

Capital Reporting Company
U.S. Copyright Office Section 1201 Public Roundtable (05/20/2016)

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UNITED STATES OF AMERICA

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U.S. COPYRIGHT OFFICE

SECTION 1201 STUDY

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FRIDAY, MAY 20, 2016

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The U.S. Copyright Office Public Roundtable
on Section 1201 met at 9:04 a.m., at the James Madison
Memorial Building, Mumford Room, Washington, D.C.,
when were present:

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1 P-R-E-S-E-N-T

2 ALLAN ADLER, Association of American Publishers

3 KEVIN AMER, United States Copyright Office

4 JUNE M. BESEK, Kernochan Center for Law, Media & the

5 Arts, Columbia Law School

6 BRANDON BUTLER, University of Virginia Library

7 GABE CAZARES, National Federation for the Blind

8 KRISTA L. COX, Association of Research Libraries

9 TROY DOW, The Walt Disney Company

10 HARLEY GEIGER, Rapid7

11 SETH GREENSTEIN, Constantine Cannon

12 MARYNA KOBERIDZE, LLM Graduate (IP Law)

13 KEITH KUPFERSCHMID, Copyright Alliance

14 JAMES LOVE, Knowledge Ecology International

15 DEREK MANNERS, National Federation for the Blind

16 CHRIS MOHR, Software & Information Industries

17 Association

18 ANDREW MOORE, United States Copyright Office

19 RAZA PANJWANI, Public Knowledge

20 DAVID M. PERRY, Blank Rome LLP

21 ROBERT S. SCHWARTZ, Consumer Technology Association

22 BEN SHEFFNER, Motion Picture Association of America

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- 1 REGAN SMITH, United States Copyright Office
- 2 JASON SLOAN, United States Copyright Office
- 3 BRUCE H. TURNBULL, DVD Copy Control Association and
- 4 Advanced Access Copyright System Licensing
- 5 Administrator, LLC
- 6 MATTHEW WILLIAMS, Association of American Publishers,
- 7 Motion Picture Association of America, Recording
- 8 Industry Association of America

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AGENDA

PAGE

Session 4:

Anti-Trafficking Prohibitions /
Third-Party Assistance

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Session 5:

Permanent Exemptions

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Audience Participation

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1 9:04 a.m.

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

3 MR. AMER: Good morning, everyone. I think
4 we're about ready to get started. Welcome to the
5 second day of our roundtables for the Copyright
6 Office's study on section 1201. Before we begin, I
7 just would like to go over a few logistical items.
8 Apologies to those of you who heard this yesterday.
9 But first of all, my name's Kevin Amer. I'm a Senior
10 Counsel in the Office of Policy and International
11 affairs here at the Copyright Office.

12 The roundtable sessions will be moderated by
13 us here at the table. We will pose questions to begin
14 the discussion on particular topics. As most of you
15 know, we ask that to indicate that you'd like to be
16 called on, if you could please turn your name placard
17 vertically. Just given the number of panelists and
18 topics, we ask that, if possible, you could try to
19 confine your comments to about two to three minutes.
20 We apologize in advance if we have to cut you off, but
21 we appreciate your understanding on that.

22 We also ask that you please obviously focus

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1 your comments on the specific topics that were raised
2 in the notice of inquiry and that are asked in our
3 questions. And finally, just at the end of your
4 comment, if you could please turn off your microphone,
5 because that avoids interference with the sound
6 recording.

7 Our final session of the day is an audience
8 participation session. And time permitting,
9 additional comments from the participants. For the
10 audience, there will be a sign-up sheet. And again,
11 we ask that comments made in that session be limited
12 to two minutes.

13 In addition, as you can see, today's event
14 is being video recorded by the Library of Congress.
15 Participants, we provided you with a video release
16 form. If you haven't yet signed it, please do so and
17 return it to any one of us here at the table. For
18 audience members participating in the last session, if
19 you do decide to participate, you will be giving us
20 permission to include your questions or comments in
21 any future webcasts and broadcasts of this event.

22 In addition, as you can see, we do have a

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1 court reporter transcribing the proceedings. Finally,
2 we just would like to note that we may seek additional
3 written comments in response to issues that may come
4 up during the roundtables. If we do so, we will issue
5 a formal Federal Register notice as previously.

6 At this time, I would just like everyone in
7 the audience to please turn off or mute any devices
8 that might interfere with the recording. Does anyone
9 have any questions about logistics before we get
10 started?

11 Okay, great. Before we begin, I'd just like
12 to invite my Office colleagues to introduce
13 themselves.

14 MR. MOORE: Andrew Moore. I'm a Ringer
15 Fellow at the Copyright Office.

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

18 MS. SMITH: Regan Smith, Associate General
19 Counsel.

20 MR. AMER: And so, before we begin, I'd like
21 to invite the panelists to just go around quickly and
22 state your name and affiliation.

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1 MR. ADLER: Allan Adler. I'm with the
2 Association of American Publishers.

3 MS. BESEK: June Besek. I'm the Executive
4 Director of the Kernochan Center for Law, Media and
5 the Arts at Columbia Law School.

6 MR. BUTLER: Brandon Butler. I'm the
7 Director of Information Policy at the University of
8 Virginia Library.

9 MR. GREENSTEIN: Seth Greenstein, from the
10 law firm of Constantine Cannon. I'm here today as the
11 aftermarket replacement part for Aaron Lowe, of the
12 Auto Care Association.

13 MR. KUPFERSCHMID: Keith Kupferschmid, CEO
14 of the Copyright Alliance.

15 MR. LOVE: Jamie Love, Knowledge Ecology
16 International.

17 MR. PERRY: David Perry, from the law firm
18 of Blank Rome in Philadelphia, on behalf of Dorman
19 Products, which is an aftermarket auto parts company.

20 MR. SHEFFNER: Ben Sheffner, Vice President,
21 Legal Affairs at the Motion Picture Association of
22 America.

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1 MR. SCHWARTZ: Robert Schwartz, Constantine
2 Cannon. I'm counsel to Consumer Technology
3 Association.

4 MR. TURNBULL: Bruce Turnbull, counsel to
5 the DVD Copy Control Association, and the Advanced
6 Access Content System Licensing Administrator LLC.

7 MR. AMER: Great. Thank you. So this
8 panel, as you know, involves the anti-trafficking
9 provisions of section 1201. And to kick things off,
10 I'm going to turn it over to Regan with a few
11 introductory remarks.

12 MS. SMITH: Yeah. So the anti-trafficking
13 prohibitions of section 1201 are not part of the
14 triennial rulemaking, as I think you know. But they
15 are generally prohibitions upon both access controls
16 and section 1201(b), which applies to copy controls.
17 In many of the comments we received, we heard
18 arguments that the intended beneficiaries of
19 exemptions to the prohibition on circumvention are
20 difficult for the intended beneficiaries to engage in
21 without assistance from third parties.

22 In the most recent rulemaking, the Register

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1 of Copyrights recommended to the Librarian some of the
2 difficulties that have arisen with anti-trafficking
3 prohibitions.

4 She stated Congress may wish to consider
5 clarifications to section 1201 to ensure that the
6 beneficiaries of exemptions are able to take full
7 advantage of them, even if they need assistance from
8 third parties. While the anti-trafficking
9 prohibitions can curtail bad actors seeking to profit
10 from circumvention by others, they also constrain the
11 ability that allows third parties to offer assistance
12 to exempted users.

13 So as the first question to kick off, I
14 think, rather broadly is how effective are the
15 participants feeling that the provisions -- the anti-
16 trafficking provisions have been at encouraging the
17 innovative digital distribution models and deterring
18 infringements. Mr. Turnbull?

19 MR. TURNBULL: In both the DVD and Blu-ray
20 case and now hopefully in the Ultra-HD Blu-ray case,
21 the availability of the content protection systems,
22 the technological protection measures, CSS and AAC3

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1 and now AACCS-2, are essential to the development of
2 those markets.

3 And the anti-trafficking provisions have
4 been essential to the integrity of the licensing of
5 those technologies. Both DVD CCA and AACCS LA have
6 taken advantage of the anti-trafficking provisions in
7 court cases against entities that are distributing,
8 trafficking in circumvention products. They are
9 absolutely essential to the business of both of my
10 clients and to the development of the market where
11 consumers have enjoyed tremendous new ways of enjoying
12 the content in the digital era.

13 MS. SMITH: Thank you. Mr. Adler?

14 MR. ADLER: For the publishing industry, the
15 importance of the anti-trafficking provisions can't be
16 overstated. The fact of the matter is, again, we're
17 dealing with a situation where we're talking about
18 circumvention of technological protection measures
19 that doesn't involve all the complications of dealing
20 with software that has a separate functionality
21 besides the fact that it is serving as a gatekeeper
22 essentially for authentication of who has access to

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1 the works.

2 So if you think about the way the explosion
3 in online subscription services for journals, e-books,
4 and a variety of other content have taken place, it's
5 all taken place because of the ability to have that
6 kind of arrangement where authorized and authenticated
7 access is done by passwords generally. And those
8 passwords can't be circumvented, at least to the
9 extent there's not wide availability of the kinds of
10 tools or devices or services that would proliferate
11 and basically threaten that type of model.

12 MS. SMITH: Can you elaborate for a second
13 on the role of the law there in encouraging these
14 models and protecting the password as opposed to just
15 the fact that there is a password on it or do you have
16 to take -- undertake enforcement activities or do you
17 think it is just a broader deterrent effect?

18 MR. ADLER: Again, as I said yesterday, I
19 don't think the law had the expectation when Congress
20 enacted it that it was going to really be able to
21 prevent or even deter hackers as such. What it was
22 designed to do, as most laws are, is to make sure that

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1 law-abiding people remain law-abiding. And so, the
2 notion that you could have some kind of locks that
3 you're permitted to use -- you're not required to use
4 them, but you're permitted to use them -- without
5 having legal protections against people constantly
6 trying and succeeding ultimately in circumventing
7 those locks would mean that the locks themselves would
8 be ultimately ineffectual.

9 So the law is very important as a general
10 matter, not because it deters or prevents the hackers
11 who are determined to engage in illegal activity, but
12 it generally means that people who are law-abiding
13 citizens will respect the business model and will
14 participate in the use of that business model,
15 understanding why they need to have their
16 authorizations authenticated.

17 MS. SMITH: Thank you. I think Mr.
18 Kupferschmid is next.

19 MR. KUPFERSCHMID: Yeah. Thank you. It's
20 pretty clear I think that consumers in the United
21 States, as well as large and small copyright owners,
22 have benefited from this sort of explosion in

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1 innovation and this explosion of innovation that we
2 see is due, at least in part, because of the
3 protection provided in section 1201 and the anti-
4 trafficking provisions.

5 Those anti-trafficking provisions have been
6 a very, very important part of 1201 since the very
7 beginning. It's our belief that they shouldn't be cut
8 back on at this point. I mean, as Allan mentioned the
9 purpose -- the ultimate purpose is to keep this
10 hacking software out of the mainstream and limit its
11 availability to the infringers so you can't just walk
12 into Best Buy, for instance, and get a copy.

13 But there are other -- many other benefits.
14 It prevents trafficking in circumvention technologies.
15 By doing that, it reduces the attractiveness of
16 commercial business models that are based on enabling
17 access to infringing works. Being able to target
18 trafficking is also important because actions of
19 distributors that circumvent that -- sorry, these
20 distributors of circumvention technologies is
21 comparatively -- I repeat, comparatively easy to
22 detect and targeting them is the most efficient and

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1 effective way to actually enforce 1201.

2 And then, it also helps prevent the sort of
3 capital formation around the black box business
4 dedicated to circumvention of sales of circumvention
5 devices and prevent sort of this arms race, if you
6 will, where a technology is cracked and the black
7 boxes are out there. And so, you have to create a new
8 technology. And it just -- I think that's the benefit
9 of everyone.

10 And just lastly, just to repeat is what
11 Allan said, it ultimately keeps consumers honest, if
12 you will, preventing circumvention tools from being
13 conveniently available at Best Buy, Amazon, Newegg and
14 things like that.

15 That's the underlying purpose and I think --
16 and I think a lot of people agree with me that it has
17 served that purpose and served that purpose well and
18 is in large part responsible for the tremendous boom
19 in innovation that we have today and these new
20 business models that consumers have access to movies
21 and music and all sort of copyrighted works.

22 MS. SMITH: Thank you. Mr. Love, would you

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1 agree with that characterization? Do you have a
2 different take?

3 MR. LOVE: (Off mic)

4 MS. SMITH: If you can turn your microphone
5 on and speak into it?

6 MR. LOVE: No.

7 MS. SMITH: Oh, okay. Well, you had your
8 placard up. So I didn't know if you had another
9 thought you wanted to share.

10 MR. LOVE: Yeah. I do, yes. I mean,
11 there's a wide range of areas where the public
12 interest in having companies protect their works
13 through technical measures are appropriate. But I
14 think as the evidence in this proceeding has shown,
15 and in other proceedings has shown, there's a whole
16 set of areas where it doesn't work out well. It has
17 perhaps like an anti-competitive effect or it defeats
18 people from being able to use lawful exceptions and
19 things like that.

20 So I think that the task for this group
21 going forward is to figure out how do you address the
22 fact that the law covers a lot of stuff and not

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1 everything is exactly the same in terms of the way
2 things play out.

3 To us, part of it's what obligations do you
4 put on people. Part of the answer is what obligations
5 do you put on people that provide -- that expect legal
6 protections from the technical measures. In other
7 words, is there -- can you just do anything and expect
8 to be protected with the full weight of all the laws
9 coming down on your head if you violate anything, no
10 matter what the context or the circumstances is, or do
11 you have any obligation to address some of the other
12 issues that may come up, many which are raised in the
13 proceeding.

14 So part of it's that, and part of it is do
15 you have the same rules for every sector of the
16 economy. Is it the same thing for movies as it is for
17 auto parts, for example, which will be discussed here?
18 Is it the same thing for textbooks as it is for
19 computer games and things? And I think it's a mistake
20 to have a unitary system where everything is kind of
21 thrown together. So I think part of the way forward
22 is to recognize that not all uses of goods present the

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1 same problems.

2 Part of the solution is to -- is to realize
3 that there should be some affirmative obligations on
4 people that expect legal protection in the state to
5 help enforce their technological protection measures
6 to address public interest in areas. And I think the
7 other area is it may be that there's more of a realm
8 for a category of people that are authorized to use
9 circumvention devices under certain contexts.

10 For example, for the area of blind people,
11 it's great that blind people have the right to
12 circumvent. But I mean, it's not something all blind
13 people can do without depending on someone to provide
14 a service for them. Same thing I'm sure is for people
15 that want to fix their own cars or something like
16 that. Not everybody can do these things on their own.

17 But it may be that you -- in some areas, you
18 may feel like you want to have some -- not completely
19 open the door all the way, but you may want to have
20 some sense that the people that are authorized to
21 provide services like that are somehow more
22 accountable and following some more circumspect

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1 things. So I think just in terms of opening things,
2 that's what I wanted to say.

3 MS. SMITH: Okay. Thank you. So that
4 raised a lot of issues, some of which we'll unpack as
5 we go throughout the discussion. But one follow-up
6 question for you, before I let Ms. Besek speak, is
7 yesterday on our first panel, as well as the Copyright
8 Office's study on embedded software devices, which was
9 the panel -- the roundtables two days ago, we talked
10 about whether there was a way to sort of divide the
11 line between software and embedded devices, perhaps
12 not related to the distribution of expressive content
13 such as a garage door opener, a car versus the
14 consumption of books, movies, music.

15 Is that -- it sounds like you think some
16 line on that may be relevant to the anti-trafficking
17 laws? I mean, would you support -- are you suggesting
18 statutory reform?

19 MR. LOVE: Well, I think statutory reform
20 should always be considered. And we would support
21 statutory reform. But whether you do it within the
22 discretion you have, it's a rulemaking, or whether you

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1 do it through statutory reform, I think these
2 distinctions should be followed. I also think you can
3 make distinctions between content such as
4 entertainment products, such as movies or computer
5 games from material that's used in an educational
6 context. It's just another illustration of an
7 additional distinction you can make.

8 MS. SMITH: Thank you. Ms. Besek? Excuse
9 me?

10 MS. BESEK: It didn't go all the way. So I
11 guess I'm not as certain as Mr. Love is about how you
12 can make these discriminations between content,
13 because I think that educators and librarians would
14 say that movies and other kinds of works are very
15 relevant -- you know, music and things like that. So
16 I think one of the difficulties that we all face is
17 how to draw lines. For example, I am sympathetic to
18 the notion that technological protection that protects
19 functional works might be in a different category.

20 However, how do you distinguish between
21 computer software that runs a particular function,
22 car, whatever and the fact that there still may be a

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1 lot of protectable expression in that computer
2 program. We have to make distinctions somehow.

3 The other point I wanted to make originally
4 was that there were a number of comments to the effect
5 that the system isn't working anyway. So why should
6 people be concerned about anti-trafficking exceptions
7 or other exemptions. And I would say that a lot of
8 this isn't a black or white, an either/or. You can't
9 argue that a system isn't effective just because some
10 people can bypass it. There's always been some degree
11 of infringement. There always will be. The real goal
12 is to reduce it to the level where you still have a
13 viable market.

14 So that -- I think that goes back to Keith's
15 comment about, you know, you don't want it just
16 available at Best Buy. Well, you don't want it just
17 available -- I was thinking of Walmart, actually
18 Keith, but the same idea. And so, it's really
19 important that that material not be -- the
20 circumvention means not be so generally available.

21 MS. SMITH: So you would agree to keep it
22 out of Walmart, Best Buy, sort of the easy access to

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1 the law abiding citizens and the hackers can find
2 things in the dark corners and that's not proof that
3 it's not working?

4 MS. BESEK: Right.

5 MR. AMER: Just to follow up on that, and I
6 think this picks up on something that Mr. Love said,
7 we had a lot of comments drawing the distinction
8 between devices -- circumvention devices and services.
9 And there was a lot of concern expressed about the
10 need for beneficiaries of exemptions to use or to seek
11 assistance from third parties in order for the
12 exemptions to have any practical effect.

13 I wonder just from your experience, to what
14 extent is that a concern? Have you seen that out in
15 the marketplace? And if so, to what extent should the
16 law recognize that sort of distinction and what would
17 you suggest could be done about it? I believe Mr.
18 Adler was next. If you -- I know you may have had a
19 comment about the previous question, but feel free to
20 address this as well.

21 MR. ADLER: Yeah. I think the real problem
22 here -- it's not so much in distinguishing between the

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1 levels of protection for different types of works. I
2 mean, the issue of dealing with embedded software in
3 consumer products and the functionality issue with
4 respect to driving those products, again, should not
5 become the tail that wags the anti-circumvention dog
6 because the issue for anti-circumvention was primarily
7 about protecting access to expressive works.

8 And the problem with that is, in response to
9 what Jamie suggested, is simply that there's no way to
10 allow for the dissemination of tools that only enables
11 the exercise of exemptions or other kinds of
12 authorized circumventions.

13 Let me give you an analogy when we talk
14 about third-party assistance. In most jurisdictions,
15 if you want to go into business as a locksmith or if
16 you want to seek employment as a locksmith, you have
17 to be bonded. You have to be certified. You have to
18 be licensed. And the tools that you're able to
19 acquire are very carefully regulated and tracked. And
20 those are mechanical tools, very distinctive types of
21 tools.

22 What we're talking about in the online

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1 world, when we're talking about circumventing various
2 types of technological protection measures, we're
3 primarily talking about software acting on software or
4 we're talking about things like random number
5 generators that are going to try to find the proper
6 password or the combination for the authentication key
7 that allows somebody to access the works.

8 And it's clear that those types of things
9 are going to have many legitimate uses as well as
10 they're going to have these types of illegitimate
11 uses. And it seems that it's going to be extremely
12 difficult to be able to identify them, to be able to
13 regulate them, to be able to ensure that the people
14 who would be authorized to use them to perform
15 circumventions are in fact also properly regulated.

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

17 MR. GREENSTEIN: Thank you. So there are a
18 few issues here I'd like to address from the past few
19 questions. So I appreciated Mr. Adler trying to draw
20 the distinction between access to expressive works
21 versus trying to get access to the functional aspects
22 of the work or the aspects of a software that control

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1 function and have no other purpose. And I think that
2 really is a line that is easy to draw.

3 I mean, where the software interoperates
4 with the part, controls the part and is really part of
5 the part -- it's inseparable from the part -- I think
6 what we're talking about, the ability to circumvent a
7 technological protection measure to get access to the
8 work is really all about repairing the functionality,
9 augmenting the functionality, customizing the
10 functionality and not anything having to do with the
11 expressiveness of the work. Some of these software
12 may in fact not be copyrightable at all.

13 There's one case in the *Ford v. Autel*, where
14 the court basically found this is not copyrightable --
15 the elements that you're trying to get access to are
16 not copyrightable. And the same was true in the
17 *Lexmark v. Static Control Components* case, where they
18 found the software was not protectable by copyright.
19 So that's one issue.

20 Looking at the real object of protection
21 here, the real object of protection is not the
22 expressive nature of the software, the software code.

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1 The real object of protection is the functionality
2 provided and stopping others from repairing that
3 functionality, stopping competition in the repair of
4 consumer products.

