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U.S. COPYRIGHT OFFICE
SOFTWARE-ENABLED CONSUMER PRODUCTS STUDY

TUESDAY, MAY 24, 2016

9:01 a.m.

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A P P E A R A N C E S

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EVAN COX, BSA | The Software Alliance

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

2 MR. DAMLE: Okay. Good morning, everyone,
3 and welcome to the second roundtable hearing on
4 the topic of copyright law as it relates to
5 software-enabled consumer products.

6 I'm Sy Damle. I'm Deputy General Counsel
7 at the U.S. Copyright Office, and I'll let my
8 colleagues introduce themselves.

9 MR. RILEY: My name is John Riley. I'm an
10 Attorney-Advisor.

11 MS. ROWLAND: I'm Catie Rowland, Senior
12 Advisor to the Register.

13 MR. BERTIN: I'm Erik Bertin. I'm the
14 Deputy Director of the Registration Program.

15 MR. DAMLE: Great. So first of all, I'd
16 like to thank the UC Hastings College of the Law
17 for hosting us. I don't know if there are any
18 representatives from -- no? Well anyways, for the
19 record, I will note that David Faigman, Professor
20 Depoorter, Lan Tran, Tom McCarthy and the Media
21 Services Group and the ITS group have been very
22 helpful in getting this set up for us. And so, we
23 appreciate their hospitality.

24 So we're conducting this study at the
25 request of the Senate Judiciary Committee, as you

1 all know. The Committee's letter observed that the
2 revolutionary nature of digital technologies has
3 led to software being essential to the operation
4 of refrigerators, cars, farm equipment and
5 wireless phones.

6 While acknowledging the role of
7 intellectual property laws in that development,
8 the Committee noted that there are questions being
9 asked about how consumers can lawfully use
10 products that rely on software to function. And
11 so, the topic today is to sort of explore those
12 questions and see whether Congress or the Office
13 needs to act in some way to solve any problems.

14 So, just a couple of housekeeping matters
15 before we begin, some of you are veterans of our
16 roundtables. So you know this. But for the others,
17 if you want to jump in on the conversation, just
18 take your table tent that's in front of you and
19 just tip it sideways so that way we know to call
20 on you if you want to jump in.

21 And just a disclaimer that your remarks
22 are being recorded and will be transcribed and
23 made part of the public record. And the panel is
24 being live-streamed, I believe. So there's that as
25 well.

1 We've got four panels lined up for today.
2 There are three before lunch and one after lunch.
3 And there will be an opportunity for any observer
4 comments at the end. We had a very productive
5 conversation in Washington, D.C., and so, I hope
6 we have a similarly productive conversation today.

7 Our first panel is about a fairly general
8 topic, which is about the proper role of copyright
9 in protecting software-enabled consumer products.
10 The goal is to explore overarching issues like the
11 need for copyright protection for embedded
12 software, whether software in everyday products
13 can be distinguished from other types of software
14 and the need for interoperability.

15 Oh, and one thing about the microphones -
16 - the microphones are on all the time. So, during
17 the conversation, if we can try to limit sort of
18 cross-talk, for the Court Reporter's sake mostly,
19 that would be very helpful.

20 Before I start off, we'd appreciate it if
21 each of you could introduce yourselves and explain
22 your affiliation for the record. Why don't we
23 start over here with you?

24 MS. AILSWORTH: Hi. I'm Ashley Ailsworth,
25 from the Specialty Equipment Market Association,

1 SEMA, and we represent the manufacturers,
2 installers, retailers of specialty equipment
3 automotive parts, specifically aftermarket parts
4 that are unique and not necessarily replacement
5 parts or direct replacement parts.

6 MR. COX: Hi. I'm Evan Cox. I'm an
7 attorney at Covington & Burling here in San
8 Francisco, and I'm here on behalf of the Business
9 Software Alliance. The Business Software Alliance
10 is the leading advocate for global software
11 industry in the United States and around the world
12 and is very involved in public policy and I've
13 worked with them for about 20 years.

14 MR. DAMLE: Thanks.

15 MR. SHORE: Andrew Shore. I'm a partner
16 with Jochum Shore & Trossevin. I run a coalition
17 called the Owners' Rights Initiative. Groups like
18 eBay, Goodwill, the American Library Association,
19 who all rely on primarily the first-sale doctrine
20 to advance their businesses.

21 MS. GELLIS: I'm Cathy Gellis. I'm an
22 attorney in private practice. I participated in
23 the study, filing a written comment on behalf of
24 the R Street Institute. I'm not representing them
25 today, although I may happen to say very similar

1 things.

2 MR. MCCLURE: Hi. I'm Sam McClure. I'm
3 from the Stanford IP Clinic, representing Engine
4 Advocacy, which is a policy organization that
5 supports the growth of technology entrepreneurship
6 through economic research, policy analysis and
7 advocacy on local and national levels.

8 MR. WIENS: Hi. I'm Kyle Wiens. I
9 represent iFixit and Repair.org, and we represent
10 consumers that are trying to fix their things and
11 professional repair technicians that are repairing
12 everything from medical equipment to automotive
13 vehicles to cell phones and a broad spectrum of
14 electronic devices.

15 MS. WALSH: Kit Walsh, a staff attorney
16 with the Electronic Frontier Foundation. We're a
17 nonprofit digital civil liberties organization
18 with over 26,000 dues-paying members. We work to
19 promote civil liberties, freedom of speech and
20 innovation in the digital age.

21 MR. DAMLE: Great. Thank you all. So, to
22 start things off, the Committee asked us to
23 examine the specific issue of copyright related to
24 software in what they called "everyday products."
25 And so, we understand the committee to have not

1 asked us for a more comprehensive review of
2 copyright in software generally.

3 With that understanding, one of the
4 really key questions here is whether there are
5 problems in the marketplace that are specific to
6 software-enabled consumer devices separate and
7 apart from software generally, and, if so, whether
8 those problems can be solved without affecting
9 copyright protection for software generally.

10 So if anyone wants to jump in and sort of
11 discuss that kind of general issue?

12 MR. SHORE: Sure.

13 MR. DAMLE: Mr. Shore?

14 MR. SHORE: Yeah. So I guess my first
15 comment would be to sort of reject the notion of
16 consumer versus business products because what
17 does "consumer" mean? Is it the product or is it
18 the setting in which it exists? You mentioned
19 refrigerators. If I have an LG refrigerator and I
20 have it in my house, is it a consumer product, but
21 if I have it in my restaurant, it's a business
22 product? So we shouldn't balkanize the code by
23 drawing these distinctions. And you know, the
24 internet has democratized the sale of retail
25 goods. So somebody could be selling a refrigerator

1 to that restaurant. Are they -- is it a business
2 product? I think that's a little tricky and I
3 would really encourage you to take the broadest
4 possible view of what consumer is because there's
5 really no definition for it.

6 MR. DAMLE: I'm sorry. So if I could just
7 ask a follow-up?

8 MR. SHORE: Yeah.

9 MR. DAMLE: What about the idea of
10 embedded versus non-embedded software? I think
11 that was also kind of -- there was a strain --

12 MR. SHORE: Absolutely. No --

13 MR. DAMLE: -- underlying the letter,
14 kind of assuming there was a way that could be
15 drawn.

16 MR. SHORE: Yeah. I think there can be
17 lines drawn. At least we've found in our
18 experience, among our members, that there are some
19 consistencies, for instance, people don't pirate
20 embedded software, right? I mean, software that
21 runs routers, you're not walking around the street
22 going, "hey, I've got some router software for
23 you."

24 And it also -- unlike freestanding
25 software it has to exist on the platform. I mean,

1 it's sort of tied one to one. But there are
2 technical people who can probably address that
3 better than I can, people like Kyle and others.
4 Sorry to put you on the spot, Kyle.

5 MR. DAMLE: Ms. Walsh, I think you were
6 next.

7 MS. WALSH: Yeah. So to follow up on what
8 Andrew's last point was, one way to think about
9 this is, "why do we ordinarily have copyright
10 law?" One of the justifications diverging from the
11 normal rule of free market competition is that the
12 products can be duplicated at very low marginal
13 cost. And that's not the case when we're talking
14 about software that's embedded in a physical
15 object that has its own manufacturer distribution
16 costs.

17 So, if we look at the underlying reasons
18 why copyright protection is justified as a
19 divergence from the normal rules of competition,
20 then it doesn't apply as strongly in the embedded
21 software context.

22 That's one of the most significant
23 distinctions that may exist. But to also push back
24 on the premise a little bit, many of the problems
25 that have emerged in the context of embedded

1 software also have overlap in the world of
2 software that's running on other general purpose
3 computers.

