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RULEMAKING HEARING

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FRIDAY,
APRIL 11, 2003

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The hearing was held at 9:30 a.m. in the Mumford Room (LM-649) of the Library of Congress' James Madison Building, 101 Independence Avenue, SE, Washington, DC, Marybeth Peters, Register of Copyrights, presiding.

PRESENT:

MARYBETH PETERS	Register of Copyrights
DAVID CARSON	General Counsel of Copyright
CHARLOTTE DOUGLASS	Principal Legal Advisor
ROBERT KASUNIC	Senior Attorney of Copyright
STEVEN TEPP	Policy Planning Advisor

WITNESSES:

JONATHAN BAND
 DAVID BURT
 STEVE ENGLUND
 SETH FINKELSTEIN
 SETH GREENSTEIN
 THOMAS LEAVENS

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C-O-N-T-E-N-T-S

**PANEL I - Compilations of lists of websites blocked by
censorware ("filtering software") applications**

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Jonathan Band, American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association, supporting the exemption	. . . 15
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compact discs**

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

10:02 a.m.

1
2
3 MS. PETERS: Good morning. I'm Marybeth
4 Peters, the Register of Copyrights. I would like to
5 welcome everyone to the first of our four days of
6 hearings in Washington in the second anticircumvention
7 rulemaking.

8 The agenda for the next three hearings,
9 which will take place at the Postal Commission in
10 early May are May 1st, May 2nd, May 9th. Then there's
11 two days in Los Angeles. That's being finalized, and
12 all of the information will be on our website next
13 week.

14 Before going further, I would like to
15 introduce the people from the Copyright Office who are
16 here with me. To my immediate left is David Carson,
17 the General Counsel of the Copyright Office. To my
18 immediate right is Rob Kasunic. We call him "Mr.
19 1201." He's kind of been our ongoing person from the
20 beginning. So he's probably the one who has been
21 contacting the various witnesses.

22 To David's left is Steve Tepp, who is a
23 Policy Planning Advisor in the Office of Policy and
24 International Affairs. To Rob's right is Charlotte
25 Douglass, who is a Principal Legal Advisor to the

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1 General Counsel.

2 This hearing is part of the ongoing
3 rulemaking process that, as most of you know, was
4 mandated by Congress under Section 1201 of the Digital
5 Millennium Copyright Act. Section 1201 provides that
6 the Librarian of Congress, not the Register, thank
7 you, may exempt certain classes of works from the
8 prohibition against circumvention of technological
9 measures that control access to copyrighted works.

10 The purpose of the rulemaking proceeding
11 is to determine whether or not there are any
12 particular classes of works as to which uses are, or
13 are likely to be, adversely affected in their ability
14 to make non-infringing uses if they are prohibited
15 from circumventing the technological access control
16 measures.

17 Pursuit to the Copyright Office's Notice
18 of Inquiry which was published in The Federal Register
19 on February 15th of 2002, we received 51 initial
20 comments proposing exemptions to the prohibition, 138
21 reply comments. All of these are available for
22 viewing and downloading on our website.

23 We intend to post the transcripts of all
24 hearings approximately one week after each hearing.
25 These transcripts will be posted on the websites as

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1 originally transcribed, but, of course, the Office
2 will give persons testifying an opportunity to correct
3 any errors in these transcripts.

4 The comments, the reply comments, the
5 hearing testimony will form the basis of the evidence
6 in this rulemaking, which, in consultation with the
7 Assistant Secretary for Communications and Information
8 of the Department of Commerce, will result in my
9 recommendation to the Librarian of Congress. The
10 Librarian will make a determination by October 28th,
11 hopefully, this time a little bit earlier than October
12 27th, on whether or not exemptions to the prohibition
13 should be instituted during the following three-year
14 period, from October 2003 to October 27th, 2006.

15 The format of each hearing will be divided
16 into three parts. First, each of the witnesses will
17 present their testimony. This is your chance to tell
18 us why we should believe you, and especially I'll look
19 at you, Mr. Finkelstein, because you're the one who is
20 the proponent of the exemption on this particular
21 exemption.

22 The statements of the witnesses will be
23 followed by questions from us, the Panel. I hope that
24 we ask tough questions that you will have to think
25 about, and all the questions are going to be the same

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1 for everybody. We hope that everybody gets tough
2 questions.

3 This is an ongoing proceedings. I want
4 you know that no decisions have been made about
5 anything. I put in my notes "about critical issues."
6 I can tell you it's not only the critical ones, it's
7 no issues.

8 The purpose of the hearings is to further
9 refine the issues and evidence presented by both sides
10 in an effort to fully obtain the relevant information.
11 The Copyright Office does reserve the right to ask
12 questions of any of the participants after the close
13 of the hearings. Any such questions asked and answers
14 received will be posted on our website.

15 After the Panel has asked its questions,
16 we intend to give the witnesses an opportunity to ask
17 questions of each other. We have not managed to come
18 up with all of the questions that should be asked.
19 I'm confident that your fellow panelists will make
20 sure that all the questions get asked.

21 With that, I am going to turn the program
22 over to you.

23 OPENING STATEMENT BY SETH FINKELSTEIN

24 MR. FINKELSTEIN: I would like to thank
25 the Committee for inviting me here. I would also like

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1 to beg your indulgence if I make any procedural or
2 cultural errors. I am not a lawyer. I am not a
3 public relations -- sorry, shall I start over again?

4 Okay, as I say, I would again like to beg
5 the Committee's indulgence if I make any procedural or
6 cultural errors because I am not a lawyer; I am not a
7 public relations person. I did have a better shirt,
8 but I am literally straight off the plane this morning
9 to come here.

10 This is not my job. I am a professional
11 programmer by trade. I have no training or experience
12 in Washington politics. If I make any mistakes in how
13 I present myself or how I answer, I ask you to indulge
14 me in that.

15 I am here, basically, to try to explain
16 why this is important, and I will try to do my best in
17 educating the Committee as to why censorware is an
18 important topic and why you should grant the
19 exemption.

20 Let me begin by trying to put some things
21 in context. Censorware is usually discussed in terms
22 of parents and children, but that is, in fact, not the
23 way I got into this and not the way that I think about
24 it.

25 I am a 38-year-old professional programmer

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1 with an interest in civil liberties. I am not a
2 professional activist nor am I a professional
3 lobbyist. I got into this because I was one of the
4 very early users of the Internet. I was at MIT. I am
5 an MIT graduate, degrees in physics and mathematics.
6 I really do have two degrees from MIT, and got to use
7 the Internet in its very early, very formative stage,
8 and I loved it.

9 I loved the information exchange. I loved
10 the ability to talk to people literally across the
11 world. You could talk to someone in Russia. You
12 could talk to someone in Iraq. It was a fascinating
13 exchange of ideas.

14 For a decade, from around 1985 to 1995,
15 there was wonderful, free-flowing exchange where there
16 were no constraints on what you could you say or what
17 you could read whatsoever, and it was fascinating for
18 an intellectual.

19 Then, in the mid-nineties or so, it began
20 to become "popular," and this was a problem. In the
21 early days, it is very hard to convey the spirit of
22 those times, where there's the idea that you could not
23 censor the Internet, that it was created to survive a
24 nuclear war.

25 There's a very famous saying by John

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1 Gilmore, one of the founders of the Electronic
2 Frontier Foundation. He said, "The Net considers
3 censorship as damage and routes around it."

4 When I heard that, I was never convinced
5 by it. I always wondered, well, what if censorship is
6 in the router? Could you control the Internet by
7 finding the choke points and cutting off that ability,
8 that ability to exchange information?

9 Now when there became a reaction as to
10 what to do about all the information being exchanged
11 on the Internet, I loved this freedom of exchange and
12 I wanted to preserve it. How can I convey what it was
13 like in the early days, when now you take it for
14 granted that you can cross the world, but this was
15 thought to be a precious thing at the time, and I
16 thought that it should be preserved.

17 Now I have to explain a bit about the
18 politics of censorware. This will, in fact, refer to
19 a bit of David Burt's comments.

20 When the Internet started to become
21 popular, there was almost universal reaction to people
22 who discovered it who were not part of the original
23 cognoscenti. The reaction went like this:

24 "Oh, my God, there's too much information
25 there. We have to somehow control it." And I was

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1 wondering about this because we were told that the
2 Internet could not be censored, but yet there were
3 people who were saying it was important to control
4 what was on the Internet. How could both be true?
5 One of these people had to be wrong.

6 So when we had this problem at the time to
7 figure out what to do with the desire to control the
8 Internet, then there was the issue of, could we,
9 basically, put the U.S. interests in a private
10 program, a company such as N2H2, and would that be a
11 good thing?

12 This is a complicated issue to try to
13 explain, but what happened was the idea was that civil
14 libertarians should advocate private companies because
15 that would avoid the means of Congress having to
16 censor the Internet. I thought this was a horrible
17 idea.

18 The reason I thought it was a horrible
19 idea was because it was turning over the Internet to
20 private blacklisters. I thought this was an
21 absolutely disastrous idea from the civil libertarian
22 point of view.

23 So this is where I come into the picture.
24 As a technically-skilled person with the ability to do
25 mathematics and decryption programming, I set out to

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1 figure out what was actually in the secret blacklists,
2 and this is where I succeeded.

3 In 1995, I first decrypted CyberPatrol,
4 and it was fascinating. I found, for example, the
5 feminist discussion newsgroup at the time thought that
6 feminism was considered pornography, technically
7 sexual acts, for example. I found that gay rights and
8 youth support were considered pornography, sexual
9 acts.

10 And this pattern was repeated all
11 throughout every program I examined. Feminism was
12 considered pornography or sexual. Gay rights was
13 considered pornography or sexual, on and on and on.

14 This led to the expose', "The Keys to the
15 Kingdom." Now that has been criticized as being
16 anecdotal. "Anecdotal" is usually used as a synonym
17 for unverified or inaccurate, but, no, it was
18 absolutely accurate.

19 What it was, it was not a statistical
20 study. It was to counter the propaganda that the
21 Internet could be easily censored.

22 Now the reason that it was published in
23 that sort of -- how can I put it? -- sensational
24 fashion was, one, well, because of the way the writer
25 did it, and, two, this decryption that I was doing was

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1 extremely legally risky at the time. In fact, there
2 were lawsuits threats from the publication of that
3 article. There's a whole story involved with that,
4 and that was not the end of it.

5 Every time there was a game of this sort,
6 I called it "the not on the list" game, that you would
7 expose something as being blacklisted as sexual or
8 pornography, or some feminist site, or some youth
9 rights sites, and the censorware companies would then
10 say, "It's not on the list," by which they meant they
11 had immediately taken it off and the new version of
12 their program was perfect. This went on and on and
13 on.

14 There would be fantastic marketing claims.
15 This moves into the Loudoun County case, where the
16 proponent, the president of the company which made the
17 censorware there, X-Stop, went out and actually said
18 on record that the program only blocked sites which
19 met a legal criteria.

20 This is an absolutely absurd thing to say
21 because these legal criteria, as you may know, are
22 very hard to do. They require judicial training.
23 There is much argument, and the president of the
24 company was saying that the program could do it.
25 Humans can't even agree on what's artistic merit. How

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1 could a program do it?

2 So I went and did a great deal of work
3 exposing what this program had blocked. But, again,
4 this wasn't my job. I've never gotten any money for
5 this. It's stressful and legally risky. When the
6 censorware companies get their blacklists exposed,
7 they don't just laugh at you; they do everything from
8 make threatening noises to, in some cases, actually
9 filing lawsuits.

10 When the DMCA came, I said, this is it;
11 this is too much. It's too much legal risk. I just
12 stopped doing this work.

13 Then came the exemption and some other
14 things, and I started doing it again. In this case,
15 I changed some of my approaches. The idea of just
16 finding specific examples is not so much an issue now
17 because it's embedded into people's understanding.
18 Even the censorware companies now say that their
19 programs aren't perfect. They actually didn't say
20 that before, because they are moving their marketing
21 claims in response to the exposures of people like me,
22 and that's very gratifying.

23 In fact, one of the comments in Mr. Burt's
24 reply comment about listing the loophole sites, I
25 believe that is in direct response to my report about

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1 it. In fact, I'm sorry I didn't submit the actual
2 report, but there's a comment where I track when they
3 actually started making the claims and said, "I'm glad
4 they're reading it."

5 So what I have been trying to do now is to
6 try to explain some more properties of the programs
7 which aren't obvious. It is very easy to say these
8 programs block pornography. That's a phrase that
9 easily falls off the top, but there are implications
10 in that statement which are very important.

11 For example, image search engines are
12 blocked in N2H2's program as pornography. Why?
13 Obviously, because you can use them to search any
14 images, and some of those images might be sexual.

15 Now if you ask somebody, "Would you like
16 to block pornography," of course, they are going to
17 answer, "Yes," except for a very few people. But if
18 you ask them, "Well, do you want to prevent people in
19 public libraries from searching for images because
20 some of the images might be pornographic," you get a
21 different answer.

22 I'm trying to explore those aspects of
23 these programs now, and that requires circumvention in
24 order to be able to do it very effectively. I think
25 I will leave my opening statement there.

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

2 Mr. Band?

3 OPENING STATEMENT BY JONATHAN BAND

4 MR. BAND: Thank you for the opportunity
5 to testify today on behalf of the five library
6 associations.

7 The reasons given by the Copyright Office
8 in 2000 for a 1201 exemption with respect to filters
9 applies with equal force today. As N2H2 notes in its
10 comments, filters are becoming more prevalent and,
11 indeed, they may become even more prevalent if the
12 Supreme Court reverses the lower court in the CIPA
13 case. Thus, the need to know exactly which websites
14 are filtered and which are not is becoming more
15 compelling.

16 I would like to spend the balance of my
17 time focusing on and responding to the comments filed
18 by N2H2 and the other filter companies. The issue
19 today is not whether filters are a good thing. It is
20 whether the members of the public should have the
21 ability to find out which websites are blocked by
22 Internet filters. We think they should be able to
23 find this out, particularly so that institutions and
24 individuals can decide whether to use a filter and
25 which filter to use.

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1 First, as N2H2's comments emphasize, the
2 use of filters has increased dramatically since the
3 Copyright Office and then the Librarian of Congress
4 granted an exemption in 2000. Thus, the existing
5 exemptions have no adverse impact that we can tell on
6 the filtering companies.

7 Second, N2H2's comments seem to assume
8 that a 1201 exemption is the equivalent of authorizing
9 the publication of the database of the prohibited
10 websites, but this is absolutely not the case.
11 Copyright still protects the database. Circumvention
12 would simply put someone in the position to make a
13 fair use of the database. But his use would still
14 have to qualify under Section 107. A 1201 exemption
15 will not change that in any way.

16 Third, from the erroneous assumption that
17 a 1201 exemption would authorize publication of the
18 database, N2H2 suggests that publication of these
19 databases would provide children with unprotected
20 computers a road map to pornographic materials. With
21 all due respect, I think N2H2 grossly underestimates
22 the resourcefulness of teenage boys. If they have
23 access to an unprotected computer, they don't need a
24 road map.

25 Fourth, the reference to the Microsystems

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1 case is completely besides the point. That case
2 involved the development of a bypass code that
3 disabled the filter. It had nothing to do with
4 accessing the database for fair use purposes.

5 Finally, the N2H2 comments discussed the
6 alternative of making queries. I'm not qualified to
7 speak to the effectiveness of the sampling made
8 possible by such queries, and I am sure Mr.
9 Finkelstein is far more qualified to comment on that,
10 but it is clear to me, as a matter of common sense,
11 that sampling can never give you the complete set of
12 the blocked websites. By definition, you only get a
13 sample, so you obviously will miss what could be
14 important information. You will never know what you
15 don't know.

16 Also, the filter companies can reconfigure
17 their software to prevent automated querying, so this
18 option may disappear in the future.

19 In sum, the Copyright Office and the
20 Librarian of Congress got it right the first time:
21 The filter companies haven't presented any evidence of
22 the harm this exemption has caused them. It continues
23 to enable an important form of fair use. Accordingly,
24 the Copyright Office and the Librarian of Congress
25 should renew the exemption relating to Internet

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1 filters.

2 Thank you very much.

3 MS. PETERS: Thank you.

4 Mr. Burt?

5 OPENING STATEMENT BY DAVID BURT

6 MR. BURT: Thank you. My name is David
7 Burt, and I am from N2H2, Incorporated, an Internet
8 filtering software company. I am here also
9 representing two other Internet filtering companies,
10 that being 8e6 Technologies and Bsafe Online.

11 To give you a little bit about my
12 background, I am a former librarian. I have been
13 involved in the study and promotion of filtering
14 software for about six years, since 1997.

15 I provided testimony in, as well as being
16 a consultant in, the Loudoun County case. I testified
17 before the COPA Commission about filtering
18 effectiveness. I testified before the National
19 Commission on Library and Information Science on
20 filters, and I also testified before the Pennsylvania
21 and California State Legislatures. I have been with
22 N2H2 for three years. My current role there is as PR
23 Manager.

24 We are pleased to be able to come here and
25 offer comments. As I made clear in my written

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1 comments, filtering companies were not aware of
2 procedure last time, so we did not submit comments at
3 that time, and we are certainly pleased to be able to
4 offer a response to some of the claims that are made
5 about filtering software.

6 What I think is most germane here about
7 evaluating filtering software is the fact that there
8 is this very rich, very extensive literature that has
9 been published of filtering software evaluations that
10 does not involve the decryption of, and the disabling
11 of, copyright control mechanisms.

12 Most recently, there was a study published
13 in the Journal of the American Medical Association
14 that was conducted by the Kaiser Family Foundation
15 that used a very extensive sampling and testing, and
16 it was conducted by a panel of experts and included a
17 professor of information science at the University of
18 Michigan, and was, in fact, peer-reviewed.

19 I think that studies like that really
20 speak to the points, some that Mr. Finkelstein raised,
21 about concerns about what viewpoint might possibly be
22 affected or what uneven standards might be used. The
23 Kaiser study is an example of a study that seeks to
24 answer a question like that.

25 That seeks to answer the question, do

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1 filters affect the ability of minors to access health
2 information? Does it very effectively, using a
3 querying method, create a sample using a querying
4 method? So to the point that there are concerns like
5 that, these can be addressed with sampling.

6 To the other concerns that Mr. Finkelstein
7 raised about obvious architectural features, the
8 single example -- in fact, the only example -- Mr.
9 Finkelstein gives during the comment period from
10 October 28th, 2000 to the present has to do with our
11 product, N2H2, with the loophole category in our
12 product. By his own submission, he admits that that
13 information was publicly available.

14 It was publicly available on our own
15 website at the time that he did that. So there really
16 was no need for him to do that because that
17 information was not just publicly available through
18 our URL checker. It was also publicly available in
19 our support pages, and it was also publicly available
20 in the logs that anyone who is a N2H2 customer could
21 check.

22 Speaking to some of the points that Mr.
23 Band raised, he talks about the need to know.
24 Filtering companies have been extremely responsive to
25 people who say, "I want to know what's in your

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1 filter." I give some screenshots and some
2 descriptions in my written testimony about our URL
3 checker database. That is a web interface, and many
4 of the other filtering companies have them, too.
5 SurfControl has one. Websense has one. Smart Filter
6 has one.

7 Anybody anywhere in the world can go to
8 our website at database.n2h2.com, look up any site,
9 see if it's categorized, how it's categorized, and if
10 they don't like the way that it is categorized, they
11 can submit a request to have that changed.

12 So I think we have been very upfront about
13 making our database available to people for
14 researchers, quite a bit more upfront than a lot of
15 other database publishers. Many other database
16 publishers, in fact, do not provide any kind of a free
17 query interface to test the database, but we do. So
18 I think we really even go further than the typical
19 database publisher does in doing that.

20 As to the other comment that Mr. Band made
21 about protecting children, I just can't agree with a
22 comment that, gee, because there's so much porn on the
23 Internet, what's the harm of making 300,000 porn sites
24 available to children? That's not the business we
25 want to be in. We don't want to be known as the

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1 world's biggest provider of pornography to children.

2 That's not why this company was founded in
3 1995 by two educators, and we initially started in
4 schools in order to protect children. We didn't build
5 this brand that we have called Bess that's well known
6 -- we provide filtering to 40 percent of the public
7 schools in the United States -- in order to be known
8 as the biggest provider to children of pornography.

9 I don't have really much to add to my
10 written comments. I think I have explained it pretty
11 thoroughly, and I really haven't heard anything in
12 either the written replies or today that refutes what
13 I have in here.

14 As to the CyberPatrol comment, in that
15 case I think the judge was quite clear about the
16 potential harms. In his Finding of Facts it says --
17 and this is on page 38 of my testimony; I'm quoting
18 from the judge's decisions: "By their own admission,
19 Mr. Jansson and Skala created this bypass code to
20 break CyberPatrol software, explicitly designed to
21 make CyberPatrol ineffective, and its intended use can
22 do nothing more than adversely affect the potential
23 market for the copyrighted work. In contrast,
24 Microsystems as well as the public, will continue to
25 suffer irreparable harm unless the individual

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1 defendants are prohibited from distributing the bypass
2 code."

3 I think some of that sentiment is really
4 echoed in a case that I submitted -- the decision to
5 just came down this week, versus N2H2. That involves
6 a DMCA case about wanting to access our database.

7 I'll point you to page 3 of the judge's
8 decision where the judge says, quote, "There is no
9 plausible protected constitutional interest that
10 Edelman can assert that outweighs N2H2's right to
11 protect its copyrighted property from an invasive and
12 destructive trespass," unquote.

13 So here we have had two judges look at
14 this issue about whether or not it should be
15 permissible to decrypt filtering software, and both
16 have really come to very similar conclusions about the
17 potential harm that would be done by doing that, and
18 really a lack, frankly, of any benefits to society.

19 As I point out in my comments, there are
20 really enormous social benefits that are derived from
21 filtering software. That, in fact, Mr. Band spoke to
22 the popularity of filtering software. That is what is
23 driving the popularity of filtering software, is the
24 fact that it does have such great social benefits to
25 people, to parents who want to protect children, to

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1 teachers who want to protect students at schools, to
2 corporations that want to protect from liability from
3 sexual harassment claims, that want to preserve their
4 bandwidth, that want to enhance employee productivity.
5 There are all kinds of social benefits to filtering
6 software.

7 In fact, that's what Congress really said
8 in 1996, when they passed the Telecommunications
9 Reform Act of 1996. In fact, it's quite clear that
10 Congress was trying to encourage the development of
11 filtering software when they passed that law, when
12 they passed the Good Samaritan exemption for that.

13 In fact, I'm quoting from the text of the
14 1996 Telecommunications Act. It says, "It is the
15 policy of the United States to remove disincentives
16 for the development and utilization of blocking and
17 filtering technologies and empower parents to restrict
18 their children's access to objectionable or
19 inappropriate material," unquote. That's what
20 Congress had to say about that.

21 As I go into my testimony, one testing
22 facility after another -- we have JAMA; we have PC
23 World; we have Consumer Reports did a test on filters
24 -- they didn't need to decrypt the filtering software
25 in order to analyze filtering products, come to

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1 conclusions about their effectiveness. There really
2 is no need to do that.

3 The record is very clear on that, that
4 there is this rich literature that has been published
5 of tests that have been done on filtering software to
6 answer the kinds of questions that Mr. Band and Mr.
7 Finkelstein have that can be done without an
8 exemption.

9 Thank you.

10 QUESTION-AND-ANSWER PERIOD

11 MS. PETERS: Let's start the questions
12 with the General Counsel. David?

13 MR. CARSON: Thank you.

14 Mr. Burt, can you just perhaps put in a
15 nutshell for us -- let me start by saying, you did
16 just state that your company and companies like yours
17 do have mechanisms whereby members of the public can
18 find out what sites are blocked by the filtering
19 software. Can you tell us, just in a nutshell, what
20 is the harm in letting researchers such as Mr.
21 Finkelstein decrypt those lists, so they can get
22 access to the entire list?

23 MR. BURT: The biggest harm, No. 1, is
24 intellectual property, because, as I go into my
25 written comments, we spent literally tens of millions

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1 of dollars developing our database. It is extremely
2 labor-intensive to do that.

3 There are editorial judgments that are
4 made about different sites, how to categorize them.
5 We have 4 million entries in our database, and we had
6 to build the infrastructure and train the staff, the
7 people, in order to populate that database. So we
8 don't want to just give that away to somebody.

9 If we were to publish our database, make
10 it publicly available, a start-up company or a
11 competitor could just take our database and then start
12 using it without having to pay the start-up cost.
13 That would put us at a huge competitive disadvantage.
14 That is one reason.

15 The other reason, as I mentioned before,
16 is to protect children. We just simply do not want to
17 make this gigantic list of pornography available to
18 children.

19 And I gave an example of what happened
20 when a company did that in my testimony. A company
21 called Net Nanny gave away a children's CD-ROM at
22 Burger King in the United Kingdom that had -- they
23 published their list, and it had 2,000 pornography
24 sites on it. The parents in the UK were so angered
25 about this that they forced Burger King to recall this

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1 CD-ROM. That's a really concrete example of what
2 happens when databases like this are published.

3 MR. CARSON: Okay. Now we have had this
4 exemption in place since October of 2000. Are you
5 aware of any instances since then when someone, taking
6 advantage of this exemption, has, in fact, either
7 intentionally or inadvertently, publicized an entire
8 list, or a substantial portion of a list, of the sites
9 that are blocked by your software or any similar
10 software?

11 MR. BURT: I'm not aware of anyone taking
12 advantage of this exemption, period, to do anything
13 during the comment period. Mr. Finkelstein says he
14 does, but he doesn't document how he did that. He
15 doesn't provide any kind of documentation about
16 decryption or any publication. The only proof he
17 cites of that, information that was publicly available
18 at times, by his own admission. So I am not aware of
19 anybody, period, using this exemption in the last
20 three years.

21 MR. CARSON: So it's probably fair to say,
22 then, that you're not aware of any problems that have
23 arisen in the last three years by virtue of the
24 exemption?

25 MR. BURT: There are certainly some

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1 serious potential problems that could arise, but I
2 think the problems have not arisen because nobody has
3 decrypted any filtering software that I'm aware of in
4 the last three years.

5 MR. CARSON: Okay. Now you mentioned that
6 the main part of the harm is the intellectual
7 property, and intellectual property is a pretty broad
8 term. Let's just explore that.

9 You're not a lawyer, I gather?

10 MR. BURT: No, I'm not.

11 MR. CARSON: So maybe this is not a fair
12 question. But when you are concerned about the harm
13 to your intellectual property, it sounds like you're
14 talking about something like trade secrets,
15 proprietary information, and so on. Am I on the right
16 line there?

17 MR. BURT: Well, we are talking about, No.
18 1, trade secrets, how we construct our -- there are
19 techniques that we use to construct our database that
20 are proprietary, but just the information itself, we
21 want to protect that information itself.

22 The categorization that we apply to the
23 URLs on the Internet, when we create the database,
24 there is original effort that goes into creating that
25 database. That's what we really want to protect.

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1 That's what gives the database its value, is that
2 value that we add to it by those editorial judgments
3 that we make.

4 MR. CARSON: Okay. Now I don't want to
5 sound callous about trade secrets or proprietary
6 rights of that nature; I'm not. But this is a
7 rulemaking about copyright. It's a rulemaking about
8 Section 1201, which is designed to address measures
9 that copyright owners take to protect their
10 copyrighted works.

11 Typically, copyright isn't concerned with
12 secrecy of information. So I am trying to understand
13 -- and maybe you can help me; maybe you can't -- as to
14 why we should care about that in the context of this
15 particular rulemaking, which is looking at exemptions
16 to a provision of law that is designed to protect
17 copyrighted works and access to copyrighted works.

18 MR. BURT: Well, our work has copyright
19 protection to it. Databases do have copyright
20 protection, and they can be copyrighted. We want to
21 protect that investment that we have of our database.
22 We want to protect that intellectual property, that
23 editorial judgments that we make in this database that
24 we have created.

25 I think you should care about that

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1 because, once you open the door for that, for some
2 databases, there are a lot of other databases that
3 could be vulnerable, too. Once you start going down
4 that road of creating exemptions for databases like
5 that, I think the other database publishers certainly
6 would and should be concerned about that.

7 Because, as this body found in its ruling
8 in 2000, it's essential that database publishers have
9 copyright protections to protect their investment, to
10 protect their intellectual property. Otherwise, it's
11 going to greatly harm the database industry. There
12 will be much less databases available.

13 And the same thing applies equally, and I
14 think probably more so, to filtering software. These
15 valuable tools that parents need, that schools need,
16 I think the availability of them will be drastically
17 reduced if we cannot control our copyrighted
18 databases, if we cannot control our intellectual
19 property.

20 MR. CARSON: All right. Mr. Finkelstein,
21 Mr. Burt just said that he's not aware of anyone,
22 including you, who has taken advantage of this
23 exemption in the last three years. Let's start with
24 you. Have you? And if you have, tell us how.

25 MR. FINKELSTEIN: Oh, I have a wonderful

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1 reply to his comment there. Mr. Burt, you say that I
2 have not published information on my decryption?
3 Well --

4 MR. CARSON: Mr. Finkelstein, I'm sorry,
5 but we do need the microphone in front of you, so the
6 court reporter can hear. I think you had better start
7 over.

8 MR. FINKELSTEIN: I'm sorry. This is just
9 such a wonderful reply.

10 You say, you criticized me for not
11 publishing details of decryption? Well, the last
12 people who published details of their decryption for
13 the world to see got a \$75,000 lawsuit for their
14 trouble, and that \$75,000 lawsuit took place right
15 downtown from me. So there were no fancy Internet
16 jurisdiction issues even, when you consider that case.

17 Therefore, could you consider perhaps why
18 I might be a little hesitant to publish details, given
19 that the last people who did it got a lawsuit for it?
20 In fact, the only reason I came out and said that I
21 had decrypted the database was in order to try to
22 preserve this exemption.