5 And that being the case, I mean, it's really
6 an interesting question as to whether section 1201(a)
7 actually applies or (a)(1) or (a)(2) really applies
8 because the consumer owns the work -- I mean, owns the
9 product and has the right of access to all the
10 functionality provided by the product.

11 So is there really an issue with access?
12 The consumer has authorized access to the
13 functionality provided by the software and that is the
14 only purpose of the software. So I would say a good
15 argument could be made that there's no 1201(a)(1) or
16 (a)(2) issue to begin with and the same would be true
17 for (b).

18 Lastly, I do want to address one of the
19 points that you raised with respect to the differences
20 between devices and services. I think you cannot make
21 that distinction, particularly for the auto repair
22 industry, simply because not every mom and pop shop --

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1 repair shop -- is going to have the ability to develop
2 the software that circumvents, then is able to then
3 repair the software in the car.

4 But everyone should be able to use a tool
5 that is provided by someone else, developed by
6 somebody else that enables that repair, which is why I
7 think you cannot really make the decision based on
8 services. I think the divide really has to be between
9 protection of functionality versus protection of
10 expression.

11 MS. SMITH: Thank you. I wanted to ask a
12 question that sort of ties what you said to what Mr.
13 Adler just said. Mr. Adler mentioned that it would be
14 difficult to limit any exemption to assistance for
15 permitted exemption. And you're saying there's
16 sometimes trouble taking advantage of the exemption on
17 behalf of the intended beneficiary.

18 So my question is to what extent have the
19 intended beneficiaries of the Office's exemptions
20 relied on tools or services that would be subject to
21 the anti-trafficking prohibition? So I guess getting
22 something in a way they're not supposed to. And on

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1 the flipside, how much are they prevented from being
2 able to make use of the exemptions? So Mr. Schwartz?

3 MR. SCHWARTZ: Well, you started off by
4 observing that anti-trafficking really isn't
5 implicated in 1201(a)(1). And I think that kind of
6 answers the question.

7 I'd like to quote somebody, and it was in
8 our comments, a quote: "In our view, manufacturers,
9 consumers, retailers and servicers should not be
10 prevented from correcting an interoperability problem
11 resulting from a protection measure causing one or
12 more devices in a home or in a business to fail to
13 interoperate with other technologies."

14 And that was Chairman Bliley of the House
15 Commerce Committee at the time on August 8, 1998 in
16 his floor statement. I think he would have included
17 autos if one would have envisioned the importance of
18 functional software at the time. So I think the
19 answer is simply leave trafficking to the courts,
20 where it belongs, and where I know Mr. Turnbull has
21 been very interested in those things.

22 When it comes to the question of the

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1 Office's role and the NTIA's role in exemptions, I
2 think honestly the NTIA had it right and the Office
3 didn't. There should be a presumption, at the very
4 least, that somebody is entitled to service, however
5 the service is provided, whether strictly as a service
6 or taking advantage -- or the servicer taking
7 advantage of a device -- when it comes to the
8 exemption process.

9 And I would say that when the question is
10 interoperability and functionality, you have the
11 presumption should be conclusive. I'm not here to
12 talk about the expressive end of that. CTA may have a
13 range of views on that. But CTA was extremely
14 concerned with the outcome of the proceeding with
15 respect to autos and also with the reference to the
16 Unlocking Act.

17 I mean, again, to refer to what everybody
18 knows about the tools being widely available to
19 people, when the Office processed the previous
20 exemption and the Congress considered the Unlocking
21 Act, everybody knew that unlocking a cell phone
22 required some type of expert assistance. And it

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1 didn't seem to trouble the Office in the past when it
2 granted the exemption. The Congress acknowledged that
3 in legislative debate.

4 I don't think anybody contemplated the fact
5 that Congress said, oh yeah, you're entitled to expert
6 assistance in the context of cell phones, meant you
7 couldn't have it when it came to autos. I've used up
8 much of my time.

9 MR. AMER: Can I -- just to follow up --
10 just to clarify, so when you talk about a presumption
11 that third party assistance should be allowed to make
12 use of an exemption, is that your understanding of
13 current law or is that a change that you would like to
14 see?

15 And is there any relevance to the fact that
16 in the Unlocking Act, Congress expressly provided for
17 third party assistance? Does that speak to what
18 current law may or may not provide?

19 MR. SCHWARTZ: The answers are both and no.
20 I think the CTA's comments argued by quoting this
21 legislative history and others that there was no
22 intention for an exemption for third party assistance

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1 to be unavailable in the exemption context, so long as
2 it didn't affect the legal environment with respect to
3 trafficking.

4 CTA would be in favor of clarifying the law
5 in this regard, and has so advised the House Judiciary
6 Committee. And as one, who on behalf of a cell phone
7 reseller, was involved as a stakeholder in legislative
8 discussions, I don't think anybody had in mind that
9 this would be decided by the Copyright Office or the
10 Register as a reason to -- the first time the subject
11 came up at all, to say, oh no, you're not entitled to
12 third party assistance. Thank you.

13 MS. SMITH: Mr. Sheffner, do you have a view
14 on Mr. Schwartz's interpretation?

15 MR. SHEFFNER: Sure. I'll get to that in a
16 second. Let me just back up for a second. First of
17 all, I just want to attach myself to and endorse the
18 previous comments of Mr. Turnbull and Mr. Adler and
19 Mr. Kupferschmid about the importance of the anti-
20 trafficking provisions to the success of the motion
21 picture industry, various business models over the
22 last 15 years, from DVDs and Blu-rays to all of the

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1 explosion now of 115 legal online services here in the
2 U.S., over 400 worldwide, virtually all of which
3 incorporate technological protection measures of
4 course with the backstop of section 1201, both the
5 anti-circumvention provisions and the anti-trafficking
6 provisions.

7 But getting to your question from a minute
8 ago specifically about whether the prohibitions on
9 trafficking in anti-circumvention devices and services
10 have impeded people's ability to exercise the
11 exemptions that they've been granted through the
12 triennial rulemaking, and I think the answer is no.

13 I think if you go and look back at the
14 record established during those six rulemakings now,
15 as well as the record developed through these
16 proceedings here, you don't have people coming forward
17 and saying, you know what, the Copyright Office told
18 me it's okay to do x, y and z under this exemption.
19 However, I'm not able to do it because of the anti-
20 trafficking provisions, at least in the audiovisual
21 sector, which --

22 MS. SMITH: Can I -- yeah, I was going to --

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1 do you have an opinion about the auto industry or
2 would you just treat that as not in your --

3 MR. SHEFFNER: I'm going to stay focused for
4 the moment on our own industry. You know, as Mr.
5 Adler and Mr. Kupferschmid alluded to, we know that
6 there are anti-circumvention -- there is anti-
7 circumvention software available out there. It's not
8 importantly on the shelf at Best Buy, et cetera, et
9 cetera.

10 And we think that's an important
11 distinction. If it were on the shelf at Best Buy or
12 you could go to Amazon or Newegg and click it, it
13 would essentially send a message to the public that,
14 hey, it's okay as a general matter to use anti-
15 circumvention software, which it's not.

16 Again, we acknowledge that there is
17 nonetheless such software out there. And again, I
18 don't think there is evidence established by the
19 record of either the triennial rulemakings or in this
20 proceeding that shows that those people who have been
21 granted exemptions are nonetheless not able to take
22 advantage of those exemptions due to the prohibition

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1 of trafficking and circumvention of devices and
2 services.

3 MS. SMITH: Thank you. Mr. Butler, you've
4 represented people who have petitioned for an
5 exemption. Do you have a viewpoint on that?

6 MR. BUTLER: Yes, absolutely. So a few
7 things to say. So one is a key reason that none of
8 the folks that I've worked with in the past and now
9 have been terribly deterred yet by anti-trafficking is
10 that we're free-riding on the pirates, right? I mean,
11 we just -- Handbrake is there. It's easy to find and
12 so if you want to rip a DVD, it's easy to do because
13 luckily the things we want to rip are also things that
14 pirates want to rip, right? And so, we get to -- it's
15 just --

16 MS. SMITH: You don't need it to be at Best
17 Buy to find it.

18 MR. BUTLER: You don't need it to be at Best
19 Buy, right. It's easily -- you just Google it. And
20 so -- sorry Google. So -- I'll be quoted on that.
21 I'm sorry. But the problem I think that I see going
22 forward is that we are -- like University of Virginia,

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1 for example, we're really interested and investing
2 heavily in digital preservation and we're building
3 special collections of digital archives.

4 So we have Salman Rushdie's laptop and
5 everything that was on it. Some of that is in
6 proprietary formats. I foresee that as DRM ages, it
7 will -- more and more different formats will become
8 obsolete and we'll be asking for exemptions to crack
9 things that no one cares about but us, right? And so,
10 the pirates are not going to make emulators for
11 obscure 1980s DRM software. And so, what are we going
12 to do in that context? I think we have to be a little
13 bit forward-thinking about that.

14 And even if, right, we build some internal
15 expertise, and so, some archivist is -- we have very
16 talented archivists who could build that tool. Can
17 they share it across consortia? That's generally the
18 way these things work. So that's one worry that I
19 have is we've been free-riding on pirates because
20 we've only asked for DVDs. But in the future, what
21 will we do when we're asking for more and more obscure
22 formats? And then, another thing -- well, did you

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1 have a follow-up question about that?

2 MS. SMITH: Yeah, I guess -- sorry -- if
3 you're suggesting that you develop an archivist who
4 can create this tool and then shares it with another
5 archivist, that that would implicate 1201(b) and
6 trafficking in a technology product or service? I
7 mean, is that what you're saying you have a fear?

8 MR. BUTLER: That's what I would fear,
9 right, that there would be some uncertainty about that
10 or that a very -- another way that libraries
11 frequently work -- universities, there are of course
12 many, many vendors who are experts who are external to
13 the university who develop specialized products and
14 services only for libraries, only for universities.
15 And it may be that they might develop the better tool
16 than we did. And an exemption might empower them to
17 do that.

18 So that would certainly be, right -- I mean,
19 so maybe the archivists working inside could make it
20 and maybe they could share it. But certainly a
21 specialized vendor couldn't say, hey, we've got a way
22 to facilitate digital preservation.

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1 MS. SMITH: Right. But so if the exemption
2 process were to extend to sort of encouraging this
3 market for circumvention tools, I mean, would that
4 bleed into some of the other concerns we opened up to
5 encourage your vendors to market and sell these tools
6 it seems like might implicate what others have said.

7 MR. BUTLER: Well, I think not. I think
8 there's security built into the -- in fact, built into
9 the whole reason that we would be coming to the table,
10 which is that no one else cares. And so, Best Buy
11 would not want to buy Windows 98 proprietary file
12 format emulators. And so, there's just no -- the
13 consumers don't care. I think no one at this table
14 would actually care. They wouldn't be harmed. And
15 so, as is often the case, it would sort of only be the
16 conscientious folks who are trying to do their jobs
17 who would be deterred in that context.

18 MS. SMITH: Ms. Beseck, did you want to
19 respond?

20 MS. BESEK: (Off mic)

21 MS. SMITH: Sorry, the microphone.

22 MS. BESEK: There was an earlier comment

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1 about whether the Copyright Office has the power to do
2 certain things under regulations or whether it would
3 have to be an amendment to the law. And I don't think
4 you can really argue that things like permitting anti-
5 trafficking or circumvention services are currently
6 embraced within the law.

7 I mean, there are specific places where it's
8 permitted in section 1201 and elsewhere -- you know,
9 encryption research and I think reverse engineering
10 where there's -- is that -- yeah, for
11 interoperability. You know, I think there are
12 definite -- and law enforcement. But I think that in
13 general, the way the statute is structured, there
14 really is no good argument that you can do that now.

15 That's not to say that the law couldn't be
16 amended and we're talking here about whether that's a
17 good idea or not. But I don't think it can just be
18 done right now through regulation.

19 MS. SMITH: Thank you. Mr. Perry, you've
20 had your placard up for a while.

21 MR. PERRY: Well, not surprisingly, I guess
22 I would echo a lot of what Mr. Greenstein was saying.

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1 Even this discussion so far today I think illustrates
2 that not all software is created equal, that maybe the
3 expressive versus the functionality divide is
4 something that really needs to be focused on. And
5 maybe it's easier when you're in the automotive realm.

6 Maybe that's an easier case because
7 everybody -- not everybody -- I think a lot of people
8 can appreciate that a lot of the software that's in
9 your car is not expressive. It's functional. It's
10 literally under the hood. And in fact, it's all over
11 your car. It's hidden to everybody. And you know,
12 whether there will be litigation to bear out that
13 software that now services what was once a purely
14 electromechanical function does not enjoy protection
15 at all -- that may happen. It may happen in
16 litigation, which of course is very costly.

17 We -- you know, our client, an aftermarket
18 auto parts company, a large company in that space, was
19 watching with a lot of interest how the exemption was
20 going to come out -- if it was going to come out and
21 how it would be worded. And so I think it's worth
22 noting that if you look at the proposed class 21

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1 exemption and you compare it with how it came out in
2 the end, the proposed class included wording, you
3 know, by or on behalf of the lawful owner.

4 We were very interested in that wording.
5 Our client does a lot of work on behalf of owners.
6 Virtually no one in this room probably could fix most
7 of their car by themselves anymore. And if you look
8 at the final class exemption, it now says by the
9 authorized owner. So our client and many others in
10 the aftermarket space I think looked at that and said
11 we still don't have the clarity that we need to do
12 what we do, which is a hundreds of billions of dollars
13 industry.

14 And I think everybody -- everyone who has a
15 car, if they haven't gone to your local mechanic yet
16 and been told that there's something that they just
17 simply can't fix because of the complexity in the
18 software, that's going to happen and it's increasingly
19 occurring.

20 And so, as Mr. Greenstein said, there is a
21 competitive -- or anti-competitive aspect to this that
22 has to be addressed. And you know, there needs to be

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1 a way that the aftermarket -- whether it's automotive
2 or others -- can deal with software. And I know
3 that's sort of embedded software which was dealt with
4 separately -- but you know, the expressive and the
5 functional, that's a pretty important line.

6 MR. AMER: To that point -- sorry -- I mean,
7 are there any lessons in that respect that we can draw
8 from the Unlocking Act? I mean, has there been an
9 increase in services that content owners might find
10 objectionable as a result of the third party
11 assistance being provided for? Please.

12 MR. SCHWARTZ: No.

13 MR. AMER: Anyone else want to -- well, Mr.
14 Love can respond to that or to the previous question.

15 MR. LOVE: Allan Adler bought up the issue
16 of regulation of locksmiths. I think that's something
17 that people should probably take a harder look at. If
18 -- I don't think locksmiths are really regulated
19 everywhere. But I think that in some states, they
20 definitely are.

21 And I think the idea that you'd have people
22 who have access to tools that are not generally

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1 available and that in some cases they're posting bonds
2 -- you know, or the authorities are aware of who they
3 are. They have certain responsibilities and that --
4 and that they're reputable citizens is sort of a --
5 makes a lot of sense in that particular area. And it
6 may make sense in this area in terms of the things.

7 I mean, you could imagine a situation where
8 libraries develop their own standards for sort of a
9 self-regulatory-type proposal where they could sort of
10 imagine practices that were reasonable and limited to
11 the purposes to which they're authorized to use works
12 under exceptions and where that could -- that could
13 flourish.

14 I think the problem is you have this
15 lobbying from the motion picture industry, the
16 database industry, you know, a few sectors of the
17 economy, maybe people with operating the software that
18 were commercial products, mass market-type products
19 for DRM protection and back in 1996 and things like
20 that. And then, you have these laws that just sweep
21 everything into it.

22 And I think that what would have been better

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1 is if sectors that felt that they deserved to have the
2 state intervene and make things illegal would
3 themselves make the case that motion pictures deserve
4 some kind of protection or it may be other types of
5 works do as opposed to just starting with the
6 assumption that everyone automatically, what the
7 context is, basically gets it.

8 So I think you should have to make that case
9 that the state should have to intervene. And in terms
10 of the cost of some of these systems in terms of
11 managing the cost of differentiation, I think it would
12 be reasonable that the people seeking the state to
13 provide the legal protection could pay money to have -
14 - to share some of the cost of administering these
15 systems, which are extensive, and that the people who
16 are seeking to operate as providing services, they
17 could also bear some of the cost as well. I mean,
18 that could be kind of an approach you might look at
19 some in the other areas.

20 The other thing I'd like to call attention
21 to is EFF submitted on April 21, 2016 -- the Food and
22 Drug Administration, they submitted comments on

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1 management of cybersecurity in medical devices. And
2 they described I think are quite important some of the
3 growth of security interests and problems that you
4 have in medical devices that are implanted in your
5 body, which could kill you, that -- you know, where
6 these issues of DMCA protection come up.

7 It's just an example of how far out -- you
8 can have, as other panelists talked about,
9 refrigerators and operating your lights, everything
10 about your home. It's increasingly becoming -- we're
11 enveloped in a system of artificial intelligence, of
12 people doing everything you can possibly imagine,
13 automatically driving cars, managing your -- I spent
14 \$825 yesterday on getting a pollution control device
15 in my car. It's probably an aftermarket part. I have
16 to go check.

17 I think that you've got this -- you've got
18 this sort of bad model for regulating much more than
19 what people anticipated 20 years ago. And I think you
20 just have to sort of -- you have to sort of get back
21 and take a different approach. You should have to
22 prove that you get the benefits of the technical

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1 protection from the government, not just assume that
2 it's there and then you have to work backwards.

3 MR. AMER: Thank you. I think Mr. Turnbull
4 was next.

5 MR. TURNBULL: I wanted to make a couple of
6 points. One, while we have no opinion on the sort of
7 things that are clearly distinct -- I mean, the auto
8 parts sector -- the concern that we do have is in
9 drawing the line between functional and expressive,
10 you could unintentionally sort of go too far the other
11 way, if you will. And that is that in a DVD player or
12 a Blu-ray player, what plays the content is a computer
13 program. And so -- and it is subject to certain
14 requirements under our licensing agreements that
15 require that it be robust against attack in and of
16 itself.

17 What AACS and DVD CCA provide are
18 specifications for how those individual programs would
19 be developed. And so, if you -- if you simply draw
20 the line and say, well, the content itself, the
21 expressive work that's encrypted on the Blu-ray is
22 protected but the computer program that plays it is

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1 not, that has the effect of defeating our system. And
2 we would -- we would be very concerned about that.
3 And so, I think in drawing whatever lines anybody is
4 going to draw, that I think needs to be very carefully
5 preserved, that the functionality that actually
6 enables the playback of the expressive content needs
7 to be protected as well.

8 The other point I wanted to make is that
9 something that both DVD CCA and AACLS LA have offered
10 and has never been taken up on is for people who are
11 interested in various exemptions or various
12 functionalities that are the subject of exemption
13 requests periodically ought to come talk to us about
14 ways in which this could be done voluntarily and
15 through tools that we could cooperatively develop and
16 could be licensed and agreed to by the technology
17 providers. And you know, we've periodically made
18 efforts to do some on our own. But we would certainly
19 be open to cooperative efforts.

20 MS. SMITH: Are you suggesting you could
21 license some sort of a tool that would allow -- that
22 would otherwise be implicated by 1201(b)?

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1 MR. TURNBULL: Yes. Well, no -- I mean, it
2 wouldn't be implicated by 1201(b) because it would be
3 licensed. So -- but for example, a number of the
4 exemptions have had to do with short -- you know,
5 clips, short portions of films that are on DVD or Blu-
6 ray. There could be a tool that could be developed
7 that would enable that specifically and wouldn't have
8 people using tools that are -- that are copying the
9 entire movie.

10 And there are various kinds of ways that
11 that could be done. And you know, I'm not saying it
12 would be easy or simple. But there are ways that I
13 think that working together those kinds of things
14 could be developed. And then, they could be presented
15 as part of an exemption if that was important for
16 them.

17 MS. SMITH: Making it harder for Mr. Butler
18 to get Handbrake maybe.

19 MR. TURNBULL: Yeah, yeah. Yeah.

20 MS. SMITH: Okay. I want to steer the
21 conversation a little bit back to Kevin's earlier
22 question, which is what can we learn from the

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1 Unlocking Act. And I notice Mr. Perry said the
2 proposed class 21 was for an exemption for the auto
3 industry, auto repair for actions by or on behalf of
4 the owner. The Unlocking Act, that language said
5 circumvention in the case of unlocking cell phones may
6 be initiated by the owner of any such device or by
7 another person at the direction of the owner.

8 So I'm wondering, you know, we can both
9 think big in terms of perhaps there's actions that
10 would require some sort of statutory reform. But what
11 are people's opinions on whether the triennial
12 rulemaking process should extend to language such as
13 status or risk or is there a benefit? Mr. Adler?

14 MR. ADLER: Yeah. I think we should be very
15 careful -- we need to be very careful about
16 generalizing or extrapolating broadly from what
17 Congress was doing with respect to that legislation.
18 And the reason is, is because the legislation was
19 passed only after Congress had satisfied itself that
20 by permitting such third party assistance, they were
21 not threatening anyone's copyrighted works.

