because it keeps getting renewed without opposition? At least working within the current statute, it says that the determination is whether users are or are likely to be adversely affected.

So at what point -- is there some point when relying on that old record and a checkbox, does that

become problematic within the current statute? Mr. Band?

MR. BAND: So what I would imagine that even after checking the box, that those of us -- someone in Washington will show up at the hearing.

And so --

MS. SMITH: I think we don't have the hearing if you check the box, though. I think that's what we're --

MR. BAND: Well, no, I'm --

MR. DECHERNEY: (Off mic) -- right hearing --

MR. BAND: Right, or you -- it can be -- we can meet for lunch over in the cafeteria. And you know, but it could be something very -- if there's a sense that there needs to be revising of the record, that can easily be done. It doesn't need to be -- the point is it doesn't need to be - - we don't need to make this more complicated than it needs to be. Let's keep this simple.

And so, I think the idea of, if you want to say, okay, let's have a quick hearing, I'll come in on behalf of the education community or I can work on behalf of the blind. I mean, someone can come in and we can talk about it and say are you still using this exemption. Yeah, we're still using it.

You know, Rebecca can come in and say are -- are people still making remixes? Yeah.

They're still making remixes. It doesn't need to be -- and the possibility -- so there's someone who can come in. It's just a question of does Rebeca have to come forward with all these examples of remixes that have been made in the last three years or does the NFB have to come forward with statistical data on the number of blind people who are making use of the exemption. I mean, it's that kind of burden. But you know, it's a problem that can easily be addressed down the road if necessary.

MS. SMITH: I mean, the only thing I will say is given that we have to have these as a triennial rulemaking, which means every three years, to have the short and then the medium and then the long I think could get complicated very quickly. So any reform I think the Office would want to make sure that it's not increasing the complexity of an already complex rulemaking.

So I don't know if you wanted to speak to that, but --

MR. BAND: Just to --

MS. SMITH: Yeah.

MR. BAND: Related to that, I mean, the

other way -- not only is it a matter of these renewals, but you could -- again, in my interest of reducing your workload, you can reduce the number of categories or number of classes. So you know, we've had -- we've grown from one class that basically covered all educational uses and documentary films and remixes and noncommercial works and now there's probably like, I don't know, eight or nine classes covering that.

You know, we could go back to -- or at some point come up with one class and just keep things simple. Certainly in the case of if you look at the -- of the 22 exemptions granted in this past rulemaking, more than half dealt with embedded software. We don't need to have 11 or 12 exemptions. You could have one, you know, properly crafted would take care of that problem.

And you won't have to worry about regulating the automobile industry. You know, let someone else do that. That's not your job. And so, but the point is these things can work in tandem to really streamline this whole process.

MS. SMITH: Professor Tushnet?

MS. TUSHNET: So Jonathan -- sorry.

Jonathan covered almost exactly what I

wanted to say. But let me just reinforce that by linking it with Mr. Cazares' point, which is it's not just patterns of protected use -- of classes that persist over time, but patterns of uses persist over time, which is why we talk about things that are non-infringing or categories of fair use. So people have really mapped those pretty well, Pam Samuelson, Michael Madison, they've done it. And those can be expected to persist over time.

In terms of, you know, don't complicate an already complicated rule, I think what we are saying is, you know, if you change the definition so that they're 44 words long, again, like they used to be, then you wouldn't -- then even having a short, medium and long form -- which I don't think you should do -- would actually represent a substantial improvement.

MS. SMITH: Thank you. So I'll call on Mr. Sheffner next and I wanted to just tee up the next question, which is how should we separate -- whether there's an administrative or statutory change dealing with new exemptions, you know, or new technologies, the expansions versus the renewal of the previously granted exemptions.

Because I think, again, some of it is that technology does evolve and this rulemaking process is

supposed to be able to accommodate those evolutions.

MR. SHEFFNER: Right. So I just wanted to address briefly Mr. Sloan's question about sort of stale, old evidence. I mean, like Mr.

Turnbull, we would not oppose the ability of proponents to incorporate by reference evidence that has been submitted in previous rulemakings.

So is it possible that evidence could get stale?

Yes. It is. But I think that it's largely a self-correcting mechanism. I would envision a revised system and it's this.