23 I keep trying to convey, this isn't my
24 job. Nobody is paying me to come here. I took the
25 money out of my own pocket to actually pay the plane

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1 fare back here.

2 David Burt is paid by the company to do
3 this. Win or lose, he goes home after this and he
4 gets paid and he gets a salary. If I am looking at a
5 massive lawsuit, \$75,000 -- I looked at the amount --
6 for publishing something versus keeping my mouth shut
7 about how I acquired it, I think the incentive there
8 is to keep my mouth shut about it.

9 MR. CARSON: Well, short of what you're
10 willing to say or what you're willing to publish, give
11 us a sense, first of all, in the last three years have
12 you, in fact, engaged --

13 MR. FINKELSTEIN: Oh, yes.

14 MR. CARSON: -- in the conduct covered by
15 this exemption?

16 MR. FINKELSTEIN: Yes, I have.

17 MR. CARSON: Okay. Can you describe for
18 us what you have done?

19 MR. FINKELSTEIN: Okay.

20 MR. CARSON: This is your chance to tell
21 us why it's important to let people like you continue
22 to do that for the next three years.

23 MR. FINKELSTEIN: There are two different
24 senses of the words "what you've done." I can
25 describe to you the way I decrypted the database, but

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1 perhaps I shouldn't, or I can describe what I've done
2 with the decrypted database, which is important. I
3 assume you're asking that second question: Why is it
4 important that I decrypt -- or am I mistaken?

5 MR. CARSON: Well, I would like to have
6 them both.

7 MR. FINKELSTEIN: This is where I asked
8 you earlier about immunity.

9 (Laughter.)

10 MR. CARSON: Well, whatever you feel
11 comfortable telling us, again, understanding that we
12 need to be persuaded that there is a reason for this
13 exemption to be granted for the next three years.

14 MR. BAND: Focus on the second question.

15 MR. CARSON: It would assist us in
16 determining that --

17 MS. PETERS: That's your lawyer.

18 (Laughter.)

19 MR. FINKELSTEIN: I know this isn't
20 literally true, but I would like to plead the Fifth
21 Amendment for grounds of incrimination on answering
22 the first question on how I did it. I could certainly
23 prove it to you by bringing you a CD of their
24 database, if you can use that.

25 MR. CARSON: All right. So you are

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1 concerned that conduct you have done under an
2 exemption of the law might lead to some kind of
3 criminal liability?

4 MR. FINKELSTEIN: Ah, no, you see, this is
5 unique. I've got an answer for you there. The
6 exemption that you have given me is an exemption for
7 the DMCA, but it is not an exemption for copyright,
8 trade secret, or violation of the shrink-wrap
9 licensing.

10 In fact, I am going to go on. The
11 CyberPatrol case was not a DMCA case. The actions in
12 the CyberPatrol case were traditional copyright, trade
13 secrets, violation of shrink-wrap licenses, and a
14 couple of other things which I called the "kitchen
15 sink" charges. Every single one of those charges
16 could be brought against me, even with this exemption.

17 MR. CARSON: So you're telling us this
18 exemption is pretty worthless?

19 MR. FINKELSTEIN: No, it's not worthless.
20 It's important in the sense that it goes to doing the
21 act. If I said here, "I have done the circumvention,"
22 without this exemption, that would be a crime. That
23 would be admitting or that would be violation. That
24 would be admitting to a violation.

25 Because of that exemption, I can tell you

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1 that I have done it, but if you ask me to give you
2 cold-level details where I start getting into the area
3 which got two people sued for copyright, trade
4 secrets, and violation of license, I think that's
5 increasing liability. It is a hierarchy of liability.

6 Why this exemption is important is this
7 exemption goes to the actual action of doing the
8 investigation itself. It says, even if you publish
9 just one fair use result, if you admit in that paper
10 that you did the investigation by circumvention, you
11 have liability because you have confessed to
12 circumvention, and fair use is not a defense to
13 circumvention. It is very clear in the Remandes case.
14 That's why the exemption is important.

15 In fact, this also answers David Burt's
16 question in a way he doesn't like. The exemption does
17 not remove all the protections that the censorware
18 companies have already. We're not talking about
19 putting this on a CD in Burger King and distributing
20 it to little children. I've not done that. Nobody
21 has done that.

22 MR. CARSON: All right, so what good has
23 the exemption done?

24 MR. FINKELSTEIN: Now what the exemption
25 has done has allowed me to do these architectural

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1 investigations. Let me try to explain these.

2 In fact, if I can take a couple of
3 minutes, let me, in the course of explaining this,
4 rebut Mr. Burt on the utility, or lack of, of
5 querying. It's not an issue of quantity; it's an
6 issue of quality.

7 All these studies that he cites are in
8 some sense the same study repeated over and over
9 again. It's take a couple of sites, see what's
10 blocked, see what isn't blocked, and so forth. That's
11 not the question I'm asking. It's like saying that
12 you don't need to have college because you have so
13 many high school essays. It is a bit like that.

14 Where circumvention is important is what
15 I call looking for the land mines here. It's like
16 trying to locate land mines in a mine field. In
17 theory, one can examine every bit of territory, but
18 it's qualitatively different to have a map of where
19 the mines are.

20 Now Mr. Burt's product, N2H2, bears a
21 semi-secret category called "loophole." Loophole
22 category is a category which cannot be deactivated
23 where things are blocked by installation as mine
24 fields, little mines, but you suddenly find them
25 blocked, and you have no idea why.

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1 Trying to figure out what these loopholes
2 are that will be blocked in libraries, that will be
3 blocked in government sites where they are mandated to
4 use censorware, is something which cannot effectively
5 be done by sampling because it's not a statistical
6 property. It's a property where the site is somehow
7 thought to be a threat to the operation of the
8 program.

9 Maybe I should back up for a moment, if
10 you will indulge me, and try to explain where I'm
11 approaching this from. I'm not approaching it from a
12 statistical point of view. Statistical studies are
13 well and good, but statistics are not the be-all-and-
14 end-all of investigations. There are other types of
15 investigations which can be done.

16 Now you'll note throughout the entire
17 proceedings I have talked of censorware, not filtering
18 software. That is not merely partisan politics. That
19 is a very important difference in how I think about
20 this issue.

21 When somebody talks of a filter, that
22 conjures up the image of this ugly, yucky, horrible,
23 toxic stuff that you're taking away and leaving a
24 clean and purified result, like a coffee filter or a
25 dirt filter. You just want to throw the ugly stuff

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1 away.

2 But that's not what these products do.
3 What these products do is they control what people are
4 allowed to read, and that's a profoundly different
5 issue. Because when you try to control what people
6 are allowed to read, and you try to put them in a
7 blinder box, you can't ever let them out.

8 For example, a loophole is a language
9 translation site because a language translation site
10 makes the information coming from the other site look
11 like it's coming from the language translation site.
12 So you can use the language translation site to get to
13 the site that's been banned in a sort of routing
14 fashion, that you route around the banned site through
15 the language translation site.

16 You can use a site that checks to see if
17 your web page has the appropriate structure to it.
18 You know what HTML is, HTML formatting. There are
19 programs which you can take and will say, well, your
20 HTML formatting has this problem or it displays this
21 way, but those are actually considered loopholes
22 because they allow you to display a banned site,
23 because you can say, oh, I want to check its
24 formatting.

25 This is a very important part of the

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1 debate, trying to get people to understand that what
2 these programs are doing are not banning pornography
3 or banning whatever. They are controlling what people
4 are allowed to read. In order to do that, for
5 example, what I did in my loophole paper was to go
6 through affirmatively -- I was not querying, not
7 sampling things, but trying to say, what are these
8 things that Bess considers a loophole?

9 It was a fascinating revelation to find
10 out that language translation sites are considered a
11 loophole. Well, that's interesting when you think of
12 that, but then you find out that HTML-checking sites
13 are considered a loophole.

14 Then, this is the really interesting
15 thing: The Google cache -- you know what the Google
16 cache is? -- that's considered a loophole because you
17 can get to any web page by using the cached version.

18 So when you tell people, well, you're not
19 banning pornography, you're not letting people use the
20 Google cache because they could use the Google cache
21 to get something forbidden, that changes the debate.
22 I have been trying to get this into the thinking
23 process of people. I may not have been very success
24 at it, but it's something I have been doing with this
25 research.

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1 MR. CARSON: Mr. Burt, anything to say in
2 response to any of that?

3 MR. BURT: Yes, I do. I would just like
4 to -- and I have already said this a couple of times,
5 but I will say it again now that Mr. Finkelstein has
6 had a chance to explain. When he was asked
7 specifically to describe specific examples where he
8 had used this exemption, the only example he came up
9 with was for N2H2 to find this loophole category that,
10 by his own admission, was already publicly available
11 in other sources. I think that's not a sufficient
12 record to justify this exemption, if that's the only
13 example that can be come up with.

14 MR. FINKELSTEIN: May I respond to that?
15 First of all, Mr. Burt is inaccurate to say that it
16 was publicly available. He has made it publicly
17 available, I believe in response to my paper. But the
18 reason I am very certain that it was not publicly
19 available -- and perhaps I can answer some of your
20 earlier questions about how this is done -- is because
21 I did not know what this loophole thing was when I saw
22 it in the database.

23 Maybe I can give you some better examples
24 by telling you what I saw. For example, when I
25 decrypted the database, it's very hard to figure out

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1 what these things are sometimes. Decryption is only
2 one step. There's the encryption, and on top of the
3 encryption, there's often a database structure. I
4 don't know if I'm getting too technical, but there's
5 often binary codes and special flags, and so forth,
6 and it's very hard to figure out what these are
7 sometimes.

8 In the N2H2 blacklist there's a whole list
9 of things. As I tried to figure out -- first, there
10 was a list, and then there was a list of flags which
11 correspond to the codes, to the entries of the list.
12 This isn't getting across.

13 There's a header of things that say that
14 pornography, violence, and there's also other internal
15 things that said things like, "loophole."

16 By the way, David, can you tell me what
17 "anod" is? I'll catch up with you there.

18 My joke about this is I can't call up
19 technical support and ask them to tell me what it
20 means. So when I saw this entry "loophole," I'm
21 thinking, what is this thing? So I searched
22 throughout the web and there was no documentation for
23 it whatsoever. The only thing that was there was the
24 log entry that was a two-letter code, "LH," from the
25 site.

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1 So what you saw, if you ran a loophole
2 site through the program itself, was a set of two-
3 letter codes that correspond to the categories, but
4 there's no documentation for this secret category.
5 And I searched very, very thoroughly to find any
6 documentation for it, but it wasn't there.

7 When I put one of the sites which was
8 listed into the query database that said it was a
9 loophole and it came back and said, "loophole sites,"
10 it didn't tell me what a loophole was. It was only by
11 -- and this is where statistical sampling is not
12 important, is not answering the question -- by
13 collecting all the other sites in the database which
14 were loophole sites and asking, "What property do all
15 these sites have; why are they like one another," that
16 I realized that what they considered a loophole site
17 was something that they deemed a threat to the control
18 of the program.

19 The question was basically, I have this
20 database in front of me. I have these strange-looking
21 sites that say, "loophole." I have no documentation
22 whatsoever for what is a loophole.

23 I go through the database and I extract
24 all sites which have the flag "loophole" on them.
25 They're privacy sites, language translation sites.

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1 Oh, what's this? It's an HTML validation site.
2 That's odd. And what's this other thing? It's a site
3 that makes things sound like Elmer Fudd. Why do they
4 have that thing there? Oh, it's a language
5 translation site, but it's just a weird language. Oh,
6 there's Google cache in here.

7 Now what property does the Google cache,
8 a language translation site, an anonymizing side, an
9 HTML validator site all have in common? Aha, they're
10 all sites where they retrieve other sites and display
11 them to you. Bingo. I think this is a very important
12 fact to get out in the debate, and that's how I also
13 did it.

14 MR. CARSON: Mr. Burt, I may have been
15 misreading your body language, but I got an impression
16 I saw an urge to respond. Is that true or not?

17 MR. BURT: Yes, I'll go ahead. It is in
18 my written comments, but in Mr. Finkelstein's own
19 report, "Bess's Secret LOOPHOLE," he just referenced
20 the website at database.n2h2.com. He says, quote,
21 "The loophole category can be verified by using N2H2's
22 single site blacklist checking form. Just test it
23 into database.n2h2.com."

24 So, I mean, right there he says that this
25 information is publicly available on our website.

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1 MR. CARSON: Well, I think the question
2 is, which came first, your revelation or his
3 detection? I don't think that's something we're going
4 to resolve here.

5 MR. FINKELSTEIN: No, no, what I'm saying
6 is the query says it's a loophole site, but there's no
7 documentation for what loophole is.

8 MR. BAND: Right, and his point is that,
9 yes, now that you know, now that he's told you to
10 look, that the Google cache won't be available, you
11 can go to their website and, sure enough, you'll find,
12 you type in "google cache," and you won't get it.

13 But the only way that he was able to
14 figure that out was by the circumvention--finding this
15 category, trying to figure out what it meant, figuring
16 out what the common property is, figuring out why it
17 was doing this. And now you can verify that on your
18 own through their site. But for his encryption or his
19 decryption work, we wouldn't know that. That's his
20 point.

21 MR. CARSON: I think we've got
22 disagreement on whether that's true or not, but we at
23 least understand the proposition.

24 MR. FINKELSTEIN: Verification is not the
25 same as investigation.

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1 MR. CARSON: Understood. Okay.

2 MS. DOUGLASS: There's also in our tech
3 support pages, there's references to the whole
4 category --

5 MR. CARSON: Okay. I want to get back to
6 what I was asking before, and I understand you have
7 expressed your reluctance to give us much in terms of
8 concrete terms about what you've done because of your
9 fear that we are not dealing with just 1201 and
10 copyright, but perhaps other things.

11 MR. FINKELSTEIN: David, will you pledge
12 never to sue me if I tell for this?

13 MR. BURT: I'm not authorized to make a
14 statement like that.

15 (Laughter.)

16 In order to make a statement like that, I
17 would have to consult with management, and they would
18 have to consult with our attorneys when we get back.
19 As a PR person, I'm not empowered to do things like
20 that.

21 MR. CARSON: Let me ask this, then, either
22 Mr. Band or Mr. Finkelstein, any help you can give us
23 in terms of letting us know not necessarily what you
24 personally, but other folks who have taken advantage
25 of this exemption, what they have done and why it is

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1 to the advantage of society to let them do that. In
2 terms of concrete terms of what people actually are
3 doing and have done, that would be of great benefit to
4 us in evaluating the need for this exemption. So if
5 either of you can help us out in that respect, that
6 would be useful.

7 MR. FINKELSTEIN: Well, I could talk about
8 some of the things that have gotten people sued for.
9 That's an easy one.

10 If you want me to talk about how
11 decryption is done or how circumvention is done, it's
12 a very --

13 MR. CARSON: No, not so much how
14 circumvention is done, but help us understand why we
15 should care. How have people used the ability they
16 have had under this exemption to society's benefit?
17 How have they taken advantage of this exemption --

18 MR. FINKELSTEIN: Great.

19 MR. CARSON: -- in a way that, if you
20 could explain it to us, we would say, "Yes, of course,
21 people have a right to do that and they should have a
22 right to do that, and we understand. We get it."?

23 MR. FINKELSTEIN: First off, I can explain
24 to you that the work that I did was cited in the
25 expert witness reports for the CIPA decision. Mr.

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1 Burt's comment is very interesting in the way he walks
2 around that, in that he says that it's not cited in
3 the actual description.

4 But if you look in my comments, you see
5 the expert witness reports themselves cite my own
6 work. They cite the specific paper that I'm talking
7 about here. That's his secret loophole.

8 Some of the things which may not have
9 specifically my name attached to them do seem to have
10 come from me. I have talked about the Bess's loophole
11 example because it is the strongest example or
12 circumvention, but there are many other things that I
13 have done which have been helpful towards explaining
14 what the process is, what is actually banned, and what
15 is actually a problem in these architectural terms
16 that I haven't actually gone out and said, "I got this
17 information by circumvention," again, because of the
18 legal liability here.

19 To back up for a moment, when we talk
20 about sampling, nobody is going to sample the Google
21 cache. It simply wouldn't occur from the list of
22 things that you would use to test a program, at least
23 not until this had been publicized. Once it has been
24 publicized, then, of course, it's become an issue.
25 But if you're trying to do an investigation, that

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1 isn't something that's obvious to you.

2 And one of the other things where I got
3 the information from circumvention was the
4 investigation of the image search engines. For
5 example, to figure out that image -- what I did was I
6 went through the program and started looking at the
7 database for what some of the other Google sites were.
8 It was vastly easier to do this by having the list in
9 front of me, asking the question: If it blocks the
10 Google cache, what other sites from Google would it
11 block?

12 That question is a very hard question to
13 answer accurately by sampling, because it's not a
14 question of just taking the list of sites and running
15 it through the verifier tool, because the way that the
16 entry can be done can be done in a way that you can
17 fool the verifier tool. You have to know the exact
18 path to put into the verifier tool.

19 In fact, I put that in my paper for
20 verifying the Google cache blocking. If you just type
21 in the Google cache itself, you get back the answer
22 that it's not blocked because the actual site isn't
23 blocked, but the way that you would do the lookup, the
24 actual string itself, is where they have the blacklist
25 entry.

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1 So in order to do the image investigation,
2 it was vastly easier to have the database in front of
3 me and try to see which image sites had been blocked
4 than fumbling around in this mine field and here are
5 the mines. This, too, is cited in the expert witness
6 reports and in the CIPA decision.

7 In the future, I expect that there's going
8 to be more of an issue where what is blocked in these
9 terms is going to be a factor in the Supreme Court.
10 Whatever the Supreme Court decision is, there will
11 probably be intense interest in investigating
12 censorware.

13 Without this exemption, you're basically
14 saying that people are constrained to do that
15 exemption blindfolded. They cannot actually look at
16 the database. They have to go through the mine field,
17 poking and probing every single bit of territory.

18 MR. CARSON: I want to get back to that
19 issue in a minute, particularly with you, Mr. Burt.
20 But, first of all, can either of you, just so we've
21 got as much of a record as we can, I want to make sure
22 I've got from either of the two of you any examples
23 you can give us of cases where people either have been
24 taking advantage of the exemption or are in the
25 process of taking advantage of that exemption. So

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1 that we, again, can understand that we're not just
2 dealing with something theoretical here, but in
3 concrete terms this is something that has been of
4 benefit and will continue to be of benefit.

5 MR. BAND: Well, again, as Mr. Finkelstein
6 has explained, his loophole research is a very strong
7 example. My understanding is one of the witnesses in
8 the California hearing is also going to be
9 specifically addressing it.

10 I don't work directly in this area,
11 typically, but my understanding from conversations
12 with people in this area is that, as Mr. Finkelstein
13 explained, that the expert witnesses do rely on the
14 work that he did and that others like him have done
15 within the past three years. But I believe that in
16 the Los Angeles hearing you will be able to get more
17 concrete examples besides what Mr. Finkelstein has
18 specifically alluded to.

19 MR. FINKELSTEIN: Let me answer that also.
20 There's something of a Catch-22 in your request
21 because, in order to come here and plead for the
22 exemption, what I have to do is actually confess to
23 violating other laws. I have to come and say, "I have
24 violated the shrink-wrap license. I have possibly
25 violated classical copyrights. I may have violated

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1 trade secrets." There aren't many people who actually
2 want to do that.

3 I mean, I think, for myself, that I am
4 sort of a fool for doing this. I'm not getting any
5 money for it. I'm not likely to benefit. Why am I
6 poking my head on this?

7 In fact, if I knew somebody who was doing
8 this, and they had trusted me that they would do this,
9 I certainly wouldn't be blabbing that in a public
10 hearing with Mr. Burt here ready to take anything back
11 to his company. This is literally a case where
12 anything I say can, and maybe will, be used against me
13 in court.

14 So, again, I am going to have to ask you
15 to be a little bit understanding that I can't give you
16 a list of other people who are doing it right now
17 because that would be, at best, violating trust and,
18 at worst, getting them sued.

19 MR. CARSON: Okay, I get your point.

20 Mr. Burt, going back to something Mr.
21 Finkelstein just mentioned, my reaction, when I read
22 your comment -- and your comment made a very strong
23 pitch that all sorts of studies had been done --

24 MR. BURT: Uh-hum.

25 MR. CARSON: -- of filtering software, and

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1 almost all of those studies use what you call a query
2 approach, which, if I understand it correctly -- and
3 correct me if I'm wrong -- the person who is doing the
4 study has a list, and I don't know how big it is, of
5 sites they want to check to see whether those sites
6 are, in fact, filtered out and runs that test with a
7 number of different filtering software and then comes
8 up and reports their results. Is that basically how
9 it is?

10 MR. BURT: That's basically how it is,
11 yes. There are a number of different ways to get a
12 sample. As the Kaiser study points out, they used a
13 random-sampling technique. Or other people have done
14 a purposeful sample because they want to answer a
15 particular question. They want to get a big list of,
16 you know, gay sites or sexual health sites and see
17 what the results are, but that's correct.

18 MR. CARSON: Okay. All right, now I'm a
19 layperson. Lord knows I know nothing about how to run
20 such a study, but it does strike me that when you're
21 doing that, when you're taking that approach, you're
22 necessarily limited by the list that you, the
23 researcher, come up with of sites that you want to
24 check on. It also strikes me as a layperson that
25 there is a lot to be said for, and a lot more that can

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1 be gained perhaps, from a study in which you simply
2 say, "I want to see the list of sites that are blocked
3 because then I can go down that list and I can make a
4 determination in each case whether that is or isn't a
5 site that I believe should be blocked.

6 Now we can then have a nice debate over
7 whether of those individual sites, in fact, should or
8 shouldn't be blocked, but at least the only way I can
9 know everything you're blocking is by knowing
10 everything you're blocking. The only way I can know
11 what you're not blocking that perhaps should be
12 blocked is by getting that list and then figuring it
13 out.

14 Now what's wrong with that? What am I
15 missing?

16 MR. BURT: Well, again, there are
17 intellectual property concerns in exposing our
18 database to somebody to examine. I think you seem to
19 be kind of getting at a hypothetical question.

20 For example, where somebody such as the
21 National Research Committee or Consumer Reports could
22 come to us and say, "We want to take a sample of your
23 entire database. We'll do it in our laboratory. You
24 can be there. We'll sign NDAs. We'll ensure that
25 it's protected," somebody that was like a reputable

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1 third party that wanted to do that, I can't say for
2 sure that we would do that, but I know that we have
3 had internal discussions about that, and we would very
4 seriously consider doing something like that, if there
5 were absolute guarantees that our intellectual
6 property would be protected and it were a reputable
7 kind of testing facility that was doing that.

8 We would not necessarily be opposed to
9 something like that, but nobody has ever asked us that
10 question, nobody, not even the people who do research
11 that are opposed to filters, such as Mr. Finkelstein.
12 None of these people have ever approached the
13 filtering companies. At least -- I can't speak for
14 all of them at all times that I'm aware of --
15 certainly not my company, asked to do this kind of an
16 approach.

17 So, yes, that is something we would
18 consider, if somebody absolutely felt they needed to
19 do that, but we don't see that need being expressed by
20 the research community. The people who did the JAMA
21 study didn't express that need. The people who have
22 done the other studies, such as the Consumer Reports
23 study, that was rather critical of filters, did not
24 express that need; neither do any of the other
25 professional testing labs.

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1 ZDNet Labs and InfoWorld test labs have
2 not come to us and said, "We can't evaluate without
3 being able to get at your entire database." They're
4 perfectly satisfied with the results that they get and
5 with the research that is published using a query
6 method.

7 MR. CARSON: Does anyone else have a
8 reaction on that particular question?

9 MR. FINKELSTEIN: Oh, plenty.

10 (Laughter.)

11 David, do you have the e-mail where the
12 representative for N2H2 said that I wouldn't get a
13 demo because, as I quote, "working with you would be
14 like working for the opposition."?

15 I like his comments about reputable, too,
16 because you tend to find out that people who are the
17 most critical and who know the most about the flaws
18 are also regarded as the least reputable, at least in
19 the company's regard.

20 Further, the last time I tried to get the
21 demo from N2H2, straightforwardly get it filling out
22 my name, I was outright refused. I was worse than
23 outright refused. I was led on, and then I got a
24 really obnoxious e-mail from their salesperson telling
25 -- I'm just not going to quote it; it was so

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1 obnoxious.

2 He didn't care. The company's going to
3 back him up for doing it, and he probably gets a bonus
4 for it or a pat on the back for it. Mr. Burt thought
5 that was great.

6 David, will you give me a demo? I would
7 love one.

8 MR. BURT: If I could respond to that,
9 what Mr. Finkelstein is referring to is a request for
10 a free trial of our database, or not our database, our
11 software, which we do offer to anybody. We give
12 people free trials, a 30-day trial of our software, as
13 do most filtering companies.

14 However, Mr. Finkelstein had conducted at
15 least three previous 30-day trials before that, and it
16 is not our business practice, nor is it of most
17 software companies, to give an endless series of free
18 trials to somebody. At some point you have to cut
19 them off, if they are not going to pay for the
20 product. So that was simply a standard business
21 decision. It had nothing to do with Mr. Finkelstein.

22 MR. BAND: If I may respond, I think Mr.
23 Carson, you're exactly right about the fundamental
24 problem with sampling, that obviously it tells you
25 something, that it can be very useful at a macro

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1 level, but at a specific micro level it doesn't work,
2 meaning it doesn't tell you whether a specific site
3 that you don't know to look at, you have no idea
4 whether or not it's blocked.

5 With respect to the assertion that no one
6 has ever asked, well, typically, when people want to
7 do independent verification, they do it independently.
8 I would just be shocked if, when Consumer Reports
9 wants to do any kind of testing of General Motors'
10 products, they enter into a negotiation and then agree
11 to do the testing at a General Motors' facility, under
12 the supervision of a General Motors' engineer. It is
13 not going to happen. That would compromise the
14 independence of the survey.

15 MR. BURT: That's typically how product
16 tests are done. The Kaiser Foundation, they did ask
17 for a copy of our software when they evaluated it and
18 did tell us what they were doing.

19 The other point I would like to make is
20 that this issue of testing databases that have
21 copyright protection, you could make the same argument
22 about other copyright-protected databases, about
23 Lexus/Nexus or about Dialog or some of the other ones
24 that don't allow people to go in and access -- you
25 can't request from Lexus/Nexus and get every single

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1 thing in the Lexus/Nexus database, complete, total,
2 free, unlimited access to do that. Yet, there's a
3 very rich testing literature of Nexus using querying
4 methods to do that.

5 MR. BAND: Right, but it's a completely
6 different situation. I mean, the whole point of the
7 testing of the filter software is basically to get a
8 sense of what kinds of sites it blocks. It poses very
9 specific and very significant public policy issues.
10 What's on the Lexus/Nexus database, that's a
11 commercial issue. If I don't like what's on
12 Lexus/Nexus, if I don't like what access I get, I will
13 go to someone else. It has no public policy
14 implication whatsoever, what is or is not available
15 through Lexus/Nexus.

16 But if we're talking about government-
17 mandated filters in public libraries and public
18 schools, there is a huge public interest in knowing
19 what is or is not censored. It is a completely
20 different situation.

21 MR. BURT: I don't agree. I think simply
22 because the government mandates the use of a product,
23 that doesn't mean that that company loses all its
24 intellectual property rights, just because it is
25 government mandated.

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1 MR. BAND: But, again, you're not losing
2 your intellectual property rights. If Mr.
3 Finkelstein, after doing his research were to publish
4 the database and make it publicly available, he would
5 clearly be liable for copyright infringement because
6 he is violating the copyright in the database.

7 But if he, instead, makes a fair use and
8 simply publishes, let's say, that the N2H2 product
9 blocks out these 10 sites, that would be a fair use
10 and that does not in any way compromise your
11 intellectual property rights.

12 You're mixing two different categories.

13 MR. BURT: Well, Mr. Finkelstein, as I
14 pointed out before, does not need to get access to our
15 entire database to publish his list of 10 sites. He
16 can do that with sampling.

17 MR. BAND: Not if he doesn't know which 10
18 sites to ask for.

19 (Laughter.)

20 MR. FINKELSTEIN: This is again saying
21 that you do not need to have a list of the land mines.
22 You can go and prod every single bit of territory. I
23 suppose that is true in theory, but in practice it is
24 not supportive of the sort of investigations that I am
25 trying to do.

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1 I want to, again, point out that, given
2 this work that I have been doing, this decryption,
3 this circumvention, it is immensely difficult. It has
4 legal liability. It requires a great deal of
5 programming skill. It requires certain advanced
6 server tools and software sometimes which are not
7 available to -- which are theoretically available, but
8 not usually found with journalists and writers.

9 So the fact that when they do a simple
10 sampling study doesn't mean that better research is
11 being done. It's like saying that, if somebody does
12 a slapdash job by walking down the street, you
13 shouldn't let them go to the Library of Congress
14 because they can already do something by walking down
15 the street.

16 MR. CARSON: One final question: The
17 reply comments filed by American Film Marketing
18 Association had a number of other copyright owners,
19 the reply comments. It made one point on this
20 subject, which is that -- well, it made a number of
21 points, but one of the points they made was that, if
22 this exemption were continued for the next three
23 years, it should not include network security
24 software.

25 Now I don't pretend to be an expert on

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1 just what that means, but, first of all, I guess I was
2 just wondering, is there anyone at this table who
3 disagrees with that statement and, if so, can you
4 explain to us why?

5 MR. FINKELSTEIN: I haven't reviewed it,
6 so I can't say at the moment.

7 MR. BAND: No, I haven't studied that
8 issue. So I have no position.

9 MR. CARSON: All right, thanks.

10 MS. PETERS: David was pretty exhaustive
11 in his questioning, but let's see if Rob has any.

12 MR. KASUNIC: Well, I'm going to have to
13 sort through and see what's left after that, but I
14 have a number of things to try to clarify a little
15 bit.