4 And if I could highlight that point for a
5 moment, I would resist drawing a distinction
6 between general purpose computers like laptops and
7 tablets and so on and other varieties of computers
8 that people purchase as part of a specialized
9 device because those are also general purpose
10 computers and many of the people who use the
11 devices either modify them. You can play Flappy
12 Bird on an e-cigarette.

13 You can turn a videogame console into a
14 low cost general purpose computer. And part of
15 the innovation and the use that people find for
16 devices that enhances their economic value and
17 leads to more innovation is a direct result of the
18 fact that the computers that are in all of these
19 consumer devices are and can be general purpose
20 computers. And that's a valuable thing. That's not
21 something to resist.

22 MR. DAMLE: So can I -- I'm going to be
23 asking a lot of follow-ups. I apologize. So can I
24 ask -- I mean, there is -- the law does have this
25 sort of idea -- I mean, to pick up on your point,

1 the law does have this idea already in the
2 Computer Rental Amendments Act of carving out from
3 this -- the new rental right this idea that if
4 it's software that can't ordinarily be copied from
5 the device during its ordinary operation, then
6 that's not subject to the rental right.

7 And that was -- the legislative history
8 indicates that that was done at the behest of
9 things like car rental companies that said, look,
10 if you were to pass this, literally it would mean
11 that we can't rent a car that has software on it.

12 Is that a -- is that something useful
13 that we can look at? If we were -- if Congress
14 were interested in trying to draw a distinction
15 between embedded software and software that you
16 buy off the shelf, is that something useful that
17 we can look to or is that problematic in other
18 ways today?

19 MS. WALSH: I think the big danger to
20 saying we're going to define a category of devices
21 where you ordinarily can't copy the software out
22 of it is because it creates an adversarial
23 relationship between the device and the people who
24 are relying on it.

25 So you have to -- in order for that to be

1 true, that you can't ordinarily copy the software
2 out of the device, you need to create an extra
3 layer of technological restrictions that are
4 trying to keep the user from having the ultimate
5 autonomy over what their device is doing.

6 And we live in an age where the internet
7 of things can tell when you wake up, what you
8 drink for coffee, whose house you're sleeping over
9 at. It has cameras on your living room. It has
10 microphones in your kids' Barbie dolls.

11 And letting those devices trump the
12 autonomy of people whose lives are shaped by them
13 is actually a very dangerous thing, both for
14 privacy, for people's security because it
15 introduces vulnerabilities that malicious hackers
16 could use and just for the personal autonomy of
17 the people, all of us who rely on software-enabled
18 devices.

19 MR. DAMLE: Mr. Cox, I wonder if you have
20 sort of a response to those points.

21 MR. COX: Well, I do to that but I first
22 want to go back to something Andrew said, and
23 that's that software in routers isn't ordinarily
24 pirated. That's true if your concern is consumer
25 piracy. But one of the biggest threats that many

1 people in the U.S. industry face is the copying of
2 their software by low-cost competitors coming out
3 of places in Asia. That is who the copyright law
4 is going to be enforced against, not your routine
5 consumer tinkering. So I think in making changes
6 to copyright law, you have to think about who
7 you're protecting and who it's going to be used
8 against.

9 I think of the experience of one of my
10 would-be clients. He can't quite afford me yet.
11 But he's making one of these hoverboard-type
12 products and all the innovation in his product is
13 in the software and the algorithms that determine
14 how it handles and how it shapes as you ride it.

15 People who have introduced products in
16 that market have been swamped instantly by people
17 who copy the software, take it apart, copy it,
18 make it in China, re-import it here. Without a
19 legal remedy, they can't do anything about that.
20 And if you think about who's bringing enforcement
21 actions, I think it's important to keep that in
22 perspective. As to Kit's comments, just a very
23 general comment -- and this theme will come back -
24 - is then that's market choice. There are a lot of
25 different options on the market and people who are

1 more sensitive about their privacy have choices
2 that respect that to a greater degree. And
3 companies work with copyright law and a lot of
4 other dynamics, including standards and other
5 things, to offer consumers choice.

6 People can find more or less intrusive
7 ways to equip themselves digitally in this world,
8 and they ought to do so according to their
9 preferences. But that is market forces at work and
10 that produces choice and a range of choice.

11 MR. DAMLE: And do you have thoughts
12 about the sort of premise that underlies the
13 Senate letter, which is that it's possible to kind
14 of identify the sort of category of software or of
15 products that we could have special rules for or
16 that we could solve -- sort of in my opening
17 question, that we could solve the problems in that
18 arena without affecting everything else. Do you
19 have thoughts about that?

20 MR. COX: The BSA thinks that that's very
21 difficult to do. The internet of things is in --
22 is one facet of developments that include moving
23 most of the processing power and functionality to
24 the cloud. BSA's submission goes into this and I'm
25 sure they commented on this in D.C., but more and

1 more, these devices are part of a service. They're
2 not just a standalone device. They are intimately
3 connected with cloud services. That's the
4 majority of the value of the functionality and
5 innovation that they provide.

6 And so, you're dealing more with a
7 service relationship, which there's ongoing
8 updating and interacting with software, a lot of
9 liability and burdens on the provider of that
10 software as a service, including liability
11 concerns, security concerns, privacy breach
12 concerns.

13 So, the desire of the people providing
14 those to have a degree of control over that
15 ecosystem is in some ways more pronounced in this
16 environment. But to draw the line between the
17 client-side and the cloud-side or what's an
18 everyday product, not an everyday product. You
19 know, there was embedded software in microwaves.
20 There was embedded software in calculators back in
21 the '70s when the copyright laws were being
22 written. That, by itself, is not new.

23 MS. ROWLAND: Can I -- I was going to ask
24 you a follow-up question about this. So at the
25 D.C. roundtable, we had a lot of discussion from

1 the automobile industry and of mechanical uses
2 that have turned into software.

3 So the example was given, I think, about
4 the windshield wiper. Before, it would have been
5 just some sort of mechanical process that would
6 not have been covered by copyright at all. And
7 now, there might be some software that kind of
8 directs how fast the wipers go or how intermittent
9 or whatnot. And there was a lot of discussion
10 about why would that be treated the same as other
11 kind of software when it's more purely functional.

12 And I wonder if you have a thought on
13 that. Are there any kind of software-enabled
14 things that might fall away?

15 MR. COX: I don't think there's an easy
16 answer to that. Going back to my first point, if
17 you come up with an innovative way to drive your
18 windshield wipers, and that adds value to your
19 car, the only person you're going to be -- well,
20 the greatest threat you'll have to that is
21 knockoffs entering the market from overseas.

22 As things get reverse engineered,
23 software is very easy to extract and copy and put
24 in a competitive product. So that's the primary
25 concern of copyright holders.

1 MS. ROWLAND: And there's, I think -- I'm
2 just realizing this, that the windshield wiper
3 example is really emblematic of patent law too.
4 It was that case, right? There was a movie about
5 it, the intermittent wiper stuff and the patent.

6 So is there -- do you think -- what do
7 you think of kind of the crossover between patent
8 and copyright in that specific area?

9 MR. COX: I can't say I have a deep view
10 on that specific area. As a lawyer, there's a very
11 large practical difference between enforcing a
12 copyright and enforcing a patent, if that's your
13 choice. The order of magnitude of cost and
14 complexity and uncertainty about your patents,
15 it's far more preferable to enforce your
16 copyrights in a situation like that against a
17 competitor, if that's what it takes.

18 MR. DAMLE: And sorry, to follow up on
19 that, so if it's a competitor, if it's competitors
20 that are overseas, are you -- how exactly do you
21 anticipate enforcing your copyrights against them?

22 MR. COX: Well, you'd have to do that
23 market by market. It's more difficult, less
24 difficult in different markets. Often, the U.S.
25 market is going to be the biggest and most

1 lucrative market and that's going to be what
2 you're most concerned about --

3 MR. DAMLE: It's about importation of
4 those goods back into --

5 MR. COX: --either ITC actions to block
6 importation or dealing with it on the ground with
7 distributors and retailers. There's a range of
8 choices. Enforcing it in China or in Taiwan,
9 that's pretty challenging.

10 MR. DAMLE: Okay.

11 MR. COX: But it's not -- you're not in
12 charge of their laws.

13 MR. DAMLE: that's right. So I know there
14 are a lot of placards up. But since we're talking
15 about automobiles, I thought it might make sense
16 just to quickly go to you, Ms. Ailsworth.

17 MS. AILSWORTH: Yeah. I just wanted to
18 make a distinction for the embedded versus non-
19 embedded. I think it might be more useful to think
20 of functional versus nonfunctional, because there
21 are a lot of software applications now that you
22 can install on a vehicle and it doesn't come
23 embedded with that software functionality. And you
24 can add that later. And I think that it's
25 important that these items that are functional

1 versus items that are nonfunctional, like a movie
2 or a video and music, versus software that you're
3 installing to change your windshield wiper speed
4 and responsiveness, there's a difference in those
5 two things. But it's not that one is embedded and
6 one is not. It's that one is really functional and
7 goes to the uses of the product and one goes to
8 the heart of copyright law and the expression of
9 the idea.