So if a proponent goes in there and files their one-page or one-checkbox form, however it turns out, and they say, you know, and we hereby incorporate by reference all the stuff that we filed in the previous rulemakings, the potential opponents of that exemption will look at that.

And in deciding whether or not they're going to oppose this previously granted exemption, one of the things they will ask themselves is has the situation on the ground changed. It could be a change in the case law. It could be a change in business models. It could be that there's new technology that enables you to do what you want to do without

circumventing DRM. And it could be that the evidence that was submitted truly is stale and doesn't reflect the current situation on the ground.

And if it is -- again, what I think is going to be a rare instance of opposing a previously granted exemption, they would have the opportunity to do it and say, you know what, we actually do have meaningful opposition here. We think the situation has changed for the following three reasons. And you know, actually the evidence they incorporate by reference is indeed stale.

MS. SMITH: Thank you. Did you also want to comment on the second question, which should be what about a new technology, for example, if there is a petition for an exemption for 4K versus we're renewing something for DVDs? How should the rulemaking process deal with renewal of the previous exemption as well as consider some of the issues with a new petition?

MR. SHEFFNER: Sure. I think I touched on this in my answer to your very first question this afternoon, and it's this. We would support a streamlined process for dealing with sort of renewal of the exact same exemption.

To the extent people want to expand that

exemption, I think they're -- in practice, it may be streamlined because the part of the renewed --

I mean, if you have an exemption -- a previously granted exemption asks for this. And then, the requested new exemption is this, what I'm saying is we don't have to fight again over this. But to the extent that they ask for this much more, yes, we think the burden should remain on the proponents of the exemption.

And you know, we'll go through the regular process about that. It'll be a lot smaller fight than having to fight over the whole thing. It will just be fighting over this much.

But again, the sort of streamlined part should only technically apply to exactly what was previously granted.

MS. SMITH: Thank you. Mr. Butler?

MR. BUTLER: Yeah. So I think -- I think that's largely true, that certainly the presumption of renewal that we've all sort of agreed on would not apply in the same way to an incremental increase. So going from the existing DVD and Blu- Ray to 4K.

But on the other hand, I would hope that some of the logic that underwrites that presumption logic that we've all sort of come to agree to would

mean that that process would -- that the arguments about 4K or whatever the new format is could be a little shorter because we would all already agree that the planned use is lawful, right? Like if it's fair use with a DVD, it's also fair use with a Blu-Ray, it's also fair use with a 4K. So that would already be established.

And the adverse effect, some of the sense of what is the pedagogical use of media in a media class, right, all of that stuff would already be on the record. So hopefully it would be a much shorter argument about why, if anything -- what, if anything, makes 4K different from DVD or Blu-Ray in terms of meriting an exemption or whatever.

MS. SMITH: Mr. Turnbull?

MR. TURNBULL: Actually, I think I agree with most of what you just said. I think from the technology provider, however, there is a substantial difference between a technology that is 10 years old and a technology that has just been launched and the considerations.

And we think that the Copyright Office should and has made with regard to new technologies and the harm to the development of the market -- again, going back to the original purpose of the

circumvention provision of the DMCA, which is -- which is not merely to stem piracy, but also to enable new markets.

And so, the enabling of the new market for 4K may have a different dynamic than the situation with regard to Blu-Ray, which is now 10 years old. So I think that -- so I think -- I do think that there's a substantial difference between -- and you can't just sort of automatically apply whatever the reasoning was with regard to DVD and then Blu-Ray and then, you know, whatever.

MS. SMITH: Okay. So Mr. Band, it seemed like Mr. Butler and Mr. Turnbull at least agreed on something. Do you want to undo that or --

MR. BAND: Oh, no. No, no. I just want to basically -- and this is kind of very difficult for me to be in the situation of agreeing so much with Mr. Turnbull and Mr. Sheffner.

But the -- I just think getting back -- one of the things that you can do in building on the issues that Bruce has identified is that in this process the Copyright Office can help manage -- and again, with the aim of reducing your workload -- okay by now what the issues are in general terms with this whole DVD/Blu-Ray, educational use, remix use and so

forth.