22 Representative of that, this is a statement

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1 from the House Judiciary Committee report. It says,
2 "Circumvention for unlocking does not compromise the
3 security of the information on the phone and it does
4 not expose any copyrighted works present on the phone
5 to increased risk of infringement. Legalization of
6 circumvention that has such harmful effects is not the
7 intent of this legislation and it would not be
8 authorized by its provisions."

9 The Senate Judiciary Committee said the same
10 thing in its report. So --

11 MR. AMER: Can I --

12 MR. ADLER: -- they set a pretty high bar by
13 determining before they acted that what they were
14 authorizing was not in fact going to threaten
15 infringement of any copyrighted work.

16 MR. AMER: Could I just ask, so what sort of
17 evidence would be useful or relevant to making that
18 sort of determination? I mean, would we look to the
19 prevalence of claims that are targeting services
20 rather than devices? I mean, in evaluating whether
21 permitting third party assistance would threaten a
22 particular market, what --

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1 MR. ADLER: I mean, over time, we would be
2 looking at those kinds of claims. We would see
3 ultimately whether or not there would be instances
4 where allegations of infringement resulting from
5 circumvention could be traced back to what had been
6 authorized by the legislation.

7 I think what Congress did in this instance
8 and what anybody would have to do in being a proponent
9 of such third party assistance is to actually think
10 through in fact what is being circumvented and what
11 are the consequences of that specific circumvention.
12 That's what Congress did. And it's precisely because
13 it determined that that authorized circumvention, done
14 even by third parties, would not allow them to expose
15 any copyrighted works to infringement, was the reason
16 that Congress felt comfortable authorizing that.

17 MR. AMER: So would that be an argument for
18 allowing the Copyright Office to make a similar
19 assessment within the rulemaking or --

20 MR. ADLER: No, quite the contrary. I think
21 that this is a task that only Congress should be
22 permitted to do because it is so significant in terms

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1 of its potential implications. And I think it's not
2 something that can simply be delegated to either the
3 Register or the Librarian.

4 And if I may just add one other thought in
5 response to what my friend Brandon said before, I
6 mean, we're very sympathetic to the whole notion about
7 libraries, archives, academic institutions wanting to
8 preserve the works that are produced by the people in
9 my industry and others. But there is another avenue
10 for them to pursue that.

11 As the Copyright Office well knows, a few
12 years ago there was a very comprehensive study done of
13 section 108 of the Copyright Act which specifically
14 would have allowed for addressing questions about
15 digital preservation, including preservation of works
16 that only exist in digital form. And we have been
17 interested in seeing that study pursued, because we're
18 not looking to essentially leave these institutions
19 locked into 20th century technology capabilities with
20 respect to preservation.

21 But there again, you'd be talking about
22 first the question of preservation and then secondly

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1 preservation to what end. Simply the end of access to
2 those works would ultimately be what preservation is
3 about, you would have to be able to determine whether
4 in fact being able to circumvent in order to preserve
5 those works is simply going to allow access by
6 scholars and students, faculty, others who are using
7 them for legitimate purposes or would the access
8 policies subsequently threaten infringement in a way
9 that might question whether or not circumvention
10 needed to be more tightly tailored.

11 MR. AMER: Thank you. Mr. Butler?

12 MR. BUTLER: Oh, boy. Yeah, so I wanted to
13 -- I'll resist responding to Allan for a minute.

14 I wanted to come back to something else
15 briefly, which is another sort of risk in the question
16 of whether the beneficiary of an exemption is actually
17 going to get the benefit of the exemption. That's I
18 think a relatively new risk. Is the question of
19 whether the Office will itself or will ask the
20 proponents of an exemption to very narrowly tailor
21 that exemption so that it steers far clear of any
22 connection to trafficking, because I think there are -

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1 - there are activities that we would say are clearly
2 not trafficking.

3 So again, internal assistance, right? So if
4 an AV librarian is asked by a faculty member to -- how
5 to make a clip -- I'm entitled to make a clip. How do
6 I do it? What do I use? That's something that we
7 think is not third party assistance. It's not
8 trafficking. It's all internal. If a documentary
9 filmmaker has an AV staff person on the staff of that
10 film, but -- and the wording of the exemptions in the
11 past -- in the 2010 and in the 2012 iterations of the
12 education exception was nicely crafted I think.

13 Actually and this is I think probably on me
14 and my students -- we diverged on that crafting for
15 reasons that are lost now to the mists of time. But
16 there was a nice crafting that said sort of the person
17 engaging in the circumvention would be allowed to
18 circumvent for purposes of allowing educational uses
19 by faculty and students. So that distinction between
20 the person and the faculty made plenty of room in the
21 plain text for librarian.

22 But that got tightened up this time around

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1 and that may be on us. But I want to make sure that
2 that is not something that is an outcome of this
3 concern about trafficking, where it gets so tight that
4 you can't have the AV person on your staff help you
5 work on this.

6 MS. SMITH: Mr. Greenstein, did you want to
7 follow up on this discussion as to whether activities
8 on behalf of an owner authorized by should be
9 something that the Office could consider, and
10 particularly Mr. Adler's point that it may be better
11 considered by Congress but also that Congress, in
12 doing the Unlocking Act, was looking at whether it was
13 implicating access to copyrighted works?

14 MR. GREENSTEIN: Yes, thank you. So the
15 legislative history that Allan was reciting basically
16 has a principle that is equally applicable to the
17 situation that we're talking about.

18 The reasoning is exactly the same. Allowing
19 circumvention by an entity on behalf of the owner of
20 an automobile does not create any risk of exercise of
21 anything other than what's in the exemption. It does
22 not put at risk the integrity of access controls or

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1 copy controls over other types of software. It is
2 really integral to the particular exemption that's
3 being granted.

4 So similar to the rationale of, well, we
5 don't -- we want to make sure that when you unlock the
6 cellphone, you're not unlocking all of the apps on the
7 cell phone or other copyrighted works. It's exactly
8 the same because the functionality aspect of what was
9 at issue in the Unlocking Act is the same kind of
10 functionality concern at issue with respect to
11 automobiles.

12 Similarly, Mr. Adler tried to draw the
13 distinction between services and devices. And at
14 least in the automotive context, I don't think you can
15 draw that distinction because there is no way that
16 Click and Clack can provide circumvention service for
17 Toyota, Volvo, Ford, GM, et cetera.

18 There is just no way that they can hire a
19 hacking expert who understands the ins and outs and
20 intricacies of all of that different software. For
21 some models, up to 70 or more software modules are in
22 a particular automobile and different for each and

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1 every model of automobile. There is no way that they
2 can do that themselves. They need to rely on others
3 who can create the tools that make that possible.

4 MS. SMITH: So you're saying there needs to
5 be a market for software for circumvention in the
6 aftermarket or auto repair?

7 MR. GREENSTEIN: Yes, and I'm intrigued by
8 the suggestion that there might be some kind of
9 authorization for locksmiths or something along those
10 lines. I'm not sure that I agree with it. But I'm at
11 least intrigued by the direction of that.

12 MR. AMER: Well, which way does that cut
13 though? I mean, if we're -- if you can't separate
14 services from devices, is there a concern that
15 allowing services could incentivize the growth of a
16 market -- incentivize the development of tools which I
17 think some would be concerned couldn't be limited in
18 their use to things covered by an exemption?

19 MR. GREENSTEIN: I don't think that concern
20 exists for the particular market that we're concerned
21 with, the automotive market, because the nature of the
22 software is so particularized and particularized to

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1 each and every model of car, that I don't think you
2 have a generalized concern of a one-size-breaks-all.
3 You know, this is really a situation where a specific
4 tool has to be provided for a specific piece of
5 software, for a particular part and function of a
6 particular model of automobile.

7 MS. SMITH: So I want to ask one more
8 follow-up about the auto industry and open it up and
9 then get to Mr. Kupferschmid, who has been patient.
10 But you know, during the rulemaking, we heard a lot
11 about the memorandums of understanding and voluntary
12 initiatives and partnerships. And Mr. Turnbull just
13 suggested in audiovisual that who he represents is
14 open to voluntary initiatives. Is there some way to
15 facilitate cooperation with the aftermarket, short of
16 upending 1201(b)?

17 MR. GREENSTEIN: I have very strong doubts
18 that that is possible, which is why even despite the
19 existence -- look, if the memorandum of understanding
20 had solved this issue, Auto Care Association would not
21 be here on behalf of its 3,000 members. It does not
22 address all of the issues. And the circumvention

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1 aspects -- well, the anti-circumvention tools are
2 becoming more and more intricate and particularized
3 each and every day and often have absolutely nothing
4 to do with the copyrighted work.

5 For example, this particular software that's
6 put in automobiles can be tied to the vehicle
7 identification number of that vehicle. And that's
8 purely for anticompetitive purposes. It has nothing
9 to do with the copyrighted work or the expression or
10 even the functionality. It's purely to protect a
11 market. But yet, there's no way to provide
12 circumvention for that aspect of the car or the
13 software alone without addressing the other aspects of
14 circumvention.

15 MS. SMITH: Thank you. Mr. Perry, did you
16 want to chime in on that question?

17 MR. PERRY: Right. Well, I mean, if you're
18 playing devil's advocate, I don't think our client or
19 Mr. Greenstein's constituents want sort of wild
20 abandonment in the world of the aftermarket for
21 automobiles. Nobody wants a safety -- a safety hazard
22 in trafficking of any kind of software or anti-

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1 circumvention device that's going to make it unsafe
2 for any of us.

3 But to suggest -- if there's a suggestion --
4 if you're on the side of the automobile manufacturers,
5 if there's a suggestion that, well, it's already --
6 it's available, you just have to come to us and we'll
7 license it to you, I think that suggestion is kind of
8 deceptive. It's not practical. You know, the
9 aftermarket -- I think the benefits of allowing at
10 least in this industry the aftermarket to do what they
11 have to do far outweigh the parade of horrors that
12 could be attributed to it.

13 And you know, I think I agree with what Mr.
14 Greenstein is saying about VIN-specific software. I
15 mean, it's a very real issue. If you are in the bay,
16 in your garage and you find that the software for one
17 Ford F-150 or GM is for this car and then there's a
18 different one for that car, it makes it -- from a
19 practical standpoint, copyright and DRM has now
20 impacted your ability to do what 25 years ago used to
21 be done on a regular basis.

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

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1 MR. KUPFERSCHMID: Thank you. I hope you'll
2 give me a little bit of leeway. A lot of questions
3 have passed since I put my card up here.

4 MS. SMITH: Yeah, you can take it back a
5 little bit.

6 MR. KUPFERSCHMID: Trying to keep this all
7 on track. So I think kind of going in reverse order
8 here, I have to admit, I don't know that much about
9 the auto industry. And I do know there's this sort of
10 MOU we've been talking about and voluntary agreement.
11 I don't know how that came about. I hear from you all
12 that it doesn't do the job.

13 But frankly, that's, excuse me, one of the
14 beauties of voluntary agreements is you can hopefully
15 go back to the parties that you were able to bring to
16 the table the first time and say, hey, this isn't
17 working. Can we come up with some mutually agreeable
18 solutions and update it? I mean, that's a lot easier
19 to do than sort of running to Congress, I think.

20 Our concern, as I think Kevin mentioned a
21 while ago, is of course once you've got these anti-
22 trafficking tools available in the marketplace, even

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1 if they're for ostensibly lawful purposes, they will
2 inevitably become useful for -- or used for unlawful
3 purposes and make them impossible to police. Now,
4 we've heard, at least in the auto industry, no, no,
5 no, that's sort of very specific. But then we've also
6 heard, wait a minute, you can't do this dividing line
7 between devices and services. They want the dividing
8 line between functional and expressive, okay?

9 And that becomes a concern because where do
10 you draw that line? Is Adobe Photoshop functional or
11 expressive? What about TurboTax? What about iWatch,
12 or the software on your iWatch? I mean, at the heart
13 of it, all software is functional, at least to a
14 degree, or at least I would hope it would be.

15 And so, sort of drawing that line, I think
16 it's interesting and telling that, you know, I
17 participated in the embedded software roundtable on
18 Wednesday. And we kind of separated these two issues.
19 But it's clear they should not have been separated
20 because it was sort of taboo to talk about 1201 on
21 Wednesday and now we're talking probably more about
22 embedded software today than we are specifically 1201

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1 or the anti-trafficking provisions.

2 Ultimately, I think we have to be really,
3 really careful about where we draw the lines, how we
4 draw the lines. I made this point on Wednesday. It
5 could lead to a lot of inadvertent consequences.

6 And in this particular instance things seem
7 to be, like I said, working quite well. I know that's
8 not true across the board. But we have to be careful
9 not to throw the baby out with the bathwater here. I
10 think in terms of the auto industry, maybe other
11 industries, voluntary agreements and working outside
12 of Congress is probably a better approach, a better
13 way to go about trying to solve this problem that
14 we're hearing today.

15 MS. SMITH: Thank you. Mr. Sheffner, and I
16 think, again, if you feel like we're talking about
17 1201 and if that implicates embedded software, feel
18 free. We heard about the swear jar from Wednesday.
19 But you can answer the question if it specifically
20 implicates 1201.

21 MR. SHEFFNER: All right. I'll try to be
22 brief because Mr. Kupferschmid actually just made

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1 several of the points that I intended to. But I'd go
2 back, I think, two or three questions ago about
3 whether the Copyright Office itself is authorized
4 under the statute to create exceptions to the
5 prohibitions on trafficking and anti-circumvention
6 devices and services. And as June Besek said a few
7 minutes ago, I think the answer is clearly no. And I
8 believe that the Copyright Office itself has
9 acknowledged that in previous rulemakings.

10 And I actually don't even think anybody here
11 today has suggested that the Copyright Office on its
12 own, under the current statute, can create those
13 exemptions.

14 MS. SMITH: And so, to be clear, you're
15 taking the language of the Unlocking Act, for example,
16 you think would necessarily -- requires Congress?

17 MR. SHEFFNER: Yeah. I mean, I think that's
18 further -- I think it was done that way in part
19 because of an acknowledgement that the current statute
20 does not permit the Copyright Office to do that on its
21 own. And again, I don't believe anybody here has
22 argued that the Copyright Office can create exemptions

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1 to the prohibitions on trafficking.

2 MS. SMITH: And do you agree with Mr. Adler
3 that the Copyright Office -- there should not be a
4 reform so that the Copyright Office could make the
5 determination whether service on behalf of an owner
6 might implicate copyrighted works? I mean, and I'm
7 thinking, perhaps providing a way, whether there could
8 be an evidentiary basis so the Office could, for
9 example, draw a line between circumventions for motion
10 pictures versus auto repair.

11 MR. SHEFFNER: We would agree with Mr. Adler
12 that the time is not right to open up the statute. I
13 mean, I think, look, there are legitimate policy
14 arguments here especially by the auto repair people.
15 I mean, I would point out we haven't heard from the
16 other side on that issue, at least at this forum. So
17 I don't think you should necessarily take as gospel
18 everything you've heard on that without hearing --
19 yeah.

20 MS. SMITH: No, and obviously we're looking
21 at written comments.

22 MR. SHEFFNER: Absolutely. But yes, as Mr.

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1 Adler said, this is a major policy change that I think
2 would require an act of Congress. Then of course,
3 once you open up the act, we're not going to just be
4 talking about this one specific issue. I mean, lots
5 of people have lots of different concerns, things they
6 would like to change, not just about section 1201, but
7 of course other aspects of the DMCA. It's impossible
8 to confine it to that.

9 And then, just to quickly wrap up, I think
10 you asked one or two questions ago about, well, what
11 are the risks if we do permit exemptions for the --
12 exemptions to the anti-trafficking provisions. I
13 think we've touched on some of them before.

14 But again, look, the basic problem is that
15 even if you acknowledge that there might be legitimate
16 reasons or that there are people who have been granted
17 exemptions to engage in circumvention and need a
18 device or a service or a piece of software to do what
19 they want to do, the problem is that those --
20 especially as to devices or pieces of software,
21 obviously can't differentiate between the legitimate
22 and the illegitimate uses, at least as to motion

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1 pictures.

2 I mean, once you put it on the shelf at
3 Walmart, I mean, yes, you might have people -- you
4 know, Mr. Butler may be able -- and his colleagues
5 would use it for legitimate purposes under the --
6 under the exemptions that they've been granted. But
7 probably the vast majority of consumers would think,
8 hey, here's a piece of software. It says that I can
9 rip DVDs and Blu-ray players. That sounds kind of
10 nifty. I should be able to do that. And it actually
11 sort of confuses consumers and misleads them into
12 thinking that it's a legitimate activity where it's
13 not.

14 MR. AMER: I just wonder though, where does
15 that leave us and is there any sort of proposal that
16 you would suggest? I mean, just sort of anecdotally
17 at least, it would seem plausible to conclude that
18 there is a material set of people who are
19 beneficiaries of exemptions who, just as a practical
20 matter, don't have the technical capability to
21 circumvent.

22 So I just wonder are we stuck just without

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1 any sort of possible solution? I mean, I think one
2 thing we've suggested is what -- could we be granted
3 authority to at least consider that as part of the
4 rulemaking?

5 MR. SHEFFNER: Well, I would say at least as
6 to motion pictures and the exemptions that have been
7 granted as to audiovisual works, I actually don't
8 think there's a problem. I mean, I think Mr. Butler
9 acknowledged a few minutes ago, and I wrote down what
10 he said -- he said, quote, "We haven't been terribly
11 deterred from engaging in the activity which is
12 authorized by the exemptions that he and his
13 colleagues have been granted."

14 MR. AMER: But yeah, is he talking about
15 prohibited activity or --

16 MR. SHEFFNER: Well, I'm not saying that
17 he's engaging --

18 MR. AMER: Right.

19 MR. SHEFFNER: And I don't think -- and
20 frankly, by going -- by going off --

21 MR. AMER: But I mean, I think that's the
22 argument, right? I mean, that you're just sort of

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1 encouraging people to break the law.

2 MR. SHEFFNER: Well, I don't believe that
3 I've accused Mr. Butler of breaking the law. What
4 I've acknowledged is the practical reality that he is
5 able to go and find tools to do what he's been
6 authorized to do by the Copyright Office and that the
7 other -- the other option, which is to say, okay, well
8 he's been granted the exemption, therefore there
9 should be a lawful market in trafficking in anti-
10 circumvention devices, has worse results, has worse
11 consequences, that -- look it, I will say that the
12 situation today isn't perfect.

13 But the alternative of permitting a
14 legitimate market in circumvention devices or software
15 would be much worse. And it would just mainstream
16 that activity and in a sense swallow the rule against
17 circumvention itself.

18 MR. AMER: Okay. Thank you. Mr. Schwartz?

19 MR. SCHWARTZ: Well, just as a rhetorical
20 question, I know you're here to ask questions, but if
21 everybody agrees that the Copyright Office Register
22 and Librarian do not have the power to grant

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1 exemptions with respect to trafficking, then why worry
2 about giving that appearance in the course of
3 legitimately acting on a petition for exemption that
4 is before you?

5 To get to this point, as you did in the case
6 with autos, you already need to conclude that this is
7 a lawful activity that is being petitioned for. So
8 why is it necessary, again rhetorically -- is it
9 necessary to look down the page to (a) (2) and (b) (1)
10 and say, oh my gosh, if we grant this petition in the
11 terms for which it's been petitioned for, so as to --
12 however you phrase it -- allow some expert assistance
13 in the form of a service or somebody's aftermarket
14 product or software, no court is going to say --
15 because they can read the law too -- that, oh my gosh,
16 we're not going to allow this case against a
17 trafficker to proceed under the DMCA because the
18 Copyright Office granted an exemption to a user who
19 had a lawful right.

20 I mean, respectfully, I don't agree that the
21 law should be interpreted to take that power away from
22 the Copyright Office. The NTIA didn't think so in its

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1 recommendations. At least our reading of the
2 legislative history, when you read all of the
3 legislative history at the time that this was
4 presented to the Congress in terms of black boxes and
5 for one purpose and not wanting to interfere with
6 interoperability or the legitimate activities of
7 retailers and servicers.

8 So again, back to your question of what
9 evidence is necessary, once you've concluded that the
10 activity is lawful and you've concluded that it
11 doesn't involve copying of expressive content, if you
12 still need to look for any evidence, if you're worried
13 about trafficking, then look to those who oppose the
14 exemption to provide such evidence.

15 Otherwise, there should be a presumption
16 under the power that you already have that it includes
17 the right to expert help, just as it was silently
18 assumed in the case with phones, or else nobody would
19 have ever gotten the benefit of those exemptions.

20 MR. AMER: Thank you.

21 MR. MOORE: So turning -- sorry, turning
22 away a bit from the rulemaking process, the Unlocking

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1 Technology Act is proposing to amend 1201(a)(2) to tie
2 trafficking to -- rather than to circumvention
3 specifically, but to facilitating infringement by
4 circumvention. I was wondering if I could get your
5 thoughts on that as an alternative.

6 MR. AMER: Just -- I know there were a
7 couple of cards up. If you all wanted to respond to
8 previous questions, I think feel free to do so, while
9 others can think about a response to the proposed
10 legislation. So Mr. Butler?