10 MS. ROWLAND: Can I ask a follow-up on
11 that? So one of the difficulties I think everyone
12 has with this topic is that we talk about
13 functional -- and I was just talking about that as
14 well. But software is functional. Like the point
15 of software, it's defined as executing a function.
16 It's a set of instructions. It does something.
17 It's useful. It's not your normal copyright issue.

18 And so, where do you then draw the line
19 or is it possible to kind of draw the line 2 about
20 when you say "functional," what do you mean? Is
21 there like a merger doctrine situation going on
22 or--

23 MS. AILSWORTH: Yeah, and I think there
24 has to be some kind of line drawn there. I don't
25 think it's easy to draw. But there's certainly in

1 the common understanding of functional versus
2 software that is for a different purpose, there is
3 an analysis that breaks it down into these are
4 functional aspects. These are the expressive
5 aspects. And there is an analysis that goes on in
6 the court doctrine.

7 So I think there is a possible way to
8 draw the line. But I think that there should be
9 further standards and possibly in the pleadings
10 standards or in a duty to conduct a good-faith
11 analysis before filing a claim that really looks
12 into, okay, what are the elements here? What is
13 functional in the court doctrine of functional and
14 what is the expression of the idea? And kind of
15 walk through that before just filing a claim
16 against anything that's doing a copy or a
17 reproduction.

18 MR. BERTIN: So it's your view that the
19 functionality analysis goes more towards copyright
20 ability versus whether there's an infringement or
21 not? So on the front end versus the back end?

22 MS. AILSWORTH: Actually, I think it goes
23 more towards the back end. I just think that there
24 should be some kind of an analysis on, you know,
25 the effects of this use and of the effects of the

1 fact that something is functional and whether --
2 that does go into the fair use analysis. So I
3 think that that should be part of this analysis.

4 But I still think that it's -- a lot of
5 these aspects are copyrightable and I don't think
6 that we should be forcing people to make that
7 determination of this is copyrightable, this
8 isn't.

9 But I think that there should be some
10 kind of an analysis of, well, the fact that this
11 is functional should -- we should require some
12 more analysis on the front end of the uses that
13 are fair to make on the back end. So it's a little
14 bit complicated and convoluted. But I don't want
15 to take away anyone's copyright protection at the
16 same time.

17 MR. DAMLE: Okay. We're going to go down
18 this line. I mean, it raises the issue of we have
19 sort of options for dealing with this. One is to
20 kind of leave it to the courts to try to draw
21 these lines on a case-by-case basis.

22 And the other option is try to encode
23 something into the statute that tries to draw some
24 of these lines. And so, if you as you're making
25 your comments, if you have -- if you want to

1 address that, that'd be helpful. So we'll go to
2 Mr. Shore, and then we'll just go down the line.

3 MR. SHORE: Sure. So Evan made the
4 point and I'm going to apologize to Evan. I think
5 he's going to take a lot of body blows today from
6 this panel. But as the only Republican in San
7 Francisco, don't worry. You can beat me up later.

8 So I do want to push back on this notion
9 that we can have a set of laws on the books that
10 are applied sort of in one setting and maybe not
11 another, that we're not going to go after
12 consumers or smaller businesses. I have a litany
13 of clients who have been under siege not for even
14 selling -- they sell unauthorized products, which,
15 as you know, are not illegal products. They're
16 legitimate products outside of the supply chain.
17 Some of these clients have been raided by men with
18 guns for doing nothing illegal.

19 So the idea that this is just something
20 that the rightsholders want enforced against
21 Chinese pirates is a total misnomer. They drop the
22 heavy hand on legitimate businesses all across the
23 United States. So we should be very, very careful
24 to say, "oh, we'll put these laws on the books to
25 enhance copyright protection, but we're not really

1 going to use them against a certain set of
2 businesses and people."

3 MR. DAMLE: Do you have examples of -- I
4 mean, to the extent you can talk about it?

5 MR. SHORE: I can't.

6 MR. DAMLE: All right.

7 MR. SHORE: I might be able to talk to
8 you privately about it, with their permission.

9 MR. DAMLE: Okay.

10 MS. ROWLAND: Yeah, because other -- our
11 panel in D.C., there was a lot of discussion of
12 "this is not a problem." You know, there's -- it
13 can be more of a discussion about --

14 MR. SHORE: But --

15 MS. ROWLAND: -- give me an example, and
16 --

17 MR. SHORE: But I have numerous examples
18 of companies like Cisco and Oracle and others who
19 right on their website address this issue of the
20 sale of unauthorized products and they wouldn't do
21 that if they weren't otherwise enforcing it.

22 MS. ROWLAND: Well, there was a
23 discussion there about like --

24 MR. DAMLE: Yeah.

25 MS. ROWLAND: -- like the frequently

1 asked questions. So Adam, one of the panels -- I
2 guess one of the frequently asked question was
3 kind of viewed as kind of like a threatening thing
4 and like it was Mr. Band who was saying, "well,
5 why would it be a frequently asked question if it
6 wasn't frequently happening."

7 MR. SHORE: Right.

8 MS. ROWLAND: But then, other people were
9 saying, "well, then please give us an example."
10 And it was a very -- it was a very heated
11 discussion about what hard evidence is there to do
12 something about it. So it would be interesting if
13 we could learn more about that from anybody.

14 MR. DAMLE: Yeah, and I mean, to the
15 extent -- I think the Senate had -- the Senate
16 Judiciary Committee had in mind, sort of they were
17 thinking about consumers principally when they
18 were giving us this assignment. And the terms of
19 service or licensing terms that were referenced in
20 your submission all seem to be sort of fairly big
21 enterprise-level type of devices -- switches and
22 major server racks -- like rack servers, things
23 like that.

24 And I didn't find anything that was sort
25 of more towards the end of the consumer spectrum

1 in terms of those kind of restrictive terms.

2 MR. SHORE: I mean, Microsoft was going
3 to do it with the Xbox One, right? I mean, they
4 wound that back after consumer outcry. So there's
5 a consumer example. It didn't go to the finish
6 line. But it got close.

7 And again, I think the notion that -- I
8 would challenge you all to sort of tell us, is the
9 product -- is it the product or is it the setting
10 and then how do you distinguish? Because if it's
11 the product, then you have to come up with a list
12 of products that fit and don't. And if it's the
13 setting, again, back to the restaurant example,
14 the refrigerator's in my house. Is it consumer?
15 It's in my restaurant. It's business?

16 I think it's very dangerous to start
17 going down the road of creating lists of these
18 products are business, these products are not. I
19 mean, you might know-it-when- you-see-it. But
20 that's not -- businesses don't run on "know it
21 when you see it." They need a clear path forward
22 under the law.

23 MR. DAMLE: Okay. Thank you. Ms. Gellis?

24 MS. GELLIS: Thanks. Well, to back up, I
25 originally flipped the card when we were

1 discussing --

2 MR. DAMLE: Sure.

3 MS. GELLIS: -- some of what Mr. Shore
4 just said about this distinction between different
5 products and also comments that Ms. Walsh said. I
6 think Ms. Walsh referenced the idea that Barbie
7 dolls now are computerized. They have embedded
8 software.

9 In footnote five of the comment I
10 submitted for R Street, we talk about a pair of
11 sneakers that runs game software on it where you
12 can put computer logic on basically anything. And
13 I think the understanding that copyright policy
14 needs to have in -- if it's going to contemplate
15 how it should apply is that everything can have
16 computing logic.

17 And I think Mr. Shore's caution about,
18 well, is that business, is that consumer is well-
19 taken, that there's no real way of delineating
20 which objects would get protection and which
21 objects would get different sorts of protection or
22 none whatsoever, and protection either in terms of
23 the copyright in the software and also consumer
24 protection of which objects would fall under
25 different regimes of what users can do or what

1 other regulators might choose to let them be able
2 to stand in and control the operation of. So that
3 was the first point to make.

4 Let's see. I lost my train of thought
5 very briefly. So let me leave it with that. I'll
6 pick up with --

7 MR. BERTIN: Okay. We'll -- sorry, so if
8 I can just follow up on that.

9 MS. GELLIS: Yeah.

10 MR. BERTIN: And this is a point that Sy
11 talked about a little bit earlier. But the rental
12 right is sort of bifurcated in a sense like that.
13 On the one hand, you have the exception for
14 videogame cartridges, which is very, very, very
15 specific and maybe over time the industry has
16 evolved past that.

17 But on the other hand, you have the
18 exception for things that are embedded -- software
19 that is embedded -- in devices that cannot be
20 copied when the software is in operation. So that
21 to me seems like the other sort of example, a very
22 general carve-out. Can you speak to which of those
23 -- if either of those or any of those --
24 alternatives would speak to the problems that the
25 Senate has asked us to look into?