So you know, one can easily imagine that there's going to be -- we'll make -- say we want to renew plus we want to expand. And then, they'll say, well, we have no problem with renewal. Okay. We have this issue with expansion. And then, you know, there could almost be like a pre-hearing conference where you guys say, okay, this is what we think. We want to hear this, we want to -- you know, where you can sort of iron out, figure out what it is that you need to -- what you need to know from us. And that way, it could ultimately reduce our burden with respect to -- but the point is it could reduce your burden as well.

You know, we're talking -- in terms of what's being renewed, we're talking about a relatively small universe of things that we know now have been -- so that this cluster of the motion picture- related issues, the issues with respect to the screen readers, maybe one or two others.

And so, there's nothing -- I don't see why you can't have at some point in the process a meeting with us where we kind of say, okay, this is -- what is it that you need more and what is it that we're going to give you more. And so, that way it will just -- instead of, again -- sort of reinventing the wheel, we

can really move the process along dramatically.

MS. SMITH: So it sounds like you're saying short of a statutory reform, if the Office provided some guidance as to what quantum of information we thought would be useful for the Register to make the recommendation to the Librarian in advance or maybe sort of iteratively working with the parties, that that could be helpful to streamlining this and avoiding for the renewals, the type of rulemaking process we had for the new petitions.

MR. BAND: Yeah. No, I think that that's right. But again, it's -- I'm trying to push you to be a little more informal. And I think that that could make the process work a lot better.

MS. SMITH: Thank you. Mr. Butler, anything to add or --

MR. BUTLER: I just wanted to add that the flipside of what Mr. Turnbull was saying about when a format is young, the market realities about that format will be thus and such. And there will be a similar -- there will be, of course, a mirror image on the side of the proponents.

When a format is young, the kinds of harms that we've typically shown for young formats are, you know, there are these titles that are not available

on the -- you know, right -- and we're told, well, that's just one or two titles. Well, it's because it's a young format. So there's an interesting mirror image thing that happens here and maybe these young formats really will benefit from getting their own kind of hearing where all of that stuff can sort of come out.

MS. SMITH: Thank you. Mr. Sheffner, did you want to add something? Oh, nope? Okay.

Mr. Turnbull, good?

MR. TURNBULL: Yeah. I mean, I -- we're having this wonderful agreement session here. And I think that what Mr. Band was talking about would make sense and would be helpful in streamlining.

I mean, I think that, again, the -- and getting and having some kind of process with the Office to sort of work with the parties to say, okay, what makes the most sense to have a hearing about would make sense.

I did want to comment just briefly on the nature of the rulemaking. And this has -- this has always been sort of a hybrid in a lot of respects between sort of the adjudicatory model and the notice-and-comment rulemaking model.

And it seems to me that that's sort of

inevitable in the process because I think it's unrealistic nor do I think Congress thought that it was going to happen, that the Copyright Office would go out and know what 200 million people might be doing with any given copyrighted work.

And so, the people who have the need to use something are the people with the information to come forward and say this is how we want to use it and this is why this is a problem for us. And you know, at the end of the day, the Copyright Office has the obligation to come out with a rule that reflects the evidence and, notwithstanding the comments about the Commerce Department report, I think that is very instructive still.

You know, they talk several places about evidence and about a record and that sort of thing. So I think that having evidence in the record is an important element of this rulemaking.

But it is -- in other respects, it doesn't have the sort of adjudicatory feel to it.

One of the comments that was made earlier, I think by Mr. Williams, about the possibility of then having a proposed rule, you know, put forward would then sort of maybe complete the cycle. That would then feel more like the notice-and-comment rulemaking.

But all of the rest of it leading up to it would be fact-finding that the Office would need in order to know what to put forward in a proposed rulemaking. And we would be okay with that as a process and we're okay with the process mostly as it is. But --

MS. SMITH: Thank you. So the next question I feel will probably spark dissent. One of the participants -- ESA is not on this panel -- had suggested a streamlined process for rejecting a proposal, saying, you know, just as we renew exemptions, we also will end up rehashing the same proposals over and over again that are consistently recommended against.

Should we have a similar streamlining proposal for, you know, a second bite at the apple for something that was denied.