11 MR. BUTLER: Sure. So just to sort of
12 revise and extend my remarks from a minute ago, while
13 Handbrake seems to work fairly well, a problem that
14 we've seen -- a general problem that we've seen in all
15 of these panels from beneficiaries is we don't know
16 what we don't know about how much better these things
17 could be, how harmed we are, what we can and can't do
18 because our behaviors are shaped by the law.

19 So we have Handbrake. Handbrake does what
20 Handbrake does. That seems to be great. We don't
21 know what someone would do if Mr. Turnbull were to
22 license them and they were to take full advantage or

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1 if they were to get the benefit of an exemption. We
2 don't know what the market would do in terms of
3 generating better tools. We also -- we just got an
4 exemption for Blu-ray, and Blu-ray is harder.

5 And I'm actually looking forward in a
6 perverse way, looking -- I'm curious what will happen.
7 Will people really get to use it? Because it is
8 harder. It takes longer. It's a big file. There are
9 sort of two or three different software processes
10 involved in the ripping. So how will that work as
11 easily as DVD. And then, of course, in the future
12 what's going to happen? And none of this stuff is
13 going to be on the shelf at Walmart.

14 And so, if that's what we're worried about,
15 let's open the floodgates for the specialized users
16 because they're not -- mechanics don't shop at Walmart
17 for the products that they need to rip cars. We don't
18 shop at Walmart for the products that we need. You
19 know, the digital preservation librarian at UVA has
20 this huge bizarre computer tower thing that has all of
21 these obsolete drives in it. It's a specialized tool.

22 That's the kind of stuff that we buy and we

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1 shop from people who sell that kind of stuff. And
2 it's not Walmart. So that might be helpful. Maybe
3 there's some consensus here. If we can keep it out of
4 Walmart, it's all good.

5 MS. SMITH: Ms. Besek?

6 MS. BESEK: I just want to make a couple of
7 points. One is on the power of the Copyright Office
8 to allow circumvention services or tools. You know, I
9 heard the quote from legislative history. But first
10 of all, that was a statement on the floor. So I think
11 we have to take that as that individual's view. And
12 secondly, legislative history one only resorts to if
13 the statute isn't clear. And I think in this case,
14 the statute is fairly clear. So that's obviously the
15 first place you go to, to understand the statute.

16 The other point I want to make is about the
17 functional versus expressive approach. I've been in
18 copyright now for 30 years and I really never thought
19 I'd spend as much time talking about automobile repair
20 as we have today. And I find it a little
21 disconcerting. And I am -- I really would not want
22 decisions about automobile repair and replacement

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1 parts to drive -- no pun intended -- the decisions
2 about circumvention, circumvention devices,
3 circumvention services.

4 And if that means ultimately there has to be
5 some distinction between software that governs
6 functional works and then, on the other hand,
7 expressive works -- and on that expressive works side,
8 I would add anything that has to deal with any kind of
9 playback device -- then maybe that's the route we have
10 to go on. But if -- I'm concerned that, you know,
11 there is a lot of understandable concern on the part
12 of the public about not being able to get replacement
13 parts for functional devices.

14 And if that is going to affect the rules
15 that govern books on e-book readers and movies and all
16 those kinds of things, then I think we have to
17 jettison some of those things or treat them separately
18 because I don't think that ultimately that copyright
19 interests are going to win the hearts and minds of the
20 American people on this.

21 MR. AMER: Thank you. So we have a couple
22 of placards up. If you care to respond to the

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1 question about the Unlocking Act, we would welcome
2 that -- yes, the proposed Unlocking --

3 MS. SMITH: The Unlocking Technology Act.

4 MR. AMER: The Unlocking Technology Act
5 that's been proposed. Mr. Love, did you have --

6 MR. MOORE: Yeah, sorry. The Unlocking
7 Technology Act that was proposed ties circumvention in
8 1201(a)(2) to facilitating infringement by
9 circumvention. So I was wondering what your opinions
10 were on that.

11 MR. LOVE: I would agree with Professor
12 Besek's comment about, you know, not worried about --
13 you know, like the automobile industry sort of driving
14 the copyright thing. You can also turn that on its
15 head and you can sort of say the rest of the economy
16 maybe doesn't want the motion picture industry and the
17 book industry to drive the rest of the economy either.

18 I think that the marriage between these two
19 things -- I would agree it is problematic. I go back
20 to the idea on the -- I think it'd be good if you
21 imagine at least two tiers of approaches, one for
22 areas where you think maybe the whole regime is kind

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1 of intended for in the first instance and where people
2 feel comfortable that they're kind of working towards
3 solutions in that area. And then, a second area where
4 kind of the collateral damage of the DMCA where
5 automobile sector, medical devices, garage door
6 openers, inkjet cartridges, all that sort of stuff.
7 And then, that you begin -- you begin the process of
8 not treating everything the same.

9 In Europe -- by the way, in the licensing
10 issue that was brought up before -- in Europe, there's
11 an obligation in the -- for copyright owners to take
12 measures that make exceptions available to people. It
13 isn't really clear what happens if they don't take
14 those measures. But it's sort of -- you know, there
15 is an affirmative obligation. I don't think there's
16 any obligation like that in the U.S. system and I
17 think that's a mistake. If you really want the
18 automobile manufacturers to license people to compete
19 against them and sell cheaper parts than the
20 automobile manufacturer wants to charge themselves and
21 they have no obligation to do so, I don't see why they
22 would want to do that.

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1 And so, this idea that people within a
2 sector should have to have an affirmative obligation
3 to license the technology or the tools or whatever
4 like that to address something as a first step, but it
5 also puts an obligation on people that are seeking to
6 traffic in devices and things like that to pursue that
7 opportunity before they resort to their own do-it-
8 yourself kind of remedies as well.

9 That may be kind of a compromise where you
10 have a step where the people that are affected the
11 most by it have -- you know, have to be approached,
12 work out the basic details, understand kind of what
13 the parameters and the debate are. And then, if that
14 fails, then you can sort of imagine kind of things
15 moving on to a different set of obligations.

16 I just want to mention also on the
17 licensing, that in President Obama's books on Kindle,
18 text-to-speech is turned off on almost all of them.
19 And this is after massive protest in front of the
20 Authors Guild and tons of letters to the president of
21 the United States from blind people, a fairly high
22 profile thing. And if you go on Amazon right now and

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1 check on President Obama's Kindle things, you will see
2 that text-to-speech is turned off.

3 So this is essentially a licensing -- it's a
4 technical protection measure. This is either a switch
5 that's either turned on or turned off by Amazon.
6 Random House famously turns it off as a default
7 position.

8 And it just goes to the frustration people
9 have when say just call us up and we'll fix the
10 problem. That doesn't often really work. And I think
11 people have to recognize that that's not a very
12 satisfying thing for consumers, when people say we'll
13 fix it.

14 Typically, when you have devices where
15 things have moved on, there's a lot of cost in fixing
16 the problem. Interoperability interfaces have
17 changed. People talk about having refrigerators with
18 blue screens of death because the software no longer
19 works. I think you have to recognize that people just
20 don't follow through and fix a lot of these problems.

21 MS. SMITH: Thank you. So we just have a
22 couple of minutes left. So I think this is going to

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1 be the last call for comments, and if we can try to
2 keep them brief -- but I think since your comments,
3 Mr. Love, involved Random House and publishing, we'll
4 call on Mr. Adler next. Thank you.

5 MR. ADLER: I just wanted to addresses the
6 previous question, if I could quickly respond to
7 Jamie, on the issue --

8 MS. SMITH: I think speak a little closer on
9 the microphone?

10 MR. ADLER: Yeah. On the issue of an
11 infringement nexus with access, we already discussed
12 that in the first panel yesterday. So I won't repeat
13 the comments I've made, just simply refer you back to
14 them.

15 But I would also point out that with respect
16 to (a) (2) and (b), what Congress did was fourteen
17 years before Congress enacted this statute, the *Sony*
18 decision by the Supreme Court had addressed the
19 question of whether or not articles in commerce that
20 could be used to infringe could be prohibited.

21 And the Court articulated a standard that
22 talked about not wanting to see prohibition affecting

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1 articles that could be used to infringe but were
2 capable of substantial non-infringing uses. And most
3 people spent the next fourteen, years and probably the
4 time since, then figuring out exactly what that meant.
5 So what Congress did here in the anti-trafficking
6 provisions was to try to be more specific about what
7 the criteria were. And it's unquestioned that that
8 criteria is in fact linked to infringing works. So I
9 don't think there's any need for new legislation on
10 that.

11 And just quickly with respect to Jamie's
12 comments about whether or not text-to-screen
13 translation software or the read-aloud functionality
14 in e-books is turned off, that turns out to be more a
15 matter of individual competitive preference among
16 publishers and typically is a function of the way
17 publishers negotiate agreements with authors.

18 Usually it's if there is an audiobook that
19 is also being authorized for publication by the
20 author, they do not want the e-book to have the read-
21 aloud functionality because they tend to think it
22 competes with the audiobook. But again, that tends to

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1 be more of a contractual issue between the author and
2 the publisher. It is not something that is don't just
3 as a matter of course or particularly because of
4 concern about violations specifically of a copyright
5 right.

6 MS. SMITH: Thank you. Mr. Kupferschmid?

7 MR. KUPFERSCHMID: Yeah. I just -- I'll be
8 very, very brief. I just wanted to address comments
9 Mr. Love made, not only just recently, but throughout
10 that sort of this law is being driven or is especially
11 for the motion picture studios or the book publishing
12 industry or the record labels or anybody like that.

13 And I can tell you that we represent over
14 15,000 sort of small businesses and individual
15 creators in this space. And they're very much
16 supportive of the anti-trafficking provisions.
17 Specifically, do they sue or do they enforce the law?
18 No, they don't have the capability of that. They
19 don't even oftentimes don't have the capability to
20 even actually bring infringement cases either.

21 And matter of fact, that's exactly why they
22 like this provision in the law because otherwise they

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1 would be in this arms race, just like everyone else.

2 And that's an arms race that the individual creator is
3 absolutely going to lose.

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

5 MR. TURNBULL: Just very quickly, first, I
6 wanted to associate myself with what Mr. Adler said
7 about the Unlocking Technology Act. I won't repeat
8 it. But I agree with that. Secondly, with regard to
9 the language, going back a while in the discussion,
10 that was in the prior librarian-related exemptions,
11 the DVD CCA had agreed and accepted that language and
12 would again and think that that would be within the
13 scope of the Copyright Office's authority and would be
14 appropriate in those kinds of exemptions.

15 And similarly, the Copyright Office has --
16 or the Librarian, in the exemptions that have been
17 granted -- conditioned certain of the exemptions on
18 the use of certain kinds of screen capture software,
19 either as a prerequisite to circumventing or in a
20 couple of cases specifically as the method for
21 allowing circumvention. And so, I think there's
22 precedent for that kind of thing at least in very

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1 specific cases where there's been an adequate record
2 developed and that sort of thing.

3 And in terms of the sort of voluntary tool
4 that I was talking about, it would be in that kind of
5 vein that we would envision it being used, as
6 something that would be brought to the Copyright
7 Office cooperatively but would then be part of an
8 exemption.

9 MS. SMITH: Okay. Thank you. So Mr.
10 Greenstein, next, you know, last call, and I will say
11 the next panel is about permanent exemptions. And I
12 thought maybe I could also invite you to comment on
13 whether in your particular situation for the auto
14 industry, that might be sort of another workaround
15 rather than changing 1201(b).

16 MR. GREENSTEIN: Okay. Thank you. So
17 first, with respect to the Unlocking Technology Act,
18 it probably would solve the problems of our industry.
19 But I think it's a much broader solution than is
20 necessary.

21 And in that respect, I note Professor Besek
22 talked about how this is really kind of a separate

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1 issue. Well, that's why we sought an exemption,
2 because it really is something that is an individual
3 need and I think best addressed in that way.

4 And from that perspective, I think permanent
5 exemptions are a positive solution. But merely
6 adopting the current solution as a permanent exemption
7 is not going to solve the problems of the aftermarket
8 automobile repair industry.

9 MS. SMITH: Thank you. And Mr. Schwartz, I
10 think you have the last word.

11 MR. SCHWARTZ: Yeah, just a while ago I
12 didn't mean to not comment on the Unlocking Technology
13 Act. I believe CTA has supported that. Of course, as
14 is the case with any legislative consideration, would
15 want to look at what's being proposed, exactly now in
16 the most up-to-date formulation after discussion. But
17 I think CTA is in support of it.

18 MS. SMITH: Thank you. Well, that will
19 conclude this panel. We are supposed to start at
20 10:45. So that cuts the break short by about 10
21 minutes. But I think we should be on track to just
22 start that on time. Thank you.

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1 (Whereupon, the foregoing went off the
2 record at 10:35 a.m., and went back on the record
3 at 10:49 a.m.)

4 MR. AMER: Oakly. Welcome back, everyone.
5 We are going to start session five, the last session
6 of the day. This session is on permanent exemptions.
7 And I'll just read the description. This session will
8 explore the necessity, relevance and sufficiency of
9 the permanent exemptions to the prohibition on
10 circumvention and will consider whether amendments or
11 additional exemption categories may be advisable.

12 So to get started, I'd just like the
13 panelists once again to introduce themselves and along
14 with their affiliation.

15 MS. BESEK: June Besek, Kernochan Center for
16 Law, Media and the Arts at Columbia Law School.

17 MR. CAZARES: Gabe Cazares, Government
18 Affairs Specialist, National Federation of the Blind.

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

21 MR. DOW: Troy Dow, with The Walt Disney
22 Company.

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1 MR. GEIGER: Harley Geiger, with Rapid7.

2 MR. WILLIAMS: Matt Williams. I'm here on
3 behalf of AAP, MPAA and RIAA.

4 MR. LOVE: Jamie Love, James Love, with
5 Knowledge Ecology International.

6 MR. PERRY: David Perry, with the law firm
7 of Blank Rome, on behalf of Doorman Products, Inc.

8 MR. MOHR: Chris Mohr, SIIA.

9 MS. KOBERIDZE: Maryna Koberidze, no
10 affiliation. I'm here as a concerned member of the
11 public and IP law enthusiast. Thank you.

12 MR. AMER: And a proud alum of our office.
13 So welcome all. So I thought we would proceed in two
14 parts, first by looking at the adequacy and the
15 functionality of the current exemptions and then
16 turning to proposals for additional permanent
17 exemptions and to get your thoughts on whether any may
18 be necessary or advisable.

19 We've thought of proceeding a little
20 differently in this session. As you know, a lot of
21 the existing permanent exemptions are specific to
22 particular types of uses and are maybe more relevant

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1 to particular -- to certain of you than others. So we
2 may direct questions specifically to individual people
3 to start out with. But everyone obviously is welcome
4 to weigh in and in fact we would encourage you to do
5 so.

6 So I wanted to start by talking about the
7 library exemption under section 1201(d). We received
8 a number of comments on this exemption from library
9 associations. I think the word useless came up in one
10 or two of them.

11 And so, if I could direct this to you, Ms.
12 Cox, I just would be interested just sort of generally
13 in your perspective on the current library exemption,
14 if you could elaborate on why it may not be as useful
15 as hoped and any changes you would like to see.

16 MS. COX: Well, I certainly think that
17 section 1201(d) is not very useful for libraries,
18 archives and educational institutions. It's not
19 actually an exemption that we asked for in the DMCA
20 legislative hearings and that whole process because
21 it's so narrowly drafted -- it's not an exemption for
22 any nonprofit library or educational use.

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1 It's not even an exemption for any library
2 or educational use that is already granted under
3 section 108 or granted under fair use. It's so
4 narrowly tailored to only acquisition decisions and
5 you can only use that exemption for the time necessary
6 for an acquisition decision.

7 And it is our view that if we are going out
8 and looking to make an acquisition, that whoever is
9 selling that book or that product to us would be happy
10 to open up that digital lock for us to make that
11 determination.

12 We find that we are -- we are constantly
13 using every three years the rulemaking process to
14 pursue the exemptions that we think are really
15 necessary, for example, to -- for assistive
16 technologies for those that are blind, visually
17 impaired or print-disabled, for educational uses of
18 audiovisual materials.

19 So for us, those are the types of uses that
20 we would find -- that we need continually and that
21 would warrant a permanent exemption versus the very
22 narrow exemption in 1201(d).

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1 MR. AMER: Thank you. And so, just sort of
2 in practice, I mean, in your experience, is the
3 current exemption -- I mean, it sounds like the answer
4 is no. Do you know of many examples of librarians
5 making use of that exemption?

6 MS. COX: I don't, because I don't know of
7 content providers who hand something over to a library
8 locked and say, do you want this product, it's locked.
9 No, I mean, it just -- for purposes of acquisitions,
10 normally the content providers are happy to unlock it
11 for us as we make a decision in purchasing.

12 MR. AMER: Okay. Now -- oh, sorry. Go
13 ahead.

14 MS. SMITH: Can I ask what are your thoughts
15 on reforming it to track the contours of 108, which is
16 different, I will say, than some of the petitions for
17 exemptions in the rulemaking.

18 MS. COX: I think that -- I mean, I think
19 that there are certainly areas where it would be
20 useful to amend 1201 in order to accommodate what's
21 allowed under 108. But there are of course other uses
22 as well that we would support.

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1 MR. AMER: Oh, sorry. So -- well yeah, so I
2 think that was one proposal. I mean, I know in our
3 comments from the American Association of Law
4 Libraries, there was a recommendation that a permanent
5 exemption be created for any use that was permissible
6 under 108.

7 I assume -- is that something that you're
8 recommending as well or do you think that the
9 exemptions that you've petitioned for pertaining to
10 motion pictures are sort of a more pressing concern?

11 MS. COX: Can we have both?

12 MR. AMER: Well --

13 MS. COX: No. I mean, yes. I think that
14 having -- expanding it to apply to section 108 would
15 be very, very helpful. And you know, I think this
16 just highlights a fundamental flaw of the 1201 process
17 that has been talked about in these roundtables, that
18 it's not linked to infringement.

19 And it's -- you know, from the perspective
20 of our libraries, who really do want to follow the law
21 and -- and ensure that -- simultaneously ensuring that
22 we are fulfilling our mission, that it doesn't really

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1 make sense to have these exemptions granted under
2 section 108 or be allowed under fair use. But then,
3 you can't actually do it just because we've moved into
4 a digital world.

5 MR. AMER: Are there any other views on the
6 advisability of -- oh, I'm sorry. I didn't even see.
7 Mr. Williams?

8 MR. WILLIAMS: (Off mic)

9 MS. SMITH: We're mic-less.

10 MR. WILLIAMS: Oh, mine just came on. Okay,
11 great.

12 MR. AMER: Okay.

13 MR. WILLIAMS: Thank you.

14 MR. AMER: Oh yeah, if we could just ask if
15 you're not speaking to turn off your microphone?
16 Thank you.

17 MR. WILLIAMS: Thank you. I did see that
18 the library community is not finding the existing
19 exemption helpful. And it sounds to me like that's
20 because the market is working really well. As she
21 said, copyright owners are more than willing to give
22 test access to libraries so that they can sample the

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1 works and decide whether to buy them. So I think
2 that's a good news story, not a bad news story, that
3 we need to worry about.

4 I, in the comments, saw that in replace of
5 the permanent exemption, what the libraries seem to be
6 asking for is all non-infringing uses exemption. And
7 we've talked in other panels about why there are a lot
8 of dangers associated with those types of proposals
9 and why 1201(a) was designed not to necessarily
10 protect only exclusive rights under section 106, but
11 also to provide a right of access that is very
12 important and that needs to be preserved.

13 When you get to the slightly narrower
14 approach of just -- for 108-covered uses, I doubt that
15 that is going to go very far in terms of reducing the
16 number of exemptions that libraries seek because what
17 I often read, at least, is that libraries and others
18 are unhappy with the scope of 108 as it currently
19 exists.

20 And so, they would rather point to section
21 107 for most of the things that they want to do, in
22 which case you either get back to a kind of pseudo all

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1 non-infringing uses-type of approach or you end up
2 needing, even if you cover all 108 activity, for
3 people to come back every three years and make new
4 requests. So I'm not sure that that would have a very
5 effective impact.

6 I think what will have a more effective
7 impact is if the more streamlined approach to renewals
8 that was discussed yesterday is adopted in some
9 workable format, the need to make permanent these
10 types of exemptions becomes a lot less important and
11 you actually preserve the ability to have some
12 confidence of renewal, but you also preserve the
13 flexibility of having the rulemaking there so that if
14 someone needs something new, they don't have to go all
15 the way back to Congress. Again, they can come to you.
16 Thanks.

17 MR. AMER: Thank you. Ms. Besek?

18 MS. BESEK: Well, specifically with respect
19 to an exception for 108 activities, I can't help but
20 wonder why the libraries need it now when they haven't
21 made such a request, not necessarily with regard to
22 all of 108 -- specific 108 activities over the last

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1 several years. It seems to me that if the statute
2 were that deficient, they would have consistently
3 asked for that exemption, and it's not there. So I'm
4 not sure there's really a basis.

5 The second point I want to make is I think
6 section 108 is broader than people might realize. I
7 was on the section 108 group, as were others here.
8 And you know, it gives libraries a fair amount of
9 flexibility with respect to providing copies for
10 users, for example.