1 MS. GELLIS: Well, I remembered where I
2 was going with that original thought, which is
3 that once -- when you've got this idea that
4 basically software can be embedded in anything,
5 anything has its own market.

6 This is the market for a pen. There's
7 otherwise is the market for a sneaker. There's
8 otherwise the market for a teapot or anything that
9 we've put internet of things on. There's a market
10 for a car.

11 And one of the things to think about is,
12 well, whether it's appropriate to have IP policy
13 affecting the market for the things because those
14 things are capable of competing in the markets for
15 themselves. Users want them to do something and
16 the question is can the manufacturer produce the
17 thing that will do the thing that the user wanted
18 it to do at the best price, at a better price than
19 what their competitor can deliver.

20 When we start adding in -- you don't have
21 the market failure that Ms. Walsh was talking
22 about where you need the IP protection to be able
23 to make sure that the manufacturer can be in the
24 market. Related to that, and I think getting back
25 to your question, is I am not entirely sure it's a

1 healthy thing for copyright to necessarily --
2 people should be able to build things, buy things
3 and use things without having to read the
4 copyright statute.

5 And to have the copyright statute provide
6 if this/then that, if this/then that, particularly
7 when the thing, its operation and the market for
8 the thing that can do that operation is so
9 independent from software existing in sort of a
10 literary work, that I believe Ms. Ailsworth was
11 describing as being a significant difference with
12 when IP protection would be more appropriately
13 applied to software than when it's controlling its
14 function.

15 I'm not entirely sure if I've deviated
16 too much from your question, but I got out the
17 rest of my thought.

18 MR. BERTIN: I hear what you're saying,
19 and if we were having this conversation 15 years
20 ago when we were saying, well, "a refrigerator is
21 a refrigerator is a refrigerator. They're all
22 fungible to some extent where they all provide
23 coldness and maybe ice and water, et cetera, et
24 cetera." But now, we're looking at a world in
25 which we have the same objects, except that the

1 functions that they perform are, we're told,
2 provided not by -- or not entirely by -- the
3 object itself but also the software that's inside
4 of it so that the market for the thing is, in some
5 ways, whether the consumer realizes it or not, a
6 desire for the functionality that the software
7 facilitates.

8 MS. GELLIS: I'm not entirely sure there
9 has actually been the change that you describe
10 because the refrigerator from the get-go always
11 had a circuit. It at minimum had one circuit. Was
12 current flowing to the compressor or was current
13 not flowing to the compressor? And some behavior
14 of the refrigerator was going to hinge around
15 that. A chip is basically many switches put
16 together and software controls how those switches
17 work.

18 So all we have is the same technology,
19 just on an extended scale where now there's an
20 awful lot of switches and now we have to keep
21 track with some sort of humanly written
22 instructions in some way, and I want to put a big
23 asterisk around that in case that's the phrasing I
24 don't think is healthy as we think about this,
25 where those switches are now controlled with

1 software. And -- but basically, you still have the
2 thing.

3 Is the refrigerator providing the
4 coldness? There's switches that are being operated
5 with current going, yes or no, yes or no, but now
6 there's a lot more switches with a lot more
7 sophisticated control. But it's still what we
8 essentially had, which I think goes to the point
9 of it is operational because how well that
10 refrigerator is going to provide coldness and in
11 what context it's going to provide coldness, it's
12 still the basic function of the refrigerator.

13 And if someone thinks a Samsung
14 refrigerator will provide coldness in a way that
15 meets their needs better than -- I'm not sure
16 Maytag is still a refrigerator manufacturer, but
17 to just name another competitor -- they can
18 compete by based on how they're controlling the
19 switches to the electricity that's going to go to
20 the compressor and give the user their coldness.

21 MR. DAMLE: Okay. Mr. McClure? You've
22 been very patient. Thank you.

23 MR. MCCLURE: Yeah, of course. Well, I've
24 got a lot of things to say and I don't know how
25 organized they're going to be. So I'll just try to

1 get through a few points and then we -- then you
2 guys can move on.

3 One quote that I think should just be on
4 the record in case you haven't heard it is Marc
5 Andreessen's copyright -- or software is eating
6 the world. Software is eating the world. He's a
7 top venture capitalist. He looms large here in the
8 Valley and he -- it's his business to build and
9 then invest in software companies and companies
10 that use software. And he understands that this is
11 sort of -- that this is a geometric progression,
12 right?

13 I think Aaron Perzanowski's comment is
14 probably the best sort of deconstruction of
15 copyright law as it stands, and I know there's an
16 inclination to kind of draw this distinction
17 between embedded software and then sort of the
18 standalone software or software in the past versus
19 software going forward or however you want to do
20 it, right?

21 So sort of leave this legal structure in
22 place that we've built up over the years and then
23 make some kind of small pivot to sort of handle
24 this new phenomenon of embedded software. But I
25 think it's just -- it's so huge that now software

1 exceptionalism has been exposed because software
2 has been put into all of these physical products.

3 A theme that's kind of come up a little
4 bit is what are businesses using software for
5 really? Is it to improve core product value? Is it
6 to sort of raise switching costs? Is it sort of --
7 is it malicious? Is it offensive? Is it defensive?
8 I think something that we shouldn't underestimate
9 is businesses' ability to use it offensively and
10 to use it in a sense that it wasn't meant to be
11 used and wasn't intended to be used because their
12 primary interest is their shareholders. It's not
13 necessarily their consumers.

14 There was one -- I think something that
15 Mr. -- in the discussion with Mr. Cox, you were
16 asking about an example -- or maybe it was Mr.
17 Shore -- an example of consumers being harmed with
18 their product. I know one example that comes to
19 mind is that people who had purchased a Nintendo
20 Wii had to make periodic updates to the Nintendo
21 Wii software. And it was actually bricked for a
22 period of time if you did not agree to that
23 update.

24 So that's an example of hundreds of
25 dollars of sunk costs in some kind of hardware

1 that has software on it, that unless you agree to
2 whatever contract is coming down the line or
3 whatever new license agreement is coming down the
4 line, you actually lose functionality entirely in
5 that product.

6 And that, to me, is not really speaking
7 to core product value, like we've -- as many
8 businesses -- software businesses would have us
9 believe, that they need to have these software
10 protections to protect their core product value.

11 It's sort of about raising switching
12 costs or imposing certain costs on consumers or
13 doing business in a certain way after a consumer
14 has already invested so much of sort of their time
15 and energy into their products.

16 MR. DAMLE: So I just have a question
17 about that, which is -- I mean, there are like --
18 there are websites -- so when I sign up for a
19 Google account, I have to agree to terms of
20 service -- for a Gmail account -- I have to agree
21 to terms of service. I have an Airbnb account, I
22 have to agree to terms of service. And whenever
23 they want to change those terms of services --
24 those terms of service, I have to agree to them if
25 I want to continue using that service, that

1 product.

2 Your example, is that so atypical? I
3 mean, that seems to be fairly common in the tech
4 world generally, outside of, just sort of embedded
5 devices. But just in general, that seems fairly
6 common. So is that -- are you saying that that's
7 problematic across the board? Is that -- is there
8 some specific problem with respect to the Xbox
9 example you gave that's different from those other
10 examples?

11 MR. MCCLURE: Yeah, and I think there is--
12 - so, yes, and I will get to that. But I think
13 this goes back to -- I lost my train of thought
14 there. But yeah, I think the big distinction for
15 me is that if you read -- for whatever reason, if
16 you actually sat down and read the Gmail terms of
17 service and you found something in there that you
18 didn't like, you could go use Hotmail or you could
19 use whatever other email provider you want to.
20 There's nothing that you have spent to set up your
21 Gmail account. It's entirely free, right?

22 If you have a thousand dollars into a
23 refrigerator, it's going to be a lot harder for
24 you to switch over to a new refrigerator if the
25 person who owns the proprietary software in that

1 refrigerator makes you sign a new license
2 agreement that has you doing something that you
3 don't like. And it's not just, I don't think,
4 going to be necessarily -- well, I'll let you --

5 MS. ROWLAND: I was going to say, I would
6 actually think that in terms of -- if you had your
7 fictitious copyright.com email address and all of
8 a sudden the Copyright Office changed it, but
9 you'd had this email address for like 10 years,
10 that would be way worse for you if your email --
11 if you had to swap out of your email address
12 because this is like your personal -- this is like
13 your address, right, versus a refrigerator.

14 So to me, that would actually be more of
15 a problem if you had like to keep going with this.
16 They introduced something that would make you
17 switch to a different thing. And it seems less
18 like copyright and more like there's a contractual
19 issue and there's like the whole EULA business and
20 whatnot that we're going to be talking about
21 later. And I wonder how you would kind of parse
22 between the copyright versus the kind of
23 contractual issues here, because they are two
24 separate buckets, right? So do you have any
25 thoughts on that?