MS. TUSHNET: So, a couple of things. I mean, in general, no, in part because the copyright owner always retains the ability to go to court and hash that out and win either on contributory infringement or infringement, depending on what the activity is. And that would end the exemption and end it next time, whereas if you lose, you just don't get that chance. So it's structurally unequal in the way

that makes mirror image treatment inappropriate.

The other thing though is that considering this rule again requires you to consider the way that all these little additions have been piled on to specific exemptions over the years. So does that mean, for example, are you proposing that we could not go back to the 44-word initial educational exemption? That seems to me like a bad idea, just because it's been loaded with other things doesn't mean that the initial exemption was inappropriate, even though in some sense it's been rejected.

And I think the kind of line-drawing that you would end up doing would be contrary to the goal of simplifying things.

MS. SMITH: Thank you. Mr. Band?

MR. BAND: I guess I would add to that that a problem with sort of like a streamlined objection is that the circumstances do change.

And I suspect also that rightsholders get more comfortable with certain kinds of activities.

And so, just to -- if a proponent is willing to go through the work of amassing new evidence, then the rights holder, if they're confident that their arguments were sound before, they can -- I mean, certainly they can always incorporate by referenc and

say all the argument -- these people haven't said anything new.

So it's not -- you know, we're not streamlining the process. But you know, once you make it clear it's okay to incorporate things by reference or, if they want to resubmit the same thing, if it really is just the same thing all over again, then the arguments as to why it wasn't valid before would apply now, whereas in our situation, it's -- it's different because we have to -- right now you're basically telling us that we have to de novo show that we're going to be adversely affected.

So we have to come up with sort of new examples of how we've been using it in the last three years as opposed to previously. So that's why the symmetry -- it is an asymmetrical situation. And you know, So certainly it could be done in a way -- you could make it clear that there are ways, you know, where they can, if they want to, incorporate stuff by reference. That's fine. But still, the need for a streamlined process I think is very different.

MS. SMITH: Mr. Butler, do you agree?

MR. BUTLER: Largely, yeah. Yeah. I think the key thing is just the incentive to -- the difficulty rather of seeking an exemption that has not

been previously granted is high enough I think to deter folks from -- you know what I mean? That's enough of a burden, that you had better really want it and really believe it.

And so, you know, I think at that point, those folks should be able to get into the process. And the people who don't have enough of an interest will be deterred by the difficulty in doing it.

MS. SMITH: I mean, you would be surprised sort of. We do get a lot of repeat players.

MR. SLOAN: I have a quick question. I just want to go back to the issue of meaningful opposition and what that would mean and what would need to be shown in those circumstances.

So we had talked about showing something, either that it's -- the exemption is not being used, there have been changed circumstances or harm or something to that effect. But I wanted to get your positions on how much evidence -- how much opposition would be needed. It seems that if you had something like a preponderance standard and the proponent is just checking a box saying unchanged circumstances, it would be a -- could be a pretty minimal showing to oppose that.

So I just wanted to get your viewpoints on

where the line should be that would make the presumption -- the presumption of meaningful in that the opposition needs to have something fairly substantive, but not also -- but then, on the other side, not be a huge burden then on the opponent such that you could never really oppose the presumption where that line might be best drawn.

MR. MCCLURE: Sure. Well, I think -- and you can correct me if I'm wrong, but you were saying that the proponent, short of a very short showing, is going to just say like the check the box of the opponent, to kick that back is just to have to overcome the check the box.

MR. SLOAN: Right, to get to more likely than not against a checked box would seem pretty minimal. So I'm just trying to see where the line might be to give both sides a chance --

MR. MCCLURE: Absolutely. And I think certainly ISRI and I'm sure many other people on this panel would want the Copyright Office to be considering the past evidentiary record and have that form the basis of whatever determination of meaningfulness the Copyright Office comes to.

So I think it's really hard to decide this question without having a super clear idea of how much

of that evidentiary record is kind of just pulled into this new discussion versus the proponent having to say affirmatively we've shown this before. You know, here it is again.

But I think our position would definitely be that the meaningful opposition would have to show some kind of significant change in circumstances such that the prior evidentiary record is overcome to some degree.

MS. SMITH: Thank you. I think we're going to try to do one last round. In the spirit of efficiency we've been talking about, we can maybe end a couple of minutes early. Mr. Band?