16 First of all, just, I guess, addressing
17 Seth first, in using the term "censorware," as opposed
18 to "filtering software," why use that term, and is
19 there a distinction? In your view, is filtering
20 something broader?

21 MR. FINKELSTEIN: Oh, yes. I think the
22 best public relations that the censorware companies
23 ever did was to get the word "filter" attached to
24 their products. When you think of a spam filter, for
25 example, you think of something that you do not want

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1 to see.

2 But, again, as I said earlier, censorware
3 is not like a spam filter. What censorware is is an
4 authority wants to prevent a subject under their
5 control from viewing material that the authority has
6 forbidden to them. This description is general. It
7 does not apply just to parents or children. That is
8 simply one instance of the general property. It could
9 be the Government of China applying to citizens or it
10 could be corporations applying to employees.

11 We can go back and forth as to who is
12 right in what cases, but the general architectural
13 properties are the same. In fact, one of the issues
14 here is that, if censorware works for parents on
15 children, then it's also going to work for the
16 Government of China on its citizens. And, inversely,
17 of course, if it doesn't work for the Government of
18 China on its citizens, then it's probably not going to
19 work for parents on children. This is one of the deep
20 structural issues of the debate.

21 But putting that aside, a spam filter, for
22 example, is something that you do not want to see and
23 someone else wants to force on you for their own
24 benefit. This leads to a different way of thinking
25 about it.

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1 For example, you can take something that's
2 probably spam and shunt it off into another folder
3 that you look at later on to see if that program has
4 made a mistake. So you're allowed to see the
5 decisions of the program and you're allowed to look
6 through what it's done in order to see if it's
7 incorrect or not.

8 They don't think that you have to be
9 forbidden from reading the spam. I have never seen a
10 spam filter that actually made it impossible for you
11 to shut it off because there is something dangerous
12 that might happen to you if you actually saw one of
13 these spams.

14 That's the difference between the issue of
15 something you don't want to see, which is filtering,
16 and something somebody else does not want you to see,
17 which is censorware.

18 MR. KASUNIC: Okay, thanks.

19 MR. FINKELSTEIN: And this leads directly
20 into the loophole sites that I have been talking
21 about.

22 MR. KASUNIC: Well, in following up on
23 that with the loophole site -- and, again, this is
24 just sort of to clarify -- are you saying, then, would
25 you have been able, Mr. Burt or David -- I have talked

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1 to all of you so many times in setting up these
2 hearings I'm going to be informal.

3 MR. BAND: We're all old friends.

4 (Laughter.)

5 MR. KASUNIC: David had said that you
6 could have discovered the loophole category, even
7 without circumvention, but is what you're saying that
8 it's the scope? You could have identified that this
9 existed, but you could have never identified what the
10 scope of that category was?

11 MR. FINKELSTEIN: The extent of it would
12 never have been found by sampling. How in the world
13 was I going to sample HTML validation sites? It's not
14 a statistical matter. You could say that you could
15 sample land mines, but they're not statistical
16 properties either.

17 The idea, what I was trying to do was to
18 go through and figure out what things does Bess
19 consider to be threats. That's not a question of, in
20 this huge list of sites, is there anything here that
21 Bess considers a threat. That's a different question.

22 How would I ever have found that a site
23 for testing how HTML is formatted was considered a
24 loophole by sampling? It would be almost impossible.
25 The language translation sites would probably not have

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1 been found by sampling even then, because of the
2 specific way that the entry is listed, because it's
3 not just the sites.

4 The way people usually do sampling is to
5 get a list, a long list, of sites or a long list of
6 URLs within the sites and just run it through the
7 program. But the blacklist itself can have the
8 entries on the blacklist in ways which are very hard
9 to find out. Things like the Google cache, the actual
10 entry is something like "?q=cache," for example, and
11 that's just not going to be found in a sampling
12 system.

13 MR. KASUNIC: What about systems or
14 methods either than sampling, like, for instance,
15 David had mentioned the log files? Would that get you
16 any further?

17 MR. FINKELSTEIN: Well, the only reason he
18 mentions log files is because log files have the two-
19 letter code "LH" for "loophole," and when I was
20 looking through the log files, I was trying to match
21 up the little codes that they had for the actual
22 categories in the database.

23 But the log files don't tell you anything
24 more than the verifier tool does that they have there.
25 It's just a big version of the verifier tool or a

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1 local version of the verifier tool. It is a sampling
2 response which can be used for a sampling study, but
3 it still has all the flaws of sampling and all the
4 limitations of sampling.

5 MR. KASUNIC: Okay. Then, too, in terms
6 of the other side of this, of the harm involved here
7 -- and I'll put this more generally to the Panel --
8 but in your comments that you cite a report, N2H2
9 report, that states that, quote, "N2H2 does not
10 believe that the final rule will affect the value of
11 its lists of blocked websites," meaning the previous
12 exemption, the rule under the previous exemption.

13 So has there, to your knowledge, first of
14 all, been any harm to the industry in general because
15 of -- and focusing this on the exemption on the
16 prohibition for circumvention because I do want to get
17 to some of the other aspects that David has been
18 raising that maybe are broader than that of just the
19 prohibition on the act of circumvention?

20 MR. FINKELSTEIN: I have not seen any
21 evidence whatsoever that they have suffered in any
22 way. In fact, the only thing that I had seen is they
23 probably have to pay David Burt to go here. I mean,
24 that's the only money that they have been out.

25 MR. BAND: And, also, obviously, indeed,

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1 the N2H2 comments reflect that the industry has grown
2 significantly since the exemption was granted. So
3 that would seem to refute any notion that the
4 exemption has caused any harm whatsoever.

5 MR. KASUNIC: Well, David, I think that
6 you deserve a chance to talk about that. It does
7 note, we'll note on page 11 in the report that it has
8 a bar graph, in your comment is a bar graph of the
9 growth of the industry, and it looks like a steady
10 growth even up through 2001, which would have been
11 after the exemption went into effect.

12 MR. BURT: And the growth is continuing,
13 too.

14 Again, I'll say that the only reason this
15 exemption hasn't harmed filtering is because nobody
16 has done any exemptions during the exemption period.
17 The only circumvention that we've -- we have heard
18 that question asked three or four different times, and
19 the only example that has been presented is Mr.
20 Finkelstein's example of the loophole category. So
21 that's why we think no harm has been done to the
22 industry during this three-year period because no one
23 has taken advantage of it.

24 If you look before that three-year period,
25 if you look at the experience of CyberPatrol, it is

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1 quite clear, looking at the judge's decision, that
2 there was harm done to CyberPatrol by the decryption
3 that was done to them. So that's where we stand on
4 that.

5 We look at the example of what happened at
6 CyberPatrol, and we look at what happened to Net Nanny
7 and the bad publicity that they got, as the examples
8 of what sort of harms can be done. That's why we look
9 at that.

10 MR. KASUNIC: Well, specifically, then,
11 you do mention some of these other cases and the
12 specific harm that has been done. But in looking at
13 some of those, it wasn't clear to me that the harm had
14 anything to do with the act of circumvention. So
15 that's what I was talking about wanting to get to.

16 The cases that you cite and quote talk
17 about publication and dissemination of the tools,
18 which would still be protected by the anti-trafficking
19 provision and there's other areas. But what
20 specifically related to -- what harm has been, or is
21 likely to occur, as a result of the limited exemption
22 based on the act of circumvention?

23 MR. BURT: Well, I can speak for my
24 company in particular, because we are so heavily used
25 in public schools. If our software is shown to be

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1 easily disabled, our database easily disabled, that
2 really undercuts the trust that we have with schools
3 in the United States, with teachers, to provide a
4 safe, secure Internet experience for them.

5 And that was the problem that CyberPatrol
6 had, too. That was their biggest concern, talking to
7 the people there, at the time of the CP hack, the
8 CyberPatrol decryption, was that all the millions of
9 parents that trusted CyberPatrol to protect their
10 children were suddenly rendered insecure, and the
11 judge goes into some detail about that in his
12 decision.

13 MR. KASUNIC: But we're talking about,
14 you're saying, "if it's disabled." We're talking
15 about circumvention for a list of websites within; we
16 are not talking about disabling the entire program.

17 So if someone is able to circumvent to
18 find the list, they may be able to find URLs to
19 different sites, but how will that help someone who
20 still has the software program functioning on the
21 site? Even if you have the URLs, if all the school
22 children in the world have URLs to all of these, as
23 long as they have a protected computer, won't they
24 still be prevented from viewing any of those sites?

25 MR. BURT: Well, as long as the software

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1 is functioning correctly, that's correct, they would
2 still be protected there. But what that would do to
3 our market, you know, to our customers, the trust they
4 have in us, if it's widely publicized that your
5 software has been compromised, that it has been hacked
6 into, that the security systems that protect that
7 software that's used to protect millions of children
8 can be easily compromised and disabled and hacked
9 into, that damages our product severely. It damages
10 our ability to sell our product.

11 MR. KASUNIC: But, again, isn't that
12 apples and oranges? Aren't we talking about --

13 MR. BURT: No.

14 MR. KASUNIC: -- the product being
15 disabled?

16 MR. BURT: It is in a sense apples and
17 oranges because, on the one hand, you're talking about
18 disabling the product altogether; on the other hand,
19 you're talking about disabling the database. But
20 that's part of the product. That code that protects
21 the database is part of the product. If they have
22 compromised the code that is used to protect the
23 database, they have compromised the whole product.
24 They have compromised the whole software --

25 MR. BAND: They haven't compromised it;

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1 they have researched it. But, again, if they
2 disseminate that beyond the narrow purposes permitted
3 under the exemption, you know, as he said, that would
4 be a trafficking violation. It, again, has nothing to
5 do with the basic issue of circumventing for the
6 purpose of seeing what the database is.

7 MR. BURT: It certainly does. Again, it
8 violates the integrity of our code, and that violates
9 the integrity of our product. Just the fact that
10 that's public that people can do that violates the
11 integrity and the marketability of our products.

12 MR. KASUNIC: Okay, well, let's --

13 MR. FINKELSTEIN: May I respond to that,
14 by the way?

15 MR. KASUNIC: Yes, please.

16 MR. FINKELSTEIN: First of all, I think he
17 is conflating two different aspects. One is
18 researching the database, and the other is the
19 operation of the program in use.

20 I had a comment about this in my
21 submission, by the way, that the definition of harm
22 does not encompass being shown to be a bad product in
23 terms of parity, for example. I'm not going to find
24 the quote, but the idea that, if you have a biting
25 review of a play and this causes the play to shut

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1 down, that is not a copyright infringement, even
2 though it causes economic harm. That is not a
3 cognizable harm to be shown to be insecure.

4 Let me segue into some comments that he
5 made just earlier about the CyberPatrol case, when
6 they said they wanted to break CyberPatrol. "Break"
7 is a technical term in cryptography. To break
8 something is to figure out how it doesn't work, but it
9 is not necessarily a bragging term, in the same way as
10 copyright infringement also has a term of art where --
11 what do they call it? -- irreparable harm. That
12 doesn't mean immeasurable harm; it means you get an
13 injunction, as I understand it.

14 So it is simply a legal standard, whereas
15 to people who hear these terms "break" and
16 "irreparable harm," they may think it far more
17 physically harmful than it is.

18 I would also like to say that, for all
19 this talk of the pornography sites, since they were
20 blacklists, they are really bad collections of
21 pornography sites.

22 (Laughter.)

23 I want to go into this because I get this
24 -- no, let me go into this. People are always asking
25 me this question: "Oh, boy, have you gotten any good

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1 porn sites?" And I tell them, "It's really, if you
2 want to get some good sites, don't look in this
3 censored blacklist."

4 In fact, I can demonstrate that --
5 (laughter) -- because when the CyberPatrol blacklist
6 went out, nobody ever said that it was such a great
7 collection. The reason why -- this is important -- I
8 know this is funny, but the reason why that they're
9 such bad lists is because there's so much junk in
10 them.

11 If you wanted a list of sex sites, would
12 you want to go through somebody else's tastes, sites
13 which didn't work, sites which had changed ownership,
14 or so forth? No, you would want a good collection
15 from somebody who had actually made a collection which
16 would appeal to you, and there are people who sell
17 them. There are people who make them for free. They
18 have absolutely no impact on the research that I am
19 doing.

20 It is something of a red herring. I know
21 it's a, quote/unquote, "sexy" topic to say that they
22 have these huge lists of pornography sites, but nobody
23 has ever tried, except in a sort of snickering
24 fashion, to use these lists as actual lists of
25 pornography sites because they don't work well that

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1 way.

2 MR. BURT: If I could just follow up
3 quickly with your question of irreparable harm, in
4 addition to the harm to the security of our product,
5 once our list is available to someone such as Mr.
6 Finkelstein, who has it, are we at that point supposed
7 to just simply assume that he's going to use it
8 responsibly?

9 We have ceded all control over our
10 copyrighted material, over our database, to somebody
11 else, just on the assumption, without any kind of NDA,
12 without any kind of contract, without any agreement,
13 that he is not going to misuse that property; he's not
14 going to sell it to somebody else; he's not going to
15 profit from it. We have no guarantees of that.

16 That's the other part of the harm, is that
17 we have lost complete control over our database, over
18 the content that we worked so hard and invested so
19 much money in, and simply trusting with nothing other
20 than the man's good intentions to show that this is
21 going to be used properly.

22 MR. BAND: But, of course, that is exactly
23 what happens in 99 percent of the times with most
24 works that are distributed to the public, that you
25 rely on the copyright laws to enforce them. This is

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1 an important point because it really goes to, what is
2 the DMCA all about and why did Congress enact it?

3 Congress enacted it to facilitate the
4 development of an online marketplace in the kinds of
5 works that are distributed to the public. What it was
6 really trying to do is to say, "Look, we realize that
7 because of the Internet and because of digital
8 technology, users, once they get their hands on this
9 stuff, are going to be able to widely distribute it."

10 So the DMCA was necessary, not to protect
11 a corporate owner against a competitor, but to protect
12 the corporate owner against infringements made by the
13 user. Okay? It was a different paradigm from the
14 typical one, where you are worried about a competing
15 publisher or a competing author. Here you're worried
16 about what the users would do.

17 In this context, however, what you are
18 concerned about is what a competitor will do. You are
19 concerned, mainly, you say, about someone else who
20 gets your database and gets into business, or you are
21 worried about what Mr. Finkelstein will do. Well, you
22 know what, you know who he is and you know where he
23 is, and you also know where the competitor is.
24 Therefore, the existing copyright laws are perfectly
25 adequate to deal with this situation.

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1 It is not the situation where, you don't
2 have the kind of product where people are going to be
3 interested in disseminating it widely on the Internet.
4 It's not that kind of product. It's not like the
5 latest Britney Spears song, for good or for bad, it's
6 just not like that.

7 Because of the different quality, to the
8 extent you are worried about the infringement that a
9 competitor might make of it, the copyright laws
10 provide you with a complete solution.

11 MR. BURT: Well, again, I think the other
12 database, you could say certainly the same thing about
13 other databases, that you could say they should rely
14 on that, and no exemption has been granted for other
15 databases, for published databases like Lexus/Nexus
16 and Dialog.

17 I'm not here to get into a broader
18 discussion about the DMCA because, first of all, I'm
19 not qualified for what the legislative history of the
20 DMCA was about, but we're not only concerned about
21 competitors, but others as well.

22 You bring up the examples of Britney
23 Spears and CD-ROMs, and I think the rise of peer-to-
24 peer networks, nothing could make the dangers of
25 allowing these copyright protections to be disabled

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1 more clear than the rise of peer-to-peer networks and
2 the very quick and very easy way in which this
3 material can be distributed through those networks.

4 MR. KASUNIC: But one thing here, I wanted
5 to get back to that, because I know that you are not
6 here to talk about the broader issue, but you have
7 referenced all the other database discussion that was
8 in the previous rule and related the filtering
9 companies' databases to, for instance, Lexus/Nexus or
10 Westlaw and other ones.

11 But in terms of the studies as well
12 involved in those other databases, isn't there a
13 difference in quantifying those between when you're
14 talking about, for instance, retrieval outcomes, when
15 you're doing testing of those databases? I guess this
16 goes back partially to the sampling issue and how
17 effective; that that was one of the reasons justifying
18 sampling.

19 But here, where we are talking about
20 what's going to be excluded and what you'll never see,
21 isn't there a distinction between using sampling for
22 receiving positive results as opposed to receiving
23 unseen results?

24 MR. BURT: I don't really think there is
25 that big of a distinction. I'll tell you why. It's

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1 because, if you're using the querying to access a
2 database such as Dialog and you don't find the record,
3 you'll never know it's there. You have to search for
4 it in order to find it and know it's there. So you
5 really have the same issue because you have a
6 copyright-protected database that you're querying and
7 finding things in it. If you miss some of those
8 things, you're never going to know they're there.

9 You're saying about a filtering database.
10 So I think the same reasoning should apply. The same
11 objections and flaws that these gentlemen raise about
12 sampling apply equally to databases, is that you're
13 not accessing the entire database all at once, but you
14 are taking a sample of it with any kind of a sampling
15 technique.

16 But, again, if you look at the published
17 literature, that is not seen as a limitation. I think
18 it's really important to repeat that nobody in the
19 research community that I'm aware of that is
20 publishing professional software, testing research, is
21 saying this about filtering databases, that you can't
22 test them adequately using these querying methods.

23 MR. BAND: Yes, but I guess, again, you're
24 mixing categories. There is absolutely no public
25 policy consequence of what is or is not in the

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1 Lexus/Nexus database. That is a commercial product,
2 and if I want to buy it, I buy it. If I don't want to
3 buy it, I don't buy it. It has no implication on any
4 broader issues of censorship and the ability of the
5 public to access information.

6 Whereas, here you are talking about
7 something -- Lexus/Nexus, that is the product. That
8 is what you're trying to access. Whereas, in this
9 whole filtering context, you're talking about what you
10 can't access. Here we are simply trying to figure
11 out, how do we figure out what are we not seeing?
12 It's a completely different situation.

13 MR. BURT: Well, I think, as a librarian,
14 and I think most librarians would agree with me, that
15 there certainly are public policy implications to fee
16 databases, how they're used, how they're distributed,
17 who has access to them.

18 In fact, this Panel heard quite a bit of
19 testimony about the public policy implications of
20 Lexus/Nexus databases and other databases of that
21 sort. So, again, I don't think that's much of a
22 meaningful distinction anyway, but you could say there
23 are public policy implications for other databases as
24 well.

25 MR. KASUNIC: I have a lot of questions,

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1 but I am going to limit it to just a couple more, to
2 give other people a chance to ask questions.

3 But since I have you here to ask some
4 technical questions in terms of how these filters
5 work, I see in your comment it lists, for instance, it
6 looks like IP addresses as well as domains or URLs.
7 Is this mixed in the filtering software? Is some of
8 this IP addresses and URLs, and individual pages or
9 whole domains?

10 MR. BURT: The answer is all three, and it
11 depends on the filtering database. There are some
12 filters that rely exclusively on numeric IPs. There
13 are some that rely exclusively on URLs, and there are
14 those that use a combination of both.

15 Some filters tend to block more at a page
16 level. Some block exclusively at a domain level, and
17 some offer a mixer. So your answer is complex because
18 filtering is complex.

19 MR. KASUNIC: So once something enters the
20 database, does it stay there? I noticed something in
21 here that refers to the fact that there is a review of
22 these, but, clearly, URLs or IP addresses aren't
23 static. These are dynamic addresses that are
24 constantly changing. So once something enters the
25 database, how often is it reviewed to see whether it

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1 still should be in the database?

2 MR. BURT: Filtering companies do review
3 their databases periodically, because, exactly as you
4 pointed out, the Net changes and your entries in your
5 database become stale after a while because the
6 content changes, the site owner changes, the address
7 disappears, and so forth.

8 I can't give you an exact figures on how
9 often we check every site in the database, but we do
10 periodically go through and check the sites. We
11 particularly check to see, obviously, ones that are
12 dead. That's a relatively easy thing to check for.

13 Then we check to see if content has
14 changed. Typically, we don't go through manually each
15 and every site to check if the content has changed,
16 but if there's some kind of indication about the site,
17 using our artificial intelligence, that there's been
18 a change to it, we will go back and take a look at it
19 and re-rate it, if need be.

20 MR. KASUNIC: So if you find there's a
21 problem through some technical means, you'll go back
22 and look at it --

23 MR. BURT: Uh-hum.

24 MR. KASUNIC: -- but not necessarily go
25 through the entire list and recheck them at some

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1 periodic intervals?

2 MR. BURT: At some point, they all do get
3 rechecked, but it may be quite a while before each
4 site gets checked.

5 What's really important is the user
6 feedback, too. Through our database, the URL checker
7 is where people can enter sites and ask that they be
8 categorized or ask that the categorization be changed,
9 too. So that is an important source of input for us
10 as well, what the users do.

11 MR. KASUNIC: Wouldn't the input, then,
12 from people who have had access to the entire database
13 and who were able to find maybe more specific and
14 broader problems with particular categories, wouldn't
15 that input then also be helpful in that same way, that
16 rather than the sort of hunt and peck, you would have
17 more profound input into potential problems?

18 MR. BURT: We really haven't seen that to
19 be true because what publications we've seen
20 criticizing filtering software that used decryption --
21 and there haven't been any of those for quite a while,
22 not during the period -- typically, only cited, you
23 know, a dozen or two dozen or so examples and say,
24 "Hey, look, here are problems with the database. This
25 is why there's problems with it," and don't really

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1 tell very much about it.

2 So any of the decryption research that I
3 have seen, I have not seen anything particularly
4 useful out of that that we would have a use as
5 filtering company.

6 MR. FINKELSTEIN: May I reply to that?
7 First off, Mr. Burt has just articulated a wonderful
8 reason why decryption is important: because he is a
9 marketing representative. That is his title. He can
10 come to you and tell you anything, and you have no way
11 of knowing if it is true or not, and he has an
12 incentive -- let me put this gently -- to tell you
13 things that put his company in the best possible
14 light.

15 If researchers are forbidden by law to
16 actually check on what he is telling you, that has
17 profound public policy implications. He has just
18 articulated a very interesting study which would
19 almost absolutely require decryption to be done.

20 Take a list of things that you know are
21 improper and see how often they get checked just day
22 by day. You can't do this very well with using the
23 validator because there will be too many, and if you
24 start hitting the validator every single day, they'll
25 get suspicious or they could get suspicious. Again,

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1 this comes back to the Consumer Reports testing idea.
2 Consumer Reports does not do their testing by going
3 into the labs of the company which they are testing.

4 So then see how often the errors are
5 corrected. I haven't done this, true, because I am
6 volunteer. If someone gave me \$200,000, like the
7 Kaiser Foundation gave to the people who did the JAMA
8 study, I could do more studies. But I just do what I
9 can.

10 MR. KASUNIC: Okay. I want to move to
11 just the last couple of questions to, I think,
12 primarily Jon about some comments that were made about
13 the burdens in the rulemaking for this exemption, a
14 couple of things that were raised in Steve Metalitz's
15 comment, and see what your response to some of that
16 is, since we'll be hearing from him later in
17 California on this issue.

18 Regarding the burden for continued
19 exemption, which the library associations support
20 here, in your view, must a proponent prove how many
21 will be able to accomplish or have actually
22 accomplished the circumvention during a given period
23 in order to sustain their burden?

24 MR. BAND: I think certainly whether it
25 has been used at all is a relevant consideration, but,

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1 by definition, if the circumvention is permitted, if
2 it's lawful, I think that a lot of things will be
3 happening that no one is going to know about, because
4 it's lawful. There's a lot of lawful activities going
5 on that you don't know about. You find out more about
6 the unlawful activity than the lawful activity.

7 So I think it's always going to be hard to
8 get the full sense of what the lawful activity is, but
9 I think it is a relevant issue. I think certainly in
10 this instance we have Mr. Finkelstein right here who
11 has given a very convincing example of an important
12 discovery he made using the exemption during the
13 relevant period.

14 MR. KASUNIC: Okay, and one last point is
15 or question: Do you have any thoughts about Mr.
16 Metalitz's suggestion that, if we do recommend an
17 exemption in this particular rulemaking, unlike the
18 last time, that it should be more narrowly tailored?
19 For instance, he expresses the recommendation perhaps
20 that the scope should be narrowed to include, for
21 instance, requesting permission, as is used in some of
22 the other statutory exemptions, requesting permission
23 first of the filtering company's software.

24 Do you think that --

25 MR. BAND: No, I think that that -- I,

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1 unfortunately, was involved with the negotiations of
2 those other exemptions. We very reluctantly agreed to
3 the issue of asking permission, but that was the only
4 way we were able to get anything at all.

5 I think, again, that is a bad precedent,
6 and I don't think it's a precedent that should be
7 followed here, especially in this context, because it
8 is so easy for the filtering company to adjust what's
9 on its blacklist or not. If it knows someone is going
10 to look at it, if I have to go and ask for permission,
11 then they might say, "Okay, sure, we'll give you
12 permission," but in the back and forth, the
13 conditions, and when they're going to give permission,
14 and so forth, In that month period that might go on,
15 who knows what they might do with their database.
16 They might decide to scrub the database. That's
17 exactly one of the problems of having to ask for
18 permission, that it, in essence, compromises the whole
19 investigative process.

20 MR. KASUNIC: Well, I guess just in
21 followup, part of what I was asking, do you think
22 that's within our scope, in order to create an
23 exemption that would include this affirmative act by
24 someone seeking to avail themselves to this exemption?

25 MR. BAND: I haven't thought about that.

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1 I will have to go back and see whether it's -- it's
2 probably not specifically within the statutory
3 authority granted by Congress. But I guess, from a
4 policy point of view, my personal gut reaction is, if
5 the question is, no exemption or an exemption with a
6 request, it is better to have the exemption with the
7 request than no exemption. But I think it's better to
8 have an exemption without any strings attached.

9 MR. FINKELSTEIN: I have a comment on
10 that. I agree with what Mr. Band just said, but I
11 also want to say that affirmatively asking permission
12 is like carrying a big target on yourself and saying,
13 "Attack me. I want to do something against you.
14 Marshall all your forces and do everything you can to
15 make sure that my research will be hindered."

16 I refer to Mr. Burt sometimes as my most
17 dedicated reader because he watches me like a hawk.

18 (Laughter.)

19 And this is his job. It sort of comes
20 with the territory. But to make it a requirement for
21 someone to do this is putting immense amounts of grief
22 on them.

23 Again, let me just respond to some earlier
24 comments here about something that didn't get
25 published, precisely because of this amount of grief.

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1 When you talk about doing a study with circumvention,
2 I just have a hard time conveying how difficult it is.
3 This is why you don't see so many of them. It is a
4 great deal of effort and risk.

5 First, you have to actually get the
6 software. This is not necessarily an easy thing. If
7 you come and tell the company that you want their
8 software in order to criticize it, when they look you
9 up and see your record, they don't happily turn it
10 over if they know that you're going to do this
11 necessarily.

12 Then you have to do the work and consult
13 with lawyers or do it entirely without legal counsel.
14 Then you have to worry about what's going to happen
15 when you actually publish it.

16 I had a paper that I was going to publish
17 during the CIPA trial, and for various reasons having
18 to do with legal things that happened right then, I
19 just decided it's not worth doing this. It's not
20 worth taking the risk of a lawsuit that's going to go
21 on for years and years to publish this material. The
22 more you increase that risk, the more you discourage
23 people from actually doing the work.

24 MR. KASUNIC: Thank you.

25 MS. PETERS: Steve?

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1 MR. TEPP: Thanks. I've only got a few
2 questions left along two basic threads.

3 The first one is on this, as you put it,
4 the architecture approach versus the sampling
5 approach. I find it interesting that Mr. Burt has
6 been able to cite to a number of studies and
7 examinations of filtering software that employ the
8 sampling approach.

9 So I guess my question to the proponents
10 is, why is it that they seem satisfied with that and
11 they think a reasonably sufficient study, an
12 examination of filtering software, can be done using
13 that method? But you don't?

14 MR. FINKELSTEIN: Because I am asking a
15 different question. Sampling is easy. It answers one
16 statistical question. If you need a publication, if
17 you need a review, if you're a person who has to write
18 something up for the research journal or for a
19 computer magazine, it is the obvious thing to do.

20 But if you want to do a deep study, if you
21 want to actually try to figure out, what are the
22 requirements, that is a very difficult thing to do.
23 It's like saying, why are people satisfied with
24 McDonald's hamburgers when there are so many of them,
25 when there are gourmet restaurants? And the answer is

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1 because McDonald's hamburgers are cheap and gourmet
2 restaurants are expensive.

3 When something is expensive and difficult
4 and risky versus cheap and easy and readily available,
5 you get what's cheap and easy and readily available.
6 But this doesn't mean the expensive and difficult
7 thing is somehow less worthy for being rare.

8 MR. TEPP: I understand your point. I
9 guess what I'm curious about is, why no one else is
10 interested -- I mean, those sound like interesting
11 questions. Why isn't anybody else looking at this?
12 Why aren't these institutions that conduct these
13 studies interested in the architecture of the
14 filtering software?

15 MR. FINKELSTEIN: Because there's no money
16 in it and it is legally risky. There is a quote from
17 Ben Edelman, who is part of the Edelman v. N2H2 case,
18 a widely-reported quote: "I want to go to law school.
19 I don't want to go to jail."

20 When I look at what I spent on this --
21 "spent" is even the wrong word -- when I look at the
22 effort I put into this, when I could have been
23 building a business during the IPO gold rush, there's
24 times I really wonder if I made the right decision.