1 MR. MCCLURE: I don't think it's -- I
2 think -- I mean, as a 24-year-old, I think it's
3 easier to switch emails than it is to switch a
4 refrigerator. But that's because I have no
5 experience switching refrigerators and I switch
6 emails all the time.

7 MS. ROWLAND: I have a 20-year-old email
8 address.

9 MR. MCCLURE: Fair enough. So that's all
10 I will say. I want to let other people have a
11 comment. But I'll think about what you asked.

12 MR. DAMLE: Thank you. Mr. Wiens? Thank
13 you so much for your patience. I appreciate it.

14 MR. WIENS: Sure. And -- sure. So I'll
15 give you a bit of background on myself and, again,
16 how maybe I can help and then I'm happy to address
17 any specific questions. I'm a software engineer.
18 That's what I studied in school. I have built
19 computers out of physical switches. I have
20 programmed digital logic to simulate a computer.

21 And in the course of learning how to be a
22 software engineer we spend a lot of time as
23 software folks thinking about copyright and then
24 we're building products that then go out in the
25 everyday world that people don't necessarily see.

1 One of the first kind of large, major
2 projects I worked on was building a robot and we
3 went all the way down to -- I mean, we're like
4 writing assembly language at the lowest level all
5 the way up to the high level -- high level logic.
6 And then, I started iFixit, which is a repair
7 manual for everything. And iFixit's mission is to
8 teach people how to repair all the things that
9 they have and sometimes those repairs are you have
10 an iPhone and the screen is cracked. Let's get new
11 glass, put it on the iPhone. It's a simple
12 physical parts swap.

13 Sometimes, it's more complicated. I have
14 -- this is a PlayStation. So this is interesting
15 from a number of perspectives. Of course, we have
16 copyright concerns about pirating software on
17 this. But as a result of that, the optical drive
18 and the main circuit board on this are linked
19 together.

20 And so, if you have a hardware failure in
21 the optical drive, the DVD drive, you have -- and
22 you put a new optical drive in, you have to synch
23 it up with the main board. And in order to do
24 that, you have to modify the firmware and bypass
25 some encryption.

1 You can either do that or you can do a
2 repair that's twice as expensive and you can swap
3 out both the optical drive and the main board to
4 keep them coupled together, which is the non-
5 software fix. You're just buying a board that
6 already has software embedded.

7 We have been able to work with a broad
8 spectrum of products. I spent a lot of time over
9 the last couple of years working with farmers.
10 Farmers are buying a \$200,000 tractor that has
11 some software on it. It's got something like seven
12 separate microcontrollers on it. And if they buy a
13 repair part, that repair part may or may not have
14 software on it. They don't necessarily know.

15 When I have talked to farmers about this
16 concept of ownership and John Deere tells them
17 that they have an implied license to use the
18 tractor for the life of the vehicle, they're
19 astonished because their concept of ownership is
20 kind of rooted in the core of what America has
21 always been, which is I paid you money for this
22 thing, it's mine.

23 And to be able to say, hey, you want to
24 do a repair on this, and that involves going in
25 and modifying a couple of bits in that software

1 and there are copyright implications of that and
2 you have to have permission from the manufacturer
3 really gets a lot of farmers very angry. And it's
4 not been a good thing to be a John Deere dealer
5 over the last year or two, as farmers have been
6 storming in asking copyright questions. And you
7 know, I understand we're talking about consumer
8 products. But this is really a challenge that
9 impacts all kinds of products.

10 I was looking on some parts websites last
11 night, and you can buy a 32-bit microcontroller
12 for about five cents, in quantities of a thousand.
13 Okay, so five cents, and if you imagine I'm going
14 to buy that and I'm going to put it on a product.
15 Let's say I'm making a greeting card and I want
16 the greeting card to play music. So I've got my
17 five-cent microcontroller. I'm going to embed that
18 in a product, sell it to a distributor. Maybe I'm
19 selling it to them for 10 or 15 cents. They're
20 going to double their margin.

21 You can have a product with 32-bit, fully
22 modern software that sells at retail for 50 cents.
23 And it can be reprogrammable. So I can take --
24 I've got the data file that's the Happy Birthday
25 song, that of course we all know about from the

1 world of copyright. But ignore the data file. Now
2 I've got the software on this chip. Is it legal
3 for me to sell this greeting card to somebody
4 else? Is there implied license of that? Can I go
5 in and modify the software? We would think of this
6 from a hardware repair perspective as it's mine. I
7 bought it. I should be able to do what I want with
8 it. If I want to cut the greeting card up and
9 modify it, I can.

10 There's a tremendous amount of
11 expectations of things we've been able to do with
12 personal property, that the moment you add
13 software, which costs five cents, to a product,
14 you change everything. So I'm a tinkerer. I like
15 getting in and messing with things and taking them
16 apart and modifying things. And I have the
17 capability to modify software just the same way
18 I've always been able to modify hardware.

19 But the rules that have always governed
20 what I can do with personal property -- I can cut
21 it up, I can modify it, I can tinker with it, I
22 can repair it if it breaks -- are becoming much,
23 much more complicated in the realm of software.
24 And I think that what farmers need and what
25 consumers need across the board is simplicity.

1 And if you look at the DMCA rulemakings
2 and the exemptions, there's 86 pages of exemptions
3 that were granted. No farmer is going to be able
4 to parse 86 pages of copyright rulings that, by
5 the way, don't go into effect until this next
6 October. So across the board, if you have any
7 guidance back to Congress, it needs to be
8 something simple.

9 MR. RILEY: So first of all, let me thank
10 you for bringing your PlayStation here, and I hope
11 you're entering that into the record so we can
12 bring it back.

13 MR. WIENS: Happy to.

14 MS. ROWLAND: And everything else there
15 too.

16 MR. WIENS: I also have -- yeah, this is
17 a LeapFrog tablet. So this is like in the -- like
18 it might be a specialty like firmware, embedded
19 firmware, but it also can be modded to be a
20 general purpose computer.

21 MR. SHORE: I call dibs.

22 MR. RILEY: So this question came up some
23 in the 1201 proceedings, and I know we're not
24 going to get into it here, but some manufacturers
25 suggested that when people tinkered with their

1 machines, there was this branding issue. What if
2 the machine failed and people see a John Deere
3 brand on the side? They don't necessarily
4 understand that someone has altered the software.

5 MR. WIENS: Right.

6 MR. RILEY: What do you think of that
7 line of argument?

8 MR. WIENS: Right. Yeah, so that's an
9 interesting argument. The same issue has been in
10 effect for physical products, right? I could buy a
11 Honda car, like damage it or get in a crash and
12 then repair it poorly and sell it and it has the
13 Honda brand on it. So I have heard that argument
14 and I don't think that's a new or interesting
15 argument because that's always been the case with
16 property. You can -- you can manipulate property.

17 What's interesting about software is it's
18 actually trivial to verify that the software
19 hasn't been modified. You do a checksum. Are you
20 familiar with --

21 MR. RILEY: Yeah.

22 MR. WIENS: Okay. So you just do a
23 checksum and you can instantly say is this the
24 software or you can just the original software
25 from the manufacturer, flash it and you're back to

1 square one. So I don't find that a particularly
2 compelling argument.

3 MS. ROWLAND: That does almost sound more
4 trademark-related, I mean, depending on if you
5 were to resell it. There's a whole jurisprudence
6 about reselling goods and whether or not they run
7 afoul of trademark laws.

8 But it's an interesting -- in the world
9 of trademark.

10 MR. RILEY: Yeah.

11 MR. BERTIN: Could I ask just a general
12 question, Mr. Wiens? I have this sense that as a
13 society, we've sort of got to a point where you
14 have a product, you buy it and you get the
15 periodic updates from the provider. Maybe you
16 understand what they're for. Maybe you don't.

17 More often than not, you simply accept
18 them --

19 MR. WIENS: Right.

20 MR. BERTIN: -- without questioning them.
21 And you keep doing that for some period of time.
22 And then, eventually, the product stops working
23 and then you just simply go out and buy a new one.
24 And I think that this is becoming more -- just
25 from my own personal sense -- that this is

1 becoming more and more prevalent, that this is
2 just sort of the way things are. Do you have any
3 thoughts on that, sort of this era in which we now
4 seem to be going towards?

5 MR. WIENS: Right. Yeah, well, and so
6 that gets to the heart of why I am doing this and
7 why I started iFixit, which is that manufacturing
8 electronics is different than manufacturing a lot
9 of other products in that it's more, much more
10 resource-intensive. The amount of raw materials
11 that it takes to manufacture a cell phone -- like
12 I have an iPhone here. It'd take over 500 pounds
13 of raw material to manufacture an iPhone.