11 And so, I don't think that we should assume
12 that that would be a narrow exception. And I think
13 without -- I think it is really akin to the no non-
14 infringing uses, rather that you should be able to
15 circumvent for any non-infringing use or any fair use.
16 I think it falls in that category and I would be
17 reluctant to see that without more.

18 MR. AMER: Thank you. Ms. Cox, would you
19 like to respond to that?

20 MS. COX: So of course, the libraries -- Mr.
21 Williams is correct, we do support the Unlocking
22 Technology Act, which would tie infringement to

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1 circumvention. But as a next best option, we do very
2 much believe that permanent exemptions are warranted
3 in certain cases.

4 For example, for assistive technologies for
5 the blind, library services, authorized entities that
6 were often providing accessible formats for the blind,
7 also for the audiovisual exceptions for educators and
8 students at our colleges and universities, for K
9 through 12 educators.

10 These are all exemptions that we have
11 supported in the past. And in the most recent
12 rulemaking cycle, the NTIA recommendation to the
13 Register in that report, it said that they acknowledge
14 the concerns by the rights holders who oppose these
15 exemptions, but that -- emphasizing that these
16 exemptions don't legalize copyright infringement and
17 that the record doesn't show that previous grants of
18 similar exceptions have led to piracy.

19 So I think in those cases, it makes a lot of
20 sense to move towards a permanent exemption, to expand
21 our current 1201(d) exemption to include the
22 activities that are really important to us, like these

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1 exemptions that we request every time. I think the
2 Library Copyright Alliance joined four different
3 proposals for exemptions for audiovisual classes in
4 this past rulemaking cycle. And you know, it seems
5 that that just keeps expanding.

6 And so, I think having a permanent exemption
7 that is broad enough to cover these areas would make a
8 lot more sense than us having to go through this every
9 time, especially when there isn't any evidence that
10 infringement occurs in having these exemptions.

11 MS. SMITH: Can you speak to Mr. Williams's
12 point that perhaps streamlining the renewal would
13 serve a great deal of your concerns, while still sort
14 of leaving the door open in case there were changed
15 circumstances in the market or something or some
16 reason to not etch it in statutory stone and make it
17 permanent? Could you live with that instead?

18 MS. COX: Well, I certainly think that
19 streamlining the process would of course help. But I
20 would have to see what the contours of that
21 streamlined process would look like because previous
22 rulemaking cycles, of course, were I think much less

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1 involved than they are today, where you have a 400-
2 page report from the Copyright Office.

3 I think that if there is a presumption of or
4 an automatic renewal unless there is evidence of
5 changed circumstances, that would certainly be
6 helpful. But what would be even better, of course, is
7 that if there's a permanent exemption where time and
8 time again, the Copyright Office is granting
9 exemptions for persons who are blind or disabled, for
10 educators and educational institutions, for students
11 in college and universities.

12 I think where there's strong evidence that
13 there has not been infringement as a result of these
14 exemptions, I just makes sense to make them permanent.

15 MR. AMER: Thank you. Could I just follow
16 up on the 108 question? We received some comments
17 that talked about the need to circumvent for -- of
18 libraries to circumvent for, for example, preservation
19 purposes and they used the example of works in
20 obsolete format, which may include TPMs in obsolete
21 format.

22 I'm just wondering if you could elaborate on

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1 that. And I wasn't totally clear whether that sort of
2 issue goes to access controls or whether the issue is
3 copy controls.

4 In other words, if you have -- if a library
5 receives a collection of VHS tapes or something, is
6 the issue with respect to preservation that the
7 library can't access the works or is it more that
8 there is a copy control which would prevent you from
9 digitizing it?

10 MS. COX: Well, I think with the VHS, it
11 would be a copy control mechanism, not an access
12 control mechanism. I think my colleague, Brandon
13 Butler, who actually works in a library may have more
14 information on this issue.

15 MR. AMER: Okay. Okay. No, that's --
16 that's fine. Well, Mr. Dow?

17 MR. DOW: Thank you. So just a couple of
18 points. I served with June on the section 108
19 committee and I had a similar reaction to the proposal
20 that there'd be some sort of exception that would
21 apply to section 108-covered activities and that they
22 apply to such a broad range of activities, including

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1 things like interlibrary loan, copies for users.

2 I know that in the course of our discussions
3 there in the section 108 group, we talked extensively
4 about the fact that copies for users for private study
5 was contemplated by many libraries to include loaning
6 of materials and providing of materials for personal
7 review, including the loaning of movies and things
8 like that for personal review.

9 And so, the notion that you would have an
10 exemption that would allow you to circumvent copy
11 protection, to provide unencrypted copies of
12 expressive works as part of interlibrary loan or as
13 part of copies for users I think would be of concern
14 to us.

15 On the issue of not having evidence of
16 infringement, one of the concerns throughout even with
17 the rulemaking process is that it's very, very
18 difficult to tie resulting acts of infringement to the
19 particular uses that are being made pursuant to the
20 exemptions, right?

21 And so, if you have an exemption to allow
22 people to make copies for a variety of uses, tying

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1 then downstream -- if the result is that that allows
2 for circumvention to release unencrypted copies of
3 works, then it's very hard to tie the downstream
4 copies of unencrypted copies to the first initial copy
5 that was made. So while there's not an abundance of
6 information in the record to show infringements, it's
7 actually really hard to say what the impact of that is
8 in the marketplace.

9 The last thing I'll say is that in terms of
10 section 108, the other thing that I think we learned
11 in that process is it's very -- that's a section that
12 is sort of technologically and marketplace-dependent.
13 And part of the reason we were gathered together to
14 talk about section 108 was because technology had
15 eclipsed the statute. And Congress had attempted to
16 make some updates in the context of the DMCA. And
17 even those updates have been eclipsed by time and by
18 technology.

19 And so, I think in that sort of context, in
20 the types of things you're talking about in 108 for
21 things like preservation, there's a benefit to having
22 a rulemaking process that can respond to those types

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1 of changes in the marketplace, to the specific
2 technologies that are being used, to the specific
3 concerns about what the impact of allowing
4 circumvention in those circumstances would be, that
5 would allow not only streamlined access to those
6 exemptions along the lines that were discussed but
7 also to have exemptions that are tailored to the
8 particular needs and to the particular concerns much
9 better than you would be able to do with a permanent
10 exception that you might find yourself looking at,
11 very much like 108, becomes quickly outdated.

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

13 MR. LOVE: Thank you very much. If the
14 permanent exceptions are by statute only and the
15 statute sort of sets out all the conditions, I think
16 that the problem in the past is you end up with a
17 fairly narrow statute that is frustrating for people
18 who are supposed to be the intended beneficiary of the
19 statute.

20 A better approach, in our mind, is if the
21 statutory mandates an exception but permits the
22 Copyright Office to provide more information about the

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1 contours of the exemption at a later date, like so for
2 example if the statute -- let's take the issue of uses
3 for people who are blind.

4 If it was to address the obligations in the
5 Marrakesh Treaty for people with disabilities, if the
6 mandate was broad but there was some sort of
7 understanding that there could be, at some point, more
8 contextual information provided if necessary by the
9 Copyright Office down the road, it might be -- it
10 might be a better situation than trying to spell out
11 every particular issue that you might want to do by
12 statute.

13 Another thing I think that's important -- I
14 mean, we think that the idea of more or less permanent
15 exceptions -- I think permanent is a funny word
16 because nothing's really, even in a statute,
17 permanent. So I think what you're talking about is
18 durable and persistent exceptions. And so, I think
19 the Copyright Office surely should be able to do --
20 the three-year thing I think is a mistake. I think a
21 lot of people have talked about that in other panels.

22 One thing -- one of the reasons -- there's a

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1 high cost of developing and implementing both the
2 tools to use the exception and, as important I think,
3 the standards and the best practices for implementing
4 exceptions.

5 Now, if you want to have a conversation, for
6 example, among authorized entities for people that are
7 blind or you want to talk about archivists or you want
8 to talk maybe about auto mechanics or whatever group
9 you want to have, for them to sort of sort out the
10 problems of the different stakeholders so that they're
11 not just looking at their own interests, but they're
12 looking at the interests of third parties that are
13 affected by the policies that are implemented, that
14 can be a pretty complicated thing.

15 And then you want to -- and then you have a
16 small enough number of people, like the number of
17 people in this room, can kind of figure out what that
18 rule should be. And then, you want to educate
19 thousands of people as to how to sort of use that
20 standard so that they do it in an appropriate way.
21 And then, you sort of say, but this whole exercise is
22 going to be revisited three years from now.

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1 I mean, this kind of defeats this idea that
2 you're really serious about doing it in a thoughtful
3 way, where you have buy-in and implementation that's
4 really consistent. So I think that one of the reasons
5 for the more persistent and durable exceptions is the
6 fact that it really is time-consuming and costly to
7 design the tools for exceptions and to implement them
8 appropriately. Thank you.

9 MR. AMER: Thank you. Mr. Williams, did you
10 have --

11 MR. WILLIAMS: Just a quick point to go back
12 to something that Troy Dow said on evidence of harm
13 from any of the existing exemptions, he's absolutely
14 right. It's almost impossible for us to collect data
15 to show that someone who used the exemption ended up
16 circulating pirate copies on the Internet.

17 On the other hand, in every cycle I think
18 since the AV works exemptions have been in existence,
19 we have pointed to examples in the proponent's
20 comments of uses that we think are likely to be
21 infringing. They are not uses that my clients have
22 had any interest in pursuing litigation over and

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1 calculating the actual harm involved is quite
2 difficult.

3 But I just wanted for the record to note
4 that we have each cycle come across uses that the
5 proponents have said are examples of how they're using
6 the exemptions and our response has been, well, some
7 of these are actually probably unlawful.

8 MR. AMER: Great. Thank you. I want to go
9 back to Ms. Cox, and then I think we're going to move
10 to the next topic.

11 MS. COX: Just because 108 has been such a
12 focus of this discussion so far, I just want to say
13 that there have been some criticisms that 108 is out
14 of date and therefore libraries just look at fair use.
15 And while it's certainly true that fair use is
16 critical to libraries, we do use 108 every day. I
17 mean, I talk to -- any librarian that I talk to, they
18 say, of course 108 is still relevant. It's still --
19 it's still something we use. Is it as good as fair
20 use? Probably not because fair use is adaptable and
21 it is flexible enough to accommodate these new
22 technologies. But 108 is not an obsolete statute.

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1 And just with respect to whether it's hard
2 to get evidence of downstream uses, while I
3 acknowledge that, yes, Mr. Dow and Mr. Williams may be
4 correct that it can be difficult to trace back exactly
5 where an infringing copy came from, I certainly hope
6 that you're not suggesting that libraries and
7 educational institutions are using this exemption and
8 passing out infringing copies.

9 MR. AMER: Thank you. So I think now we're
10 going to move to talk about the reverse engineering,
11 encryption research and security testing exemptions.
12 As you may know, in the 2015 recommendation, the
13 Office found a compelling case that 1201(f), (g) and
14 (h) are inadequate to accommodate their intended
15 purposes.

16 So I just would like to start with a general
17 question. I'd like to ask your views as to how these
18 provisions might be amended to more effectively
19 facilitate legitimate reverse engineering activities
20 and security research. I think this may be
21 particularly relevant to Mr. Geiger and Mr. Mohr. But
22 others, of course, are welcome to comment as well.

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1 MR. MOHR: Sure. Thanks. Well, just a
2 couple of -- a couple of preliminary points.
3 Essentially, from our perspective, we believe we don't
4 -- I'm not sure we share the Office's conclusions on
5 this particular point. We believe that the current
6 statute is working, that it can work.

7 Let me just address a couple of things. I
8 mean, one of the things that I have heard today that
9 probably would cause my members a bit of heartburn is
10 some suggestion, maybe implicit, maybe not, that
11 software is let's say a second class copyright citizen
12 and that is something that we wholeheartedly reject.

13 And we heard that, I think, in some -- as if
14 one can separate the function from expression easily.
15 I really -- I have looked at a decent number of cases
16 examining these issues and that's not an easy line and
17 it hasn't been an easy line basically for a long, long
18 time. And it's true not only with respect to computer
19 programs, but it's also true with respect to
20 cheerleader uniforms and plays and all kinds of idea
21 expression. It's the same line that's expressed in
22 different ways. And it's a really fuzzy one.

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1 With respect to the exemptions themselves, I
2 mean, we believe the reverse engineering exemption is
3 adequate. With respect to security testing, our
4 members have relationships with the security testing
5 industry. If there are areas in which voluntary
6 agreements may be useful to kind of allay section 1201
7 concerns, we're certainly open to discussing those.
8 But at this time, we don't see any need to open up the
9 statute.

10 MS. SMITH: Can I ask a more targeted
11 question about 1201(f), the reverse engineering
12 statute? So in the rulemakings and in yesterday, we
13 heard a lot about how 1201 was not intended to prevent
14 a lock-in effect for printers or garage door openers
15 or something. And when I read 1201(f), it says you
16 can circumvent for the purpose of identifying and
17 analyzing elements necessary to achieve
18 interoperability.

19 Do you have an opinion on whether it makes
20 sense to reform 1201(f) to include things necessary to
21 enable interoperability? And I think the Breaking
22 Down Barriers to Innovation Act has some specific

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1 language to that too. I mean, what are your thoughts
2 on going beyond I guess identifying and analyzing into
3 helping facilitate interoperability?

4 MR. MOHR: I think there's -- I think that
5 if my recollection is correct, and it very well may
6 not be, that this particular -- that the standard in
7 1201(f) came out of existing case law. I can't recall
8 which case.

9 I would have concerns about the breadth of
10 the concept of facilitating interoperability covers I
11 think a wealth of sins. And many of them could lead
12 to pretty bad things for a lot of my members. So I'm
13 not -- color me skeptical about that particular
14 proposal.

15 MR. AMER: Mr. Geiger?

16 MR. GEIGER: Thanks. So unsurprisingly, we
17 disagree that the statute is currently working with
18 regard to security research. The temporary exemption
19 is a big deal for us. It is extremely helpful.

20 But that aside, in talking about the
21 permanent exemption, as it stands right now, 1201 does
22 chill very important security research, research that

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1 will help prevent harm to individuals and it will help
2 prevent breach of sensitive data. And we gave you an
3 example in our comments.

4 We have a researcher that is employed by
5 Rapid7 who is a diabetic. He wants to research his
6 own insulin pump but was prevented from doing so,
7 prior to the temporary exemption, because of 1201 of
8 the DMCA. In addition, a lot of independent security
9 researchers, folks that are not necessarily employed
10 by us but that we work with to help improve our own
11 security products, they are chilled.

12 That is, they don't engage in the research
13 to begin with or many of them actually receive cease-
14 and-desist letters that reference the DMCA. This is
15 again prior to the temporary exemption. So we don't
16 think that it works and we think that this issue of
17 security research in software is becoming a lot more
18 important.

19 As discussed previously, we are seeing this
20 explosion of software, both in the physical world and
21 virtually. And there are a lot more security flaws
22 than there are people to fix it. And in many cases,

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1 manufacturers either don't know about the software
2 flaws or they turn -- they're willfully ignorant of
3 them.

4 Part of the problem with voluntary
5 agreements, and this goes to the requirement of
6 authorization in the permanent exception, is that it
7 hampers independence. It means that the manufacturers
8 themselves get to control completely how the security
9 research takes place and what the publication is like.

10 And if you're a manufacturer that doesn't
11 support independent security research or if you are a
12 manufacturer that has something to hide, as
13 Volkswagen, for example, right, then that will -- that
14 will make the research a lot less effective and not as
15 independent. There are also several other problems
16 with the permanent exception, one of which is this
17 requirement that it violate no other law.

18 The CFAA is very, very broad. It's very
19 ambiguous. It is the subject right now of some pretty
20 sharp circuit splits. So you're importing a lot of
21 the ambiguity from these other laws into 1201, laws
22 that have their own chilling problems and doing it

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1 largely for non-copyright reasons.

2 There's also a part of the permanent
3 exemption that says that the information derived from
4 the research cannot be maintained in such a way that
5 could facilitate infringement or violation of another
6 law. Well, what happens if you're a security
7 researcher and you've contacted the manufacturer about
8 a problem in their product? They do nothing and
9 standard practice is that eventually you will make
10 that disclosure public.

11 MS. SMITH: Well, doesn't the statute
12 contemplate that by saying it's a factor that should
13 be considered? And maybe in that specific use case,
14 it would make sense to not stick it with the
15 manufacturer, but go broader?

16 MR. GEIGER: Absolutely. The fact that it's
17 just a factor as opposed to an outright requirement,
18 sure. But both factors are cutting against the
19 security researcher, right? One is --- you know, if
20 they've publicly disclosed it and then others can use
21 that for nefarious purposes, which is part of the
22 point, right? Part of the reason why you publicly

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1 disclose is to encourage a manufacturer to actually
2 correct their flaw if they haven't been previously.

3 And then, the second was whether the
4 information is solely for the purpose of benefiting
5 the manufacturer, the owner of the computer system.
6 And a lot of time, security researchers are doing this
7 for the benefit of the public, not necessarily the
8 owner of the computer system.

9 I want to make three other points really
10 quick because we've talked about --

11 MS. SMITH: Right, keep it quick because
12 we'll have follow-up questions.

13 MR. GEIGER: I'll talk about it quickly. We
14 talked about this in previous panels, right? So this
15 idea of an embedded software exception or in the
16 temporary exception we're talking about consumer
17 devices. These lines are blurring, right? And things
18 that are embedded in software now may not be -- or
19 embedded in devices now may not be in devices in the
20 future, consumer devices, likewise.

21 Security researchers work on more than just
22 devices. They work on networks. They work on

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1 completely virtual software. And what counts as a
2 consumer device is also in many cases a business
3 device or is used by infrastructure. And we want to
4 encourage that kind of security research. So, thank
5 you.

6 MR. AMER: I'd like to ask you a follow-up
7 and then others can weigh in as well. It's sort of a
8 more general question. I mean, you mentioned the
9 multifactor framework that both 1201(g) and (j)
10 provide for.

11 As a general matter, do you sort of think
12 that type of framework is helpful, where there's sort
13 of a multifactor analysis that a court can take into
14 account, or does that in itself provide -- sort of
15 reduce some of the certainty as to what's permitted
16 and under what circumstances?

17 MR. GEIGER: It absolutely reduces the
18 certainty. And in our opinion, we'd prefer to see a
19 blanket security research exception for things that
20 are not -- just for the sole purpose of improving the
21 safety and security and correcting software flaws. So
22 I would kind of cut it off right after the definition

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1 of security testing.

2 So in many cases, we are seeing agencies
3 move to protect the other types of equities that you
4 see in the permanent exception, like privacy, like
5 safety. The NHTSA -- the Transportation Security
6 Agency as well as the FTC and others, like they are
7 already moving to protect against hacking in a way
8 that violates privacy. We've got laws for that. So
9 it's unclear to us why 1201 ought to be the vehicle,
10 so to speak, to prevent those types of activities.

11 I will also say that when it comes to
12 trafficking we -- because we are a penetration testing
13 company, we actually do use software. We market
14 software that can be used to circumvent. And some of
15 that includes circumventing passwords or brute forcing
16 encryption. Companies -- this is very valuable to
17 them because they want to know what flaws they're
18 susceptible to.

19 And so, we have to traffic in that software
20 in order to -- in order to run our business. And we
21 work with security researchers that send us updates
22 and exploits. They traffic in the circumvention tools

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1 to us so that we can keep our products up to date. So
2 this is an important component of security research.
3 And I would just -- I'm saying this not because I want
4 to see trafficking fall by the wayside if we're
5 talking about reforming the permanent exemptions.

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

7 MR. WILLIAMS: Thank you. I'm primarily
8 here to talk about books and music and movies. So
9 some of these issues are to a certain degree separate
10 from those interests. However, I do have some
11 concerns that if you start taking a lot of the
12 limitations out of some of these permanent exceptions,
13 that there will be unintended consequences that will
14 impact the industries that I'm here representing.

15 I went through the statute this morning and
16 had the pending legislation and started marking
17 through the portions that would be deleted. And a lot
18 of the safeguards that Congress decided it made sense
19 to put in there are being taken out. And some of that
20 might be for perfectly legitimate purposes. I can't
21 speak to that. But some of it could cause some harm.

22 And so, I'm skeptical of whether it's

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1 necessary because usually when Congress decides to
2 amend an exception that's already in the statute,
3 there's a number of cases that have come through the
4 courts. They've either come out the wrong way or
5 there's a lot of indecision between them when you
6 compare them. And I don't think that's been the case
7 here. There's been a lot of debate in the rulemaking
8 about what the existing exemptions would allow or not
9 allow. But I haven't seen much in the way of
10 litigation to point to.

11 So I think to take it to Congress without
12 those types of badly decided cases, it might be a bit
13 of a stretch. I mean, I can think back to when the
14 last sentence of section 107 was added and I think
15 that was 1992. There was five, six, seven I think
16 unpublished works cases that took place before
17 Congress decided we should add this sentence that just
18 basically says if it's an unpublished work, it might
19 be a fair use.

20 MS. SMITH: Well, can I ask you a follow-up
21 question? Because, you know, I take your point about
22 treading lightly on statutory reform. But we do have

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1 this rulemaking process where if the permanent
2 exemption doesn't work, perhaps you're not seeing
3 litigation but you are seeing petitions before the
4 Copyright Office. And the security testing might be
5 such an example, where they said the requirement that
6 there's authorization from the owner is not working
7 for us. Could you grant us a different exemption?