25 Nobody who is looking at a research

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1 project is going to say, "Well, gee, let me put my
2 research into something which might get me sued, which
3 might get me unending legal hassles, which might get
4 me into trouble with the dean, which might get me bad
5 press, which will certainly get me enmity of these
6 powerful companies, or I could do something cheap and
7 easy." What are they going to take?

8 Look at what happened to Ed Felton with
9 the threats from the Secure Music Digital Initiative
10 case. People get scared.

11 MR. TEPP: Okay, that's segues, actually,
12 nicely into the second thread I wanted to pursue. You
13 have been quite articulate about the concerns you have
14 about the legal consequences of revealing the full
15 scope of all the actions you have taken and the
16 chilling effect that the law may have on others who
17 may be doing similar sorts of things.

18 But I think that puts back on us an
19 interesting consideration. What is the justification
20 for allowing an exception to the anticircumvention
21 provisions in 1201(a)(1) for allowing activity that,
22 as you have described it, may very well violate
23 copyright licensing agreements, trade secrets, et
24 cetera?

25 MR. FINKELSTEIN: Because that's not

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1 within the purview of the Panel. The Panel is charged
2 with figuring out whether the circumvention itself
3 should be forbidden or not. You can't leverage it.
4 It's a circular argument.

5 The courts have the ability, the courts
6 have the job of judging those other items. But I
7 think that you have to proceed, assuming that they
8 judge it lawful, should the Panel itself make it
9 unlawful?

10 What I am telling you is that the cost of
11 going to court to find out if it is lawful is enormous
12 and ruinous. This often intimidates people from even
13 trying. That is the risk that I am taking. But when
14 you do your determination, you should assume that it
15 is lawful because the court has not decided otherwise.

16 MR. BAND: Also, if I may, there's a
17 couple of other possible responses to your question.
18 One is that the availability of all these other
19 protections calls into question why Congress enacted
20 the DMCA in the first place, but that's also beyond
21 the purview of this body. But I just wanted to
22 mention that.

23 I think also, and relatedly, it would seem
24 to me that in this situation, if someone did a very
25 close legal analysis, the most likely legal risk would

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1 be breach of contract, but I don't think there would
2 be a copyright violation because any dissemination of
3 the information would probably be a fair use, because
4 you would typically reveal a few sites out of the 4
5 million, and that would almost certainly be a fair
6 use.

7 In trade secret, of course, you are
8 allowed to reverse engineer. That is not a breach,
9 that is not a trade secret violation unless, again,
10 you're somehow violating the contract.

11 So that would be the issue, and I think at
12 that point you could say, well, maybe there's
13 preemption. So you would have to do a very close,
14 lengthy, legal analysis. It could be that at the end
15 of the day you would conclude that to engage in this
16 activity would not be a breach of contract; it would
17 not be unlawful to do that.

18 But it would require a legal analysis and
19 probably at the end of the day you would say, well,
20 maybe; maybe not, or the risks are -- you know, you
21 will probably be sued, but you might prevail, and so
22 forth.

23 But I don't think it's a foregone
24 conclusion that to engage in the circumvention, if an
25 exemption is granted, would clearly be unlawful. It

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1 would be a gray area.

2 MR. TEPP: Okay. Just so we're clear, I
3 am not stating any legal conclusions about what any
4 activity conducted under the existing, or possibly
5 future, exemption may or may not result in, but to the
6 extent that concerns have been raised by the
7 proponents of an exception, that they may face
8 liability under some of the various areas we have
9 discussed, I think it is a relevant consideration.

10 Certainly, at the very outset, the
11 rulemaking is not to determine whether or not an
12 exception generally is a good thing, but whether or
13 not an exception for the purpose of non-infringing
14 uses is the core question. So copyright is clearly
15 implicated.

16 To the extent that the Librarian has the
17 opportunity to take into consideration other factors,
18 it doesn't seem to be irrelevant, as a public policy
19 matter, to consider whether or not an exception that's
20 being pursued may be exception for activity that
21 violates other laws.

22 MR. BAND: No, I agree that it's a
23 relevant consideration, but, again, everything here
24 cuts both ways. I could say that the fact that there
25 are other legal issues involved would lead to the

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1 result that, were you to grant an exception to the
2 circumvention, the exemption would be taken advantage
3 of rarely by people who would be going in with their
4 eyes open, would receive advice of counsel, and to
5 minimize their risk would occur rarely, and therefore
6 the likelihood of having any adverse impact to the
7 copyright owner would be minimal.

8 MR. TEPP: Okay. Well, let me turn this
9 on its head then and come over to Mr. Burt and ask:
10 You have cited a number of cases and instances where
11 filtering software companies have defended their legal
12 rights against those who sought to do various sorts of
13 things with their software, and specifically the
14 database that's the heart of the software.

15 So my question to you is: Don't those
16 also demonstrate that, even without the protection
17 under 1201(a)(1) prohibiting circumvention, you do
18 have adequate legal measures to protect the industry,
19 and that, as a result, an exemption, if a new one is
20 granted going forward, has relatively little
21 likelihood of adverse effect?

22 MR. BURT: Well, we would like to get this
23 exemption, too, just as all the other database
24 publishers do as well, just because we think we do
25 need this extra added layer of protection, and that

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1 is, in fact, why the law was passed in the first
2 place, to provide that -- Congress wouldn't have
3 passed the law if they didn't think that there was a
4 need for greater protection.

5 I think, as I mentioned earlier, the rise
6 of peer-to-peer networks and the very rapid,
7 widespread ability to distribute large files, large
8 database files such as ours, makes the need for this
9 extra protection really clear.

10 MR. TEPP: Well, I don't want to start a
11 debate over the adequacy of protection. Obviously, we
12 have, for example, the Napster case, which shows that
13 copyright on peer-to-peer networks can be addressed
14 through the courts in the United States.

15 What is it that you have seen or that you
16 think is likely to occur that isn't protected in some
17 other way and then that shouldn't be allowed?

18 MR. BURT: The circumvention of our
19 copyright protection for our database, just to get in
20 there. You're asking me really to talk about how
21 specifically different aspects on copyright apply to
22 us as a company, and I'm really kind of reluctant to
23 go down that path because I'm not a copyright
24 attorney. I'm not familiar with how each individual
25 law applies to us. So I guess I have to defer that

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1 question a little bit just because of lack of legal
2 knowledge.

3 MR. FINKELSTEIN: Let me just make a
4 remark. As you say, the exemption is for non-
5 infringing uses. The problem is, though the use may
6 in theory, if argued out in a four-year legal case, be
7 determined to be non-infringing, it is very difficult
8 to be the person who goes through that court case for
9 four years to establish it.

10 I would like to quote from the CyberPatrol
11 case, from one of the programmers who wrote about
12 this, and what he wrote has been very affecting to me.
13 He wrote, "What I found out was that those
14 organizations, through no fault of their own, were
15 able to give me a lot of sympathy and not enough of
16 anything else, particularly money, to bring my
17 personal risk of tragic consequences down to an
18 acceptable level, despite, incredibly, the fact that
19 what I had done was legal. Ultimately, I couldn't
20 rely on anybody to deal with my problems but myself.
21 Some people learn that lesson a bit less impressively
22 than I had to." I'm trying not to learn that lesson
23 impressively either.

24 (Laughter.)

25 And I would also like to quote from the

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1 CyberPatrol case, which Mr. Burt brings up. One of
2 the initial statements says, "The defendants don't
3 have a fair use defense because they haven't submitted
4 one." So he's using the case where there was no
5 defense, and the reason there was no defense to
6 establish that this was a non-infringing use was this
7 personal risk of tragic consequence to the person who
8 did it. Do you see my problem?

9 MR. TEPP: Well, I do. Let me turn it
10 around on you, I guess, and say, if there are so many
11 chilling effects from other aspects of the law, does
12 that not limit the potential utility of an exception
13 to 1201(a)(1) because that's only one of the myriad of
14 possible darts that could be thrown at you?

15 MR. FINKELSTEIN: What it says is that
16 this is not the be-all-and-end-all of the
17 investigations. This is just one part of the risk.

18 As I said, it's a hierarchy. In this
19 case, what we're talking about is the ability just to
20 do it, to say that you have done it. It may not be
21 the case -- let me make sure this doesn't get too
22 convoluted.

23 If you have this prohibition in place,
24 then you can't even do the work. You can't even say
25 that you've done it by decryption, and if they ever

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1 find out that you have done it by decryption, you are
2 liable.

3 It is not necessarily true that, if you
4 have the ability to do it, that you will do it. But
5 if you don't have the ability to do it in the first
6 place, then you will never do it at all. Is that
7 clear?

8 MR. TEPP: I follow you. All right, thank
9 you.

10 MS. PETERS: Charlotte?

11 MS. DOUGLASS: I just have a few quick
12 checking questions, actually. I would like to know
13 what is the -- if you could just give me a general
14 idea of the decrypting community? How large is the
15 group of people who are likely to need to decrypt over
16 the next three years? Or what is the community like?

17 MR. FINKELSTEIN: There aren't that many
18 people doing it because, as I say, it's risky and not
19 a lot of money. So you either find people like me,
20 who are extremely dedicated to civil liberties, or you
21 find other people who have no idea of what they are
22 getting into.

23 (Laughter.)

24 I, in fact, do know of some people who
25 have done this work and not revealed it. I haven't

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1 asked them why they have not revealed it, but it is
2 again the case, if they are not going to tell me why
3 they are doing it, I can't tell you that they exist.

4 MS. DOUGLASS: So it's not a community of
5 one or two, or whatever?

6 MR. FINKELSTEIN: It's maybe six people or
7 so, but who knows who else is out there that may
8 someday suddenly get the idea to do this either for
9 dedication or ignorance.

10 MS. DOUGLASS: Okay.

11 MR. BAND: But I would just make two
12 points. One is, obviously, this is a subset of a much
13 larger community that is engaged in encryption
14 research and security testing generally. So this is
15 a subset of a larger group.

16 I also think that if the Supreme Court
17 reverses the lower court in the CIPA decision, and then
18 schools and libraries are required by law to use the
19 filters, if they receive federal funding, I suspect at
20 that point the public interest in the issue will rise
21 significantly, and at that point the group of six
22 might become twelve.

23 MR. FINKELSTEIN: It might become a growth
24 industry.

25 MR. BAND: Yes.

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1 (Laughter.)

2 But I suspect at that point, once people
3 start seeing that it has more and more of and more and
4 more businesses start using it, but especially once
5 the public schools and the public libraries across the
6 country are all required, if that unfortunate day
7 comes where the Supreme Court reverses the lower
8 court, then I think you will see -- and that would
9 happen within the next three years, probably within
10 the next three months that they will make their
11 decision.

12 At that point you'll see, you could see a
13 potential growth, but still it's not going to be an
14 exponential growth because you're talking about
15 something that's very hard to do. Again, you do have
16 the sampling option, which is a simpler, less-refined
17 approach, which tells you something but it doesn't
18 tell you everything.

19 So the group of people who are going to
20 pursue that, dig down to really get all the details,
21 to really understand completely what is or is not
22 blocked, is always going to be a relatively small
23 group of people.

24 MS. DOUGLASS: Okay.

25 MR. FINKELSTEIN: I would like to say it's

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1 not like Napster.

2 (Laughter.)

3 MS. DOUGLASS: Okay. I would like to ask
4 you, Mr. Finkelstein, how many different types -- or
5 is this something that can't be grasped by just a
6 layperson -- how many different types of research
7 methods are there in terms of, you know, there is
8 decryption; there is maybe log filtering; there's
9 querying? How many particular categories are there in
10 order to do research on filtering websites?

11 MR. FINKELSTEIN: Oh, you've basically
12 covered the main ones: sampling, log investigation,
13 and decryption.

14 MS. DOUGLASS: Oh, okay. Thank you.

15 I have a question for you, Mr. Burt. That
16 is about harm. Do you believe that any of the
17 companies that are now in business would be harmed to
18 the extent that they might not be in business; they
19 might decide, "Well, there's all of this encryption
20 going on; we might as well close up."? Is that the
21 kind of harm that's taking place?

22 MR. BURT: I think if the decryption were
23 to become widespread and the publication of the lists
24 and availability of the lists were to become
25 widespread, that would drive some companies out of

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1 business because they would lose all of their
2 investment, because other people would be taking it.

3 MS. DOUGLASS: But the publication of the
4 lists might be a copyright infringement. So just the
5 decryption itself, would people -- I'm thinking back
6 to your comment on, I think someone cited to us,
7 saying that the 2000 exemption did not have any
8 harmful effect on your industry.

9 So I'm just trying to get a grip on
10 particularly the exemption's harm to your industry.

11 MR. BURT: Well, again, as I said earlier,
12 it didn't have any harm because nobody has used the
13 exemption that we know of.

14 MR. BAND: But Mr. Finkelstein has --

15 MR. BURT: Excuse me. I'm being censored
16 here. I've got to talk.

17 (Laughter.)

18 I'm a librarian; I can say that.

19 As far as I know, no one has used this
20 exemption to do this kind of research. That's why
21 there hasn't been any harm that I'm aware of. But,
22 again, as I said, the harm could be quite bad. If the
23 exemption were heavily used and people were
24 trafficking these lists quite widely, the harm could
25 be quite widespread.

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1 MR. FINKELSTEIN: David, will you
2 authorize me to send to the members of the Panel the
3 complete N2H2 blacklist to prove that I have, indeed,
4 circumvented the encryption?

5 MR. BURT: Again, as I said earlier, I
6 can't make legal decisions like that for my company.
7 I'm not empowered to do that.

8 MR. FINKELSTEIN: Well, then, will you
9 reserve your characterization because of the fact that
10 I have offered to prove it?

11 MR. BAND: Not to belabor the point, but
12 this is a little bit like the Iraqi Information
13 Minister saying, "No, there are no American troops in
14 Baghdad," when, the American troops were right there.

15 You keep on saying, "No, no circumvention
16 has occurred," when right next to you there's a guy
17 who has said a dozen times, "I circumvented it and
18 this is what I did." I am a little surprised. That's
19 all I can say.

20 (Laughter.)

21 MR. BURT: Well, I think it's certainly
22 illustrative that you have compared the filtering
23 industry to the Baath Party, what you think of it.

24 (Laughter.)

25 I think Mr. Finkelstein would probably

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1 agree with you.

2 (Laughter.)

3 MR. FINKELSTEIN: I think more like China.

4 MR. BURT: But Mr. Finkelstein has, as you
5 said, he said, that is the only evidence he has
6 presented, the only --

7 MR. FINKELSTEIN: I have offered more
8 evidence. You just won't let me present it.

9 MR. BURT: Well, you guys won't let me
10 talk or I would finish.

11 The only evidence he has presented is this
12 inference, based on inference, about this loophole
13 category that, by his own admission, that information
14 was publicly available. So I don't consider that
15 proof.

16 So I'm curious, what exactly proof? Are
17 you offering to mail my company a copy of our
18 database?

19 MR. FINKELSTEIN: No, I'm offering to
20 e-mail it to all the members of the Panel. I'll cc
21 you if you want.

22 MR. BURT: Why don't you just simply send
23 it to our company?

24 MR. FINKELSTEIN: Why would I do that?

25 (Laughter.)

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1 MR. BURT: Well, okay, you're saying you
2 want to prove that you did this. So why don't you
3 send it to our company instead of the Panel?

4 MR. FINKELSTEIN: I think that the Panel
5 might make better use of it.

6 MS. DOUGLASS: I actually think that I am
7 finished with my questions.

8 (Laughter.)

9 MS. PETERS: Good.

10 MR. FINKELSTEIN: One more legalistic
11 comment: Again, in N2H2's own documents -- I want to
12 stress this -- they say, "N2H2 does not believe that
13 the final rule will affect the value of its lists of
14 blocked websites." That is them saying it, not me.

15 MS. PETERS: I hear you.

16 Actually, there was a lot of interaction
17 between the panelists, which was very helpful.
18 However, I want to make sure that, if any one of you
19 has a question to ask anyone else, now is the time.

20 Jonathan says no.

21 MR. FINKELSTEIN: No questions at this
22 time.

23 MR. BURT: No questions at this time.

24 MS. PETERS: All right, then I want to
25 thank our three witnesses: Mr. Band, Mr. Finkelstein,

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1 and Mr. Burt. It was very helpful.

2 MR. FINKELSTEIN: Thank you.

3 MS. PETERS: And we'll be back this
4 afternoon. You won't, but we will.

5 (Laughter.)

6 (Whereupon, the foregoing matter went off
7 the record for lunch at 12:12 p.m. and went back on
8 the record at 1:33 p.m.)

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1 A F T E R N O O N S E S S I O N

2 1:33 p.m.

3 MS. PETERS: Okay, we're going to resume
4 this afternoon, turning to a different topic. It's
5 the copy-protected Red Book Audio Format compact disc.

6 You weren't here this morning. How we are
7 going to do this is each of you gets to make a
8 statement. Then we'll ask questions, and then you can
9 ask questions of each other. How it worked this
10 morning was, though, the Panel asked questions of each
11 other as we went along. So we'll see how this plays
12 out.

13 We're going to start with the proponent of
14 the exemption, which is you, Seth, and then go to you,
15 Thomas, and then end up with you, Steve. Is that
16 okay?

17 So let's begin.

18 OPENING STATEMENT BY SETH GREENSTEIN

19 MR. GREENSTEIN: Thank you very much.
20 Good afternoon.

21 MS. PETERS: Good afternoon.

22 MR. GREENSTEIN: On behalf of the Digital
23 Media Association, first of all, thank you very much
24 for inviting us here to testify on behalf of our
25 proposed exemption.

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1 Before I begin, I would like to make two
2 important points. The first point is that webcasters
3 also seek to promote legitimate enjoyment of music
4 with compensation to copyright owners and to artists.

5 A lot of what we do involves promotion of
6 compact discs by exposing the audiences to new music
7 and through online commerce, "Buy" buttons and links
8 to sites where CDs are offered for sale.

9 We empathize with the labels' efforts to
10 secure that market. We recognize what's happening to
11 the CD market. We are concerned about it, too. Music
12 is a very important part of what we do. To the extent
13 that the record industry is suffering because of lag
14 in CD sales, we feel the pain as well.

15 The second point I would like to make is
16 that, in fact, the exemption that we are seeking is
17 not our preferred solution. The preferred solution
18 really is to be able to work together with the labels
19 to ensure that all webcasters have access to all non-
20 protected, high-quality recordings from all labels.
21 That would be the preferred solution.

22 The problem is that there are so many
23 labels and so many webcasters that it is, frankly, not
24 possible to do that. It's not possible, I think, for
25 the Recording Industry Association to make any kind of

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1 a guarantee in that regard.

2 Thus, we are here today, largely because
3 we see the protected compact disc coming at us, and we
4 are concerned about how the future will affect
5 webcasters as a whole. Webcasters need to have access
6 to sound recordings. Some webcasters play compact
7 discs directly on CD audio players or from computers,
8 more likely. But most of them make ephemeral
9 recordings of those compact discs.

10 We need ephemeral recordings for a number
11 of reasons. First, we have multiple servers to handle
12 the level of traffick that comes into our sites. So
13 we need to have a copy for each of the servers.

14 We need to have copies that are optimized
15 for transmission in high quality at different
16 bandwidths. Some people still connect through dial-up
17 access as well as through various levels of broadband
18 access. We need to have copies that are optimized for
19 each of those transmission means.

20 Of course, there are different
21 transmission codecs that are used. The Windows Media
22 Player is one; Real Player is another; QuickTime for
23 Apple, or MP3 streaming. Those are some examples of
24 the different kinds of codecs that are used for making
25 webcast transmissions. For each of those transmission

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1 formats, there needs to be a file in that particular
2 format.

3 Webcasters' libraries include hundreds of
4 thousands of recordings for the major webcasters.
5 Typically, for a particular channel, there will be
6 several thousand that are active at a given time or
7 for a particular genre. There will be several
8 thousand that are active at a particular time, and, of
9 course, new songs are added constantly. Some of the
10 old songs in the catalog are cycled through, so that
11 the sound of the service remains fresh.

12 A few webcasters have very sizable
13 businesses that are capable of reaching very extensive
14 audiences, similar to the types of audiences and size
15 of audiences that some radio stations reach. But most
16 webcasters are small businesses. They are startups.
17 They hope to become big businesses some day, but they
18 are still in their early stages of development.

19 The Digital Millennium Copyright Act, and
20 particularly the statutory licenses under Section 112
21 and 114, entitled all of these services to have the
22 same degree of access, the same license rights. So
23 that all these services could have access to the same
24 music at the same royalty rates and on the same terms.

25 The DMCA created a level playing field, a

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1 secure marketplace where success would be built on the
2 entrepreneurial acumen of the leaders of the services,
3 on the technological innovation of the software that's
4 used and the web developers who develop not only the
5 music transmission means, but also the look and feel,
6 if you will, of the site.

7 The sound quality of the service, of
8 course, is a very important attribute of the success
9 of a service, and, of course, the ears and the skills
10 of their music programming staffs.

11 The basis of competition among webcasters,
12 therefore, are the features that they offer, the
13 visual impression of the website and of the player,
14 the marketing acumen, the brand recognition, the
15 ancillary services and information that are offered,
16 the music programming skill, of course. But key among
17 these also is the timely availability of sound
18 recordings and the sound quality of the webcasts
19 themselves.

20 Internet radio has many benefits for the
21 public and for copyright owners of sound recordings.
22 We play more genres of music than you will ordinarily
23 hear in a particular marketplace of radio. You will
24 hear music by more artists. You will hear deeper cuts
25 off of particular artists' albums.

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1 But, of course, they also have pop
2 channels where consumers expect to hear the latest
3 hits as they are being released. Webcasters, we
4 believe, have a chance to be highly competitive with
5 radio and to beat radio at its own game in many
6 respects. Small webcasters have the opportunity to be
7 competitive with other webcasters, if we are offered
8 the chance to survive and grow.

9 One of the most fundamental concerns the
10 webcasters have is the concern of having prompt access
11 to music. Radio stations typically receive service
12 from record companies. Some webcasters do, but,
13 typically, most webcasters don't receive sound
14 recordings from record labels.

15 Webcasters most often purchase sound
16 recordings at retail. They then take these compact
17 discs and rip the CDs onto their webcast servers.
18 Another avenue for some companies is that they will
19 contract with a third-party company that will already
20 pre-rip the sound recordings into files and formats
21 that can be used by various webcast services.

22 As I noted, many genres of music and many
23 webcast channels rely on the influx of new music.
24 Particularly pop channels need access to music on the
25 day and date when they are released. A top 40s

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1 station, top 40 channel, has to have the top 40. It's
2 quite often the case that a song will debut in the top
3 10. It won't work its way up the charts from No. 200.
4 It will debut at the top. These services need to have
5 access to the sound recordings as soon as they are
6 released.

7 For those webcasters who do receive
8 advance copies, it is very important that their files
9 can be on their servers before the date that the CD
10 actually reaches the marketplace, so that they can be
11 ready and able to webcast as soon as the date of
12 release arrives.

13 But, ironically, the advance copies that
14 are sent to webcasters are most likely to be the ones
15 that are copy-protected. Again, it is a legitimate
16 concern that the record labels have that these may
17 leak onto the Internet services such as KiZaA or
18 similar Internet peer-to-peer services, often get
19 access to sound recordings before they are released on
20 the street and released in stores. The way that that
21 often occurs, or one way that that may occur is from
22 advance copies.

23 These are the copies that are most likely
24 to be copy-protected, but these are also the copies
25 that we, as webcasters, are vitally interested in

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1 getting access to early, so that we can rip the files
2 onto our servers and have them ready for webcasting on
3 the date that they are available for broadcast.

4 Well, given the webcasters' shared
5 interest with the record industry in promoting lawful
6 services for sale and consumption of music, we
7 understand, we share the frustrations that apparently
8 motivate their desire to apply these technological
9 protection measures to audio compact discs.

10 But we are concerned that the interest and
11 content protection will result in additional
12 disadvantages and impediments for the success of U.S.
13 webcasters. Over the past few years, there has been
14 talk about labels applying protections to compact
15 discs in the United States. There are few known
16 experiments here in the United States to date. The
17 soundtrack for "More, Fast, and Furious"; there's a
18 Charlie Pride CD. We have heard that the Donnas has
19 been released with content protection, and some
20 others. It is much more common in Europe, in
21 Australia, and elsewhere.

22 Recently, Macrovision issued a press
23 release that was picked up in the press that said that
24 there were 100 million discs that they had released in
25 other markets that were encoded with their system.

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1 SunnComm has announced that they have contracts as
2 well for a different kind of a system for applying
3 protection to compact discs. Again, so far, this has
4 happened mostly in Europe and elsewhere. But there
5 are articles that are indicating that record labels
6 are planning to do this in the United States as well.

7 Up until now, the systems that have been
8 used have not worked very effectively. I have talked
9 to a number of DMA members who have said that they
10 have encountered copy-protected audio discs in the
11 past, and the content protections don't work
12 particularly well. They were able to try multiple
13 times to get access to the content, and the content
14 protection system eventually failed and they were able
15 to do the ripping.

16 But systems are getting better. They are
17 getting more sophisticated, and we can't count on
18 getting access to the sound recordings without
19 circumvention.

20 As I mentioned, recently, Arista Records,
21 a major record company, part of the BMG family, has
22 issued a news report saying that they are going to
23 begin applying protection measures more widely, even
24 in the United States, to all their products. As I
25 noted, this has happened at least currently with

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1 respect to promotional CDs.

2 These content protections take a number of
3 different forms. Some of them you could call copy
4 protection; some of them you could call access
5 control, in that some of them prevent the discs from
6 playing on computing devices. Some of them also
7 prevent ripping.

8 Some of them have what is called the
9 second session; that is, in addition to the music in
10 the compact disc Red Book Audio Format, they also
11 include a second compressed version of it that is
12 either playable on a computer but not able to be
13 ripped from the computer onto a hard drive or may
14 allow some limited types of ripping, but it's in a
15 particular compressed format that is not as high
16 quality as the Red Book Audio Format itself.

17 So the application of these protection
18 measures creates some fundamental problems for many
19 Internet webcasters. First, of course, delay in
20 getting the recordings onto our services. Second is
21 the impact on the sound quality.

22 If the only content we have access to is
23 through the second session, which is a compressed
24 file, then the sound quality of what we are webcasting
25 is not going to be on a par with the other sound

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1 recordings that we are webcasting.

2 Third, of course, rather obviously,
3 there's an economic aspect to this as well, even
4 pursuant to the statutory licenses. As you know, the
5 past decision of the CARP was that webcasters are to
6 pay 8.8 percent of their license fee for performing
7 sound recordings for making ephemeral recordings. And
8 if we are prevented from making those ephemeral
9 recordings, essentially, webcasters are paying for a
10 license right they cannot use.

11 We believe that we meet the standards that
12 are set by the Copyright Office and by the statute for
13 this exemption. Clearly, the making of ephemeral
14 recordings is a non-infringing use of the class of
15 works.

16 We, as webcasters, are likely to be
17 adversely affected by this prohibition. It's not just
18 a matter of inconvenience or expense. This is a
19 substantial adverse impact on the competitiveness of
20 services, the ability to compete based on the
21 availability of sound recordings at the time when
22 others have access to them, and as to the sound
23 quality. Ultimately, it has an impact as well on the
24 dissemination of copyrighted works and the
25 availability of copyrighted works to the public via

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1 webcasting.

2 This is a measure that controls access to
3 copyrighted works. As I noted, some are access
4 controls, in that they do not even permit the CDs to
5 be played on computers. Some are copy-control
6 measures.

7 But I submit to you that Congress has said
8 something important with respect to the applicability
9 of Section 1201(a) (1) to this particular case, because
10 the exemptions that were provided in the law, the
11 limited exemptions that were provided, specifically
12 note that those who take advantage of circumvention
13 pursuant to the exemptions are not to be liable under
14 1201(a) (1).

15 If 1201(a) (1) did not apply with respect
16 to the making of ephemeral recordings, then there
17 would have been no need for Congress to have included
18 1201(a) (1) in the language of the exemption. Because
19 they did, they recognized that there was an
20 implication under 1201(a) (1), even with respect to the
21 making of ephemeral recordings. Therefore, an
22 exemption from 1201(a) (1) ought to be available to us
23 as well.

24 Now if these protections are widely
25 applied, what are the options that are available to

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1 webcasters? Well, Option No. 1 is, pursuant to the
2 exemption, we can ask a label to provide us with an
3 unprotected copy. They may refuse or they may delay
4 giving us access to the recording.

5 We may not know when recordings are coming
6 out. We may not know when others are receiving
7 promotional copies of recordings in advance of the
8 release date.

9 The statute provides no definition of what
10 is a reasonable time to delay before you are allowed
11 to circumvent. A reasonable time in webcasting is
12 really instantaneous, because when others have access
13 to the content, we need to be competitive; we need to
14 have access to the same sound recordings that others
15 are able to webcast. Otherwise, the compulsory
16 license and the intention of Congress to create a
17 level playing field becomes meaningless.

18 Another possibility is that, if we ask a
19 label for a copy, they may provide a copy in
20 compressed form, and the compressed form may be in a
21 lower sound quality to the quality that we otherwise
22 webcast on our services.

23 Under the current exemption, once provided
24 with a lower-quality, compressed version, we would
25 have no option to circumvent. The statute itself

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1 seems to say that, if the copy is provided, we have no
2 ability to circumvent without a further exemption
3 under 1201(a)(1).

4 Another possibility, of course, is that
5 when we ask a label for an unprotected copy, they may
6 give us a copy in a format that is not used by the
7 service. They may provide it, for example, in the
8 Windows Media Player format, just as an example, when
9 the particular service operates using Real Player
10 transmission means. If that's the case, then we will
11 have to convert the file from Windows Media Player,
12 which is itself a compressed format, into the Real
13 Audio format, which results in yet further audio
14 degradation of the signal.