14 Semiconductors are the most resource-
15 intensive product that we manufacture. The
16 semiconductor industry consumes over 70 percent of
17 the world's supply of several critical metals that
18 are in -- and they're hugely geopolitically
19 important. Rare earths, things like the neodymium
20 in the magnets in these things, can't be recovered
21 in recycling. The cobalt and the lithium in
22 batteries in these phones can't generally be
23 recovered in recycling.

24 And so, we have a massive environmental
25 problem that we're making all these products and

1 we don't have systems in place that make it easy
2 to repurpose them. And so, for example, this
3 PlayStation 2 -- okay, so we've got some new
4 PlayStations since then. So no one really is
5 playing or pirating games on a PlayStation 2. But
6 this is a perfectly good computer and actually
7 people have built supercomputers out of clusters
8 of PlayStation 2s bundled together.

9 So the hope would be that we can -- that
10 one of the solutions to this e-waste crisis that
11 we're in is to allow people to repurpose and
12 modify electronics for new uses that the
13 manufacturer didn't intend. There is a project in
14 Indonesia where they have issues with illegal
15 mining -- or illegal logging. And so, they have
16 taken old cell phones that people don't want
17 anymore and set them up throughout the forest with
18 solar panels and they're using the microphone and
19 the cellular transmitter in them to detect illegal
20 logging.

21 And it's a really cool project and
22 they're able to do it with phones that maybe they
23 couldn't have afforded technology that
24 sophisticated. But it's our five-year-old phones.

25 Now, of course, to do that, you're going

1 to need to go in and modify the original software.
2 But that's kind of the same thing as modifying the
3 hardware and attaching a solar panel to it. You're
4 just changing a physical thing that you own.

5 MR. DAMLE: So just a couple of follow-
6 up -- I mean, just to go back to my original
7 question if we're looking at it from the copyright
8 law perspective, what do you think - - is there
9 something in the copyright law that you think is
10 preventing that kind of reuse and repair that
11 could be clarified or improved in some way or -- I
12 mean, looking at existing doctrines, like fair
13 use, oftentimes people look at fair use for --

14 MR. WIENS: Right.

15 MR. DAMLE: -- things like
16 interoperability and reverse engineering. Do you
17 think those existing doctrines are sufficient or
18 does Congress need to do something more specific?

19 MR. WIENS: Right. Yeah, so there's a
20 huge spectrum of issues where copyright is causing
21 problems for people. One is 1201. We'll talk about
22 that tomorrow.

23 MR. DAMLE: Right.

24 MR. WIENS: But outside of 1201 and this
25 fear of modification, we've seen across the board

1 the folks who end up with this expertise or end up
2 selling products that are based on derived
3 software frequently are based outside the United
4 States.

5 When we were looking at the tractor
6 situation and the challenges that farmers are
7 having, all of the companies that sell chips to
8 modify and improve fuel efficiency on farm
9 equipment are in Canada and the UK. There were
10 none of them in the U.S. And it's the same thing
11 with diesel equipment. There's a lot of
12 modifications. You want to be able to make the
13 diesel equipment that you can't. We are seeing
14 dealers threaten local mechanics over access to
15 things like diagnostic software.

16 I have a friend in San Luis Obispo. He's
17 a diesel mechanic. He's phenomenal. He repairs
18 everything from tugboats to big Mack trucks. And
19 he has to have access to the software because he's
20 got to go in and make some modifications. So like
21 a diesel engine is sort of the -- it's basically
22 the same platform. There's four or five major
23 manufacturers. But some manufacturers have
24 settings that make repair easy and other
25 manufacturers don't.

1 And so, you have to go in there and
2 modify the actual software itself. And when he
3 goes to the local dealer and asks for either parts
4 or diagnostic components to connect into the
5 engine, they start treating him like a competitor
6 and they cut him off from access to the parts and
7 tools that he needs.

8 So yes, I would say anything that
9 transfers control from the owner back to the
10 manufacturer ends up as a stifling influence. And
11 what we have seen is that -- so another friend is
12 a local farmer. And over time, they used to do all
13 of the repairs on their farm equipment themselves.
14 And over time, they've had to do less and less
15 because as functionalities move from hardware into
16 software, they've had less control over the things
17 -- over the physical equipment. And they've had to
18 start going back to the dealer.

19 MS. ROWLAND: What is your solution?

20 MR. WIENS: I would pass to Kit for that.
21 Ms. Walsh has I think thought about solutions more
22 than I have.

23 MR. DAMLE: Sure. Yeah, Ms. Walsh, if you
24 want to talk specifically -- the Copyright Office,
25 to the extent we're talking -- to the extent

1 copyright law is a solution, we'd be curious to
2 know about that.

3 MS. WALSH: Well actually, my first point
4 would be to build on something that Mr. Cox said
5 which is that the rightsholders are concerned
6 primarily about commercial competition and that
7 they're not concerned about what individual
8 consumers are doing. And that's probably
9 particularly true in a context where you have a
10 device -- again, you can't sort of duplicate your
11 friend's refrigerator for free. There's no risk of
12 sort of consumptive --

13 MR. DAMLE: I'm sorry -

14 COURT REPORTER: I'm sorry. Your
15 microphone is turned off.

16 MS. ROWLAND: No, it's on.

17 MS. WALSH: Oh, it's illuminated. Let's
18 try moving it closer. Okay.

19 MR. DAMLE: Is that good?

20 COURT REPORTER: I think so, yeah.

21 MR. DAMLE: Okay. Thanks.

22 MS. WALSH: Okay. So I was building on
23 something that Mr. Cox said earlier about the
24 interests of rightsholders being primarily about
25 commercial competition and infringement that might

1 be involved in competition and not with the acts
2 of individual consumers and that that's
3 particularly true with embedded software where you
4 can't copy your friend's refrigerator. You
5 wouldn't download a car. You can't download a car.

6 MS. ROWLAND: Well, not yet.

7 MS. WALSH: Maybe a 3D print file.

8 MR. BERTIN: 3D printer.

9 MS. WALSH: And actually, a very -- that
10 presents a simple fix, which is that there could
11 be a minimum threshold of commerciality for
12 something to be infringement. That's a
13 particularly good fit again for the embedded
14 software context where there are markets for the
15 physical objects. That would fix a huge number of
16 the problems with individual self-repair, with
17 noncommercial research and so on.

18 If this is really a problem about large,
19 industrial activities, which is the origin of
20 copyright law and sort of where copyright law was
21 its best was before it spread into everyday
22 activities of every single American and person in
23 the world. That presents a relatively simple way
24 of ameliorating a lot of the harms that we're
25 hearing about today.

1 I would also like to point out that
2 market forces haven't provided great solutions, in
3 part because people don't have good information
4 and in part because people feel powerless.

5 There's a Pew Research study that showed
6 that 91 percent of Americans thought they had lost
7 control over their privacy with respect to
8 software-enabled services and devices and most
9 wanted the government to do more to protect them,
10 and --

11 MR. DAMLE: Is that -- again, like we're
12 the Copyright Office. There are lots of other
13 agencies looking into these privacy issues. You
14 know, it sort of hits us glancingly in the
15 copyright context. But I'm just wondering what the
16 sort of copyright --

17 MS. WALSH: Yeah.

18 MR. DAMLE: -- sort of angle on that is.

19 MS. WALSH: So it's actually a lot of the
20 other agencies are trying to come up with
21 affirmative consumer protection measures that will
22 protect people's privacy. And copyright is a
23 little bit flipped because what we have is
24 copyright rules that in many cases prevent people
25 from protecting themselves.

1 So when you have 1201 that keeps people
2 from auditing devices and figuring out, hey, my TV
3 is dialing back to Korea and sending voice data
4 there, then that would prevent people or watchdog
5 groups from identifying privacy harms that are
6 taking place.

7 If we don't let people modify what their
8 devices are doing, devices that are full of
9 microphones, that are -- that have control over
10 your communications, then people can't, if they
11 determine, oh, I don't actually want Apple to be
12 tracking my location all the time -- if you cannot
13 modify the functioning of that device, due to a
14 provision of copyright law, that is a way
15 copyright law is actually acting to harm consumer
16 privacy.

17 So the consumer protection approach there
18 is dialing back the restrictive rules that are
19 keeping people from protecting themselves and that
20 works in conjunction with affirmative rules that
21 prevent the privacy invasions in the first place.

22 So sort of the best way for the mark to
23 be able to moderate harms to privacy as well as
24 other issues that people have when they're trying
25 to purchase devices and they want to know if they

1 can repair it, if they can lend it and so on, is
2 for the default rule to be a consumer protective
3 rule. And if manufacturers want to diverge from
4 that with technological restrictions or
5 contractual restrictions, then those need to be
6 very prominent and very visible.