8 I think in prior rulemakings, we saw that
9 more specific for certain devices. But there's sort
10 of a repeat echo of security research being something
11 if properly defined, that might be permissible through
12 the exemption process. I mean, would you oppose maybe
13 not crossing out all of the statute, but for example,
14 that specific -- you know, could you speak to specific
15 reform proposals, the requirement of authorization
16 being one of them?

17 MR. WILLIAMS: I guess I would say again
18 that I think that the easier and preferable route to
19 addressing those issues that have already been raised
20 in the rulemaking is to do the streamlined renewal
21 process as opposed to taking this to Congress and
22 asking them to rewrite the statute.

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1 One, because I am worried that there will be
2 unintended consequences, but two, because I also think
3 it's such a difficult task to draft it in such a way
4 that no one who's writing a law review article is
5 going to be able to come up with a hypothetical case
6 that would come out the wrong way. And then, people
7 are going to have to come back and present issues to
8 you guys anyway.

9 So I'm not so sure that trying to rewrite it
10 will actually fix the problem of people needing to
11 bring to your attention issues that are of concern to
12 them. I'm not ready to go through line by line on the
13 things that have been proposed to be taken out and
14 give you a position for my clients on each one of
15 them. But the things that concerned me were the
16 completely striking out the factors that are to be
17 considered. As you said, they're just factors to be
18 considered. Violations of other laws in the context
19 of these things, that also I think is something that
20 would have to be thought about very carefully.

21 MR. AMER: Thank you. Mr. --

22 MR. WILLIAMS: I'm sorry. I had one last

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1 thing that I originally intended to say. I apologize.

2 MR. AMER: Sure.

3 MR. WILLIAMS: One thing I would just ask
4 you to do, if you do decide to make recommendations in
5 this area, is if you'd go back to, I think, 2010 and
6 earlier rulemaking decisions, there were issues that
7 came up about whether or not you're entitled to access
8 a movie or another expressive work on every different
9 type of device that you might want to access it on.
10 And the Office consistently concluded that that's not
11 the case, that you don't have that right.

12 And I would just ask that if you make
13 changes in this area, you take a look at those prior
14 decisions and just make sure that you don't overrule
15 them essentially without intending to do so. Thanks.

16 MR. AMER: Mr. Love?

17 MR. LOVE: When a -- there's this automatic
18 protection that is associated with technical
19 protection measures right now and we would prefer a
20 system where you'd apply, pay a small fee and register
21 the fact that you have a technical protection measure
22 that you believe is entitled or should be entitled to

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1 legal protection.

2 And then, in the application for doing so,
3 that you would describe how you would address
4 legitimate use of users under exceptions, issues of
5 interoperability, perhaps issues of unsets on the
6 protections such as depositing unlock keys for the
7 Copyright Office and that you would have a terms of
8 service for the technical protection measure which
9 describes the impact of the technical protections on
10 what you believe the user rights to be, something
11 along that line where you begin to sort of treat the
12 legal protections of TPMs as a privilege, not a right,
13 and that you associate the privilege with obligations
14 on the person who wants to stay to enforce the right
15 for them, recognizing that there are these competing
16 areas.

17 I think that that would -- some of the
18 problems you have right now of people are looking for
19 permanent exceptions and things like that. I mean,
20 sometimes it's because the practices in the TPM thing
21 are so inconsistent with public policy and it's just
22 the -- it's obvious that you want -- you want to have

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1 some carve-outs. But people always raise these issues
2 like, well, do you anticipate all the problems and
3 things like that.

4 I think just starting with the idea that
5 everything's protected and you have to kind of claw
6 back the exceptions, I think that creates a lot of the
7 problems. If you sort of create the environment where
8 you have to sort of make the case of exceptions for at
9 least that you describe that you believe you've met
10 the case at a very minimum, I think it begins to make
11 the whole process more manageable.

12 Also, I'm a little concerned about the
13 relationship between trade agreements and what you're
14 doing in this proceeding because you're -- the
15 government is involved in these trade agreements where
16 you're creating exceptions about what we have to do
17 within the contents of the trade agreements and then
18 they're creating these investor state agreements where
19 people can bring lawsuits against the -- or bring
20 arbitrations against the United States around those
21 things that their expectations aren't met and things
22 like that.

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1 And I think that it would be important for
2 the Copyright Office, to the extent that they're
3 modifying the rules or changing the rules in this
4 thing to also talk to the United States Trade
5 Representative to make sure that there's ensuring
6 enough flexibility in our agreements.

7 And if we change our philosophy about how to
8 do these technical locks on things across a wide range
9 of industries, not just the motion picture industry or
10 the book industry, but in these areas that involve
11 automobiles and consumer electronic devices and all
12 the other things affected by the trade agreements,
13 that we're not in a situation where you're trying to
14 do one thing where the United States Trade Office --
15 Trade Representative is making that difficult.

16 MR. AMER: Thank you. And that actually
17 sort of anticipated a quick question. So are there
18 any other examples around the world of that sort of
19 system where, you know, providing for a registration
20 of TPMs that you're aware of, and might that implicate
21 international obligations of the U.S.?

22 MR. LOVE: I think right now the closest --

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1 the closest model for that would be the obligation in
2 the European Directive that you have responded -- that
3 you have obligations to provide user rights in areas
4 that are part of the Directive, although I don't think
5 it's really spelled out very clearly. And it's not
6 the same as sort of registering works.

7 I think though that the movement against
8 registration and copyright across the board for
9 everything has been a mistake. And I think the idea -
10 - you could make an analogy between the collateral
11 damage and harm that's been done by having copyright
12 always -- I mean, everything --

13 MR. AMER: I think we do --

14 MR. LOVE: -- on TPMs there's exactly the
15 same problem. It's just too sweeping. And the
16 combination of no obligation on the person that's
17 protected and the fact that everything is
18 automatically protected, those things collectively
19 create a lot of problems.

20 MR. AMER: Okay. Thank you. Mr. Geiger?

21 MR. GEIGER: If I can respond to a couple of
22 things Mr. Williams said, part of the reason that we

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1 don't see a ton of litigation on 1201 in security
2 research is because, for two reasons. One, a lot of
3 security research is chilled and by 1201 doesn't
4 actually get to the litigation stage. You know, so
5 we'll see researchers get cease-and-desist letters and
6 many times they are not able to -- just don't have the
7 expertise to evaluate the legal claim. And it just
8 doesn't go to litigation. And then, second --

9 MS. SMITH: Can I interrupt? Is that -- are
10 you speaking academically or commercially or both?
11 Because I know in the rulemaking, there seems to be
12 sort of a divide between the researchers for research
13 sake and those who are perhaps unaffiliated with an
14 organization and then entities such as Rapid7.

15 MR. GEIGER: So for folks that are
16 unaffiliated with an organization, that's typically
17 where the cease-and-desist letters tend to have the
18 most impact. If you're affiliated with an
19 organization, then you have more resources to draw on
20 to evaluate your legal claims. We play in both
21 worlds. We work a lot with independent security
22 researchers and try to help be a steward to that

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1 community. But we also have our own researchers.

2 And in cases where you have an institutional
3 affiliation, a lot of times you just see it ignored,
4 right? You just see -- you see the cease-and-desist
5 letter just kind of ignored, and you say, well, if you
6 want to go to litigation over this for real, then
7 we'll do that. And often, it doesn't get to that
8 stage. Either way, the system is broken. It may have
9 made more sense when it was enacted, but as it is now,
10 it's not working.

11 And we have --I mean, cybersecurity is a
12 national priority. Everybody recognizes that. So why
13 in the world would we wait for bad cases to be
14 litigated?

15 Two other points. One is when it comes to
16 not violating any other law, most of these other laws,
17 including the CFAA, provide a private right of action.
18 It would seem odd to us to -- if the security research
19 is violating the CFAA, why suddenly the permanent
20 exception protection should also fall away? I mean,
21 the punishments under CFAA and other laws are already
22 relatively harsh. So why add onto that with

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1 copyright? I don't understand why that would play
2 into it?

3 And in addition, if it's a matter of
4 violating a licensing agreement, then you do have
5 recourse through breach of contract to go after the
6 researcher there. So there are other avenues that
7 don't need to necessarily rope in section 1201.

8 MS. SMITH: Can I ask you a more targeted
9 question? Because I am hoping that these roundtables
10 sort of focus us on potential areas of reform or why
11 they may not be advisable.

12 But if you can trust the encryption
13 exemption with a security testing exemption, security
14 testing exemption I think needs to be with the
15 authorization whereas with encryption you just need to
16 make a good faith effort. And I know in the
17 rulemaking, we heard a lot about the bug bounty
18 programs or front door policy or ways in which there
19 is sort of an understood protocol or norms or ethics
20 that one might go about in getting authorization.

21 If we made some revision to call it a good
22 faith effort to get authorization as opposed to a

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1 requirement, would that help you out? Would that be -
2 - do others see problems with that?

3 MR. GEIGER: So, unfortunately, no. And for
4 a couple of reasons. It's definitely better than a
5 requirement. And our standard practice is that we do
6 make a good faith effort to try to contact the vendor,
7 whoever has the flaw. And however, that is not ---
8 not every manufacturer, not every vendor actually has
9 a means of being able -- of contact.

10 And it is a policy that, in fact, the
11 Department of Commerce is working now to try to get
12 more adopted through its multi-stakeholder process.
13 But it is not really the norm among industries right
14 now. And especially with the Internet of things,
15 where we're seeing a lot of companies that are
16 entering this computer space and that maybe have not
17 had a lot of experience in it before, they don't
18 necessarily think to have a vulnerability disclosure
19 process. And sometimes, it is very difficult to get
20 in touch with them. The other problem with it --

21 MS. SMITH: Well, in that case, wouldn't you
22 have made your good faith effort or --

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1 MR. GEIGER: The other problem is that you
2 don't always know how to contact a vendor. And some
3 of the research that we do is entirely online. Some
4 of it is automated. We have a Project Sonar that
5 scans the entire Internet in fact, does it every week.
6 And it is not always feasible to contact the owner.

7 And it's often not feasible to contact -- in
8 the case of Project Sonar, where we're scanning
9 billions of devices, there are millions of owners.
10 How do you contact all of them? So it's a best
11 practice. But it is not one that I think the
12 protection ought to hinge on because it doesn't scale.
13 You know, you don't always know the owner.

14 Even if you do know all the owners, it
15 doesn't scale and it's not -- it's not always the
16 practice of every manufacturer to have an avenue. And
17 so, there is -- we've experienced it -- sometimes
18 dispute over whether the effort was good enough.

19 MR. AMER: I think we'd like to go to Mr.
20 Mohr and then turn to the next topic.

21 MR. MOHR: Just a couple of pretty quick
22 points. It's difficult for me to figure out exactly

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1 what Mr. Geiger's company does. I don't know
2 precisely what they do and how they do it. I would
3 actually like to discuss that with him afterwards, in
4 a nice way.

5 MR. GEIGER: Anytime, anytime. I didn't
6 want to take up time in the panel, but I'd be happy to
7 do that.

8 MR. MOHR: That would be -- that would be
9 useful. I mean, just a couple of things. Look, I
10 mean, computer networks existed at the time this
11 statute was enacted. Things are different now.
12 Certainly the connectivity of ordinary devices is
13 expanding. But our members certainly have -- are
14 quite fond of the CFAA, for example, in its current
15 form. And they are also quite fond of the DMCA in its
16 current form.

17 We -- again, I mean, a lot of our -- I mean,
18 a lot of our concerns are -- they may not be as much
19 with the legitimate activities that Mr. Geiger's
20 company does. I mean, sonar to me does not sound like
21 cracking. It sounds like looking. That's not
22 something that would necessarily implicate the

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1 circumvention of a technological protection measure.
2 And that's -- I heard that and that's why it struck
3 me. I was puzzled as to how the DMCA would be
4 implicated in a situation like that.

5 MR. GEIGER: So I just used Sonar as an
6 example of a large-scale security research program.
7 And for the most part, Sonar is just looking. And
8 we're looking at ports and website -- or web router
9 and website connections that are not encrypted or that
10 have -- appear to have no password protection and so
11 forth. And CFAA actually stops us from going further
12 in many cases.

13 But I'm mostly using that as just an example
14 for the problem that you would have with scaling for a
15 large-scale research project and something that you
16 are able to provide notice to individuals for.

17 MR. MOHR: And my concern would be with a
18 large-scale -- something dubbed a large-scale research
19 project that did much more than let's say walk around
20 a neighborhood and see whose blinds were down. I
21 mean, at that point, we would have concerns. We would
22 have obviously security concerns and we would have

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1 potentially infringement concerns as well.

2 MR. GEIGER: Well, I understand that. I'm
3 not really sure where the copyright infringement
4 concern is there on your end. But let's say that it
5 is a project like Sonar that is scanning for routers
6 that are sending unencrypted traffic or that there is
7 a flaw in the implementation of the encryption. And
8 so, you'd want to check to see whether or not that
9 flaw was present in these routers all around the
10 world. And I would guess that you could probably find
11 thousands of routers at least that meet this flaw.

12 In order to find out that they are in fact
13 flawed, then you may have to test it. And I don't see
14 where the -- where the problem is for the availability
15 of the copyrighted work. I don't see where the
16 copyright infringement is. It'd be difficult to get
17 authorization in order to do that beforehand or to
18 inform the router owners directly after the fact. And
19 it would not be covered currently by any of the
20 permanent exceptions. And --

21 MR. AMER: Yeah --

22 MR. GEIGER: Sorry. Go ahead.

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1 MR. AMER: Sorry. You all are certainly
2 welcome to continue this after the roundtable. I
3 think we -- I think did you have one more question on
4 --

5 MS. SMITH: Yeah, before we moved off that,
6 I just wanted to open it up to anyone else who wanted
7 to comment about these three permanent exemptions and
8 specifically the one for interoperability, 1201, if
9 anyone had thoughts on that. So Mr. Dow?

10 MR. DOW: Just two thoughts very quickly.
11 One is -- I think this goes to Mr. Williams' point
12 that this notion of interoperability -- I don't know
13 what Mr. Geiger's company does either. But just
14 listening to him, I have every belief that what he
15 does is in good faith.

16 But what we've seen even in some of the CSS
17 litigation is that we've had people who've tried to
18 take advantage of the exceptions for things like
19 security testing and interoperability, but for things
20 that really were just about removing content
21 protection from movies and other entertainment. And
22 so, unfortunately --

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1 MS. SMITH: And so, in those instances,
2 they're doing it in the name of research or how do
3 they link that together?

4 MR. DOW: Well, so for example, in the
5 *Corley* case, you had a defense that was put forward
6 that said that what was going on there was really just
7 a matter of trying to make DVDs interoperable with
8 Linux computer systems because they said there wasn't
9 a Linux player that could play those DVDs. In fact,
10 there were licensed Linux players at the time.

11 But the problem was that the way they
12 preferred to make those movies viewable on a Linux
13 player was to remove the copy protection. Remove the
14 encryption so they would play on any player, right?
15 That makes the movie interoperable by making sure that
16 there are no protections, right?

17 Now, the court saw through that and didn't
18 see the permanent exemption as applicable in that
19 circumstance. But it was an example of somebody who
20 was not a good actor who was trying to leverage some
21 of these exemptions for purposes other than the ones
22 that were intended. And we need to be mindful of the

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1 ability of people to do that in the way they're
2 crafted.

3 The second point I was going to make -- and
4 this is sort of probably taking my Disney hat off and
5 putting back on my former Judiciary Committee counsel
6 hat -- that this interaction between Mr. Geiger and
7 Mr. Mohr I think just highlights the fact that these
8 exceptions in the statute were very, very carefully
9 negotiated, down to every word between the relevant
10 impacted parties.

11 If we just start going through and crossing
12 out words, we start -- we start upending a balance
13 that was struck. Now, whether or not this balance
14 continues to work today is a totally separate
15 question. But the notion that somehow we could just
16 start rejiggering things and that we would maintain
17 the type of balance that was maintained I think is a
18 concern.

19 If Mr. Mohr and Mr. Geiger go off and figure
20 out what the right modifications are to it and it
21 doesn't implicate the types of concerns I was
22 referring to, that may be another thing. But I think

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1 this sort of counsels towards a consensus-based
2 approach to these things.

3 MR. AMER: Ms. Koberidze?

4 MS. KOBERIDZE: I wanted to pick up on
5 something that Mr. Love mentioned regarding European
6 Directive. Europe went with another approach than the
7 U.S. The U.S. decided to give fewer exemptions and to
8 go with rulemaking process. European Union went with
9 giving an originally long list with exemptions. But
10 some of the countries decided to provide a mediation
11 process.

12 And maybe with permanent exemptions under
13 1201, that could be a position for the parties to get
14 into that mediation process, like we just saw with Mr.
15 Geiger and Mr. Mohr. They are open to discussion.
16 And that would be helpful.

17 So for example, it could be like the first
18 step would be for the interested beneficiary of the
19 exemption to come forward and contact the copyright
20 holder and say we would like to make certain uses
21 under the permanent exemption. Do you agree or not?
22 If they do not, then the intended beneficiaries could

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1 go and request certain agency -- in this case, it
2 would be Copyright Office -- to help to accommodate
3 the access or third party assistance, whatever is
4 applicable in the specific -- under a specific
5 permanent exemption.

6 MR. AMER: Thank you. I do think we need to
7 move on. I want to turn to talking about proposals
8 for new permanent exemptions. And I wanted to start
9 with a proposal that we saw pretty substantial
10 agreement on in the written comments. And that would
11 be an exemption for the print-disabled and visually
12 impaired.

13 As you know, the current exemption applies
14 to literary works protected by TPMs that prevent read-
15 aloud functionality or screen readers or other
16 assistive technologies. I would be interested in your
17 thoughts about whether Congress might consider making
18 that specific exemption permanent. If so, whether the
19 current language is sufficient or whether it should be
20 altered in some way. And I'd like to start with Mr.
21 Cazares.

22 MR. CAZARES: I think that I first and

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1 foremost would be remiss if I didn't recognize the
2 effort that both the publishing industry and the
3 libraries have done in the last few years to try and
4 ensure that accessibility is something that's
5 incorporated from the beginning.

6 I think Ms. Cox brought up a good point on
7 the exemptions that the libraries really do rely on to
8 ensure that assistive technology and other
9 technologies used by the blind and visually impaired
10 are available, and likewise the publishers have done
11 great work with their members to ensure that products
12 are being produced accessibly.

13 Having said that, I think that it's safe to
14 say that for people who are blind and visually
15 impaired, that circumstance certainly isn't going to
16 change. I expect to be blind three years from now.
17 So I think that the discussion is worth having on
18 setting up a permanent exemption. I think that the
19 language that we have now is worth revisiting, with
20 all of the interested stakeholders.

21 Accessibility has been something that has
22 quite literally taken a village to try and bring to

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1 the mainstream. So I think that the discussions that
2 we've spearheaded, both with the libraries and the
3 publishers and the discussion that we're having now is
4 a good start. But I definitely know that the National
5 Federation of the Blind is supportive of such
6 permanent exemption.

7 MR. AMER: Thank you. May I ask a follow-
8 up? I just would be curious to know your views on
9 sort of how the market -- and you mentioned this at
10 the outset of your statement -- is responding. Have
11 you noticed a change over time, an increase in
12 accessible format copies becoming available in the
13 marketplace, such that maybe the need to circumvent
14 may be diminished?

15 MR. CAZARES: So I certainly don't think
16 that we're at a point where the need to circumvent
17 needs to be diminished, particularly in the realm of
18 education. There's still a lot of work that needs to
19 be done to ensure that e-books and digital books that
20 are produced particularly with the DRM are accessible.

21 What we're finding now is that a lot of time
22 authorized entities have to then take such materials

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1 and ensure that they're accessible. I think that
2 we're doing -- we're making significant progress. But
3 I don't think we're at the happy-go-lucky day where I
4 can safely say that everything that is produced
5 digitally, particularly in the literary realm, is
6 accessible from the beginning.

7 MR. AMER: Great. Thank you. Ms. Cox?

8 MS. COX: So you've heard me say earlier,
9 but of course we agree with the position of the
10 National Federation of the Blind that these permanent
11 exemptions are necessary. And I would just add a few
12 points, that as the Obama administration earlier this
13 year submitted the Marrakesh Treaty for ratification
14 by the Senate, also submitted implementing
15 legislation, it's really important to note that if the
16 Marrakesh Treaty comes into force, that in order to
17 comply with the treaty and really make it useful, it
18 would be good to have that permanent exemption to
19 ensure compliance with the treaty.

20 Additionally, as Mr. Cazares pointed out,
21 that even though, yes, there are more works being
22 produced digitally, it doesn't mean that those works

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1 are necessarily accessible, especially in the
2 educational realm. Our libraries work very often with
3 the disability services offices to ensure that we are
4 able to provide accessible formats of various
5 textbooks, which are often not created in an
6 accessible format from the start. You know, we would
7 love for everything to be immediately accessible for
8 our users that are print-disabled. But that's simply
9 not the case today.