15 There is a second option available to
16 webcasters, if protections are widely applied, which
17 is we can try to obtain the files from a third-party
18 ripping service. That, of course, increases the
19 expense, and that expense is not economically feasible
20 for many smaller webcasters.

21 Of course, there is the possibility that
22 even the third party's efforts to obtain access to a
23 copy-protected file may be thwarted by the
24 technological protection measure. So the third party
25 may delay in having access to the file or may not have

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1 access to it at all, if their attempts to circumvent
2 are unsuccessful.

3 Option No. 3 available to webcasters is to
4 develop your own circumvention tool. Well, that's
5 what's contemplated under the statutory exemption. It
6 is, of course, time-consuming. It assumes that there
7 is a high level of skill even among small webcasters
8 to be able to perform that circumvention.

9 Of course, there is no guarantee that a
10 particular service is going to use a specific content-
11 protection method. We will have to have available on
12 staff someone who is able to circumvent various copy-
13 protection means, various content-protection means,
14 and to continually work on these means as the
15 technological measures themselves evolve and become
16 more sophisticated.

17 There is, of course, a fourth option,
18 which is we could take the analog output signal from
19 a CD audio player, not a PC, digitize it, and then put
20 it into different formats as necessary. But, of
21 course, that results, again, in lower sound quality
22 than going directly digital to digital.

23 It is inconvenient. It involves
24 additional expense, and, of course, there is no
25 guarantee that there will not be future analog-

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1 protection means applied. So that, in and of itself,
2 could be a temporary solution.

3 I guess in closing what I would like to
4 say is that DMA and our members really hope that this
5 is a problem that can be resolved without an
6 exemption. We hope that this is something that can be
7 resolved among copyright owners and webcasters.

8 But, if not, and there are some practical
9 problems to resolving it between every webcaster and
10 every sound recording copyright owner, we need the
11 safety valve that is intended to be provided by
12 Congress through the 1201(a)(1) exemption. In
13 particular, the kinds of safety valves we're looking
14 for: the ability to circumvent without delay.
15 Particularly, that's true in cases in which a
16 copyright owner previously has refused access to a
17 particular sound recording.

18 The statutory exemption seems to imply
19 that the requests to the content owners have to be
20 made on a sound-recording-by-sound-recording basis.
21 We would think that, once refused, we ought to be able
22 to immediately begin circumvention efforts because of
23 the likelihood that the refusal is going to be
24 repeated. Doing it on a sound-recording-by-sound-
25 recording basis for the tens of thousands of sound

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1 recordings that are issued every year is simply not
2 practical.

3 Second, we would seek the ability to
4 circumvent where the music files that are provided to
5 us by a content-owner, if provided, are not of a
6 quality that is equivalent to the other music files
7 that we webcast on our services.

8 Lastly, of course, where the music files
9 that are provided by a particular content owner are
10 not provided in all formats that are needed by the
11 service, we would need the ability to go back to the
12 highest-quality available recording and do the
13 encoding into a particular format. So, once again, we
14 are certain that we are able to webcast in all formats
15 with sound recordings of equivalent quality.

16 In closing, we would say that we believe
17 that the exemption is justified, and we request that
18 the exemption be granted. Thank you.

19 MS. PETERS: Thank you.

20 OPENING STATEMENT BY MR. LEAVENS

21 MR. LEAVENS: Good afternoon. My name is
22 Tom Leavens. I'm General Counsel for Full Audio in
23 Chicago, and we want to thank you for the opportunity
24 to be here and provide our views on this issue with
25 you this afternoon.

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1 Full Audio is a digital music distribution
2 company located in Chicago. We were formed four years
3 ago. We launched our service in April of last year.
4 We have recently relaunched under the name Music Now.

5 I should say, initially, to echo some of
6 the remarks that Seth has made, that we support all
7 the efforts to ensure the protection of the legitimate
8 distribution of music. We are not against copy
9 protection. Our interests are aligned with the record
10 companies in that respect. We want them to be
11 healthy. They provide the very thing that we sell.
12 So we are very much aligned with them in that respect.

13 We are here today simply to talk about a
14 very specific operational and competitive issue that
15 we see coming. Our content partners are all the major
16 labels. We have agreements with Universal, Warner,
17 EMI, BMG, and Sony. We have agreements also with the
18 independents Sanctuary and Koch, and we are also
19 working to add additional independent labels onboard
20 with our content. We also have an agreement with the
21 Harry Fox Agency, which is along the lines of the
22 agreement that the RIAA has with the Fox Agency.

23 So our goal from the beginning was to be
24 a legitimate licensed business. We have achieved
25 that. We enjoy good relations with our content

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1 suppliers.

2 Our distribution partners are Microsoft.
3 We are embedded in the Microsoft Corona Player, along
4 with Pressplay. We are distributed through Clear
5 Channel, through Charter, and through Earthlink.

6 As far as my own personal experience, I
7 spent eight years as General Counsel for a record
8 company prior to joining Full Audio about two-and-a-
9 half years ago. So I can speak a little bit from the
10 perspective of operationally what goes on within an
11 independent record company.

12 The service of Full Audio initially
13 involved only conditional downloads. In relaunch,
14 which occurred last month, we also added permanent
15 downloads and DMCA-compliant radio. So our experience
16 with radio is relatively recent.

17 We maintain different files for each one
18 of these features, each one of these functions, at
19 different bit rates. For example, we have radio which
20 is offered both at a 32-bit rate and a 128-bit rate.
21 We also have our downloads with separate files at a
22 128-bit rate.

23 So we have a need for making sure that we
24 have files not only at this different bit rate, but
25 making sure that it's in conformance with the codec

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1 and the DRM that we are using, which is .wma.

2 We obtain our files principally from
3 compact discs. We also do receive some electronic
4 files from the labels that we have that our content
5 deals with, and we have also purchased some files from
6 a third-party supplier, as Seth has mentioned.

7 We prefer to use compact discs for the
8 reason that it is an actual object that gives us a lot
9 of information, which is important, on publishing, but
10 it is also important for us to be able to re-encode
11 when we need to, for any number of reasons, whether
12 we're going to be upgrading on the bit rate or in the
13 case where we have loss of files, which has definitely
14 occurred I shouldn't say a lot, but when it does
15 happen, it is important for us to be able to replace
16 a file very quickly. Having CD is the best way to do
17 that.

18 We have on the radio side over 200,000
19 files currently in our service, and we are adding
20 thousands of files to that radio service each month.
21 It is a process that must be an automated process. We
22 cannot have exception processes involved with the way
23 in which we add files to our radio service. Every
24 time we have an exception process, it adds by a level
25 of magnitude time that is expensive for us, that puts

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1 us at a competitive disadvantage.

2 Every time that we have to in some way
3 single out a particular disc and deal with it on an
4 individual basis, it's an extraordinary expense to us
5 because it takes away from the systems that we have
6 set up in order to accommodate the massive amount of
7 music that we need to be able to put into our system
8 in order to be competitive.

9 The process not only has to be automated
10 because of its volume, but we also need to be able to
11 identify and track the files in our system for
12 purposes of meta-data and for purposes of being able
13 to report usage. It's very important that each file,
14 when it comes in, has an individual file number
15 attached to it. We track it through the system. When
16 anything about that file appears in the service, there
17 has to be an associated meta-data to accurately
18 describe it. There's all kinds of reasons why this is
19 not something which -- it is not a system that is
20 susceptible in any way to individual attention.

21 We have been following the developments in
22 the copy protection and have been talking to our
23 content suppliers about that over the course of our
24 initial negotiations with them and during the time
25 that we have been in agreements with them. It has

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1 principally been along the lines of the consequences,
2 the implications to us, for our conditional download
3 service because that is what we have been doing up to
4 about a month ago.

5 We have received assurances that things
6 are going to be worked out with respect to the people
7 that we have talked to, and we have no reason to
8 believe that that's not the case.

9 We want that to happen. It is not only
10 that it is going to be easier for us if that happens,
11 but, of course, we are paying under the DMCA for the
12 right to make ephemeral copies. We think that implies
13 an obligation to deliver means for us to be able to
14 make one.

15 But here are our issues: We don't know
16 when a recording is going to be copy-protected at this
17 point. It's anecdotal. It's maybe something that we
18 learn for the first time when we try to encode
19 something. But if it's part of this automated
20 process, it's not going to come to our attention
21 really until it gets kicked out in some way when we're
22 trying to encode something.

23 We don't know what solution has been
24 applied for the copy protection, what it is that we
25 would need to do in order to make a copy from that,

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1 where it is that we would go.

2 As Seth mentioned, we don't know really
3 how it is that 112(a) would be interpreted with
4 respect to whether the notice that we would give to
5 the record company would be a blanket notice or
6 whether it would be individual notices. If it is
7 individual notices, again, that is something which we
8 just really can't accommodate, given the number of
9 files that we are dealing with on a monthly basis.

10 We don't know what a reasonable time would
11 be for us to have to wait. We don't know how that is
12 going to be interpreted by our competition either with
13 respect to how long we keep something out of our
14 service before we would implement any kind of any
15 circumvention or any circumvention efforts.

16 We don't really know, either, what our
17 recourse would be in the event that there is a problem
18 with a file that is delivered to us. The problem
19 could be the quality of the file delivered or the
20 format or some other kind of incompatibility. We
21 don't understand really what it is that would be our
22 alternatives under those kinds of circumstances.

23 We know, we believe that the issues that
24 we would have with respect to the type of protection
25 that we would be getting or that we would be

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1 encountering from the record labels is not really a
2 question of bad intent as far as their performance.
3 Our content providers have worked hard to deliver
4 content to us under our conditional download service,
5 and we see that this is probably something that is
6 going to continue as we go into radio, although we
7 have not been receiving any service with respect to
8 our radio service.

9 I am not sure how many webcasters do
10 receive service for the webcasting. Any of the
11 service that we have received has been only in
12 connection with our conditional download or permanent
13 download service. It would not include any files that
14 go beyond that, because, obviously, anything that the
15 record company releases is something that we could use
16 for radio, but we have not received any files that go
17 beyond just what is available for our download
18 service.

19 What is going to happen really is that,
20 while there has been this productive work that we have
21 encountered with the major record labels that we are
22 dealing with, that as they deal with this issue of
23 copy protection, that, first of all, there is a
24 greater amount of content that they are going to have
25 to deal with, obviously, as opposed to the subset that

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1 we get licensed.

2 They are going to have to deal with a
3 greater number of companies, which are going to be in
4 the several hundreds as opposed to -- I'm not sure how
5 many are the shipment licensees, but I don't imagine
6 that it's more than 25 or 50-something that they are
7 currently dealing with at this point.

8 And there's the greater range of encoding
9 requirements that each of the webcasters are going to
10 have as well. To the extent that we have received
11 files from the record companies, they have been files
12 that have been according to requirements and
13 specifications that we have worked out with them, but
14 we're just one company. We would need, for example,
15 in addition to what we are getting for a conditional
16 download, we would need files for our radio that would
17 be at two different bit rates for .wma.

18 The range that the record company would
19 get would be -- I can't imagine the different numbers
20 that the other webcasters would be having or all the
21 different encoding requirements that they would have.
22 But the record companies are going to face a
23 tremendous number of variations in those files which
24 is far different than what it is that they are serving
25 up today.

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1 Our fear is that the introduction of the
2 copy-protected discs is going to overtake the ability
3 of the record labels to service all the webcasters
4 without creating some kind of competitive disadvantage
5 somewhere. That ultimately is what it comes down to
6 for us.

7 We also are concerned that the smaller
8 companies, the independent companies, are not going to
9 have the resources in order to serve the files that
10 would be necessary in order for us to be able to use
11 recordings that are otherwise copy-protected. Having
12 worked for the small record company, I know the
13 resources just aren't there to be able to do that.

14 The independents that we have used have
15 been very cooperative with us, but the systems that
16 they have are not the same as the systems for the
17 larger record companies and they are not going to be
18 in a position to be creating those just for the
19 purposes of serving us as webcasters.

20 Then there are some companies that just
21 may elect to give just favored service to others, and
22 that is something that we just have to anticipate is
23 going to occur at some point.

24 In essence, what is preferable for us is
25 the record companies be able to self-execute on this

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1 compulsory license that we have under the DMCA, that
2 we not be involved with a complicated process whereby
3 we have to be making approaches, waiting for periods
4 of time, having to put ourselves at jeopardy of a
5 competitive disadvantage of some kind of way to
6 exercise the rights that we have as webcasters.

7 As long as our webcasting is DMCA-
8 compliant, just as with the mechanical license that
9 the record company has for phonorecords, it's simply
10 an elective process that they undertake without having
11 to take any other steps dealing with the publisher.
12 Our goal would be to be in that same position, that we
13 would not have to be required to be approaching the
14 record companies in order to be able to exercise the
15 rights under the DMCA.

16 Thank you.

17 MS. PETERS: Thank you.

18 Steve?

19 OPENING STATEMENT BY STEVE ENGLUND

20 MR. ENGLUND: Thank you for the
21 opportunity to present the views of the Recording
22 Industry Association concerning DMA's proposed
23 exemption.

24 We appreciate the concern that the
25 webcasters have expressed for the piracy concerns of

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1 record companies. We also recognize that webcasters
2 are, in fact, licensed under Section 112(e), are
3 entitled to make ephemeral copies, and many record
4 companies work productively with many webcasters to
5 make that happen in ways that are entirely outside the
6 statutory process.

7 It just appears to me that, based on the
8 things that we have heard from Seth and Tom, that it
9 is not necessary for webcasters to receive permission
10 to circumvent access controls in order to have access,
11 and it may not be quite the panacea that it might
12 first appear if they were to get that permission.

13 It's important to begin, though, with an
14 understanding of the purpose of Section 1201 and this
15 proceeding. Congress enacted 1201 because it
16 recognized that access-control and copy-protection
17 technology are desirable tools that copyright owners
18 should be encouraged to use, and that these
19 technologies can, in fact, increase access to works.

20 So 1201 is designed to promote the use of
21 these technologies. We are concerned that any
22 inclusion of copy-protected CDs on the list of
23 exemptions will undercut Congress' intentions in
24 creating Section 1201 to promote the use of such
25 technologies.

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1 But Congress did create this proceeding as
2 a failsafe mechanism, but this failsafe mechanism
3 applies only to technologies that control access to
4 works. The purpose of this proceeding is to ensure
5 that access is not unjustifiably diminished.

6 This proceeding is not about copying.
7 Yet, all we have heard from Seth and Tom is about
8 copying.

9 The very name of DMA's proposed class for
10 the exemption contradicts its place in this
11 rulemaking. Protected CDs are primarily designed to
12 inhibit copying, not access. While it's true that
13 some copy-protected CDs might, as a technical matter,
14 employ both access and copy-control measures, it's
15 very clear from what we have heard this afternoon that
16 DMA isn't concerned about access because there can be
17 no question that webcasters have access in a variety
18 of ways. Their concern is about copying.

19 We heard from Seth that one of the options
20 available to webcasters is to play a CD that is copy-
21 protected on a CD player. Seth suggested using the
22 analog output to make copies. I submit they can use
23 the digital output to make copies, if he's concerned
24 about analog-to-digital signal degradation, but it is
25 very clear that a copy-protected CD can be readily

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1 accessed and that copies can be made from it if
2 webcasters need to make copies. They can access it in
3 the digital domain if they need to make copies.

4 So, in addition, there's no assurance
5 under Section 112 or Section 1201 that webcasters, or
6 any other user of copyrighted works, ought to have
7 access to works in the most convenient means. I think
8 that it is sufficient that webcasters have access to
9 make copies in the digital domain as they do. There's
10 no need for an exemption.

11 In the last rulemaking on this subject,
12 the Office rightfully rejected requests for DVD
13 exemption under somewhat similar circumstances. You
14 noted, properly, that it wouldn't be a violation of
15 1201(a) for an individual to circumvent copy controls
16 as long as in doing so he or she did not circumvent
17 access controls. That is very similar to the case
18 that is presented here.

19 There the Office found that in the case of
20 motion pictures on DVDs, anyone with the proper
21 equipment can access the work, just as a webcaster
22 with a CD player can access the sound recording on a
23 CD. The Office denied the DVD exemption because of
24 the absence of evidence that access controls were
25 being used to lock up material in a way so that there

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1 was effectively no means for a user wanting to making
2 an infringing use to get access. That, too, is the
3 situation here. Webcasters have access to the music
4 on copy-protected CDs by playing them in CD players.

5 So, in the absence of that evidence, I
6 think you ought to reject DMA's proposal. But even if
7 there is a genuine issue here as to access, DMA has
8 presented only hypothetical concerns that are well
9 short of the substantial adverse effect on non-
10 infringing uses that's required to support an
11 exemption.

12 They haven't offered any evidence that
13 webcasters have been unable to access sound recordings
14 in the past, and they have offered only speculation
15 that the copy control might affect webcasters in the
16 future. As Seth noted, there have been only a very
17 small number of copy-controlled CDs that have been
18 commercially released in the United States. It's by
19 no means clear that there will be a substantially
20 larger number released in the future, certainly not
21 sufficient to support a finding of substantial adverse
22 effect on non-infringing uses.

23 But even if you thought that there could
24 be, Congress provided the solution in Section
25 112(a)(2). Webcasters should ask copyright owners,

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1 not the Copyright Office, for the means to make
2 copies.

3 It has been suggested that circumvention
4 will solve all of the problems of the webcasters. On
5 the other hand, many of the comments we have just
6 heard suggest that it is really no panacea.

7 Tom talked about his need to have an
8 automatic process with no exceptions, but I think if
9 you give webcasters permission to circumvent, you will
10 end up with precisely the situation that Seth
11 described as unworkable: every webcaster needing to
12 have a staff hacker to circumvent access controls. As
13 the access controls technology changes, webcasters
14 will have to keep circumventing.

15 So I don't think that Tom achieves his
16 goal of having an automated process with no exceptions
17 because, if he is permitted to circumvent access
18 controls, he is going to have to hack every CD that he
19 receives. Instead, the right answer is that
20 webcasters should do what Section 112(a)(2) says they
21 should do, which is to ask copyright owners for the
22 means to make copies.

23 Presumably, at least in many cases that
24 will happen because, as Seth and Tom indicated, quite
25 apart from the statutory structure or any issue of

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1 circumvention, many record companies provide files
2 either in CD form or electronic forms to many
3 webcasters. In those kinds of relationships, people
4 can bargain over formats and people can bargain over
5 delivery and means that will achieve the needs of
6 webcasters.

7 But it appears here that the webcasters
8 are trying to rewrite Section 112(a). We heard
9 several instances in their remarks that they have
10 concerns about the period of time that Section
11 112(a)(2) gives for copyright owners to provide a copy
12 that has the means to be copied.

13 They have particularly taken exception to
14 the need to have this period of time. They want to be
15 able to circumvent on the first day that a release
16 becomes available, even if they haven't previously
17 known that a release was going to be available. That
18 is just taking exception to specific provisions of
19 Section 112(a)(2) that Congress has provided.

20 In addition, DMA's approach in its
21 comments at least would likewise ask the Office to
22 stand conventional statutory interpretation on its
23 head. In essence, DMA argues that, because Congress
24 created Section 112(a)(2), Section 1201 must prevent
25 them from doing something they want to do, and because

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1 Congress failed to include a similar exemption in
2 112(e), that "omission," as DMA's comments call it,
3 has to be rectified.

4 But this isn't the proceeding to correct
5 Congress' omissions, nor is it a proceeding to rewrite
6 the terms of Section 112(a)(2). The Office had it
7 exactly right in the rulemaking three years ago when
8 you decided that you should proceed with particular
9 caution when Congress has already made in the statute
10 specific judgments about the scope of an exemption.
11 Certainly, the record before you right now provides no
12 basis for you exercising the heightened standard of
13 particular caution, why you want to essentially
14 rewrite Section 112(a)(2).

15 As I have already mentioned, this whole
16 issue is highly speculative. DMA certainly has not
17 provided the highly-specific, strong, and persuasive
18 evidence that is required to establish a likelihood of
19 future adverse impact under the standards for this
20 proceeding to apply to the alleged future harm.

21 It is by no means clear that record
22 companies will ultimately deploy copy-protection
23 controls in any substantial numbers. Even if they do,
24 record companies understand that webcasters may play
25 or are an important outlet for their works. So

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1 webcasters and record companies will both be motivated
2 to work together to address the issue in the
3 marketplace, should it be the case that copy
4 protection becomes widely used.

5 Accordingly, the Office should not at this
6 time grant an exemption. The Office can certainly
7 revisit the issue in three years, if there is more
8 evidence of a problem then.

9 MS. PETERS: Thank you very much.

10 Now I'm going to turn it over to the
11 Copyright Office Panel, but before I go to Charlotte
12 and ask her to start the questioning, I'm having
13 trouble with one piece, which has to do with access
14 controls. Most of the testimony had to do with copy
15 controls.

16 Seth, you did say that there was some
17 issue or some of these CDs had access controls. Could
18 you explain what the technology is and where the
19 access control is, and is it in all, a few, whatever?

20 MR. GREENSTEIN: The access control that
21 has been applied to date prevents a compact disc that
22 is playable in a normal home audio player from being
23 played on a personal computer.

24 MS. PETERS: Okay. So it can be played on
25 -- so it's that it can't be played on it?

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1 MR. GREENSTEIN: It cannot be played on a
2 computer's CD-ROM drive. That's the nature of the
3 access control that's being applied.

4 MS. PETERS: But it still can be played on
5 a CD player?

6 MR. GREENSTEIN: It can, and if you are
7 listening in your home or if you are in some radio
8 broadcast studios at least of the past, they generally
9 rely on audio players. Webcasters don't generally use
10 audio players. It's the rare webcaster that uses an
11 audio CD player rather than a personal computer.
12 Frankly, even radio broadcast studios now are
13 migrating away from pure audio players, going to
14 personal computer-based systems.

15 So to the extent that this kind of control
16 is applied to a compact disc, it will prevent
17 webcasters from engaging in the act of webcasting at
18 all. Even if there were no copy protection applied,
19 the access control would prevent the ripping from
20 occurring in the first because you could not play it.

21 MS. PETERS: Do you want to add anything
22 to that?

23 MR. LEAVENS: Well, just to concur that we
24 launched with 36 channels, and we anticipate that we
25 are going to be adding more. We do not serve that off

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1 of a conventional CD player. We serve that off the
2 computer.

3 We need to be able to store, and through
4 the programs which we developed, be able to sort and
5 play those files off the computer, and not have
6 somebody sitting at a device and playing a CD off of
7 a conventional CD player.

8 MS. PETERS: Steve, could you comment?

9 MR. ENGLUND: Yes, I think Seth has
10 accurately described the technology that is used by
11 many of the implementations here, now not all of the
12 implementations. There are a variety of different
13 technology vendors here. They all use somewhat
14 different techniques. There are some vendors that use
15 somewhat different techniques that we probably would
16 say are not access controls, but Seth is right that
17 there is the large class of the evolving technologies
18 here that could be considered access controls in that
19 they permit access on some devices and not other
20 devices.

21 But I think it is entirely sufficient for
22 webcasters to be able to access the works on a home or
23 professional CD player because that is all that is
24 required for purposes of this proceeding. They have
25 access by playing it, a CD, in a CD player. They have

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1 perfectly straightforward means of copying that
2 material entirely in the digital domain on their
3 computers using methods that essentially Seth
4 described. As a result, there's no access issue here
5 for the Office to address.

6 MS. PETERS: Okay. So the record
7 industry, in making its music available, is
8 essentially going to make it available in just CDs
9 that play in dedicated players as opposed to making
10 them available to play on computers?

11 MR. ENGLUND: I think, as I said, it is by
12 no means clear that record companies are going to use
13 this technology to a substantial degree at all. That
14 is an open question, and yet a further reason why it
15 is premature for the Office to put copy-protected CDs
16 on the exemption list at this time.

17 There are a number of tradeoffs that
18 record companies face in considering the technology.
19 Certainly, record companies have a substantial
20 interest in deploying an effective technology that
21 permitted universal access and substantially limited
22 copying. But these technologies are not all that
23 effective, as Seth suggested.

24 Technologies come at a cost, both out-of-
25 pocket costs and perhaps a customer-acceptance cost.

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1 Record companies will balance those considerations and
2 make their own decisions about whether to use this
3 technology or not. Some may; some may not. The
4 particular configurations they use will be their
5 decision, and it is by no means clear what those
6 configurations will be.

7 Seth accurately described the kind of
8 configuration that many people have talked about,
9 which is a disc that would have two so-called sessions
10 on it, a first session of conventional Red Book Audio
11 that is playable in the ordinary course on a customary
12 CD player and a second session that is accessible in
13 the ordinary course by a computer.

14 We have heard that it may not be
15 compressed in the way that the webcasters would like
16 it, but, in fact, they are likely to have access on
17 both CD players and computers. So they are asking for
18 an opportunity to circumvent the access controls on
19 the first session because they're not satisfied with
20 the sound quality of the access they get through the
21 second session. But I think that is the question that
22 is being presented to you.

23 MS. PETERS: Okay, but just on that one
24 that has the first session and the second session,
25 those still have to be on dedicated -- can they be

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1 used in computers?

2 MR. ENGLUND: The short answer is yes.

3 MS. PETERS: Okay.

4 MR. ENGLUND: The interest of record
5 companies is in selling products that can be readily
6 accessible by all consumers.

7 MS. PETERS: Okay.

8 MR. ENGLUND: So one of the technological
9 challenges that record companies and the vendors of CD
10 copy-protection technology face is how to achieve
11 universal access, because nobody is going to make
12 money in the record business by selling records nobody
13 can access.

14 MS. PETERS: Okay.

15 MR. ENGLUND: The emerging way or an
16 emerging way of doing that is to provide for access
17 differently in the case of CD players and computer
18 CD-ROM drives because there are technical differences
19 in the way those two kinds of drives read the data off
20 the CD.

21 So the first session provides access on a
22 CD player. The second session provides access on a
23 computer. But the particular files in the second
24 session, which are accessible by the computer, may be
25 compressed so that there's less injury to copyright

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1 owners from having higher-quality files available.
2 They may be secured by a DRM. There are a number of
3 different configurations that are possible.

4 MS. PETERS: I was just having a real hard
5 time figuring out where the access issue was, but I
6 think I now at least understand it.

7 Did you want to say something?

8 MR. GREENSTEIN: I just wanted to address
9 a couple of points with respect to whether the access
10 that Steve suggests is available is actually
11 sufficient. We are talking about professional users
12 here. The kind of access that might be sufficient for
13 a home user is different than for a professional user.
14 Professional users have to be able to work with files
15 in particular ways in order to optimize their
16 services.

17 Again, we compete based largely on the
18 availability of high sound quality through very small
19 speakers. You have to start with the highest-quality
20 product in order to achieve that. You have to
21 optimize your product. You have to optimize the sound
22 quality of the files to make sure that what comes out
23 at the other end is thoroughly acceptable to the
24 consumer, at least equivalent to the FM or CD
25 experience.

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1 If you start with a compressed file and
2 then have to start processing it from there, it's,
3 well, garbage in/garbage out. It gets worse and
4 worse, deteriorates each time, to a level that is
5 unacceptable and, in fact, creates some disparity of
6 the signal.

7 We would like our signal to become
8 consistent in sound quality throughout. If some sound
9 recordings sound really good and some do not, then our
10 service is the one who suffers. We are the ones that
11 get the blame, not the record companies, even though
12 it may be the record company's fault.

13 Finally, one other point that Steve
14 mentioned is, well, perhaps one way we could get
15 access to the content would be to start off with an
16 audio CD player --

17 MS. PETERS: A CD player, yes.

18 MR. GREENSTEIN: -- and then take the
19 outputs from that. The formats are different. Again,
20 there's conversions that have to occur, and the
21 conversions will, again, result in some degradation of
22 sound quality.

23 We would like to be able to go directly
24 from digital to digital in the same digital format, so
25 as to avoid those kinds of problems and to have a

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1 higher sound quality as our end product.

2 MS. PETERS: Can I just, before we go to
3 you, Tom, can I just ask a question? With what you
4 just said, you almost suggest that your recommendation
5 for an exemption is limited by use. It's by
6 professional webcasters. Is that right?

7 MR. GREENSTEIN: Well, inasmuch as every
8 webcaster has the obligation to pay license fees and
9 to, therefore, we hope gain some income because of
10 that, we think of all webcasters as being
11 professional.

12 MS. PETERS: So everybody who -- I was
13 actually trying to get a handle on the scope of what
14 you were proposing.

15 MR. GREENSTEIN: Yes. I mean, the
16 specific exemption that we are seeking is on behalf of
17 those who engage in the act of webcasting and who have
18 that need to make ephemeral recordings. It is not a
19 more generalized request.

20 Now I also understand from prior rulings
21 that you have said that the exemption is not on a
22 user-by-user basis. I would ask you, with great
23 respect, to revisit that, I would think for the health
24 of the industries that are sitting here at the table.

25 Obviously, a generalized exemption to

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1 circumvention is not going to be something that is
2 good for the recording industry or for our industry.
3 But, on the other hand, our industry cannot get along
4 without having exemption and access to these
5 recordings.

6 MS. PETERS: Okay.

7 MR. GREENSTEIN: So I would ask you,
8 respectfully, to revisit that ruling in this context.

9 MS. PETERS: I hear your respectful
10 request.

11 (Laughter.)

12 Tom?

13 MR. LEAVENS: I wanted to make a practical
14 point, and that is that the option of doing something
15 in real time with a CD is not really there for us. I
16 am not in charge of the encoding process at our
17 company, but I did ask the people who are before I
18 came here today what the consequences would be for us
19 to have to do things in real time. Roughly, it
20 multiplies the time dedicated about 15 times.