7 We'll talk about this more in the next
8 panel, what happens when manufacturers try to get
9 people to waive, in these elaborate one-sided
10 EULAs, important consumer protection rights. That
11 can undermine all of the protections that Congress
12 has tried to put into place in the form of fair
13 use, in the form of statutory exemptions to 1201,
14 117 rights, et cetera. So really having limits on
15 the scope of the exclusive rights is the best
16 measure.

17 Fair use is a very important catchall
18 measure. But it can't be the first line of defense
19 for people. If you always have to rely on fair use
20 to do your own car repair, to innovate, to enter a
21 market, that can be risky and unpredictable. So
22 again, narrowing the scope of the exclusive rights
23 in the first place is the most predictable and
24 helpful means. Carve-outs can be helpful, as long
25 as it's clear that they're a floor on permitted

1 activity rather than a ceiling.

2 So if we identify a narrow problem and
3 make a carve-out for it as opposed to narrowing
4 the exclusive right in the first place, then it
5 should just be very clear that that's a floor,
6 that's a safe harbor and you still get the full
7 scope of your fair use rights as a backup. But
8 that clarity has been introduced just to make it a
9 little bit easier.

10 We also advise people all the time on the
11 need to be concerned about some of the contractual
12 provisions that restrict reverse engineering,
13 restrict research. As part of our Coders' Rights
14 Project, we do that. And I have a list of consumer
15 products that have restrictive EULA terms.

16 MR. DAMLE: Sure, and we can talk about
17 the licensing terms in the next panel. But we're
18 running short on time on this panel --

19 MS. ROWLAND: Can I ask a little, one
20 quick question?

21 MR. DAMLE: Yeah.

22 MS. ROWLAND: It sounds like you're kind
23 of focusing on a solution that would be about a
24 noncommercial use by an individual. Is that a fair
25 assessment of what you're going for or --

1 MS. WALSH: That is one large swathe of
2 activity --

3 MS. ROWLAND: Right.

4 MS. WALSH: -- that can relatively
5 easily, if we can all agree that that's not what
6 rightsholders are traditionally concerned about,
7 then that would be a good start.

8 It's not -- there are other activities.
9 So the ability for other companies to come in and
10 compete in the marketplace in a legitimate way by
11 reverse engineering, by creating interoperability
12 with APIs, that's also important, something that
13 we care about.

14 MR. DAMLE: Okay. So Mr. Cox, I feel like
15 I should give you a chance to response to all of
16 that.

17 MR. COX: Thanks. There are a few
18 different threads to respond to, but a couple of
19 basic comments. One is I don't think you should be
20 using copyright law to fix privacy problems.

21 You can remove restrictions and perhaps
22 protect privacy more. But that has a lot of other
23 unintended consequences. That's not copyright
24 policy. That's privacy policy and I happen to be a
25 huge fan of the EFF in that area. So I'm very

1 sympathetic to privacy concerns. I just don't
2 think they can be solved with copyright.

3 MR. DAMLE: Well, do you think that -- I
4 mean, do you have a sense of where they should be
5 solved? What is the --

6 MR. COX: I'm getting into personal views
7 at this point.

8 MR. DAMLE: Okay. All right. That's fine.

9 MR. COX: I don't want to try and sum up
10 BSA's position on that.

11 MR. DAMLE: Okay.

12 MR. COX: The second point is that a lot
13 of these issues come down to business model. The
14 story of the tractor or the PlayStation, the
15 personal, noncommercial exception works up to a
16 point. But to take, for example, the Nintendo or
17 PlayStation and turning it into a brick. Most of
18 those things -- as a consumer, it would be
19 frustrating to spend a couple hundred dollars and
20 then have your thing be a brick. You're out a
21 couple hundred dollars.

22 But what that misses is that you got that
23 thing for a couple hundred dollars because it's a
24 business model that sells that thing as a loss
25 leader. Most of the console games makers have sold

1 their consoles at a loss on the presumption that
2 they can use their constellation of legal rights
3 around that device to make money on the back end.

4 And this is a business model you see in
5 game consoles. You see it in printers. You see it
6 in a variety of areas. Competition and choice and
7 business models, there's discipline on that. If
8 John Deere makes too much trouble for too many of
9 their consumers at some point, people are going to
10 be driving Lamborghini tractors and that is a
11 tractor maker. It's one of the biggest tractors in
12 Europe.

13 So you can't separate the individual
14 problems from the business models. And fixing that
15 with copyright law takes away the certainty and
16 stability that allows companies to experiment with
17 business models and find ones that do and don't
18 resonate with consumers. And companies get
19 disciplined by consumers if they go too far in any
20 of these directions. People push back. So I'll
21 stop there because you said we're short of time.

22 MR. DAMLE: Yeah. If there's anything
23 else, I mean, we can go a little over if there's
24 anything else you wanted to respond to.

25 MR. COX: That's it, I think.

1 MR. DAMLE: Okay. All right. We'll just
2 get two more people for quick comments. You have -
3 - Mr. McClure, and then, Ms. Ailsworth, to close
4 us out, the first panel? Do you want Ms. Ailsworth
5 to go first or -- okay.

6 MS. AILSWORTH: I was just going to
7 follow up quickly, just to make sure my point on
8 embedded versus non-embedded gets across because I
9 think that's something that could show up in
10 whatever final legislation the Judiciary Committee
11 puts forward.

12 So I just want to caution using an
13 example of chip technology in vehicles. And I want
14 to make sure that if embedded shows up in the
15 legislation, and we are defining things on a
16 dichotomy, embedded versus non-embedded, that
17 embedded is very well- defined because there are
18 situations where the software or whatever added
19 functionality that's using software is coming
20 direct from the original manufacturer on the
21 vehicle, there are situations where it's installed
22 at the dealership prior to first retail sale.

23 So, and then there's obviously the
24 vehicles purchased and then taken to a shop and
25 it's put on there. So at what level is this

1 embedded software? That needs to be fleshed out a
2 little bit. And then, another example would be
3 chips that are soldered on versus not soldered on.

4 The vehicles used to come with engine
5 control modules that were not soldered on and they
6 would be switched out quite easily.

7 Now, almost across the board, they are
8 soldered into place. And so, if you want to
9 reprogram it, you need to re-flash it. It's not as
10 easy just to switch it out. So does that affect
11 whether we're deigning this as embedded versus
12 non- embedded.

13 MR. DAMLE: Okay. Thank you. Mr. McClure,
14 you want to close out our first panel?

15 MR. MCCLURE: Yeah. Just to state
16 briefly, the questions that you asked me to think
17 about were Google versus a refrigerator and also
18 the copyright versus contract. And, well, it came
19 up again, but Google -- in this sort of Gmail
20 example, of course it was software alone. And
21 there's a consumer expectations idea that kind of
22 floats through that point. We talked about
23 personal property and sort of ownership
24 expectations there.

25 Just to respond to Mr. Cox very briefly,

1 I think his point is well-taken that these sort of
2 business models wouldn't arise necessarily if
3 there weren't these copyright tools at hand. But I
4 think that goes to sort of the broader theme that
5 businesses are able to respond very flexibly to
6 the tools they have at hand and use them in
7 certain ways that maybe we didn't expect or didn't
8 anticipate. And do we necessarily want them to
9 have the ability to be able to use copyright to
10 leverage contract, to have -- to sort of pass the
11 baton off to contractual lock-in? And I think I
12 just wanted to push back on the ease of switching
13 a refrigerator a little bit. It could be easy.

14 But if you had a refrigerator that was
15 bricked and somebody who couldn't afford to buy a
16 new refrigerator or who was in an emergency
17 situation or whatever, I mean, this is perishable
18 food that's in their home. And I can think that
19 sort of gets to safety issues and things outside
20 the scope of copyright. So, and I see --

21 MS. ROWLAND: Yes. I think it's about
22 demographics. It's a demographic decision.

23 MR. MCCLURE: Sure.

24 MS. ROWLAND: And for the record, I was
25 saying it was a copyright.com email address. I was

1 not targeting Gmail.

2 MR. MCCLURE: Fair enough. Fair enough.
3 But I think the broader point that I just wanted
4 to make was that there are going to be sort of far
5 reaching implications and as all refrigerators
6 have embedded software, we're not going to be
7 choosing between a normal functional fridge and an
8 embedded software fridge. We're going to be
9 choosing between embedded software fridges. And
10 for most consumers who don't have enough
11 information to make that choice effectively or who
12 don't know how it's going to affect them
13 downstream, it's something to be wary of.

14 MS. ROWLAND: Can I say one thing? It's
15 kind of like a point, I suppose --

16 MR. DAMLE: Sure.

17 MS. ROWLAND: -- which is -- and maybe we
18 can talk about it in later sessions, that, you
19 know, we had a lot of discussion in D.C. about oh,
20 well, if you don't like this, you can just go to
21 that.