10 And just, you know, I think -- I think the
11 example of the print-disabled also ties into this
12 question of interoperability because oftentimes
13 individuals with print disabilities have a specific
14 device that they use. And while it might be
15 accessible on one format on an iPad, it might not be
16 accessible on a Kindle. And it's really unfair to ask
17 someone who is print-disabled to buy five different
18 devices to find the one that works for them.

19 And this actually came up I believe in the
20 2006 rulemaking process where the joint reply comments
21 from rights holders groups like the AAP, MPAA, RIAA
22 criticized the American Federation for the Blind's

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1 evidence showing that four of the five works that they
2 looked at were not -- were not accessible to them.
3 They actually found that three of those four were
4 accessible. They just weren't accessible on the
5 format -- the platform that was being used to test
6 this in the evidence. So I think it's really
7 important to ensure that, especially for the print-
8 disabled, that you're not -- you're not restricting
9 that exemption.

10 MR. AMER: Thank you. Ms. Besek?

11 MS. SMITH: Microphone.

12 MS. BESEK: This is an appropriate area for
13 Congress to act because I think the history of the
14 rulemaking indicates that this is an exemption that's
15 regularly been sought and granted without a lot of
16 opposition. And I think there's strong public policy
17 reasons for raising it to the level of a permanent
18 exemption. So I would favor it in general.

19 Although, you know, I can't say sitting here
20 the exact formulation of a past rulemaking is the
21 correct one. And that's something that we would have
22 to look at. I do have some concerns about the

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1 accessibility discussion that we just had. And you
2 know, because there's also the other side of the coin.
3 You don't want to discourage the market for creating
4 accessible versions for other types of devices as
5 well. So there are both sides of that to consider.

6 MS. SMITH: Do you have a view as to whether
7 a discussion about implementing a permanent exemption
8 along this line should be limited towards sort of the
9 general subject matter of the prior exemption for the
10 print-disabled as opposed to accessibility or
11 assistive technology more broadly?

12 I mean, we've received written comments of
13 an organization representing individuals with
14 degenerative diseases, not necessarily related -- so
15 not necessarily related to e-books or accessing books,
16 but maybe playing a videogame, for example.

17 MS. BESEK: At this point, I think because
18 part of my rationale is that there has been -- there
19 have been a series of exemptions already granted, I
20 would mean the print-disabled, that doesn't mean that
21 other groups couldn't seek in the future an exemption
22 under the rulemaking. And perhaps at some point that

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1 would be deemed worthy of a permanent exemption. But
2 I think it would be premature to do that right now.

3 MR. AMER: Mr. Williams?

4 MR. WILLIAMS: Thank you. I think we would
5 agree that this is an important exemption that's been
6 in existence now for some time. I think you're also
7 right to say that there's generally consensus that it
8 should continue to exist and be renewed. And at this
9 point in time, the market isn't adequately addressing
10 the problem and that's why we don't oppose the
11 existence of the exemption.

12 I think the streamlined renewal process,
13 again, is something that would be more effective at
14 addressing this than trying to make the exemption
15 permanent for a couple of reasons. The first is my
16 understanding is that there are formats in development
17 that are going to roll out that will make this problem
18 much less significant if it doesn't go away.

19 There's EPUB-3 and HTML-5 which I understand
20 are going to help address these issues. And so, if
21 that were the case and circumvention became
22 unnecessary, then there wouldn't be a need to have an

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1 exemption sitting in the statute when we could just
2 renew it through the rulemaking process.

3 The other issue is that if the language does
4 need to be revisited, I think that's something that we
5 would be open to. But I don't think I've seen any
6 specific proposals about how that needs to be done.
7 So that's something that could be worked out before
8 the next rulemaking or during the next rulemaking.

9 If we could come to consensus, we could
10 address what the changes are that need to be made.
11 And again, if you put it in the statute as it
12 currently is drafted or in some new slightly revised
13 form, then that's how it will be. And the rulemaking,
14 the benefit of it is it's more flexible than that.
15 You can revisit it. You can figure out, well, if it's
16 not fixing the problem, let's get together and fix the
17 problem. So that's I think the better way to address
18 it.

19 MR. AMER: Although, I mean, a permanent
20 exemption wouldn't preclude future requests
21 administratively.

22 MR. WILLIAMS: No, I agree with that. But I

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1 also question whether it makes sense to go through the
2 whole legislative process of putting new permanent
3 exemptions into the statute when it's unlikely they're
4 going to end up being the ultimate solution. And I
5 think that's why Congress created this rulemaking is
6 that it knew there's going to be a lot of things that
7 come up that we can't address in the statute.

8 And so, you know, Title 17 is very long
9 already. And if we start putting new things in it
10 that very quickly become irrelevant or become no
11 longer capable of addressing the problems, then I
12 don't find -- I don't think that that's a helpful way
13 to go about it.

14 MS. SMITH: So, I hear you, but Congress
15 also implemented a variety of exceptions to the
16 prohibition on circumvention, which are these
17 permanent exemptions. I mean, should we treat these
18 on par with a continuously renewed exemption or, you
19 know, where is the line? Why have one for encryption
20 but not have one for assistive technology?

21 MR. WILLIAMS: Sure, and I think you have to
22 assess every issue as it comes up. As I was saying

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1 earlier, I think a lot of the permanent exemptions
2 appear to have largely done their job in that
3 litigation is not taking place that results in bad
4 outcomes. And I think there's a lot of people who
5 seem to have concerns about the scope of these
6 exemptions.

7 But there's not a lot of evidence that if it
8 actually got litigated, they wouldn't have addressed
9 the problem. But that being said, the fact that no
10 one is content with them to me indicates that no
11 matter how we work through over the next couple of
12 years creating new permanent exemptions, someone's
13 going to figure out a reason why in a couple of years
14 they're worried they're not going to work right.

15 And they're going to come to you with those
16 concerns. And so, I feel like that renders the
17 legislative work that everyone would have to do a
18 little more suspect because there's already a process
19 that, as I said yesterday, is working quite well where
20 the Office is able to address these things. And if
21 you can get them renewed in a much less burdensome
22 fashion, that to me is far preferable to going with

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1 the legislative route.

2 MR. AMER: Mr. Love?

3 MR. LOVE: I don't know if you're aware of
4 this, but we spent -- I spent maybe five years of my
5 life working about half-time on -- you know, on this
6 issue. So we've followed the debates on it. I'd call
7 attention to -- I mean, if you look at the --
8 certainly the temporary thing has been a problem for
9 the groups. There's been years when almost no
10 evidence was provided for the renewal, just because it
11 was such a burdensome proceeding.

12 And it would have been -- and there was a
13 recommendation by the professional staff to get rid of
14 the exception because the burden had been met in the
15 administrative proceeding. But I think the Library of
16 Congress wisely extended the exception anyhow because
17 it recognized that it was just such a failure of the
18 process and that the need was still there.

19 So I think the idea of having a permanent
20 exception is appealing, or at least a more durable
21 exception in some ways. The language in the treaty
22 that people have referred to, which says that the --

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1 that you shall take appropriate measures to make sure
2 that beneficiary persons can enjoy the limitations of
3 the exceptions that they should have, is kind of the
4 level of generality where maybe the specifics of how
5 that's done could be done more administratively.

6 I'm sympathetic to the idea that rigid
7 statutory frameworks are not necessarily that
8 appealing in a lot of cases.

9 I know that there was an earlier exception
10 for the blind that had a commercial availability
11 provision in it. And there was a letter on the 21st
12 of September, 2012 from NTIA to Maria Pallante that
13 discussed this issue. And some of this is I think
14 described in a note that Krista Cox is the author of,
15 June 7, 2013, Marrakesh number four, when Krista was
16 working with us, was addressing this issue. And I
17 would recommend that memo because I think it's quite -
18 - it's quite well-written and I think it's informative
19 on this point.

20 But it's -- the finding by NTIA was that the
21 interoperability problem had gotten worse, not better.
22 The hope was -- we always hear at these talks that

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1 you're not going to -- you know, licensing will solve
2 the problem, technology will solve the problem, blah,
3 blah, blah, blah.

4 But then, the thing that Krista mentioned
5 earlier about the cost of obtaining different devices
6 -- also in the context of the treaty, you saw people
7 making these presentations in the treaty negotiations
8 that would get up and they would show you what was
9 considered to be accessible.

10 Like one blind person from South Africa, he
11 had had a PDF reader. It would read an entire page of
12 text to him in the sort of permitted format that they
13 had accessibility. And he was just trying to get the
14 footnote at the bottom of the page. And he'd try and
15 copy it down after he'd hear it.

16 And then, he'd have to start it again and
17 again and he'd have to do it several different times
18 because the reader he was using didn't allow him to
19 stop or cut and paste and things like that, whereas
20 other readers that people were using were designed
21 more functionality and were really easier to use and
22 more effective for people. Not only could you speed

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1 up the process quite a bit, but you had other
2 abilities to sort of utilize the text in other ways.

3 I think people that are not really familiar
4 with it -- I wasn't that familiar with it myself and I
5 started to learn about these things -- just don't
6 really understand how high tech some of the assistive
7 technologies really are and how idiosyncratic they are
8 for the users and things like that. So for that
9 reason, NTIA really changed its position on the
10 commercial availability because they just didn't think
11 it was really a workable standard.

12 Now, that said, I think this balance between
13 having a permanent mandate to do something that makes
14 people unequal in the way that you're supposed to is
15 the right approach. And then, being able to fine-tune
16 the details of how the exception is implemented over
17 time, probably a good idea.

18 My mother's deaf. She was one of the
19 people who was excluded from the Marrakesh Treaty
20 because the motion picture industry insisted on that
21 in the negotiations. Her situation's better today
22 than it was in the old days because we used to have to

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1 buy separate devices to do kind of captioning and now
2 you can get that more -- even Netflix has it these
3 days, which is kind of nice.

4 But it is the case that it was I think a
5 disappointment that the Marrakesh Treaty on print
6 disabilities was as narrow. It was a political
7 decision. But it also permitted countries to
8 implement them more widely. And I think U.S. law is
9 wider in a lot of areas, certainly in the area of
10 education. So I think that striking the right balance
11 as to how inclusive it is, but also recognizing that
12 maybe the exceptions are maybe better understood in
13 some areas of disabilities in terms of the overall
14 effect on all the stakeholders is probably accurate as
15 well.

16 MR. AMER: Thank you.

17 MR. LOVE: So you know, I think maybe --
18 sort of arguing against myself a little bit -- sort of
19 maybe sort of giving kind of like -- accepting that
20 you sort of know what you're doing in some areas and
21 you know you should be doing something in other areas,
22 but maybe you're not quite as confident you know what

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1 that thing is just yet is probably realistic.

2 MR. AMER: Thank you. I think we're going
3 to go to Ms. Koberidze and then back to Mr. Cazares.

4 MS. KOBERIDZE: I believe there is a strong
5 support for a permanent exemption for print-disabled
6 people. And we have rulemaking records since 2003.
7 We have case law, *Authors Guild v. HathiTrust*. We
8 have Chafee amendment and we have also international
9 obligations under Marrakesh Treaty.

10 And although despite all this regulations,
11 print-disabled people still cannot benefit from the
12 exemptions that are granted within the rulemaking
13 proceedings. And this is because they need
14 accessibility and they need third party assistance.
15 And I think it would be very important when we
16 consider permanent exemption to consider these two
17 issues, how to facilitate accessibility and how to
18 facilitate third party assistance.

19 Whether it will be through mediation
20 process, as I mentioned, with the copyright holders or
21 whether it will be with help of the Copyright Office
22 or maybe there could be a third solution, to create a

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1 separate management organization similar to Sound
2 Exchange in the music industry which will help to
3 manage third party assistance issues. Thank you.

4 MR. AMER: Thank you very much. Mr.
5 Cazares?

6 MR. CAZARES: -- that a couple of great
7 points have been made. I agree in part with Mr.
8 Williams. I think that the forthcoming of EPUB-3 and
9 HTML-5 are going to kind of revolutionize the way
10 accessibility is approached in the mainstream.

11 But I also want to address the fact of the
12 permanent exemption. The fact is that people with
13 disabilities, particularly the AFB, the American
14 Foundation for the Blind and other folks have been
15 requesting exemptions that have been, by and large,
16 being renewed with little to no opposition because the
17 circumstances really don't change for people with
18 disabilities.

19 I think given the notion -- the fact that we
20 have a large number of people who are blind or
21 visually impaired in this country alone guarantees a
22 permanent exemption. I don't see the need, until the

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1 process is reformed, for the renewal -- the rulemaking
2 process -- I don't see the reason why people with
3 disabilities, people who are print-disabled have to go
4 through the burdensome process of requesting for and
5 waiting to be granted another three-year exemption.

6 I think that this particular circumstance,
7 given the situation of blind and print-disabled
8 Americans, warrants a permanent exemption.

9 MR. AMER: Thank you very much. I think we
10 have quite broad agreement on that topic, which is
11 encouraging. We have -- we're getting close to the
12 end. And so, I think we just had one or two sort of
13 suggestions for permanent exemptions that we wanted to
14 ask your views about.

15 One proposal that came up in the comments
16 was to make the current unlocking exemption permanent.
17 We'd be interested in your views on the advisability
18 of that. Mr. Dow?

19 MR. DOW: So I think it was Mr. Adler in the
20 previous panel who read some from the legislative
21 history and the contextual part of the unlocking --
22 the circumstances of the unlocking legislation. And I

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1 think that that counsels towards an approach that says
2 a permanent exception for that type of thing is really
3 not the way to go. And I think that's not unique to
4 unlocking per se.

5 I think that really applies when you're
6 dealing with very technologically specific items in
7 general. But the one thing on the unlocking
8 legislation specifically was that the unique
9 circumstances of that was that we knew what that
10 meant. We knew what it meant to unlock a phone. We
11 knew that what it meant was the entry of a code,
12 right?

13 It was a handful of digits that could be
14 entered in and the only thing that resulted from the
15 entry of those digits was that you could connect that
16 phone to a network. It didn't expose the content on
17 the phone. It didn't expose personal information.
18 There weren't privacy interests that were affected.
19 There weren't copyright interests. It was a very
20 narrow thing.

21 But we didn't know what that was going to
22 mean for the next device, right? I mean, that was one

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1 of the issues that we talked about when asking should
2 this be expanded into the context of tablets and other
3 computing devices, right? Does circumvention for the
4 purposes of connecting the device mean the same thing
5 in those contexts? Does it simply mean that you can
6 connect that device to a different network or does it
7 mean that all of a sudden it does implicate some of
8 these other interests that didn't exist at the time of
9 the cell phone unlocking legislation?

10 And so, I think the legislative history
11 speaks specifically to that. It talks about that
12 being a unique circumstance and why congress was
13 comfortable doing it. And I think it speaks towards
14 why, in the context of trying to look at that for
15 other devices and in other contexts, it really
16 requires a specific focus and one that's uniquely
17 suited to something like the rulemaking as opposed to
18 the legislative process and the permanent exemption.

19 MR. AMER: Thank you. Mr. Love? Oh, that
20 was from before? Okay. Anyone else want to weigh in?
21 Ms. Koberidze?

22 MS. KOBERIDZE: I support this type of

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1 exemption, although I understand it will be very hard
2 to agree on the language, especially since, as was
3 mentioned a lot today, new devices are coming in and
4 it's very hard to predict what kind of users and what
5 kind of uses will need to be exempted. But we need to
6 start discussing it now because as the last rulemaking
7 showed, it will be -- it was the beginning.

8 All those devices, smartphones, TVs and
9 medical devices. Now we will have Amazon Alexa and
10 then we will have smart homes. And everything will be
11 connected. And a lot of security testing would be
12 needed. A lot of privacy issues will arise.

13 And those will not be concerned with
14 copyright law by itself, but because a lot of those
15 devices and technologies use copyrighted material,
16 which is computer programs, it would be helpful to at
17 least start drafting some permanent exemption that
18 will help us to start moving in that direction of
19 unlocking certain devices for certain uses. Maybe it
20 would be very narrowly tailored. But we can at least
21 use the rulemaking record to find out which ones are
22 more important to make now.

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1 MS. SMITH: Can I ask just one follow-up
2 question? Then I think we're going to move to another
3 proposal.

4 But just should we consider the specific
5 narrow case of unlocking your phones differently than
6 the broader jailbreaking classes, right, where you're
7 opening up an activity -- you know, host your device
8 maybe as the technology works differently, sort of
9 going to Mr. Dow's point and we may not know exactly
10 what software is being implicated for that? Should we
11 treat unlocking differently than jailbreaking?

12 MS. KOBERIDZE: Yeah. What I'm talking
13 about, unlocking, it means I'm trying to just cover
14 all the aspects, including car tinkering and including
15 jailbreaking. I don't expect those -- all of those
16 could be even become permanent exemptions. But at
17 least wireless devices, just unlocking, to be able to
18 change carriers.

19 And it's interesting how the rulemaking
20 itself resulted in changes on the marketplace because
21 now, even if we look at the Amazon Alexa, the system
22 is open to third party applications. And we don't --

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1 might not need jailbreaking for that specific device.
2 But changing -- at least changing carriers, I think it
3 could be very helpful to have for the mobile devices.

4 MS. SMITH: Okay. So I think I'll go to Mr.
5 Williams next and then, I think, in your answer, you
6 sort of open up where we were going to go next
7 anyways, which is sort of repair and auto tinkering.
8 So if you would like to comment on that, also feel
9 free, since we're running short on time.

10 MS. KOBERIDZE: Thank you.

11 MS. SMITH: Mr. Williams?

12 MR. WILLIAMS: Thank you. Just on your last
13 question about how to handle jailbreaking, I would be
14 opposed to trying to create a permanent exemption for
15 jailbreaking for the reasons that Mr. Dow expressed
16 related to unlocking and also because even within the
17 context of the rulemaking, there have been things
18 referred to as jailbreaking proposed that the Office
19 has concluded should not be granted.

20 And going back to what I referred to earlier
21 and Mr. Dow referred to, the Linux situation with
22 DVDs, there are a number of times that people have

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1 sought to impress on the Office that they were
2 entitled to access an expressive work on any device of
3 their choice. And the Office has concluded that's not
4 correct.

5 And so, to try to craft a permanent
6 exemption for jailbreaking the things the Office has
7 concluded you should be able to jailbreak, but not
8 sweeping in the things that you've already concluded
9 you should not be able to hack and then also address
10 future devices and future products and services, I
11 think that would be a very unworkable task. So I'd be
12 opposed to that.

13 MS. SMITH: Okay. Thank you. Mr. Love, and
14 I'd ask you to keep it short, just because we are
15 running out of time for all of our next commenters.

16 MR. LOVE: Right now, the Copyright Office
17 is the decider on a lot of these things. And then,
18 other agencies petition the Copyright Office with
19 their concerns. In the FDA proceedings right now,
20 there's been requests that the FDA as a regulatory
21 thing regulate some of the -- some of the technical
22 protection measures on medical devices as part of a

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1 broader work they're doing on medical devices and
2 hospital networks in terms of cybersecurity.

3 I'm just wondering if in some cases it makes
4 sense for the Copyright Office to farm out some --
5 like in the jailbreaking case, I mean, maybe the --
6 I'm not sure that it makes sense for the Copyright
7 Office to be the be all and end all of the decision-
8 making in terms of future way you might imagine doing
9 this or should this be something that you envision
10 that other agencies could -- I mean, does it always
11 have to be your rulemaking authority or could another
12 agency basically be --

13 MS. SMITH: Thank you. I mean, I do take
14 your point and in fact, in the last rulemaking, the
15 Copyright Office did solicit some viewpoints from
16 other agencies when commenters had suggested that it
17 may fall under their bailiwick.

18 I think the discussion of jailbreaking is
19 getting a little fuzzy, whereas in the rulemakings
20 it's been referred to opening up a device in order to
21 install different apps on it. So it wouldn't -- that
22 wouldn't necessarily extend to medical devices. But I

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1 do take your point. And Mr. Mohr?

2 MR. MOHR: Just quickly, I mean, I think,
3 you know, we -- SIITA has had some experience with
4 trying to move I think in hindsight a bit too quickly.
5 So we were supporters of UCITA and I was not
6 representing them but I was at many of those drafting
7 meetings. And what you had was somebody trying to
8 draft a statute that codified practice that would
9 literally change every two months.

10 We would have new language proposed because
11 AOL did something or CompuServe did something. And it
12 just never stayed still. And I think in terms of --
13 for a lot of the kinds of things that we are talking
14 about, that the type of flexibility, particularly
15 with, as Mr. Williams mentioned, the kind of
16 streamlining which we've discussed and which enjoys
17 pretty broad support, with that type of flexibility, I
18 think you will produce better policy results.

19 MS. SMITH: Thank you. I know we're running
20 out of time. I have one final question. Others may
21 have other questions about just some of the other
22 permanent exemptions, if anyone wanted to weigh in on

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1 them.

2 There's one, for example, for privacy, if we
3 can beat the hypothetical to death right now, is it
4 working if you want to turn off your smart
5 refrigerator so it doesn't spy on you or protection of
6 minors, analog devices. There's one for federal
7 agencies. Does anyone else want to comment on
8 potential reforms to those? Mr. Perry?