21 So it's a process that we now do where we
22 put the CD in, and it's encoded at the bit rate that
23 we want within a relatively short period of time. If
24 we had to start doing things, playing the entire CD
25 through, and then perhaps going through a second

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1 process or a third process in order to arrive at a
2 file, it becomes economically undesirable for us to be
3 able to offer the service that we do, which is the
4 array of channels that we want to offer, the richness
5 of the content that we want to offer, which requires
6 us to have thousands of new tracks added every month
7 to the service.

8 MR. GREENSTEIN: One other point that I
9 did want to address that Steve made, which is the
10 immediacy of the threat. It's true, at the moment all
11 we know about are that there have been a few
12 commercially-released CDs into stores that have
13 protections applied to them. Some of these are access
14 control. I think, as a matter of fact, all of them
15 pretty much were access control as well as copy-
16 protected. We have started to see within our services
17 advance copies, promotional copies, that have content
18 protection applied to them.

19 But there is an article that we have seen,
20 and it's dated March 28th. This is on news.com. I
21 can submit this to the Office, if you wish, along with
22 a written statement. I think it would probably be
23 useful for the Office to see.

24 It indicates that an analyst for J.P.
25 Morgan says that Arista Records, a subsidiary of BMG,

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1 "appeared to be moving to market with CD copy-
2 protection technology. They expect volume shipments
3 of protected CDs to ship commercially in the U.S. as
4 early as in the May-June timeframe," using the
5 SunnComm technology, which is a step beyond what we
6 have previously seen in the marketplace.

7 MS. PETERS: You just said, "copy
8 protection." Is it access?

9 MR. GREENSTEIN: Well, it's difficult to
10 know because the SunnComm solution is capable of both.
11 The SunnComm solution, I believe they have multiple
12 "flavors." One of the "flavors" is this second
13 session type of technology.

14 MS. PETERS: Okay. I actually wasn't
15 going to ask questions. Yes, Steve?

16 MR. ENGLUND: Several miscellaneous points
17 that people have raised: First, Seth referred a
18 moment ago to advance copies, and I believe he did in
19 his earlier remarks as well. It strikes me that the
20 advance copies are probably the copies that record
21 companies are most interested in protecting with this
22 kind of technology, but the universe of copies that
23 least justifies an exemption in this proceeding
24 because the advance copies are ones that record
25 companies are providing the webcasters. Very often,

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1 they are ones that record companies and webcasters are
2 bargaining over the terms in which they will be
3 provided.

4 As long as there is that relationship
5 apart from the statutory structure, one of the things
6 they ought to talk about is whether the copies will be
7 copy-protected. It seems to me a webcaster ought to
8 say, "Thank you for all of those CDs you have been
9 giving me, but I can't use them. Please give me CDs
10 I can use." If that takes place, then I submit that
11 some exemption is not necessary.

12 Second, Seth referred to processes that
13 are workable for home users versus commercial users
14 and suggested that, while it might be fine for a home
15 user to make copies in real time using a regular CD
16 player, that it is not workable for a commercial user.
17 One of the issues that we struggle with in licensing
18 of webcasters all the time is that there is a very
19 small number of large commercial webcasters, the ones
20 represented by DMA. Many of them have or are pursuing
21 relationships with large record companies. Many of
22 them are serviced, at least in part, by record
23 companies already. They have the relationships to
24 deal with the issue.

25 The question that arises, and the reason

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1 Seth has said that he is here, is for small webcasters
2 who in many cases really are home users because two
3 people are operating a webcast out of the basement.
4 It strikes me that it is very difficult in our
5 licensing purpose to try to identify who is a hobbyist
6 and who is a real webcaster. The folks who are kind
7 of hobbyists/kind of commercial probably would find it
8 a lot more workable to engage in exactly the kind of
9 copying we have talked about, and it seems that they
10 ought to have sufficient access to satisfy all the
11 purposes of this proceeding.

12 Finally, I am obviously here today out of
13 concern that you will adhere to your previous decision
14 that you cannot define a class of works relative to a
15 use, rather but that it must start with the
16 identification of a class of copyright works. I think
17 you were clearly right that you have to start with a
18 class of copyrighted works.

19 I kind of assume it's going to be sound
20 recordings, but, as I read the statute, you certainly
21 do have the power to identify a class of users who are
22 affected by a particular type of technological
23 protection measure and a particular non-infringing use
24 they would like to make. If you make such a finding,
25 as I read the statute, it is that use by that class of

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1 users that is privileged.

2 So I don't think that you ought to put
3 copy-protected CDs or even sound recordings on copy-
4 protected CDs on your list of exemptions. But if you
5 do, I hope you will make clear that not everybody in
6 the world is allowed to circumvent, but only
7 webcasters who are licensed and making and paying for
8 license to ephemerals under 112(e).

9 MS. PETERS: Thank you.

10 Charlotte?

11 MS. DOUGLASS: Yes. Seth, are you happy
12 with the class of works that you have described in
13 terms of Red Book Audio CDs? I'm sorry. Did you hear
14 me? Did you describe the class of works as precisely
15 as you wanted to in the request for an exemption?

16 MR. GREENSTEIN: Thank you. That's an
17 excellent question.

18 I think that we described it that way
19 because that was the threat that was known, but I
20 think it's also correct that, in fact, the class could
21 be broader because it could be any type of sound
22 recording, any format that is desired to be used by a
23 webcaster for making the ephemeral recordings.

24 I mean if, for example, CDs over the next
25 couple of years go away and we move toward super-audio

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1 CD or we move toward a DVD audio or other types of
2 formats, or protected electronic formats, or even a
3 higher-quality second session format, those are
4 formats that webcasters could reasonably wish to use
5 for webcasting purposes and for the making of
6 ephemeral recordings that they need for the purposes
7 of webcasting.

8 So perhaps you were right, in my effort to
9 be moderate, perhaps I was too modest in defining the
10 class, and that might more properly be defined as a
11 class of sound recordings that are used for making of
12 ephemeral recordings.

13 MS. DOUGLASS: Is sound recordings the
14 only class?

15 MR. GREENSTEIN: That is all we are
16 seeking, yes.

17 MS. DOUGLASS: Okay.

18 MR. GREENSTEIN: Because that is really
19 what is covered under the statutory license that is at
20 issue.

21 MS. DOUGLASS: Okay. Are you really
22 concerned or unsatisfied with 112 as it is and, if so,
23 if you could fix it, how would you fix it to more
24 precisely help me understand what it is you want to do
25 that the statute doesn't do for you now?

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1 MR. GREENSTEIN: I think, again, at the
2 risk of concurring with Steve too often, I concur with
3 him that the real solution here is not to have to use
4 112 ever for this purpose. But, again, we are talking
5 about safety valves, and the safety valve that is
6 there in the exemption for 112 I think is insufficient
7 in a number of ways that I described.

8 First, because it seems to imply that you
9 have to make the request on a sound-recording-by-
10 sound-recording basis, on a phonorecord-by-phonorecord
11 basis, that becomes unworkable. It becomes extremely
12 expensive and time-consuming.

13 We would submit that it ought to be that,
14 if the requests have been made and regularly refused,
15 that you can continue to ask from time to time, but
16 you should be able, nevertheless, to just plunge right
17 in and do perform the circumvention, that you need to
18 be on the street the day and date of release with the
19 same sound recordings that your competitors are able
20 to play.

21 I think that the other aspect of it has to
22 do with quality, that, again, the statutory exemption
23 as written seems to imply that, if you are given a
24 low-quality recording by the record company in
25 response to your request, then you have lost the

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1 ability to circumvent. We submit that that's not
2 sufficient, that we have to maintain the high quality
3 of our services, no matter which sound recordings we
4 are dealing with, and should be able to circumvent for
5 that purpose.

6 MS. DOUGLASS: So, for you, access control
7 is prevention of being able to access a high enough
8 quality of sound to transmit to your audience?

9 MR. GREENSTEIN: Right. I would think
10 that you can kind of summarize the concerns in three
11 or four ways: timing, to be able to get prompt access
12 to recordings; quality, the sound quality; the formats
13 that you need. Again, if, for example, you are
14 delivered copies only in particular formats that you
15 use sometimes but not all the time or don't use at
16 all, that creates a problem for you, but the statute
17 would say that you're no longer able to circumvent.
18 Of course, there is the whole issue of the impact on
19 competitiveness and the expense of getting around the
20 access controls by other means.

21 MS. DOUGLASS: Have you all talked about
22 it among the industries? I know the belt-and-
23 suspenders type of approach you have to make in doing
24 business, but have the two industries talked about it
25 to an extent that you would be happy to -- could you

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1 work it out among yourselves? I think that's the
2 point.

3 MR. GREENSTEIN: We would like to. I
4 think, again, that is the optimum solution. The
5 problem is that we don't have everybody at the table.
6 The Recording Industry Association and Sound Exchange,
7 while they represent a very large number of companies,
8 I think can't bind them all. This is a problem that
9 exists for any company that applies content protection
10 and for any large number of webcasters and the many
11 that DMA represents and the many that DMA does not
12 represent.

13 MS. DOUGLASS: This kind of proceeding,
14 since it's every three years, it bears the burden of
15 proof that is substantial, at least by some account.
16 Why would you want to try to obtain an exemption here
17 as opposed to getting a more permanent fix? Even if
18 you get one this time, you would have to do it again.
19 I mean, this is just a personal question.

20 MR. GREENSTEIN: Uh-hum. I think the
21 permanent fix is the better one. Well, I think,
22 actually, voluntary agreements are best. Second is a
23 permanent fix, and perhaps the first would lead to the
24 second by consensus between the industries.

25 But failing that, we have to take

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1 advantage of the tools and the opportunities that are
2 available. As you see, hundreds of millions -- more
3 than a hundred million CDs have been protected
4 elsewhere in the world. There are news reports coming
5 out of labels in the United States looking toward copy
6 protection and other kinds of access controls.

7 We see the train coming. We would like to
8 jump on the train, but we're afraid we're going to get
9 hit by it instead. So I think we have to take
10 advantage of the opportunity that's in front of us
11 now, and that is why we have submitted the request for
12 an exemption.

13 MS. DOUGLASS: And you have taken this
14 opportunity, standing on the harm that the train is
15 coming, that you've heard that it's been done in
16 Europe? Have any of your members, for example,
17 actually tried to -- have any of your members been
18 harmed by this phenomenon?

19 MR. GREENSTEIN: We have encountered them.
20 Our members have told us that they have tried to rip
21 discs and met with copy protection and met with access
22 controls.

23 They said that, up until now, the methods
24 that have been applied have been reasonably
25 ineffective. So trying repeatedly or trying a couple

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1 of things that I don't think anybody would consider to
2 be circumvention per se, they have been able to get
3 access to the material and to make the copies that
4 they needed.

5 But the methods are getting more
6 sophisticated. I think we are not going to see much
7 longer the circumvention by taking a felt-tip pen and
8 writing on a particular area of the disc. When we
9 start to encounter these types of access controls, it
10 is going to be a lot more difficult for us, and the
11 impact of it can be much more substantial and severe.

12 MS. DOUGLASS: I think that's it. Thank
13 you.

14 MS. PETERS: Steve?

15 MR. TEPP: Thank you.

16 Let me start with you, Mr. Englund. The
17 TPMs we're talking about that will not allow a CD to
18 be played back in a computer, is that the purpose of
19 the TPMs or is that an incidental effect of the copy
20 control?

21 MR. ENGLUND: Certainly, the fundamental
22 purpose of copy protecting CDs is to protect the CDs
23 from copying. Record companies are highly motivated
24 to let people enjoy music on any platform they can
25 choose.

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1 It has been the difficulty of the
2 technological challenge here in securing the CD format
3 against modern ripping technology that has kind of led
4 people in the direction of the second session
5 technology and other approaches that we have talked
6 about this afternoon.

7 It may not be completely clear whether
8 that is, in fact, an access control since ultimately
9 it allows access on both platforms, but it is
10 certainly not -- it is, as you described it, more of
11 a byproduct of how you prevent copying than of a
12 desire to prevent access on a particular platform
13 because record companies want people to be able to
14 access and enjoy music.

15 MR. TEPP: Given that, by definition,
16 we're talking about application TPMs prospectively,
17 because I think everyone agrees that to date it's been
18 a very limited application, to what extent is the
19 recording industry looking to continue or not continue
20 that incidental effect of the copy controls that it
21 does apply and may apply in the future?

22 MR. ENGLUND: I think many record
23 companies are interested in principle in copy
24 protecting CDs. They are not the primary innovators
25 of the technology here. There are a number of copy

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1 control companies that are the technology innovators.
2 They are testing the various technologies that are
3 available.

4 They are thinking about, though, these
5 technologies are effective and cost-effective and
6 likely to result in more money at the bottom line
7 rather than less, and they will make decisions based
8 on that factor; they will make those decisions
9 independently. It is possible that some record
10 companies will deploy some forms of copy protection on
11 some CDs and others won't.

12 Does that answer the question?

13 MR. TEPP: I think so. Let me toss
14 something out for the whole Panel.

15 To what extent -- and this is a technical
16 question, so I apologize asking it to three lawyers --
17 to what extent, to the best of your knowledge, is it
18 possible to circumvent the copy control but not the
19 access control aspects of the TPMs we're talking
20 about?

21 MR. GREENSTEIN: Well, I'll take a whack
22 at it.

23 (Laughter.)

24 It is the blind leading the blind here.

25 I think one thing I would mention first is

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1 that one of the technological protection measures that
2 seems to be in the offing is something that does play
3 in the computer, but it permits access only to the
4 lower-quality second session. So the access control
5 that is being applied there is really an access
6 control with respect to the higher-quality format,
7 which is what webcasters would need in order to
8 perform webcasting.

9 I guess as to the technological question
10 you have asked, I think none of us knows the answer
11 because none of us really has seen the technology
12 that's going to be used. I mean we know that there is
13 a Macrovision technology out there that they acquired
14 largely from their own efforts, plus Midbar and
15 Cactus. That is the one that has been rather easily
16 circumvented in Europe and Australia and elsewhere.

17 But as far as the SunnComm solutions, they
18 really have not hit the market yet. So we don't know
19 exactly what the impact is going to be.

20 MR. ENGLUND: I basically agree that so
21 far the copy-protection aspects of copy-protected CDs
22 have been somewhat easy to circumvent. For the
23 reasons I described earlier, I think they may always
24 be easy to circumvent, because if the music can be
25 rendered in a CD player, it can probably be copied.

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1 It is a difficult technological challenge
2 to copy protect CDs. A lot of companies are working
3 hard to do it. Record companies are very interested
4 in their efforts, but it really by no means is clear
5 as a technological matter, from what I hear from the
6 technologists at the record companies, that technology
7 vendors will ultimately succeed in securing the CD
8 format to a very high degree. We hope they will. If
9 they do, we will be interested in deploying it, but
10 today it's not clear that they will succeed.

11 MR. GREENSTEIN: I think there is a
12 perception, even on behalf of the vendors of the copy
13 protection, that the consumer in markets outside the
14 United States is somewhat more docile and more
15 accepting of limitations than the United States
16 consumer may be. So it is difficult to predict even
17 what the reaction will be from the U.S. consumer to
18 these technologies and how long they will persist.

19 We have to look out at the moment,
20 assuming that the threat is going to be as real as it
21 could be, that the statements of record companies that
22 they have made on their websites, for example, in the
23 UK and elsewhere, that they intend to move toward
24 universal application of these technologies mean that
25 they are going to be applied in the United States as

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1 well. If so, the means may not be known, but the
2 impact I think ultimately is going to be very
3 predictable, at least for webcasters and their ability
4 to make the ephemeral recordings that we need.

5 MR. TEPP: Okay, thank you. Let me turn
6 now to Mr. Greenstein and Mr. Leavens for a question
7 about sort of the business side of it, of webcasting.
8 You indicated that there are some, although it sounded
9 like a small minority, but some webcasters who do use
10 CD players rather than computers to generate the
11 ephemeral copies that are the subject of the requested
12 exception. Why is it that they are satisfied with
13 that and others are not? What's the distinction
14 there?

15 MR. GREENSTEIN: Actually, to clarify, I
16 think I was the one who mentioned that. It was not
17 that they used them to make the ephemeral recordings,
18 but, rather, that they used them for webcasting,
19 similar to the way that you used to have turntables in
20 a radio studio, radio broadcast studio, or you
21 currently have professional CD audio players in these
22 studios, in broadcast studios for radio, that is
23 essentially what some webcasters do, particularly non-
24 commercial webcasters, educational institutions, and
25 such. But I don't know of any larger-scale webcaster

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1 that works off of CDs directly.

2 MR. LEAVENS: We don't. For purposes of
3 trying to manage and track the number of tracks that
4 we have, we have in place software which ensures that
5 the broadcast is DMCA-compliant. We actually have
6 real people who program each of the radio stations in
7 the sense of selecting the songs that are going to be
8 there, determining the relative importance of the
9 songs and how frequently they're going to be played,
10 and that.

11 But this is a service that depends upon
12 the able body of a computer to serve it up, to select,
13 to track, to make sure that we're going to be paying
14 the royalties correctly that we need to under the
15 DMCA. It's not a circumstance where we could have
16 somebody sitting at a player and taking out a CD and
17 putting it in and in some way trying to -- I suppose
18 they could be playing it off of a track list that is
19 computer-generated, but they would then have to be
20 somehow inputting information as to what they're
21 playing and how long it is. It just isn't going to
22 work for the scale in which we are working.

23 MR. TEPP: It's operational logistics,
24 then, is what you're saying?

25 MR. LEAVENS: That's right, and to be

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1 competitive with who we view as our competitors, we
2 can't operate that way.

3 MR. ENGLUND: Just to be clear, I have
4 never suggested that webcasters need to play CDs on CD
5 players in real time as they are transmitting, but it
6 is entirely possible to use CD players to access
7 access-protected CDs, to the extent that's necessary
8 to make ephemeral copies once, but would thereafter be
9 used on a repeated basis and organized with the kind
10 of scheduling software that Tom was talking about.

11 MR. TEPP: Well, clearly, Section 112
12 envisions the creation of ephemeral copies. So let me
13 turn to that for a moment.

14 A comment made by DMA talks about the --
15 and we've already talked about it today -- the
16 exception to 1201(a)(1) in 112(a), but the absence of
17 a corresponding provision in 112(e). I guess there
18 are two ways to look at that.

19 The way that you have painted it is let's
20 correct this omission, but I'm interested in your
21 response potentially to the opposite interpretation,
22 that if Congress chose to put it in 112(a) but chose
23 to omit it from 112(e), does that reflect a
24 congressional intent that there not be an exception to
25 1201(a)(1) for the purposes of 112(e)?

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1 MR. GREENSTEIN: I'm speaking in stereo
2 with both microphones.

3 (Laughter.)

4 In fact, I think that actually in the
5 comment is an error because 112(e) (8) does provide an
6 equivalent exemption.

7 MR. TEPP: Of course, we have it all
8 memorized.

9 MR. GREENSTEIN: That's right.

10 (Laughter.)

11 The "bible" has come out now.

12 MS. PETERS: Speak for yourself.

13 MR. GREENSTEIN: I would say that
14 statement is an error in the written comment.

15 MR. TEPP: Okay.

16 MR. CARSON: The only one, no doubt?

17 MR. GREENSTEIN: Ever.

18 (Laughter.)

19 MR. ENGLUND: Seth, is the request, then,
20 to broaden the scope of (e) (8)?

21 MR. GREENSTEIN: No, actually, it's for an
22 exemption of 1201(a) (1).

23 (Laughter.)

24 MR. ENGLUND: Effectively, to broaden
25 (e) (8)?

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1 MR. GREENSTEIN: To correct certain
2 operational deficiencies, in light of the oncoming
3 train. It's not to broaden (e) (8) specifically or to
4 broaden 1201(a) (2). The issue really is that there
5 are certain situations in which this exemption will
6 not be workable and will continue to work substantial
7 adverse effects on webcasters' ability to make
8 ephemeral recordings.

9 MR. TEPP: That has to do with the need to
10 request permission?

11 MR. GREENSTEIN: Again, it's timing,
12 quality, format.

13 MR. TEPP: Okay.

14 MR. GREENSTEIN: And expense.

15 MR. TEPP: Okay, well, that leads me well
16 into another question I had. The statute that lays
17 out the standards for this rulemaking speaks of non-
18 infringing uses of works. It does not speak of
19 particular formats of works or certain devices to
20 render classes of work.

21 So what is your best pitch as to why
22 issues like format and devices, and the four
23 principles you've laid forth, fit within the criteria
24 of the rulemaking?

25 MR. GREENSTEIN: I think these are all

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1 part of the non-infringing use that's contemplated
2 under the ephemeral recordings exemption and license;
3 that the reason for ephemeral recording exemption, and
4 particularly the multiple ephemeral recording license,
5 was specifically because of the need recognized by
6 Congress for webcasters to have files available to
7 them in multiple formats, multiple bit rates, multiple
8 codecs, and for multiple servers.

9 So that is a use that was clearly
10 contemplated by Congress. That is statutorily the
11 license and, therefore, by definition, not infringing.
12 So I think, specifically, this is the type of non-
13 infringing use that is cognizable under a 1201(a)(1)
14 exemption.

15 MR. TEPP: Well, a minute ago you were
16 talking about the 112(e)(8) and how what you're asking
17 for here is an exception under 1201.

18 MR. GREENSTEIN: Yes.

19 MR. TEPP: Presumably, the 112(e)(8) is
20 meant to deal with the various factors which went into
21 the enactment of 112(e). What you are asking for is
22 somehow broader than that, and it has to be considered
23 by this Panel and the Library in the context of the
24 standards in 1201.

25 So can I ask you, with reference to 1201,

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1 to talk about the concerns you have raised and how
2 they qualify within the standard we are constricted
3 by?

4 MR. GREENSTEIN: Well, I think the
5 standard is whether there is likely to be a
6 substantial adverse impact with respect to non-
7 infringing uses; that is, being impeded by the
8 technological protection measure with respect to
9 access control.

10 With respect to the likelihood, again, the
11 CDs marketplace, they're starting to show up on our
12 doorstep where there are copies that are for
13 promotional use only being delivered to webcasters.
14 What are the promotional uses? The promotional use is
15 not just to listen to it for your own personal
16 enjoyment. It's to be able to actually use them in
17 your webcasting activity. These protected CDs are
18 unusable by us.

19 Again, we have seen the news articles.
20 That is really all we can rely on at this point. We
21 can rely on news articles that describe the intention
22 of the various labels to start engaging in widespread
23 content protection in the United States in the coming
24 months; projections and information from analysts,
25 reliable analysts from J.P. Morgan talking about this;

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1 the content-protection companies themselves like
2 Macrovision and SunnComm, Macrovision, in particular,
3 talking about how hundreds of millions of these discs
4 have been protected and are available elsewhere in the
5 world.

6 This is, you know, likely to happen in the
7 United States if the news reports are true and if the
8 experiences of consumers are not so overwhelmingly
9 negative that it forces record companies to back off
10 on their plans.

11 The substantial nature of the impact, I
12 think I have tried to describe at length how it would
13 have a very severe impact on competitiveness of
14 services that are by nature entrepreneurial businesses
15 in a brand-new marketplace trying to establish a new
16 medium. We have several strikes against us already,
17 and we are trying to develop the means to compete.

18 One of the ways that we compete is on
19 timing and sound quality. Those are two of the ways
20 that we compete. To the extent that we are unable to
21 compete in that way, we are disadvantaged with respect
22 to radio, disadvantaged with respect to those entities
23 that have prompt access and high quality, which
24 include perhaps some of the larger webcast
25 competitors, but also include the record companies

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1 themselves, which are engaging in various webcasting
2 activities, either on their own or through joint
3 ventures that they have entered into.

4 So the impact is substantial. Clearly,
5 it's a non-infringing use, and the impact is created
6 by the presence of a technological measure that
7 controls access.

8 Again, maybe I can ask this to Steve, so
9 he can help me puzzle through this. Because the
10 statute refers to the fact that you would not be
11 liable under Section 1201(a)(1) for making an
12 ephemeral recording. Why would Congress have needed
13 to say that if it didn't view this kind of activity as
14 being potentially liable under 1201(a)(1), which is
15 with respect to technological measures for access
16 controls? If this is purely copy control, why would
17 Congress have needed to say this at all, since there
18 is no provision with respect to the circumvention of
19 copy controls under 1201(b)?

20 MR. ENGLUND: I have wondered the same
21 thing myself and concluded that it is perhaps not the
22 only thing in the statute that is simply not
23 necessary.

24 (Laughter.)

25 But, as we have talked about earlier this

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1 afternoon, there may well be particular
2 implementations of particular technologies on some CD
3 products that are technically access controls.

4 Thank you for pointing out 112(e)(8). I
5 shouldn't have taken Jon at his word that there is an
6 omission.

7 (Laughter.)

8 Once you consider that there is 112(e)(8),
9 it seems like your mantra of time and quality,
10 formats, and competitiveness becomes simply timing.
11 With respect to timing, Congress has provided a
12 mechanism whereby webcasters can ask for copies, and
13 if they don't receive them, they can circumvent.
14 Circumvent is ultimately what you're asking for here.
15 So you're saying that a reasonable time is, in fact,
16 unreasonable because it impacts your competitiveness,
17 but that is the injury you suffer.

18 With respect to quality, formats, and
19 competitiveness, Congress has given you permission to
20 circumvent, maybe not on the time table you would
21 like, but, nonetheless, it has given you permission to
22 do the circumvention that you're trying to be able to
23 do in this proceeding.

24 So that your issues of quality, formats,
25 and competitiveness are already addressed in the

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1 statute to the same extent they could be addressed in
2 this proceeding. Therefore, the mantra becomes simply
3 timing. And the question is whether rewriting the
4 provisions of 112(e)(8) to take out the timing
5 requirements that Congress put in is a substantial
6 adverse impact, but it's not.

7 MR. GREENSTEIN: I think it certainly is
8 not just about timing, because, as I mentioned, if in
9 fact I were to go to a record label and ask for a copy
10 in order to make the ephemeral recordings for its
11 server, and it was given, let's say, the 32-bit copy
12 that Tom can use on the Music Now service with respect
13 to the lower-bit-rate transmissions, but would do him
14 no good with respect to the higher-bit-rate
15 transmissions such as people who have cable modems or
16 DSL at home, then the way the statute is written, it
17 would appear that the webcaster is simply out of luck.
18 They have gotten a phonorecord from the copyright
19 owner, and there is nothing more to do about it.

20 I think the underlying presumption, I
21 think, that everyone had when we were discussing the
22 DMCA back in those halcyon days of 1998 was that we
23 were dealing with phonorecords that were the types
24 that we all knew about. They were the CD. They were
25 the CD quality, all of equal quality, and that's

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1 really what we were facing.

2 I think, since then, the market reality
3 has proven otherwise, where, for example, the second
4 session that we're talking about is something that is
5 of substantially lower quality.

6 MR. ENGLUND: I think it's just
7 speculation what kinds of copy a record company might
8 provide if a webcaster asked for it. It seems to me
9 it's as likely that they will provide an unprotected
10 CD as that they would provide something bad, because
11 record companies certainly care about quality. Record
12 companies don't want their music to be perceived as
13 sounding bad.

14 It's simply speculation, and the Office
15 has rightfully found that speculation is not
16 substantial adverse impact, particularly when it ought
17 to be proceeding cautiously, given that Congress has
18 provided a specific exemption.

19 MR. TEPP: Well, let me ask you something
20 along those lines, Mr. Greenstein and Mr. Leavens.
21 Has your industry used 112(e)(8) and been told the
22 second session copy is all you are getting or has it
23 been used at all? What is your experience with that?

24 MR. LEAVENS: Full Audio really has had
25 limited experience in the whole webcasting area. So,

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1 unfortunately, I can't say that we have encountered
2 the circumstance where we have requested something and
3 been denied.

4 We have encountered the circumstance where
5 we have a promotional CD, which we simply tried out
6 because it's an Arista CD and we wanted to find out
7 whether in fact what we had been reading about was
8 true, and it was true; we weren't able to encode it in
9 any way. It's not been released commercially, I
10 guess. So it's not something which we can put into
11 the service. I don't know, when it is released,
12 whether it's going to be copy-protected at that time,
13 but the experience that we have encountered has been
14 relatively little, I guess.

15 So we're going on the basis of what we
16 understand to be the practice which is coming toward
17 us, all the reports that we see, and, frankly, from
18 the perspective of us, it makes a lot of sense to have
19 copy protection in the marketplace in order to ensure
20 that kind of legitimate delivery of content.

21 So we're not disfavoring it in any kind of
22 way. We favor it because, as I said, we are very much
23 involved with DRM ourselves as a company. We rely
24 upon DRM in order to deliver secure files, which
25 enforce the rules that we have with respect to our

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1 subscribers.

2 So we are not inconsistent in any kind of
3 way. It's simply that we see that there is this
4 development which we don't know it's not going to
5 happen. I know that perhaps could be characterized as
6 speculation, but it does seem very inevitable,
7 certainly within these three years, that we are going
8 to be encountering this.

9 MR. GREENSTEIN: From the other webcasters
10 that I've spoken to, they have encountered copy-
11 protected discs, but they have not been of the second
12 session variety yet. So they have not really had the
13 opportunity to see whether 112(e)(8) works or not. At
14 the moment, their experience has been simply that
15 whatever discs they have encountered, they have been
16 able to overcome with something that I think nobody
17 would characterize as circumvention.

18 MR. ENGLUND: And nobody I've talked to in
19 the recording industry is aware of anybody ever having
20 asked under 112(a)(2) or (e)(8).

21 MR. GREENSTEIN: There's a certain
22 chicken-and-egg aspect to this, I admit, but the
23 problem is that we read the news reports, we see
24 what's happening abroad, and we know that protection
25 mechanisms are getting more and more powerful and are

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1 potentially coming to market in the United States.
2 Again, if this J.P. Morgan analyst is correct, then
3 it's going to happen as soon as May to June with
4 respect to a major record label. That's the major
5 record label that has the copy-protected disc or the
6 protected disc that Full Audio's service has seen on
7 the promotional basis only.