MR. BAND: Well, I guess the way I would respond to that question is I'm not sure you really need to specify the exact precise level of how material the opposition is or how significant it is. If, you know, Mr. Turnbull or Mr. Sheffner's client, if they make a submission as to why something should not be renewed, you'll look at it and you'll decide whether it is material or whether it has weight or not. And then, you'll decide whether to kick it over.

You know, because this is all going to be -- and I'm not sure how there would ever be a possibility of us challenging your decision whether or not to kick

it over, right, whether to put it in the streamlined process or the other process. I think it would be very hard for us to come up with a court challenge.

So given that you're going to have a fair degree of discretion, it's going to be very hard for us to somehow show that you abused your discretion going one way or the other - - I mean, it would have to be pretty blatant, like, oh, there Band goes again, let's screw him.

You know, but barring that, I don't think -- I think it would be very -- so I don't think -- again, I think let's keep it simple.

Let's not make it so complicated that we get tied up in standards and burdens such that we don't move forward. I think we're in a position where we could move forward pretty easily and not worry about those nuances.

MS. SMITH: Mr. Sheffner?

MR. SHEFFNER: Yeah. I largely agree with what Mr. Band just said. And just to respond to Mr. Sloan's question about sort of what meaningful opposition would look like we were not terribly specific in our own written comments about exactly how the process should work. But let me just sort of spell it out how I envision in kind of non-legalese.

I mean, what I envision is essentially a sort of prescreening process that the Copyright Office would employ before delving into sort of the regular process that we've all gotten used to over the last six cycles or so. So the initial step would be the proponent of a previously granted exemption filing something short. We can argue about whether it's a page or a checkbox or a paragraph or whatever.

And then, the -- essentially what the Copyright Office is going to be asking itself, or should be asking itself, is do we have a real fight here. Do we have a real fight between sort of two sets of arguments or do we have essentially an unopposed request for an exemption? So the opponent of the previously granted exemption, again in this rare case where someone is actually going to come forward and oppose a previously granted exemption, I would just say, again, it's going to be a one-page form and they're going to identify why there is meaningful opposition here.

Is it because there is -- you know, a short description -- there is a change -- they've discovered that there's actually great harm or significant harm from the previously granted -- from the exception to the prohibitions in the DMCA? Is

there changed case law that would touch on whether or not the use at issue was non- infringing? Is there new technology that would -- that would make possible what the proponents want to do without circumventing the DRM? That kind of thing.

Again, a short form that allows the Copyright Office to look at it and say, you know, do this prescreening and say do we have a real substantial fight on our hand or is this essentially a no-brainer where there's no significant -- no meaningful, whatever the right word is -- opposition. And if there is, then again, it just gets shunted back into the regular process.

MS. SMITH: And then, would you think if the Office in its prescreening determined it was sort of insufficient under administrative law principles or something, we could go back and say give us a little more, like Mr. Band was saying, or --

MR. SHEFFNER: Yeah, again, I mean, we haven't -- we haven't specified a whole set of processes. And like Mr. Band, I wouldn't want to make it too complicated. But I mean, I think at a high level, that's what -- I mean, I just explained what I think the Copyright Office should be trying to do is screen out -- okay, are we -- do we have a real fight

here or do we not?

And again, in the vast, vast majority of cases where somebody has gotten an exemption already, there is not going to be a real fight.

There's not going to be an opponent who has shown up. And they're not going to bother to show up unless they really, really have a good reason, that I'm sure they'll be able to identify in a page or two.

MS. SMITH: People will probably hold you to that. Just kidding. Mr. Turnbull?

MR. TURNBULL: I would -- I would agree with that and only add that I think that the nature and quantum of evidence that would need -- or argument that would need to come forward would depend a bit on what the previous grant was.

If the previous grant is this is really a close case, but we think that it's okay and we'll -- you know, we'll go forward, then you may not need as much to come back and say, yeah, there is a real argument here.

If the previous was -- if it's already been granted three times and this is the - - the fourth time around and it's just - - it's just clear as a bell that -- and the opinion, the recommendation is really clear, then it's going to take more to come

back and say, no, there's really now -- there really now is a new argument. There really now is new evidence or whatever. I just -- and again, I think that -- I mean, agreeing that it'll take -- it'll be in your discretion.