9 MR. PERRY: I thought you'd never ask.

10 MR. AMER: We appreciate your patience.

11 MR. PERRY: That's okay. I won't repeat
12 what was said in the previous sessions. And our
13 client is a player in the auto aftermarket industry.
14 You know, we haven't -- to be honest, I talked at
15 length with our client about permanent -- the
16 permanency of the exemption. I think it's -- and I'm
17 not really sure what a streamlined renewal process
18 would be, as distinguished from permanent, exactly how
19 it would work.

20 I think if we liked the exemption, we would
21 want it to be permanent. We don't like this exemption
22 as it's written so we haven't spoken about it very

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1 much. The class 21 exemption, as I pointed out in the
2 prior session sort of morphed from as it was proposed
3 to as it ended up.

4 And some of the wording in there with
5 respect to, "on behalf of the owner or authorized
6 owner" -- some of the wording in the exemption
7 essentially for the \$200 billion auto aftermarket
8 industry sort of left them basically hanging. If you
9 -- and a point I did not make in the prior session was
10 -- and this may be the only exemption of all the
11 classes -- the class 21 exemption really doesn't kick
12 in from I think 12 months from when it was originally
13 promulgated.

14 And it also has an explicit sort of
15 directive over to the DOT and the EPA, which sort of
16 ties in with a point that Mr. Geiger made earlier
17 about, you know, those laws are there. Do we need to
18 have the Copyright Office in an exemption essentially
19 give sort of a tentative shout-out over to the DOT and
20 the EPA saying we just want to make sure that what
21 we're doing here isn't going to violate your laws.

22 So just to be safe, let's not make any of

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1 this happen for 12 months. And the effective result,
2 at least for the aftermarket industry, was to
3 basically look at this exemption and say well that
4 basically didn't really give us much of anything
5 except maybe another year to wait and see what
6 litigation is going to ensue, what kind of lobbying is
7 going to take place.

8 And you know, if you're -- if you're --
9 however, if you are a car repair enthusiast, starting,
10 I guess, in October of next year, if you want to
11 circumvent and fix your windshield wipers and break
12 into the chip that exists in there, I suppose this
13 exemption is for you.

14 The reality is that it doesn't help the
15 average person. It doesn't help any of us, the
16 average person who drives a car who goes to their
17 local mechanic, which is about I think 70 percent of
18 automobile aftermarket repair is done through your
19 local mechanic. It's not done at the dealer.

20 Of course, this ties in hugely to automobile
21 manufacturers and big auto and all the tensions
22 between the automakers and their own dealers, where

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1 there's great tension, the aftermarket, where there's
2 additional tension, and, to Mr. Mohr's point earlier,
3 I mean, I think we fully agree, the expression versus
4 function -- functionality, that dichotomy, it's not
5 easy. It's not easy at all.

6 Some cases I think with cars are easier to
7 see than others if you're talking about a windshield
8 wiper or a door, the button that brings your windows
9 down. But there are a lot of grey areas in this. So
10 sort of a long answer to address a variety of issues
11 that came up earlier. But this particular exemption
12 in class 21 is so watered down and tentative that
13 there's no reason for us to want this to be permanent
14 as written.

15 MR. AMER: Thank you. Ms. Koberidze?

16 MS. KOBERIDZE: I just wanted to add that
17 even ask whether the wording in our permanent
18 exemptions subject to privacy and security and other
19 regulations will resolve the concerns expressed today
20 and earlier in the roundtable regarding privacy issues
21 and safety issues. So will it give some deference to
22 other agencies who are best positioned to address

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1 those issues?

2 MR. AMER: Thank you. Mr. Love, and then
3 Mr. Dow, and then, I think we're going to open it up
4 to the audience.

5 MR. LOVE: If it was possible, we would
6 think it would be useful if the Copyright Office would
7 have a permanent exception in this to the extent of
8 remedies to anti-competitive practices or possibly you
9 mentioned privacy, maybe that's another area to that
10 the Federal Trade Commission would spread out and it's
11 like sort of the idea of not just having this office
12 but maybe kind of a decentralized area where, in
13 addition to whatever you do, that another agency such
14 as the Federal Trade Commission, which deals with
15 anti-competitive practices and interoperability issues
16 on a regular basis may play a role.

17 Also, I said this earlier in terms of
18 medical devices for the FDA, I think if the FDA
19 asserts some kind of role in the area of security of
20 medical devices and networks, I think they should be
21 able to extend the benefits of an exception and then I
22 think that should kind of be hardwired into the

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1 process.

2 And the last thing I would say, the final
3 thing would be on the National Science Foundation. I
4 think they should be able to make similar
5 recommendations as it relates to artificial
6 intelligence systems, a topic which we addressed in
7 some of our comments earlier.

8 MS. SMITH: Thank you. And I just want to
9 make clear, currently under the statute, 1201(i) is an
10 exemption in the Copyright Act for the protection of
11 personally identifying information. So that's an
12 existing place to either accept, build off from, et
13 cetera.

14 MR. AMER: Mr. Dow?

15 MR. DOW: Okay, just very quickly. One
16 thing that I think we really haven't touched on has
17 been the incentive value of the rulemaking process.

18 The rulemaking process in part was adopted
19 to give copyright owners an incentive to use
20 technological protection measures, to apply them to
21 protect their works in ways that can accommodate non-
22 infringing uses because there was this process that

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1 said if you use these things in ways that cut out non-
2 infringing uses and impair that, then there's the
3 likelihood that you will wind up with an exception
4 that's going to allow people to hack into your
5 technological protection measures, an incentive built
6 in there to try and be responsible about the way you
7 apply those.

8 And I think we've seen some of that. There
9 was a comment I think a few minutes ago about maybe
10 some movement that we have seen in the market for
11 accessibility and perhaps having something to do with
12 some of the rulemaking proceedings with respect to
13 unlocking and how that may have driven the marketplace
14 in some ways. Whether we're talking in security
15 research, whether we're talking in unlocking and
16 jailbreaking, whether we're talking in licensing.

17 And we heard Mr. Turnbull earlier talk about
18 the willingness to talk about solutions to provide
19 licensed mechanisms to achieve these things because
20 the backstop alternative really isn't appealing. The
21 rulemaking process, the ongoing nature of it, provides
22 those incentives.

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1 The permanent exceptions really don't
2 provide those incentives. If you have a permanent
3 exception, the incentive is really to say, okay, well
4 I guess we have nothing there. That's just the way it
5 is. And there's no incentive to work going forward.
6 So I think it's just worth remembering that there was
7 a purpose to be served in the incentive nature of the
8 rulemaking. I think it works. I think it has some
9 impact and I think there's value to it.

10 MR. AMER: Thank you. We are over time. So
11 I think we're going to have to leave it there. Thank
12 you all very much. This was very helpful. And now,
13 our final session is an audience participation
14 session. We have a microphone at the back. Oh, here
15 it is at the front.

16 And so, if you have signed up, you're
17 welcome to come forward and ask any questions or make
18 any comments either about this particular topic or any
19 of the topics that we've talked about. And you can
20 still sign up.

21 MS. SMITH: Do we have anybody who's already
22 signed up who wishes to speak? No? All right. All

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1 right. Head on up.

2 MR. AMER: And if you could just -- yeah,
3 right.

4 MR. BUTLER: I can lean down.

5 MR. AMER: If you could just identify
6 yourself? I know who you are.

7 MR. BUTLER: Yes, of course. Absolutely.
8 Brandon Butler, from the University of Virginia
9 Library. I just wanted to chime in. Earlier there
10 was a discussion about the scope of section 108 and a
11 question of whether in the context of preservation
12 activities, one would need to necessarily violate the
13 ban on circumvention for purposes of copying as
14 distinct for purposes of access.

15 And the answer is absolutely yes. Best
16 practices for preservation and for access include to
17 make multiple copies in different formats, often in
18 different locations so that -- for example, you don't
19 want to be pulling up an emulator of an outdated DRM
20 thing and the original file every time a researcher
21 wants to read that thing that was on Salman Rushdie's
22 laptop. What you would do is do that once, export

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1 that content into an access copy and then try not to
2 ever have to do that again so that all that stuff
3 stays safe and not changed by the processes that
4 you're applying in order to preserve the thing.

5 MR. AMER: Thank you very much.

6 MR. BUTLER: And can I say one other thing?

7 MR. AMER: Sure.

8 MR. BUTLER: Because I was not on the
9 earlier panel about the first panel yesterday, I
10 wanted to weigh in a little bit about the question of
11 competition issues and non-copyright interests that
12 come into play in the context of 1201. Someone
13 mentioned earlier on this panel, I think, the notion
14 that other agencies should be able to weigh in.

15 And I just wanted to agree with that, that
16 if the question is, if we're really thinking about
17 overhauling the whole 1201 system, changing the
18 legislation, not just thinking what can we do without
19 changing the legislation, it would be great to have
20 the agencies that really know cars be the ones that
21 drive, so to speak, the process that has to do with
22 cars.

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1 MS. SMITH: Great. I mean, I hate to put
2 you on the spot during open mic time, but currently,
3 there is consultation with NTIA and other agencies can
4 participate in the rulemaking. I think you saw a lot
5 of them did reach out to the Copyright Office or we
6 solicited them. You know, so is it broken and in need
7 of fixing or is it sort of working and you're just
8 saying I acknowledge that this is happening and that's
9 okay?

10 MR. BUTLER: I think there is a real risk
11 that where the interests at the heart of the issue are
12 car safety or consumer safety or competition, that
13 having an agency that deals routinely with copyright
14 issues and with people who care about copyright issues
15 in the driver's seat consulting the people but
16 ultimately the last word is in the copyright-relevant
17 agency seems maybe like something that is not ideal.

18 If we could -- if we could move the driver's
19 seat over to the other agency and then they would
20 consult with you so that you could weigh in and say,
21 you know, no, there's not a problem for the copyright
22 industries, the primarily copyright-oriented

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1 industries. This is primarily about cars. It would
2 make more sense for them to control and to consult you
3 than the other way around.

4 MS. SMITH: Yes, and I think the Office has
5 probably, in our defense, has tried to stick to the
6 copyright interests or thinking of it under the title
7 of the Copyright Act. But that's good to consider.

8 MR. GEIGER: Can I make a quick point on
9 that, which is that we're not really seeing the
10 agencies that have relevant expertise in these areas
11 hold back either. So it's not as if though 1201 is
12 keeping these agencies at bay and they're not issuing
13 their own regulations or their own legislative
14 proposals to enhance car safety or prevent hacking or
15 circumvention because of 1201.

16 In many cases, we're seeing both move
17 forward. In the case of the FDA, they just released
18 their aftermarket cybersecurity guidelines for medical
19 devices. We saw NHTSA come out with -- or at least
20 support legislation that would have addressed hacking
21 in cars. So it's unclear to us why -- like what
22 benefit 1201 is serving for these agencies if they're

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1 coming forward with their own proposals or in many
2 cases have existing regulations anyway.

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

4 MR. ADLER: At the moment, my name is the
5 only one on that sheet back there, just so you know.

6 MR. AMER: Oh, okay.

7 MR. ADLER: Yes, I just wanted to make an
8 additional comment -- the discussion about the
9 accessibility exemption I think was very interesting.
10 When we -- as Mr. Williams indicated -- do think that
11 if we get the streamlining process right for renewal,
12 that renewal with respect to the exemption is more
13 appropriate for all the reasons that were mentioned
14 about flexibility and particularly because of the fact
15 that the market is changing.

16 It's not changing fast enough. It hasn't
17 changed to the point where it is satisfactory. But it
18 is continuing to change. And that's the reason why
19 commercial availability was always discussed as an
20 exception to the exception, even when we talk about
21 the Chafee amendment. And I would point out that, for
22 example, the importance of access controls cuts in

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1 many different directions.

2 For example, we helped to validate the
3 legitimacy of Book Share, which was an authorized
4 entity under the terms of the Chafee amendment that
5 became the first authorized entity to exist online and
6 to be able to provide access to accessible format
7 copies of works in digital forms on a subscriber
8 basis.

9 And we supported that and it was worth
10 pointing out that Book Share uses access controls such
11 as encryption to make sure that when these materials
12 are being delivered to beneficiary persons who are
13 entitled to use them, who need the accessible format
14 copies, that they're being delivered to the right
15 people. I would also point out that there was a lot
16 of discussion about the Marrakesh Treaty.

17 With respect to the TPM provision of the
18 Marrakesh Treaty, it's generally the view that U.S.
19 law already complies with that language precisely
20 because of the exemption that has been created and
21 renewed in the 1201 rulemaking process, as well as a
22 result of the Chafee amendment itself.

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1 But with respect to the comment I just made
2 about Book Share, I would also just point out that
3 there's an agreed statement that goes along with the
4 Marrakesh Treaty, that in referring to the TPM
5 section, specifically says that because the ability to
6 transport across national borders accessible format
7 copies of works is what the treaty provides for and
8 intends to be able to facilitate, this language was
9 agreed upon:

10 "It's understood that to distribute or make
11 available accessible format copies directly to a
12 beneficiary person in another contracting party, it
13 may be appropriate for an authorized entity to apply
14 further measures to confirm that the person it is
15 serving is a beneficiary person and to follow its own
16 practices as described" in the article that delineates
17 what an authorized entity is.

18 So access controls are going to be important
19 in order for the Marrakesh Treaty to be a success, to
20 make sure that not only can accessible format copies
21 be delivered across national borders all around the
22 world from an authorized entity in one country to

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1 another, but as the treaty also provides, from
2 authorized entities in one country directly to
3 beneficiary persons in another country without having
4 to have the intercession of an authorized entity.

5 So I would also just mention that we have
6 emphasized the importance of making sure that people
7 understand what an "authorized entity" is, that an
8 authorized entity indeed is willing to undertake what
9 is necessary to make the Marrakesh Treaty a success
10 and to facilitate its purposes properly. And I hope
11 that we will have support for that with respect to
12 others who commented favorably on the notion of the
13 importance of an accessibility exemption in the 1201
14 process.

15 MR. AMER: Thank you very much.

16 MR. MANNERS: Hello. My name is Derek
17 Manners. I'm from the National Federation for the
18 Blind as well. I just wanted to comment briefly. I
19 think there's a lot of agreement that the
20 accessibility exemption is important. I think it's
21 nice to hear that we're sort of debating about how to
22 best preserve it, how to make it easier for everybody

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1 and I think that's widespread agreement about that.

2 One point I would like to make though is
3 that Mr. Williams in particular indicated that the
4 rulemaking process encouraged parties to work
5 together. And I don't think that a permanent
6 exemption would discourage parties from continuing to
7 work together, in particular because many of the
8 entities -- third party entities that have been
9 discussed that have to make things accessible for the
10 blind and print-disabled have legal obligations to do
11 so under sections 504 of the Rehab Act and titles II
12 and III of the ADA.

13 And so, there will be a continuous dialogue
14 on how to make sure that that's done well because they
15 have a legal obligation to do so. And that's going to
16 require buy-in also from the publishers and
17 manufacturers to make sure that it's not being -- like
18 Mr. Adler was talking about, that there are controls
19 to make sure that it's not being abused or that copies
20 aren't getting leaked out.

21 And so, I don't think that the permanent
22 exemption would be -- would preclude continued efforts

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1 to work together to ensure that blind people have
2 access to accessible material while still protecting
3 the interest of the stakeholders. Thank you.

4 MR. AMER: Thank you very much. Did you --

5 MS. COX: Yeah, I just -- I mean, I wanted
6 to clarify that I agree with Mr. Adler that we can
7 comply with our treaty obligations by renewing this
8 exemption and ensuring that this exemption continues
9 to persist. My point was simply that having a
10 permanent exemption really makes a lot of sense and it
11 would ensure compliance rather than risk at some point
12 that the exemption is not granted in the future.

13 MR. AMER: Thank you.

14 MR. PANJWANI: Good afternoon. Raza
15 Panjwani, from Public Knowledge. There are just a few
16 general comments I wanted to add based on this panel
17 and some of the prior panels. I would encourage the
18 Office, as it's undergoing this study, to adopt a lens
19 of asking what was the bargain in section 1201 between
20 rights holders and the public and is that bargain and
21 the assumptions underpinning that bargain about the
22 marketplace and the incentives actually functioning.

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1 And I think a great example of considering
2 that is that throughout the discussion, we've heard
3 some folks say that we think the exemption process is
4 working fine. We think the renewability discussion is
5 academic. And most of the folks making those --
6 taking those positions are the folks on the rights
7 holders' side.

8 And I think it's important to realize, as
9 Professor Tushnet put it yesterday, that there are
10 asymmetries in the process, that if the process is
11 falling short of its goal, for example, of providing
12 the exemptions that are necessary to the public, that
13 leaves the rights holders whole in a sense, that the
14 ban is working, the 1201(a) prohibition on
15 circumvention is still working.

16 You know, the process only isn't working for
17 them when the exemptions go too far. And I think it's
18 worth sort of noting that because, especially I think
19 the discussion about the renewability being academic I
20 think is important to realize because there have been
21 cases where exemptions haven't been renewed. And I
22 think for those on the proponent side, it's not

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1 academic that there is a risk of exemption not being
2 granted, that the burden is on them to provide the
3 proof necessary to get the exemption. So I don't
4 think that's an academic discussion.

5 And finally, on that point, and especially
6 tying into the accessibility discussion, the example
7 that Mr. Love brought up of footnotes not being
8 accessible, that might be a case where someone might
9 say, well, 95 percent of literature is accessible.
10 That's just an edge case.

11 When you're the user and that particular
12 case implicates you, it's not an edge case. That is a
13 failure of the system. And I think the exemption
14 process and the user carve-outs in the permanent
15 exemptions aren't meant to cover those edge cases in
16 particular. So I would urge the Office to consider in
17 terms of evaluating what the burden of proof should
18 be, is considering that edge cases don't necessarily
19 mean the system is working. Thank you.

20 MR. AMER: Thank you very much. Did you
21 have another comment? No? Okay. That's okay.
22 Anyone else? Ms. Koberidze?

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1 MS. KOBERIDZE: Just a quick remark
2 regarding accessibility. So the rulemaking exemption
3 for print-disabled people was renewed since 2003.
4 Today, now it's 2016 and still there is statistics
5 that over 90 percent of the books are not available in
6 the form for print-disabled. And even tech companies
7 like Microsoft, in their comments, they agree on that.
8 And they fail and they acknowledge that they were not
9 able to accommodate all the needs of the print-
10 disabled people.

11 MR. AMER: Thank you. Mr. Love?

12 MR. LOVE: Well, I want to mention I was
13 contacted recently by someone who supported our work
14 in the past in different areas. And he asked me a
15 bunch of questions about artificial intelligence. And
16 I guess he was -- he was following a lot of things
17 that you're beginning to see more and more in the
18 literature of concerns about the potential, really
19 almost existential threat or at least in some people's
20 minds these things kind of represent, different points
21 of view.

22 But then, there's like a wider range of

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1 things about just as we get enveloped more with
2 software that we barely understand what's going on in
3 our lives, you know, we're being told what movies to
4 watch or how to drive to work. I mean, it's just
5 become such a huge part of our life these days that
6 this idea that you need to audit and monitor and
7 understand better these forces which are shaping our
8 lives.

9 I don't think people are really here to cut
10 up with how different life is today than it was five
11 years ago, 10 years ago or 20 years ago in terms of
12 the relationship between us and software. And I think
13 it's important to realize that being able to look
14 under the -- to have somebody to have the authority to
15 basically take a look under the hood to sort of see
16 what's going on is going to become more important, not
17 less important.

18 So to the extent that you're making the
19 system more leaky, not less leaky, I think that's a
20 good thing, not a bad thing. I just wanted to say
21 that.

22 MR. AMER: Thank you very much. Oh, Mr.

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1 Williams?

2 MR. WILLIAMS: Thanks. Briefly, I just
3 wanted to return quickly to something the gentleman
4 from Public Knowledge just said about considering, you
5 know, is the bargain that was struck in 1998, is that
6 being met and are rights holders fulfilling their end
7 of the bargain. And I think if you look through the
8 several pages of our initial filing in this proceeding
9 and in all of our rulemaking filings, you'll see that
10 there is just a vast array of new products and
11 services that have hit the market and that my clients
12 have been meeting their side of that bargain to the
13 best of their ability.

14 And I just wanted to make sure that that was
15 on the record. I think consumers have benefited
16 greatly from the existence of 1201. There are all
17 kinds of products and services that no one would have
18 thought would be available that have been made
19 available. Thank you.

20 MR. AMER: Thank you very much. That
21 concludes today's session. Thank you all very much.

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1 (Whereupon, the foregoing adjourned at 12:46
2 p.m.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, Natalia Thomas, the officer before whom
3 the foregoing proceeding was taken, do hereby
4 certify that the proceedings were recorded by
5 me and thereafter reduced to typewriting
6 under my direction; that said proceedings are
7 a true and accurate record to the best of my
8 knowledge skills, and ability; that I am neither
9 counsel for, related to, nor employed by any
10 of the parties to the action in which this
11 was taken; and, further, that I am not
12 relative or employee of any counsel or
13 attorney employed by the parties hereto, nor
14 financially or otherwise interested in the
15 outcome of this action.

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Natalia Thomas

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Natalia Thomas

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Notary Public in and for

21

the District of Columbia

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