8 So we can see the reports saying that this
9 is going to happen. It has not happened yet. But now
10 is the time that we have to come to you to make our
11 pitch, and so here we are.

12 MR. TEPP: Okay, I just have a couple more
13 questions. Let me go to you, Mr. Englund.

14 Mr. Greenstein has just repeated the
15 concerns based on this analyst's prediction about
16 upcoming use, an increase in use, of TMPs on CDs by
17 recording labels. Let me ask you, if it comes to pass
18 that the recording industry does apply TMPs more than
19 it has in the past -- I guess it is a two-part
20 question -- why hasn't it been done to date very much,
21 and why might it be done more in the future?

22 MR. ENGLUND: As I have said before,
23 record companies, in principle, are very interested in
24 protecting CDs from copying, but how you do that and
25 whether you do that, when you do it, are complicated

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1 business decisions that involve a lot of factors that
2 need to be balanced.

3 One is the effectiveness of the
4 technology, and another is the cost of the technology,
5 since these technologies do come at some cost, both
6 internal and out-of-pocket.

7 Another is the potential for consumer
8 resistance. While my impression is that there has not
9 been a lot of consumer resistance outside the United
10 States, there have certainly been some vocal opponents
11 in the United States, so that one has to have some
12 pause about that.

13 Ultimately, record companies need to make
14 a decision about whether the investment in copy-
15 protection technology and the potential for consumer
16 backlash is justified by the potential for reducing
17 copying. Thus far, the available technologies have
18 merely provided a speed bump to copying, what some
19 people characterize as keeping honest people honest.

20 The cost/benefit decision that people have
21 made so far has been that it is not clearly warranted.
22 If the technology got better, maybe it would be more
23 clearly warranted. With more experience, maybe it
24 would be warranted.

25 It is just premature to try to predict

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1 what the problem is, and there is no need for you to
2 try to predict whether there is a problem here because
3 webcasters have access. Webcasters have access by
4 copying from CDs. Webcasters have access under an
5 explicit statutory exemption that they would like to
6 broaden so as to have faster access perhaps, but that
7 is really all we are talking about here, is merely a
8 matter of timing.

9 MR. TEPP: Okay, let me ask my last
10 question then of Mr. Leavens and Mr. Greenstein. Mr.
11 Leavens, you just spoke a moment ago about recognizing
12 the importance of DRM in your own industry, and,
13 similarly, on the part of the record labels. So my
14 question is, to what extent do you think that there is
15 a legitimate countervailing argument to the proposed
16 exception that there are genuine anti-piracy concerns
17 that make an exception for sound recordings
18 potentially a dangerous one?

19 MR. GREENSTEIN: I guess let me speak
20 first, if you don't mind, which is I think, given the
21 nature of what we are asking, it really poses no
22 danger to the sound recording copyright owner at all.
23 All we are asking is that legitimate businesses that
24 webcast music should be able to do that on a
25 competitive basis that is equal to other similar

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1 services, be it radio broadcasting or webcasters that
2 may have better relationships or more direct
3 relationships with record companies.

4 There is really no threat whatsoever.
5 Again, we are not asking for a generalized exemption
6 or prohibition on application of access-control
7 protection or content protection to all compact discs
8 or all sound recordings. We are seeking the ability
9 to circumvent in a limited class of users for a
10 specific type of works, solely to promote lawful
11 activity. So I cannot see how that is going to have
12 any negative impact on the record industry generally.

13 We have other requests that are being made
14 for circumvention with respect to compact discs,
15 technological protection measures. Each of those
16 should be judged on its own merit. This one, I think,
17 is a narrow and particularly meritorious case.

18 MR. ENGLUND: This time I have to disagree
19 with Seth. First, even if it is possible for you to
20 create some exemption, coupled with an identified
21 class of users and a use that is limited so as to
22 extend the benefit of the exemption only to webcasters
23 and only to webcasters licensed to ephemeral copies,
24 I think that the webcasters' interest in getting their
25 copies faster than the express statutory provisions

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1 provide doesn't justify that exemption.

2 But, more importantly, there is a large
3 risk here for sound recording copyright owners. That
4 is the risk that other people in the larger universe,
5 including courts, should a record company ever try to
6 enforce the provisions of 1201, will interpret 1201 so
7 as to find that the inclusion of copy-protected CDs on
8 your list of exemptions allows everybody to
9 circumvent. I think that that is a risk, given your
10 finding three years ago.

11 Even though I think that you probably do
12 have the power to limit an exemption to a particular
13 class of users, uses or users, I certainly can't rule
14 out the possibility -- in fact, I'm very concerned --
15 that a court might say, "Copy-protected CDs are on the
16 list. Therefore, they can be circumvented."

17 Quite apart from the strict legal issue,
18 I think that, even if you conclude, and you rightly
19 conclude, that you can limit an exemption to
20 webcasters and to ephemerals, that our experience with
21 enforcement litigation suggests that the issue will
22 have to be dealt in every case at great expense and
23 great loss of time.

24 I can only think about Section 1008 of the
25 Copyright Act, the limitation on actions under the

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1 Audio Home Recording Act. The Office has found,
2 everybody has found who has ever considered the issue,
3 that the Audio Home Recording Act does privilege peer-
4 to-peer file-trading networks, but the issue comes up.
5 Every litigation has to be fought back at considerable
6 cost.

7 MR. GREENSTEIN: And you win each and
8 every time.

9 (Laughter.)

10 MR. ENGLUND: So the question is whether
11 Arista Record Companies ought to have their legitimate
12 efforts to bring enforcement actions hampered and
13 delayed, sometimes by months. In the Napster case the
14 action was delayed for a long time while AHRA issues
15 were considered. To suffer that kind of harm while
16 this issue is fought -- that was fought over and over
17 again. I think that's something that the Office has
18 to take into account in deciding whether the
19 webcasters' desire for accelerated timing is a
20 substantial adverse impact.

21 MR. LEAVENS: Full Audio has been the
22 beneficiary of some of the litigation that the RIAA
23 has fought. So we certainly are not advocates for
24 hobbling them, but when you consider the kind of
25 defense that somebody would impose here, they would

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1 have to establish that they are a webcaster, that they
2 have filed their notice with the Copyright Office,
3 that they have facilities.

4 It is not an easy thing to do. You can't
5 justify it on the basis of, "Whoops, I was a
6 webcaster" or "I intended to be a webcaster." It is
7 like defending a fair use on the basis of a review you
8 have not even even written yet.

9 So I think that the risk of, on a
10 practical level, of creating some kind of greater
11 burden with respect to litigation or enhancing piracy
12 I think is pretty remote.

13 MR. ENGLUND: I think I have to disagree.
14 If the Copyright Office says that sound recordings
15 released on copy-protected CDs are an exempt class of
16 works, I think everybody who is ever accused of
17 circumventing access controls on them will say sound
18 recordings are an exempt class of works. End of
19 story.

20 MR. LEAVENS: Well, I suppose if that were
21 something that we were asking, but we're only asking
22 for purposes of being able to do an ephemeral copy for
23 exercising our rights under the compulsory licensing
24 provisions of the DMCA. It's very narrow, and that's
25 a very high standard for somebody who's a simple

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1 hacker to try to meet.

2 MR. GREENSTEIN: And just to emphasize a
3 point that I think the Panel understands, but Steve
4 seems to miss somehow, this is not just a question
5 about timing. This is a question about timing,
6 quality, format --

7 MS. PETERS: That we got.

8 (Laughter.)

9 MR. GREENSTEIN: Yes, I knew that you did.
10 I just wanted to make sure that perhaps, having seen
11 that you get it, Steve might also get it on the
12 rebound.

13 (Laughter.)

14 MR. ENGLUND: I'm just being dense this
15 afternoon.

16 (Laughter.)

17 MS. PETERS: I have consulted with my two
18 staff members who haven't yet spoken. They tell me
19 they have a number of questions, especially the
20 gentleman on my left.

21 So I'm going to suggest that we take like
22 a five-minute break, so that people can use
23 facilities, so they can endure the rest of the
24 afternoon.

25 (Laughter.)

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1 Okay?

2 (Whereupon, the foregoing matter went off
3 the record at 3:23 p.m. and went back on the record at
4 3:32 p.m.)

5 MS. PETERS: Our witnesses are back, the
6 Commissioners are here, so let's go.

7 Rob?

8 MR. KASUNIC: Okay. I just have a few
9 questions, mostly -- well, let me begin with Seth.
10 Based on the current situation -- and let me just see
11 if I have this straight -- that there's no actual harm
12 in the marketplace now related to access controls on
13 Red Book CDs or any other kind of music that you were
14 talking about needing exemption for, right? Is that
15 right?

16 MR. GREENSTEIN: We have actually
17 encountered protected discs. Thus far, the means that
18 have been used have been completely ineffective.
19 Therefore --

20 MR. KASUNIC: Copy-protected discs,
21 though, right?

22 MR. GREENSTEIN: No, access as well. I
23 mean, for example, some of the protection systems that
24 have been used in the past don't work on Macintosh
25 computers at all. As a matter of fact, they would

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1 then prevent you from reopening the drawer of you
2 CD-ROM in your Macintosh. I actually talked to a
3 couple of people who have had to take their Macintosh
4 drives back to an Apple retailer to try to get it
5 fixed because they couldn't get the CD out once it was
6 in.

7 So there are those kinds of unique access
8 controls that have been applied, but so far, at least
9 for the webcasting community, who thrive, I guess, on
10 Windows and other operating system environments, we
11 have not been prevented from getting access by the
12 control measures that have currently been applied.

13 MR. KASUNIC: Well, I guess just an aside
14 then. Let me ask Steve: These measures that were
15 precluding use on an Apple computer were not planned
16 by the recording industry to operate as an access
17 control in that way, to destroy Apple computers, were
18 they?

19 (Laughter.)

20 MR. GREENSTEIN: It's part of a Microsoft
21 conspiracy.

22 (Laughter.)

23 MR. ENGLUND: The answer must be no.

24 (Laughter.)

25 I am not sure what particular products,

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1 what particular technologies were at issue here, but
2 it is certainly the case that no record company
3 intentionally locked up anybody's Apple CD-ROM drive.

4 MR. KASUNIC: So there were some
5 unintended access problems on limited devices that
6 have come into the market? Is there any reason to
7 believe that those will not be fixed in the
8 marketplace?

9 MR. GREENSTEIN: Again, some of the more
10 intended -- maybe not that one, in particular -- some
11 of the technologies that were applied were intended to
12 prevent playback on personal computing devices. So,
13 from that perspective, they were intentionally access
14 control to prevent playback as well as to prevent
15 copying. I guess if you prevent playback, you have by
16 nature prevented copying on a personal computer.

17 MR. KASUNIC: Okay, then in terms of that
18 actual harm, how substantial was it?

19 MR. GREENSTEIN: At the moment, as I said,
20 the substantiality is not with respect to what has
21 happened in the past. The fear is the oncoming train.

22 MR. KASUNIC: So it is di minimis at
23 present in the actual market?

24 MR. ENGLUND: I think he's told you it's
25 well nigh non-existent.

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1 MR. GREENSTEIN: I think that would be
2 correct.

3 MR. KASUNIC: Okay. Then what we're
4 focusing on is likely harm, right?

5 MR. GREENSTEIN: That's correct.

6 MR. KASUNIC: And in order to, as we have
7 defined likeliness in the typical sense, that it is
8 more likely than not, what evidence is there that this
9 is going to be more likely than not, that you will not
10 be able to negotiate in the future, that the recording
11 industry will refuse, that the marketplace will not
12 take care of it, any of those other possibilities will
13 fail to happen, and that that is more likely and that
14 you will be denied access, that that is the
15 likelihood?

16 MR. GREENSTEIN: There are several parts
17 to the question. Let me see if I can take them one by
18 one.

19 First is the likelihood that content
20 protection is going to be applied. I think, given the
21 experience in Europe, given the fact that we are now
22 starting to see these discs coming in on promotional
23 discs, these protection measures being applied to
24 promotional discs, given what we have heard from
25 analysts and various news reports, it's likely that

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1 this is going to happen and going to happen in the
2 near term.

3 That is what we are starting to see now,
4 and we can see the risk. Particularly as CD sales
5 continue to decline in the world market, for various
6 reasons, it is likely that content protection is going
7 to be applied. So that threat is real.

8 The impact, we believe, is substantial
9 because, first of all, I guess the impact is
10 substantial because we can say for a certainty that
11 not every webcaster is going to be able to "one on
12 one" with every record company. Even the largest
13 webcasters are going to have some difficulties getting
14 in touch with independents.

15 MR. KASUNIC: But that is taking another
16 step in this. We haven't even gotten there yet.
17 First, we have to find likelihood before we can see
18 whether we get to the point of this being substantial.

19 MR. GREENSTEIN: All right, I guess I was
20 getting to the point of the likelihood of the
21 negotiations issues. The reason that there is
22 statutory license, or one of the reasons that there is
23 a statutory license, had to do with the administrative
24 difficulty of negotiating one on one between all of
25 the webcasters and all of the record labels.

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1 There are thousands of webcasters and
2 thousands of record labels. Administratively, it was
3 impossible to say that they could predictably deal
4 with them one on one to get the licensed content that
5 they needed.

6 The same administrative difficulties are
7 going to happen here. So the impact from that
8 perspective, is it likely that there are going to be
9 webcasters who are going to be disadvantaged in this
10 way? Absolutely. Is it going to happen to everybody
11 in the same way? I would say absolutely not.

12 I think it is extremely likely that
13 somebody like a Yahoo or Real Networks or an America
14 Online will have a much easier time dealing with the
15 issue than will even Full Audio or webcasters that are
16 smaller in size. But, yet, the statutory license
17 guarantees them all equal access and equal rights.

18 MR. KASUNIC: When is it likely, and more
19 likely than not? How do we know that it is going to
20 take place? Maybe, then, at some point it is likely
21 that copy protection or some form of access protection
22 will be employed. What evidence is there that it is
23 going to be employed in the next three-year period and
24 that these problems will occur?

25 MR. GREENSTEIN: The evidence that we have

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1 is the experience in Europe, the content-protected CDs
2 that we're starting to see coming in through the door
3 as promotional CDs, the few CDs we have seen as
4 experiments that have come in the door in the past
5 using less-effective protection mechanisms, user
6 ports, that license agreements have been signed with
7 companies such as SunnComm that do have more effective
8 protection mechanisms.

9 We have pronouncements on the websites of
10 various record companies, particularly BMG and EMI,
11 with respect to their intentions to apply content
12 protection more widely to all of their CDs as
13 possible. If this is going to happen, it is going to
14 happen in the next three years.

15 We are also, we hope, moving from a purely
16 CD-centric environment to other kinds of distribution
17 means as well, such as DVD audio and super-audio CD
18 and we hope greater online distribution with DRMs.

19 With respect to the CD copy protection --
20 and DVD audio is already protected, I suppose -- if
21 this is going to happen, it's going to happen within
22 the next three years or it will likely not happen at
23 all.

24 MR. KASUNIC: Well, then, in terms of what
25 our requirements are of having them, more likely than

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1 not, we can look to circumstantial evidence, and the
2 only thing that I really heard in terms of that was
3 the deployment and licensing articles. Are those the
4 basis, the circumstantial basis, for the likelihood,
5 aside from your --

6 MR. LEAVENS: Well, I think Seth had
7 mentioned the statements of the record companies
8 themselves of their intention that appears on the
9 websites.

10 MR. GREENSTEIN: The statements, in
11 particular, I think are more on the websites of record
12 companies with respect to their non-U.S. operations.
13 So, for example, I would be happen to provide to the
14 Office -- there's a statement from the BMG website
15 about what their intentions are, about the importance
16 of copy protection for CD audio.

17 MR. KASUNIC: In the non-U.S. market?

18 MR. GREENSTEIN: In the non-U.S. market,
19 that is where the statements have been made. That's
20 correct. The U.S. market is the largest market for
21 compact discs, however, and to say that you're
22 experimenting in a smaller market I think is not
23 necessarily a guarantee that it's going to only stay
24 in the smaller market, particularly because we have
25 seen limited experiments happening here in the U.S.,

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1 when you have limited experiments happening first in
2 Europe, in Australia, in Japan, and then announced
3 intentions to go to a more widespread protection
4 mechanism there.

5 The fact that we have seen experiments
6 here in the United States indicates that there's a
7 substantial likelihood that the protections will
8 become in the United States, once those experiments
9 are through.

10 MR. KASUNIC: Steve, do you have --

11 MR. ENGLUND: I certainly agree with your
12 line of questioning.

13 MR. KASUNIC: Right.

14 MR. ENGLUND: Seth has admitted that there
15 is essentially no harm presently. Where there is an
16 assertion of a likelihood of future harm, the
17 proponent is required to show by highly-specific,
18 strong, and persuasive evidence that the harm is more
19 likely than not. Where proponent is seeking to
20 rewrite an existing statutory exemption, you should
21 proceed with particular caution.

22 So this proposal is positioned within the
23 framework of this rulemaking in the position that has
24 the absolute highest bar to be overcome. They are
25 required to prove a lot of harm with a great deal of

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1 likelihood, and better evidence than I have seen in
2 the last couple of minutes.

3 And, still, you should proceed cautiously.
4 I think within that context you should deny the
5 proposed exemption.

6 MR. KASUNIC: Well, based on what Seth had
7 just said about the experience in Europe dealing with
8 the use of these controls in Europe, how does that fit
9 into -- does that support a circumstantial case of the
10 use in this country?

11 MR. ENGLUND: No. It is very clear that
12 there have been experiments, both abroad and in the
13 United States, with copy-control technology. If there
14 were effective, cheap, well-accepted copy-control
15 technology, the threat of universal access, there
16 would be a lot of interest in deploying it, but it is
17 a very open question today whether it will ultimately
18 be deployed to a significant degree in the United
19 States.

20 MR. KASUNIC: Has the recording industry
21 made any statements that you're aware of that they
22 would be unwilling to work with webcasters in terms of
23 necessary uses in the future, should there be problems
24 with certain kinds of copy protection?

25 MR. ENGLUND: I'm certainly aware of no

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1 such statements.

2 MR. KASUNIC: Are you, Seth?

3 MR. GREENSTEIN: I'm not aware of any such
4 statements. Again, we came to you hoping that we
5 could work this out in the marketplace, but, yet, this
6 proceeding exists as a safety valve, and that's the
7 valve that we're looking for.

8 MR. ENGLUND: Yes, they say they want to
9 work it out in the marketplace, but this sure came as
10 a surprise to us, and they have never asked us in the
11 marketplace to work it out, rather than perhaps it has
12 been dealt with among the individual companies.
13 Certainly servicing is something that is routinely
14 dealt with among individual companies, quite apart
15 from the statutory structure. But DMA never
16 approached RIAA and said, "We really need to be
17 working on legislation to rewrite 112(e)(8)."

18 MR. KASUNIC: Well, let me turn a question
19 to Tom about, in terms of the automation issue, how
20 will this -- I think a point that Steve made -- how
21 will this be a panacea? If this exemption were to be
22 put in place, how would this help? How would this
23 automate the process?

24 MR. LEAVENS: Well, it removes the
25 preliminaries to the process, first of all. It allows

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1 us to self-execute without having to go through all
2 the notice and the waiting, and that.

3 I'm not sure exactly how it is that it is
4 going to enhance our ability, frankly, to automate.
5 I just know that we need to keep our system operating
6 as an automated process as much as we can. One of the
7 things that I had overlooked in mentioning about the
8 need to rip the CD, as opposed to doing something real
9 time, is simply the way in which you obtain meta-data
10 at that particular point, as opposed to having to
11 enter that on some kind of manual basis.

12 So, in terms of what we have to do in any
13 kind of manual process or real-time process that
14 involves having to simply play the CD, we are not able
15 to integrate the meta-data in the same kind of way,
16 which additionally adds to our time.

17 I guess what we are foreseeing is the hope
18 that there is going to be a solution that would allow
19 us to have some kind of a circumvention that we can
20 build into our system that's going to be recognized
21 when the CD is put into the system, and kick in
22 automatically without it being kicked out and us
23 having to pay particular attention to it. I'm not a
24 technology person, so I don't know how all that would
25 happen.

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1 MR. KASUNIC: Wouldn't this put webcasters
2 in more competition, in more competitive
3 disadvantages, because some webcasters would be able
4 to circumvent and others wouldn't? Actually, this
5 wouldn't level the playing field, but it would be
6 based on what an individual webcaster was capable of
7 doing?

8 MR. LEAVENS: It is really something that
9 we view as being for those circumstances where we
10 can't make agreements with people, where we can't
11 reach accommodations.

12 You ask about, has there been something
13 that has been determined industrywide? We would love
14 that, but, as Seth mentioned, we can't get everybody
15 to the table. We can't control the activity; RIAA
16 can't control the activity of all of its members. Not
17 all record companies are members of the RIAA.

18 So what we are looking for is something
19 that essentially gives us the ability to work under
20 the circumstances where we can't work out something on
21 a consensual basis. It's akin to, I guess again, the
22 mechanically license that record companies have for
23 musical compositions.

24 The number of times in our record company
25 that we exercised that right was very little, but when

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1 we needed it, when we were in circumstances where we
2 had somebody that wasn't going to give a consensual
3 license, we had the ability to get the license anyway.

4 So I'm really thinking about this in terms
5 of not the labels that are going to be responsible,
6 who are going to have the resources, who are going to
7 have the inclination to work with us and work with
8 other webcasters. I'm thinking about the others who
9 may not have the inclination, may not have the
10 resources, may not be found.

11 MR. KASUNIC: If this is -- I guess to
12 Seth -- if this is a likely problem during the next
13 three-year period, how would this not be a likely
14 problem into the future beyond that three-year period?
15 Isn't this just a general problem that would be more
16 appropriately addressed by Congress?

17 MR. GREENSTEIN: It might be a problem
18 that occurs. Well, let me take it point by point.

19 I think, if it occurs in the next three
20 years, and I think it is likely to happen --
21 otherwise, we wouldn't be here in front of you --
22 then, yes, it is likely to be a problem that persists
23 into the future. It is a problem that I would hope,
24 once it becomes identified, finds another solution
25 because I think the safety valve is always, and should

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1 be, the last resort.

2 There should be other ways to deal with
3 this. It should be something that could be dealt with
4 either by voluntary agreements or by Congress. I
5 mean, certainly, if you're looking for the panacea,
6 the panacea is to require, as a condition of the
7 statutory license, that everybody who pays an
8 ephemeral gets service by the record company of an
9 uncopy-protected compact disc with the highest audio
10 quality. That's not likely to happen.

11 So we can't look just to the panaceas. We
12 have to look to the realities of what is second best
13 and what is the absolute minimum that we would need.
14 The absolute minimum is that, if all else fails, we
15 need to have the ability to circumvent in a rapid
16 timeframe, not on a sound-recording-by-sound-recording
17 basis, but where it has been shown to you that you are
18 either not going to get the sound recording from the
19 record company on a timely basis or you are going to
20 get it in a quality that is not sufficient for your
21 needs, you have the ability to exercise self-help.

22 So, from that perspective, that is really
23 what the request is about. Is it likely that this
24 would be a request that would have to be renewed in
25 three years? I think the answer is probably yes,

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1 because a safety valve would be needed then as well,
2 although, again, I would hope that the majority of the
3 problem would be accommodated in other ways through
4 marketplace discussions.

5 MR. KASUNIC: I know David has a lot of
6 questions. So I have just one more, and this is to
7 Steve in terms of a comment you made about the scope
8 of the exemption, should we choose to find an
9 exemption here, and that it could be narrowed to the
10 particular scope of use.

11 Do you believe that we should, within the
12 exemption itself, actually, or that we have the
13 authority to fashion an exemption that would include
14 a particular use?

15 MR. ENGLUND: No, I don't think that you
16 ought to create an exemption, but I think the relevant
17 statutory provision is 1201(a)(1)(D), at the bottom of
18 page 179, carrying over to 180, in your purple books
19 here, which says that, "The Librarian shall publish a
20 class of copyrighted works...that non-infringing uses
21 by persons who are users of the copyrighted work are
22 or are likely to be adversely affected."

23 And the key phrase is the last one: "And
24 the prohibition contained in subparagraph (a) shall
25 not apply to such users with respect to such class of

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1 works for the ensuing three-year period."

2 I think that it may well be a sufficient
3 basis for you to identify webcasters as a class of
4 users that is likely to be affected and to privilege
5 only the activity of webcasters that has been
6 identified.

7 MR. GREENSTEIN: Once again, I'm forced to
8 agree with Mr. Englund.

9 (Laughter.)

10 MS. PETERS: David?

11 MR. CARSON: All right, I would like to go
12 back to the first question asked by Charlotte a few
13 days ago.

14 (Laughter.)

15 Seth, this will actually follow up on
16 that, because I think you agreed with Charlotte that
17 in the comment you filed all you identified as a class
18 itself was copy-protected Red Book Audio Format
19 compact discs, correct?

20 MR. GREENSTEIN: That's correct.

21 MR. CARSON: Let me take it a step
22 further. Maybe I missed it, but when I read the
23 entire comment, I think the entire comment was about
24 copy protection and not about access controls. Am I
25 right or did I miss in the written comment about

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1 access controls?

2 MR. GREENSTEIN: Perhaps it was spoken as
3 the scope of the discs themselves, and the sound
4 recording formats is perhaps too narrow. Perhaps it
5 was too narrow in reference to copy protection alone.

6 There are other access controls that are
7 being applied that would also have the effect of
8 preventing playback on computers or other types of
9 access by computers and, therefore, prevent ultimately
10 the making of the ephemeral recordings.

11 I guess what was meant by the focus on
12 copy protection was really twofold. First, that that
13 is really the ultimate problem that we are seeking to
14 address, the ability to make the ephemeral recordings.
15 So any technological protection measure that
16 interferes with the ability to make those ephemeral
17 recordings is really what is at issue in our comment
18 ultimately.

19 Second, it is because of the reference to
20 1201(a)(1) in the two statutory exemptions that seems
21 to recognize that a copy-protection mechanism that
22 prevents the making of an ephemeral recording is
23 potentially otherwise actionable under 1201(a)(1) and,
24 therefore, an exemption would be justified.

25 I guess we refer to that in the footnote,

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1 that there are other access control means that have
2 been applied, but that Congress made this express
3 statement indicating that, at least from their
4 perspective, the making of ephemeral recordings was
5 control of access; a technological protection measure
6 that prevents the making of ephemeral recordings was
7 an access control under 1201(a)(1). So it is perhaps
8 from that implication that we sought specifically to
9 focus both on the ephemeral recordings and also
10 brought it under the 1201(a)(1) proceeding with
11 respect to even the copy protection.

12 MR. CARSON: All right. Well, apart from
13 what you said in that footnote, referring to Section
14 112(a)(2) and newly-discovered 112(e)(8), I gather,
15 what other argument do you have for us as to why we
16 can pay any attention whatsoever to copy controls as
17 such in this rulemaking?

18 MR. GREENSTEIN: To copy controls as such?

19 MR. CARSON: Yes.

20 MR. GREENSTEIN: Well, 1201(a)(1) does
21 talk about direct controls access.

22 MR. CARSON: Right.

23 MR. GREENSTEIN: To the extent that the
24 control that is applied prevents playback or other
25 types of access, then certainly it is cognizable under

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1 1201(a)(1), but, otherwise, I would say specifically
2 that Congress appears to have spoken in this matter,
3 that the making of ephemeral recordings and any
4 control measure that prevents the making of ephemeral
5 recordings is potentially actionable under 1201(a)(1)
6 and, therefore, justifies an exemption.

7 MR. CARSON: And that's your best
8 argument, is it?

9 (Laughter.)

10 Let me give you every opportunity, Seth.

11 MR. GREENSTEIN: That's my story, and I'm
12 sticking to it.

13 (Laughter.)

14 MR. CARSON: Okay, very good.

15 Now back to the other point I was making:
16 Again, apart from what you have just told me, I see
17 nothing in the comment you wrote that talks about
18 access controls as such. Why are we talking about
19 this today?

20 You, of all people, know very well the
21 process we set forth here, what was in our initial
22 Notice of Inquiry, the process we had for filing late
23 requests, if you didn't get it in on time. I have to
24 say, and we are not ruling from the Bench here, but I
25 have a very hard time understanding how you have put

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1 before us the question of access controls on CDs. I
2 am wondering why we are talking about it right now.
3 How is that question before us properly at this point,
4 given the procedures we have set forth?

5 MR. GREENSTEIN: I think it is before you
6 because, again, an access control can have the effect
7 of preventing the ability to make an ephemeral
8 recording. Again, putting aside the argument with
9 respect to the actual statutory language that Congress
10 wrote in the two exemptions, anything that prevents
11 playback or access to a file on a disc will prevent
12 the making of an ephemeral recording. So you have to
13 start there.

14 If there's an access control measure that
15 prevents it from being played back in a CD or prevents
16 the making of a copy of a file on a CD or another type
17 of disc, then that is an access-control measure that
18 ultimately has the effect of preventing the making of
19 an ephemeral recording.

20 MR. CARSON: All right. Now I know this
21 has been asked before and I know it has been answered
22 before, but I'm a simpleton, I guess. I am having a
23 hard time getting my hands on just specifically what
24 kinds of access controls you have actually seen out
25 there. So can you, as simplistically as possible,

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1 explain to me what kinds of access controls you are
2 aware of being used on CDs now, either in the real
3 marketplace here or in test markets that you're aware
4 of?

5 MR. GREENSTEIN: I guess the two that
6 we're aware of, one deals specifically with the
7 ability to even play back a protected file on a
8 computer. The second has to do with this second
9 session technology.

10 Essentially, what that does is that it
11 prevents the computer from reading -- therefore,
12 copying or playing back -- the full, high-quality
13 audio, Red Book Format audio, on the disc. Instead,
14 it allows access by the computer only to the much
15 lower-quality, compressed Windows Media Player format,
16 or whatever format happens to be adopted in that
17 particular solution.