But you know, I think that that -- the level is going to be -- it'll be pretty apparent in any given case. And your question about if somebody submits something and you go, well, on its face, that really doesn't do it, but we're not quite sure what you're getting at, yeah, I think you ought to have the discretion to go back and say, you say that there's new case law or you say that there's some new technology. But you're really not describing that.

If we're going to reopen this into a full evidentiary hearing, we need more than that. And you know, maybe not giving -- not extending it out a long time or giving, you know, repetitive. But it seems to me you would have the discretion to do that. I would hope that the lawyers representing the opponents would come forward and do well in the first instance. But if there was a question, I think it's within your discretion to ask for more.

MS. SMITH: Thank you. Professor Tushnet?

MS. TUSHNET: So just briefly, I wanted to

talk about the characteristic or the characterization of checking a box as somehow not meeting your burden. I mean, I don't think that's just checking a box any more than when you check a box saying you've submitted truthful information on your tax return, that that's a meaningless or trivial act. It's an affirmation that the conditions at issue continue to exist, or exist in the case of the tax return.

So it seems to me that in order to refute the box, the checked box, you should have to show those conditions and laws have changed, just like the IRS would want to show that in fact that wasn't your income. You know, and if you want me to, I will submit the entire record from the last three rulemakings as attachments so you can consider them submitted. But that seems kind of trivial.

I mean, I would be happier if you considered the checkmark to be me making that submission. If we all agreed that that was what I was doing, then it seems to me that we -- that we then have a full submission. It's just one that's already in your books.

MS. SMITH: Thank you. Mr. Geiger?

MR. GEIGER: So in this renewal process that we're talking about here, we've talked about having a

one-page of why we -- of meaningful opposition of why circumstances have changed. And if the Copyright Office then, in its discretion, decides that it is in fact meaningful, then they kick it over to the normal process. I would -- unfortunately, it would be a more complex process.

But I would suggest that in between those two actions, you actually give the proponent the opportunity to respond, the proponent the opportunity to say, no, the meaningful opposition is not meaningful and here's why because, you know, otherwise -- and hopefully that will inform the Copyright Office to better exercise its discretion before beginning the long and laborious process of going through the whole temporary exemption again.

MS. SMITH: Thank you. Mr. Butler, I think you may have the last word.

MR. BUTLER: Yeah. So it's getting complicated now, isn't it? The one-pagers are proliferating, which is good for those of us who bill by the hour.

But I don't anymore, so -- and I wonder -- ultimately, I think -- I guess this may be too obvious to say. But ultimately the folks who oppose I think are going to have to come forward with some real

information to explain why they think circumstances have changed.

And so, I don't know -- I just wonder how useful it is, unless the Office is willing, I think, to say based on a one-pager and the opponents are willing to be judged based on a one- pager, like no, we're going no further. That's just not enough. We're not going to listen.

Then perhaps the opponent should just go ahead and come forward with whatever reasons they have, like the full bore, because otherwise how do we know what those reasons are and how do the proponents respond, right?

So if there is information that the opponents have, maybe they should go ahead and disclose it or else, again, maybe we can all agree that sometimes that one page will just be on its face lame and you can reject it. And then, maybe the one-page thing is a good idea, as long as everybody's okay with being killed at that stage and not going forward to the full thing.

MS. SMITH: Thank you. Well, we are two minutes early. So I'll consider that a minor victory. And this panel is concluded. Tomorrow, we start again at 9:00 in the morning talking about the anti-

trafficking prohibitions.

(Whereupon, the foregoing adjourned at 3:00 p.m.)

CERTIFICATE OF NOTARY PUBLIC

I, NATASHA THOMAS, the officer before whom the foregoing proceeding was taken, do hereby certify that the proceedings were recorded by me and thereafter reduced to typewriting under my direction; that said proceedings are a true and accurate record to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

NATASHA THOMAS

Notary Public in and for the

District of Columbia

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I, BENJAMIN GRAHAM, do hereby certify that this transcript was prepared from audio to the best of my ability.

I am neither counsel for, related to, nor employed by any of the parties to this action, nor financially or otherwise interested in the outcome of this action.

BENJAMIN GRAHAM

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