18 The SunnComm solution, as I understand it,
19 uses the Microsoft Windows Media Player format, or the
20 .wma format, but prevents access to the full, high-
21 quality audio. Those are the two technologies that
22 are access-control technologies that we are aware of
23 at this point.

24 MR. CARSON: Okay. Now I'm pleased that
25 I have got probably two of the world's experts on

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1 Section 112 in front of me because I would like to ask
2 a question that has always bothered me about 112. It
3 may not sound like it's leading anywhere, but I think
4 perhaps it is.

5 So, Mr. Leavens, if you feel you're an
6 expert on this, by all means, you pipe in, too.

7 (Laughter.)

8 But I happen to know that Seth and Steve
9 are --

10 MR. GREENSTEIN: I thought you were
11 talking about Rob and Steve.

12 (Laughter.)

13 MR. CARSON: So tell me, construing the
14 statutory language of 112(c) -- and we'll just talk
15 about 112(c)(1); we won't go on to the little "A's" or
16 the "B's", and so on.

17 MR. GREENSTEIN: "C"?

18 MR. CARSON: Well, 112(e), I'm sorry. My
19 eyes -- there's bad light here. 112(e), you're
20 absolutely right.

21 How is it that that statutory license
22 permits you to make more than one phonorecord when in
23 the fifth line of the text we're all looking at, it
24 says it's a license to "make no more than one
25 phonorecord" of the sound recording?

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1 MR. ENGLUND: The parenthetical that
2 follows says, "unless the terms and conditions of the
3 statutory license allow for more."

4 MR. CARSON: And where do we find those
5 terms and conditions?

6 MR. ENGLUND: Do you want to answer that
7 one?

8 (Laughter.)

9 MR. GREENSTEIN: I would hope they are in
10 the regulations that were enacted by the Librarian.

11 MR. CARSON: Pursuant to the CARP process?

12 MR. GREENSTEIN: Pursuant to the CARP
13 process and pursuant to various voluntary submissions
14 to the Copyright Office for the regulations to
15 implement voluntary license agreements as industrywide
16 agreements.

17 MR. CARSON: Steve, do you concur with
18 that?

19 MR. ENGLUND: It is certainly our
20 understanding that the result of the CARP decision is
21 that webcasters are permitted to make multiple
22 ephemerals under 112.

23 MR. CARSON: Okay. So the CARP has the
24 power in setting rates and terms to have -- actually,
25 it sounds like it has considerable power to determine

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1 the scope of this license. Is that a fair statement?

2 MR. ENGLUND: I think it is fair to say
3 that this parenthetical authorizes the CARP to deviate
4 from the one-copy rule and permit multiple copies.

5 MR. CARSON: Okay.

6 MR. ENGLUND: I would not go so far as to
7 say that it can deviate from the statute in other
8 respects.

9 MR. CARSON: Okay. Let's turn to
10 112(e)(8), the newly-discovered provision that may
11 offer some hope, but perhaps not enough to some of us
12 here.

13 Does the CARP have power in setting rates
14 and terms to construe 112(e)(8) -- and let's put it to
15 you, Seth -- to construe it in such a fashion that
16 112(e)(8) can, in fact, pursuant to regs issued
17 initially by the CARP, and ultimately by the
18 Librarian, you can get everything you need out of it?
19 Does the CARP say anyone, any webcaster, who needs to
20 get access to a sound recording in the appropriate
21 format that that webcaster needs may demand that the
22 sound recording copyright owner make it available to
23 him in that particular format, or would that be beyond
24 the scope of the power that the CARP has?

25 MR. GREENSTEIN: I would need to ponder

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1 the question further. I think the answer depends on
2 whether that could be seen as within the scope of the
3 current language, within a reasonable interpretation
4 of the statutory language, or if it is something that
5 is beyond the scope of reasonable interpretation of
6 the statutory language. I cannot say, as I sit here,
7 that I have the right answer for you.

8 MR. CARSON: Okay, fair enough. Steve,
9 anything?

10 MR. ENGLUND: Having thought about it for
11 all of 30 seconds --

12 MR. CARSON: That's more than I think of
13 most of the things I do.

14 (Laughter.)

15 MR. ENGLUND: My visceral reaction is that
16 the CARP probably could not. There certainly is
17 legislative history, more in the 114 than the 112
18 context, but maybe in the 112 context, of what rates
19 and terms mean for the purpose of the statutory
20 licenses. There are some examples that are given of
21 the sorts of things that are like terms.

22 I think the CARP is permitted to authorize
23 multiple copies because the statute says very
24 specifically that they can. It is certainly not
25 obvious to me, as I sit here, that the CARP could

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1 write into the statutory license a term that says, on
2 demand, record companies shall deliver CDs in whatever
3 format a webcaster wants.

4 MR. CARSON: All right, I understand that.
5 Now, Steve, you said something probably 45 minutes or
6 an hour ago that I took down, and I don't know if you
7 will even remember having said it now. But I was
8 curious about what you meant.

9 You were talking about 112(e)(8), and you
10 said, in discussion, that the "Congress has already
11 given you," referring to Seth, "what you want with
12 respect to quality and format," and I think there was
13 one other thing that I missed, "although perhaps not
14 timing."

15 Can you elaborate on what you meant when
16 you say Congress has given him what he needs or wants
17 with respect to quality and format?

18 MR. ENGLUND: This is a proceeding about
19 circumvention of access controls. All that Seth is
20 asking for is permission to circumvent access
21 controls. Congress has given him that.

22 MR. CARSON: Maybe not what he wants, but
23 as far as it's willing to give it to him?

24 MR. ENGLUND: Yes.

25 MR. CARSON: Is that what you are saying?

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1 MR. ENGLUND: It says in 112(e)(8) that,
2 if he doesn't do it in a timely manner, he can
3 circumvent. I suppose his argument is how copyright
4 owners are going to be so motivated to prevent
5 webcasters from circumventing that they will just give
6 them copies of -- the term -- "terribly low quality,"
7 and that will satisfy the obligation and force the
8 webcasters to use the low-quality copy and cut off the
9 ability of webcasters to circumvent. That doesn't
10 seem very practical to me.

11 MR. CARSON: Of course, 112(e)(8) doesn't
12 say that the record company gives you copies, does it?

13 MR. GREENSTEIN: That's right. I was
14 dealing with talking about the transmission of a copy
15 of a phonorecord because that, to me, seems a lot more
16 likely and practical than the likelihood of a
17 copyright owner delivering to a webcaster a general
18 means of circumventing the content-protection system.

19 I think that it would not be wholly
20 unreasonable, despite the statutory language, for a
21 copyright owner to fear that, having made this
22 available to webcasters, this means they might somehow
23 or another find their way into the marketplace in a
24 more broad way.

25 I recognize that the statutory language

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1 says that what the copyright owner is supposed to make
2 available is the means to undo the access-control
3 protection. I just have a very practical fear that
4 that is not what would happen in practice then.
5 Instead, what would happen is, at most, we would get
6 access to copies of the files without the protections
7 applied.

8 MR. CARSON: Well, why not stand on your
9 rights? I mean, doesn't this language arguably give
10 you exactly what you are asking us to give you? In
11 other words, if the copyright owner has to give you
12 the means to circumvent, if they really have to do
13 that, you have got exactly what you want and you can
14 get it in whatever format you want, can't you?

15 MR. GREENSTEIN: Well, of course, they
16 don't have to. They could say that it is not
17 technologically feasible or economically reasonable
18 for them to do so.

19 MR. CARSON: And then you get to do
20 exactly what you're asking us to let you do?

21 MR. GREENSTEIN: Right, although, again,
22 according to the statutory language, this has to be
23 accommodated on a sound-recording-by-sound-recording
24 basis.

25 MR. CARSON: Is that clear to you?

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1 MR. GREENSTEIN: It says, "a phonorecord"
2 and "such phonorecord." If I were to read that
3 language quite literally, that would mean that the
4 request has to be made on a phonorecord-by-phonorecord
5 basis.

6 MR. CARSON: Okay. Now looking at that
7 same language, all right, the language says the
8 copyright owner has to do this in a timely manner in
9 light of the transmitting organization's reasonable
10 business requirements.

11 Now it strikes me, Seth, that you have
12 made a pretty compelling case that in many cases your
13 reasonable business requirements are going to be right
14 now or in the next few hours or, at best, the next day
15 or two, and anything beyond that is beyond reasonable
16 business requirements.

17 MR. GREENSTEIN: Uh-hum.

18 MR. CARSON: I think that would be, if I
19 were in your shoes, that would be my position. Isn't
20 that your position?

21 MR. GREENSTEIN: That would be my
22 position.

23 MR. CARSON: And, Steve, do you
24 acknowledge that there may be circumstances where
25 that's exactly the case?

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1 MR. ENGLUND: I don't know whether it's
2 hours or days, but I understand that webcasters have
3 a legitimate interest in getting new releases on
4 quickly. I certainly see the language here, which
5 speaks for itself.

6 MR. CARSON: So, Seth, what's your problem
7 with this particular provision when you're talking
8 about timing? Isn't the timing here good enough,
9 given your reasonable business needs?

10 MR. GREENSTEIN: The problem is that,
11 again, it has to be done on a phonorecord-by-
12 phonorecord basis. That leads to the timing issue.
13 Because if you have to make the request on a
14 phonorecord-by-phonorecord basis, then you have to
15 give an appropriate amount of time for the record
16 company, for the copyright owner, to respond. That
17 seems rather implicit.

18 If they don't respond within five minutes,
19 when I needed the sound recording on my air yesterday,
20 does that give me the right to circumvent? I don't
21 know the answer to that. None of us knows the answer
22 to that.

23 To say that the way that we should go
24 about this is by, essentially, filing a lawsuit
25 against the sound recording copyright owner to get the

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1 court to enjoin them positively to provide these means
2 to us I think is not economically within reach of most
3 webcasters and not practical, given the needs of the
4 webcasters themselves.

5 MR. CARSON: All right. I think, just in
6 response to the last question Rob asked, both Steve
7 and Seth suggested that we do have the power in
8 determining classes of works to narrow the eligibility
9 of people who can take advantage of exemptions for
10 particular classes of work.

11 So have I misconstrued what either of you
12 said?

13 MR. GREENSTEIN: That's correct.

14 MR. CARSON: Okay. Now that's interesting
15 to hear. Let me just remind you that that was not the
16 conclusion this Office came to three years ago. I
17 mean, we, in no uncertain terms, made our
18 interpretation of how this statute works.

19 It strikes me a little puzzling, I'm a
20 little puzzled to be sitting here today in a hearing
21 and hearing you for the first time suggest that it
22 ain't necessarily so and there may be another way of
23 interpreting it. I have seen nothing in writing. I
24 have seen no legal analysis.

25 I think if you read the Notice of Inquiry,

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1 we said certainly we're not locked into any legal
2 analysis or legal interpretation we did three years
3 ago, but we're going to expect you to make a pretty
4 good case because those decisions of interpretation
5 that we made a few years ago are decisions that we put
6 a lot of thought into, and we've got a relatively firm
7 conviction they're right. And if they're not right,
8 then someone really does have some kind of a burden to
9 persuade us that it is wrong.

10 Do you really think that you have carried
11 that burden, just by coming in here today and orally,
12 in about 30 seconds each, telling us what you think?

13 MR. ENGLUND: I'm not the proponent of the
14 exemption.

15 MR. GREENSTEIN: Well, I don't know how
16 much I can add to the arguments that were made last
17 time around by those organizations that argued to you,
18 I thought convincingly, that exemptions ought to be
19 available to certain classes of users in particularly
20 meritorious cases.

21 The language of 1201(a)(1)(B) talking
22 about how -- it talks about non-infringing uses by
23 persons who are users of a copyrighted work and that
24 the prohibition shall not apply to such users with
25 respect to such class of works. It seems to open the

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1 opportunity for the Office to apply exemptions to
2 particular users for particular classes of works, and
3 particularly meritorious circumstances.

4 If the circumstance that I have put before
5 you, at least with respect to the non-infringing
6 nature of the use and the justification for the use,
7 doesn't seem to be meritorious, I don't know what
8 would. But it seems to me that under the
9 circumstances and under the statutory language, one
10 could reasonably say that an exemption could be
11 granted to a particular class of users, so that the
12 prohibition would not apply to such users.

13 MR. CARSON: Okay.

14 MR. ENGLUND: I think an exemption has to
15 be made with respect to a class of works.

16 MR. GREENSTEIN: Yes.

17 MR. CARSON: No, we understand that. Yes,
18 I think you do say that's at least a starting point.
19 Okay.

20 Steve, I want to make sure I understand
21 what the point is of the second session. Why is
22 there?

23 MR. ENGLUND: Record companies want people
24 to get their music. A way of doing that is to provide
25 different access or access through different means on

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1 different kinds of devices. The second session is a
2 means of providing access on PCs.

3 MR. CARSON: But is it necessarily part of
4 that that the quality of what you get in the second
5 session is poorer than the quality of what is on the
6 first session, or whatever you call the other session?

7 MR. ENGLUND: There are inherent
8 limitations on the space and the capacity of the CD
9 carrier to hold data. In order to have a typical
10 number of recordings in the first session, you would
11 probably almost certainly compress the data in the
12 second session.

13 MR. CARSON: It almost has to be more than
14 that, doesn't it? I mean, why bother having two
15 different forms on there unless there's something
16 different about the second form?

17 MR. ENGLUND: In addition, the second
18 session is to protect it, so that -- it may be
19 compressed, and it may also be protected with a
20 digital-rights-management system, so that copying is
21 limited.

22 MR. CARSON: Okay. But I'm not sure I
23 heard a response from you to the point made by Seth,
24 and perhaps by Tom, that when you're webcasting -- and
25 we all understand, I think, that most webcasters,

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1 probably all webcasters, are transmitting from server
2 copies, not from CD players; I think at one point you
3 finally acknowledged that -- that they are necessarily
4 going to have to use the second session copy and not
5 the better-quality copy in those cases where you are
6 using the second session features. That's understood,
7 isn't it?

8 MR. ENGLUND: I don't think it is.

9 MR. CARSON: Okay, so why is that?

10 MR. ENGLUND: For a couple of reasons.
11 First, thanks to newly-discovered 112(e)(8), they can
12 circumvent the access controls in the first session.

13 MR. CARSON: Okay. So even if they've got
14 the second session, because they can copy that,
15 112(e)(8) gives them the ability to circumvent to get
16 the first session copy, is that true?

17 MR. ENGLUND: Interesting question.

18 MR. CARSON: Great. Seth, do you still
19 need to be here?

20 MR. ENGLUND: I may have misspoken.

21 MR. CARSON: Let me give you a moment
22 because this may be important.

23 MR. ENGLUND: Section (e)(8) begins, "If
24 the transmitting organization entitled to make a
25 phonorecord" -- and it's a webcaster with a license --

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1 "is prevented from making such phonorecord by reason
2 of the application of technical measures that prevent
3 reproduction of the sound recording." There's a bit
4 of a disconnect there, as has been noted.

5 I suppose the answer has got to be that,
6 if they have access, that they can't circumvent, but
7 they've still got the opportunity to work with the
8 copy in the second session and they've still got the
9 ability to copy the first session.

10 MR. CARSON: Okay, I was curious about
11 that because I don't quite understand it. When you
12 say, "copy the first session," put it in a CD player,
13 I gather, and then what do you do with it? How do you
14 get it onto that server? Because that's where it's
15 got to end up.

16 MR. ENGLUND: You string a wire from the
17 CD player to the server.

18 MR. CARSON: Okay, and that works?

19 MR. ENGLUND: Yes.

20 MR. GREENSTEIN: No.

21 (Laughter.)

22 MR. ENGLUND: I've never tried it.

23 MR. CARSON: Okay.

24 MR. ENGLUND: But it's clearly the case
25 that you can transmit the output of a CD player to the

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1 sound card of a computer. It may be slower than
2 ripping, clearly slower than ripping. You have heard
3 from Tom that ripping is much faster, but it is
4 clearly possible to send those bits over a wire,
5 capture them, and format them into the same bits that
6 would have been rendered on the CD player.

7 MR. CARSON: Let me hear what our other
8 two panelists have to say about that.

9 MR. LEAVENS: Well, I suppose one can make
10 their own gravel, too.

11 MR. CARSON: I'm sorry, their own what?

12 MR. LEAVENS: Their own gravel, too. I
13 sounded a little facetious, but from the sense that
14 you are describing a process that is entirely
15 inappropriate to the systems that are set up for us to
16 operate and the benefits that we're supposed to be
17 enjoying by this digital technology.

18 So I can't speak to the technical aspects
19 of the statute that you're talking about, but we have
20 no remedy really, from what you are describing here,
21 as far as being able to play something in real time
22 and then somehow get that translated into a digital
23 file. There are far too many processes involved, far
24 too much time involved.

25 MR. CARSON: Well, let me make sure --

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1 Seth, go ahead.

2 MR. GREENSTEIN: I'm just trying to
3 understand exactly how this would work, because the
4 output of a CD player, let's say analog or digital,
5 it's not the same format that is computer data. It's
6 a different data format. Dealing with digital data
7 first, it's a different data format.

8 So you would need to convert it into the
9 data format that the computer understands. Then the
10 computer can record it, and then you can start
11 manipulating it, then, to have it encoded for
12 different bit rates and different codecs, a much more
13 cumbersome process, much more expensive, and, frankly,
14 when you're talking about doing this in real time for
15 tens of thousands of sound recordings per year,
16 prohibitive.

17 If we are talking analog, then you would
18 have to go through a very similar process where you
19 would have to go at the analog output and digitize it.
20 And each time you perform transformations on data, you
21 are losing some sound quality. As hard as you try and
22 as good as the technology is, you are losing some data
23 each and every time as you go from one format into
24 another, which has an impact on the sound quality.

25 MR. CARSON: Steve, do you disagree with

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1 that?

2 MR. ENGLUND: To some degree. It is true
3 that the data format used in Red Book Audio is
4 different from the .wav file format that is commonly
5 used on computers and commonly used as the input to
6 encoders and compression software.

7 But the process of turning Red Book Audio
8 into a .wav file is something that happens all the
9 time in a computer when you rip. It is not a
10 computational matter. At least it is not clear to me
11 that it is a computational matter.

12 It is much different from the process that
13 would have to take place to convert the so-called
14 S/P-DIF output of a CD player into a .wav file on a
15 computer. It seems like the kind of data
16 transformation that could be accomplished by somebody
17 writing software, if the software doesn't exist
18 already. I have never had occasion to look for it.

19 MR. CARSON: You folks may get a
20 subsequent question from us on this, because it sounds
21 like you think this is a significant point, Steve, and
22 I'm taking it as a significant point.

23 MR. ENGLUND: To the extent that Seth's
24 concern here is quality and not timing --

25 MR. CARSON: Yes, yes.

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1 MR. ENGLUND: I mean, he says, "The second
2 session isn't sufficient for me."

3 MR. CARSON: Right.

4 MR. ENGLUND: I think the second session
5 ought to be sufficient access for purposes of 1201.
6 You have previously found that there is no right here
7 to get access in the best, most convenient possible
8 way.

9 But to the extent that quality
10 consideration is material here, a way to get CD
11 quality audio is to play it in the CD player.

12 MR. CARSON: Well, let's be clear in what
13 we said before. I think what we said before was, when
14 you are talking about fair use, for example, someone
15 who under the doctrine of fair use is able to make a
16 good claim, "I should be able to get a copy of this,"
17 doesn't necessarily have the right to get that copy in
18 the optimal, best digital format. There may be other
19 ways of doing it, and that may meet all the
20 requirements of fair use.

21 We are talking now about a statutory
22 license where people who comply with the terms of the
23 license do have, in effect, a right to transmit
24 performances of those works to their customers, and
25 that is what you want them to be able to do, I

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1 believe.

2 So, under those circumstances, are you,
3 nevertheless, saying they have no reason to expect
4 that they are going to get good quality content that
5 they can retransmit?

6 MR. ENGLUND: We're not talking about good
7 quality versus bad quality.

8 MR. CARSON: Well, I thought that was the
9 whole point.

10 MR. ENGLUND: No, we were talking about
11 less-than-full-CD quality, but they transmit in less-
12 than-full-CD quality. I think the considerations are
13 very similar to your past finding, which was, in fact,
14 made in the fair use context, as you indicated.

15 The statutory license does not address
16 access or quality. There is no requirement in the
17 statutory license that if a record company has chosen
18 to release a recording only on cassette tape, that it
19 provide access on CDs to webcasters who might want
20 higher quality.

21 MR. CARSON: Yes, but we are not talking
22 about that. We are talking about a CD which has high
23 quality here and right next to it somewhat lower
24 quality. Because of the way you set it up, you are
25 necessarily, at least according to Seth's scenario,

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1 not to your scenario, you are necessarily relegating
2 them to the lower-quality copy.

3 It's not that you only put it out in audio
4 cassette. You've got good quality and so-so quality,
5 and you're telling Seth, "Sorry, you're stuck with so-
6 so quality."

7 MR. ENGLUND: I think you should not rush
8 to assume that the quality is so-so.

9 MR. CARSON: Okay, that was my next
10 question.

11 MR. ENGLUND: The quality is whatever the
12 author of the CD chooses to encode it at, and that
13 will be based on a number of product design
14 considerations. It is not the desire of record
15 companies to sell a low-quality product. Record
16 companies want consumers to be able to buy and enjoy
17 the music and pride themselves on selling quality
18 product.

19 Occasionally, it has been suggested that
20 one way of securing the CD format is to offer a second
21 session that is somewhat degraded in sound quality,
22 but a better technological approach is probably to
23 secure it with a digital rights management system.

24 In any event, I'm not a "golden ear."
25 There are some people called "golden ears" who listen

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1 to recordings and can tell such differences, but I
2 don't know that I can tell the difference between an
3 MP3-compressed file and a CD-quality file, at least
4 when listening to it on my computer speakers.

5 So I think you should not rush to assume
6 that this is lousy quality.

7 MR. CARSON: Okay, so you're telling us
8 there is no reason for us to conclude that the second
9 session copy is going to be of such quality that it is
10 not going to be as useful for webcasting purposes or
11 to put it --

12 MR. ENGLUND: It would be commercially-
13 acceptable quality because record companies don't want
14 to put out a product that is not commercially-
15 acceptable.

16 MR. CARSON: And, again, the only reason,
17 is it a fair characterization of what you said earlier
18 that the only reason that the second session may be
19 lower quality is simply because there's not enough
20 room on the disc to put two equally-good-quality
21 copies on it, or might there be other reasons why the
22 quality of that second session one isn't going to be
23 as good? Had there been a choice, we don't want it to
24 be as good of quality? Is there any reason to think
25 that is going to happen?

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1 MR. ENGLUND: That may play into the
2 analysis. It may largely be a matter of the
3 technology vendor's choice of how the second session
4 technology is implemented in terms of what kinds of
5 formats are supported in the second session.

6 MR. CARSON: Seth, I think you are
7 straining for the mike or no?

8 MR. GREENSTEIN: Yes, I was. I wasn't
9 straining, but reaching.

10 (Laughter.)

11 There is an important difference between
12 the types of users that are targeted for the second
13 session versus webcasters. The type of users targeted
14 for the second session, that's the end product that
15 they are going to use. That's the end product they're
16 going to listen to.

17 Probably, you know, is it as good as the
18 kind of MP3 file that you would rip for yourself?
19 Probably yes. But webcasters don't use it as the end
20 product. It is the source material for them. That is
21 the starting point from which they have to make
22 additional transformations, from which they have to
23 make better-quality recordings for the high-bandwidth
24 users, lower-quality recordings for more optimal
25 transmission over lower bit rates. They have to go

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1 from one media format to another, to another, to
2 another, to make sure that they've got the full range
3 of copies that they need to provide full service to
4 all of their potential users.

5 From that perspective, broadcasters,
6 webcasters, always like to start with the very highest
7 quality. A television broadcaster doesn't use a VHS
8 tape when they show movies. HBO doesn't use VHS tape.
9 I mean they use digital beta tapes. They use the
10 highest-available quality format. They don't use
11 DVDs. They use professional-quality media.

12 CD audio is not the highest quality
13 available, but it is the highest quality that is
14 commercially available in retail that webcasters have
15 easy access to if they don't get service of higher-
16 quality copies from the record companies.

17 They need to start with the highest-
18 quality source material in order to perform the
19 transformations, in order to afford the public and to
20 offer to the public a competitive service.

21 MR. CARSON: Steve, when I was asking an
22 earlier series of questions, there was one followup I
23 think you were suggesting but I wasn't hearing it very
24 clearly. Does it still seem pertinent?

25 MR. TEPP: Well, it's a short one. I'll

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1 just jump in with it.

2 It went back to the question you were
3 asking about 112(e)(8) and the phonorecord-by-
4 phonorecord concern that was expressed. And the
5 question was, to what extent can you, of your own
6 initiative, simply bundle requests? There is nothing in
7 the text of 112(e)(8) that appears to prohibit that.

8 So couldn't you engage in a little self-
9 help on that problem by bundling the appropriate
10 requests for accessible phonorecords and address that
11 concern?

12 MR. GREENSTEIN: By bundling requests, you
13 mean, essentially, to make requests in advance, to say
14 that for everything you release over the next coming
15 three years, we would like to have access to them?

16 MR. TEPP: I don't think that would work
17 under -- well, I want your opinion. That's not what
18 I was asking about.

19 MR. ENGLUND: I really wouldn't rule out
20 the possibility. That's precisely the right
21 marketplace solution here. This is all speculation,
22 but if a webcaster were to ask a record company, "Are
23 you ever going to service me when I ask you for a
24 copy," and the record company says, "No, I'm not ever
25 going to service you," that seems like wholly

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1 sufficient. It seems like the sort of thing that we
2 shouldn't be speculating about, proceeding where there
3 is a very high burden of proof to be overcome before
4 an exemption should be granted.

5 MR. GREENSTEIN: I guess we have the
6 reverse concern. I mean, suppose the answer comes
7 back and says, "Well, no, ask me on a record-by-record
8 basis. I'll let you know what's available for that
9 and whether it's appropriate to give you the
10 circumvention tool, whether it's appropriate to give
11 you a file, or what level of quality file I'll give
12 you. Ask me in particular cases, and I'll give you
13 particular answers."

14 MR. TEPP: Let me just follow up with one
15 thing, and then I will give it back because I've
16 already had my chance.

17 But, given, as Rob has articulated quite
18 well, the standard we are dealing with here of
19 likelihood, is there any reason to think that
20 particular CDs, even within a single label, are going
21 to get that sort of disparate treatment, where they
22 will give you "yes" to some, "no" to others, "We'll
23 give you the tool here, but we will give you something
24 else; we will give you an unprotected copy there."?

25 MR. LEAVENS: Do you mean track by track

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1 within a CD?

2 MR. TEPP: Either track by track within a
3 CD or CD by CD within a label's repertoire.

4 MR. LEAVENS: I suppose there may be some
5 artist considerations that go into whether there is
6 something that is granted. There may be some
7 particular artists more concerned about that kind of
8 thing than others, or there may be -- I know there are
9 provisions in our contracts with the labels for our
10 conditional download service that allows the record
11 labels to withdraw tracks from our service simply on
12 the basis of artist relations issues.

13 When they get involved with contractual
14 negotiations with the artist, they are not compelled
15 to stop exporting through services such as ours, but
16 they may want to remove them from the marketplace, so
17 that is not an issue when they are talking to them.
18 We have actually encountered that a couple of times,
19 not a lot, but it is the kind of thing that does go on
20 all the time in the record industry. The labels are
21 very sensitive about their relationships with their
22 artists. They are protective of that. It is the most
23 important relationship that they've got.

24 So there may be reasons, for purposes of
25 artist relations, that there could be a variation in

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1 how it is that they are granting consent or not
2 granting consent.

3 MR. TEPP: So I know I promised that was
4 the last one. I'll really keep to this one.

5 Is it fair to say, then, that what this
6 whole request boils down to is the problem with the
7 potential phonorecord-by-phonorecord approach of
8 112(e)(8), and that barring that, 112(e)(8) does
9 everything you need?

10 MR. GREENSTEIN: Again, depending on the
11 response that you get from the copyright owner, it
12 could. It has the potential to offer everything that
13 is necessary, but there's no guarantee in it that, if
14 it is literally applied, that the problems would be
15 addressed. Literally applied, the problems would not.
16 That is the reason why we are spending so much time,
17 and that Tom flew in from Chicago, and that lawyers
18 are getting paid to address this issue.

19 I guess one other way to look at it is
20 maybe by analogy to the experience of the motion
21 picture industry, where they don't apply copy
22 protection to every motion picture cassette. They
23 apply it somewhat selectively, depending upon the
24 value of the title, whether it is being sold at a low-
25 price point, whether it is being sold at a higher-

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1 price point.

2 Certain motion pictures they can apply the
3 technological protection measures at various levels of
4 intensity, depending upon the need. A lot of it is
5 business marketing philosophy. If a particular work
6 is especially valuable, they may apply copy protection
7 to it using a very strong, robust system. If it is
8 another artist, they may apply it less or they may not
9 apply it at all.

10 It is difficult to predict, although I
11 think in the marketplace, if the experience in the
12 motion picture marketplace is any guide on this, then
13 I think it is quite likely that there will be
14 different reactions with respect to different sound
15 recordings, the same way that there are different
16 copy-protections mechanisms and modalities applied
17 with respect to motion pictures.

18 MR. TEPP: I will keep my promise this
19 time. Thanks.

20 MS. PETERS: Guess what, we're finished.
21 I want to thank each and every one of you. This was
22 a long session, but it was a very helpful session for
23 us. I can't speak for you.

24 In any case, thank you.

25 (Whereupon, the foregoing matter went off

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the record at 4:32 p.m.)

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