22 But at some point, it becomes like an
23 industry standard, right? So at what point --
24 every refrigerator is going to have like the same
25 software embedded. So it's kind of when is the

1 market not an option anymore.

2 MR. DAMLE: Okay. Something to talk about
3 in the next panel. Perfect segue to our next
4 panel. So let's take a 10-minute break and try to
5 be back here at -- well, let's just say 10:15.
6 Take a nine-minute break. So let's try to start
7 the next panel at 10:15. Thanks.

8 (Whereupon, the foregoing went off the
9 record at 10:06 a.m., and went back on the record
10 at 10:15 a.m.)

11 MR. RILEY: We are now on to our second
12 panel, which will discuss ownership and
13 contractual issues as they relate to consumer
14 devices with embedded software. This panel was
15 pretty lively in D.C., and we hope it will
16 continue to be spirited here.

17 Whether a software transaction is
18 characterized as a sale or a license has important
19 implications for consumers, including whether
20 those consumers qualify as owners of the software
21 under section 109 and 117 of the Act, provisions
22 we will discuss more in panel four.

23 In submitted comments, some parties
24 suggested that the government should limit
25 parties' ability to contract away certain rights,

1 especially through clickwrap or shrinkwrap end-
2 user license agreements or terms of service.

3 Parties also suggested that enacting a
4 statutory preemption when a copyright holder tries
5 to enlarge their rights granted under copyright by
6 contract.

7 Other suggestions include intervention
8 when important public interest considerations are
9 at issue, such as privacy or security. Even more
10 wanted to protect a right to repair or tinker,
11 despite any contractual prohibition. Of course,
12 some in the D.C. hearings thought these were an
13 extreme measure and suggested that the government
14 should not interfere with parties' freedom of
15 contract without a compelling interest.

16 As we go through this panel, as is true
17 throughout these proceedings, any real-world
18 examples of contracts regarding software on
19 embedded consumer devices are helpful. Before we
20 get started, we have two new panelists. I'll let
21 them introduce themselves. Mr. Sheffner?

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

25 MS. SOLLAZZO: And I'm Erica Sollazzo.

1 I'm here from Stanford's IP Clinic on behalf of
2 Engine Advocacy.

3 MR. RILEY: Great. Thank you. With that,
4 let's open the discussion. And same as with the
5 first panel, if you're interested in responding,
6 please tip your tent card to the side.

7 Generally, how often are software-
8 enabled consumer products accompanied by terms of
9 service, end-user license agreements or other
10 licenses or contracts? Would anybody like to kick
11 us off? Ms. Walsh?

12 MS. WALSH: I would say that it's the
13 norm, not always, but that it is very common for
14 there to be assertions of an enforceable contract
15 that accompany the sale of a device. And sometimes
16 the contract is hidden at the back of a user
17 manual. Sometimes when you initiate the device,
18 you need to click "I Agree." Sometimes it's on
19 the labeling and these have different levels of
20 enforceability. But it's very common that there
21 are restrictions on these terms. And many of them
22 include terms that you restrict rights that you
23 traditionally have under copyright law or under
24 general free speech principles.

25 I have a few examples. One is that the

1 Nest Labs' EULA, the Nest home automation system,
2 includes a prohibition on discussing the
3 performance of the product, so sharing the results
4 of functional and performance tests with respect
5 to the product. It's common to have a prohibition
6 on reverse engineering.

7 As one example, the Apple Watch Terms of
8 Service, but that's one if you pick up an
9 arbitrary terms of service relating to a software-
10 enabled device, you're likely to see a reverse
11 engineering prohibition.

12 Another one that's quite common is a ban
13 on the use of non-approved software or hardware,
14 so anything that the manufacturer has not given
15 permission to run on the device or to plug into
16 the device. That's a common prohibition. For
17 example, the Windows 10 license includes an
18 ability to remotely kill-switch your software if
19 you use non-approved software or hardware.

20 Another restriction is a bar on using the
21 software on a secondhand device, which is a sort
22 of clever attempt to get around the first sale
23 doctrine by saying, sure, you can sell someone --
24 this is the Cisco router terms of service -- you
25 can sell someone your Cisco router. But then, they

1 don't have a license to run the software on it. So
2 you've sold them something that has very little
3 value to them.

4 One that we've talked about earlier is
5 the ability to make continued use of the device in
6 the event that there's either a new software
7 update that the manufacturer would like you to
8 install or a new terms of service or EULA that the
9 manufacturer would like you to agree to.

10 The example which we already discussed is
11 the Nintendo Wii U, which is not the only one but
12 it is the one that I have handy because the device
13 was actually bricked and there was a very unhappy
14 user who said I would like to keep using the
15 device that I paid for in the way that it
16 functions until today, until Nintendo called up my
17 Wii U and said, stop working, make this person
18 agree to new terms or do nothing. Don't let them
19 keep playing single-player in their home. Don't
20 give them access to their saved files. Just stop
21 working.

22 MR. RILEY: So can I ask about the Wii U?
23 Has there been any lawsuits regarding that
24 particular incident or --

25 MS. WALSH: Not that I'm aware of.

1 MR. RILEY: Okay. But we did see an
2 earlier example of I think -- Mr. Shore brought up
3 the Xbox. Xbox One had always on -- basically this
4 prohibition from people being able to play without
5 it being connected to the internet, which was
6 turned off because of basically consumers being
7 upset by this and rising up.

8 What's the difference between something
9 like the Wii U and the Xbox One where we have this
10 bricking and consumers being able to change their
11 contractual terms in what was their terms of
12 service on the Xbox One versus the Wii U?

13 MS. WALSH: I think people had a lot more
14 leverage at the time that the controversy arose
15 around the Xbox One. So that was before the device
16 was issued. Microsoft was trying to build hype for
17 it. It hadn't already had its initial burst of
18 sales, whereas with the Wii U, this is something
19 that arose later on where people had already paid
20 out. They'd paid hundreds of dollars.

21 It was in their living room. They'd had
22 saved games and it was -- both the public had less
23 leverage with respect to Nintendo and also the
24 typical user, this would just contribute to their
25 sense that I don't like what's being done to me,

1 but there's nothing I can do. It's easier to just
2 click through. Probably it's not going to get me
3 into any trouble. I want to keep playing my games.

4 So it's at that point a combination of
5 less leverage and the idea of what you would be
6 losing as opposed to not buying some product
7 that's unappealing because of its terms, you'd
8 actually be losing something that you've invested
9 time and money into. So the leverage of the
10 company is greater to just get you to click
11 through and agree to the terms to be able to keep
12 using your property.

13 MR. RILEY: All right.

14 MS. WALSH: A couple more common terms -
15 - one is a lot of the terms of service claim that
16 you are waiving your right to prepare derivative
17 works, including non-infringing derivative works
18 like parodies, like software patches and so on.

19 So the Fitbit is an example. Blizzard
20 terms of service is another example. And related
21 to that, terms often ask you to waive your ability
22 to engage in lawful circumvention of technological
23 protection measures, so for purposes of
24 accessibility or interoperability. The Sony
25 PlayStation 4 is an example of a software-enabled

1 device that has that provision in its terms of
2 service.

3 MR. DAMLE: So, sorry, on the last one,
4 it's even where there's regulatory exemption --

5 MS. WALSH: Exactly.

6 MR. DAMLE: -- the contract says you
7 waive your right to assert that regulatory
8 exemption?

9 MS. WALSH: Right. It's a contractual
10 restriction that is stated in terms of a general
11 ban on engaging in circumvention, which doesn't
12 have a carve-out. So some actually do have a
13 carve-out and say if it's lawful circumvention,
14 then it's not a violation of the contract and
15 that's fairly responsible. But that's -- there's
16 nothing that compels companies to do that and it's
17 not a universal practice to do that.

18 That's an example of the way that if
19 these contracts were effective at waiving all of
20 the rights that they're trying to waive, it would
21 erase the balance that Congress has tried to enact
22 and that the Copyright Office, through the
23 rulemaking process, tries to enact by creating
24 exemptions to the exclusive rights that copyright
25 holders have.

1 MR. RILEY: I wanted to go back for a
2 second. Cisco has been brought up a couple of
3 times regarding their terms. But Cisco also has
4 terms that say software bundled with hardware is
5 subject to a software transfer relicense policy.

6 I think on an earlier panel, or on the
7 panels in D.C., we talked a lot about the
8 difference between business entities and
9 enterprise-level companies versus those with
10 basically -- I don't want to say a consumer
11 because I know Mr. Shore will be upset -- but
12 those that are not subject to such negotiated
13 licenses.

14 But we did see in Cisco at least that
15 there were some terms that would apply more
16 towards that consumer end of the spectrum, the
17 user end and not a business end. I'm just -- do
18 you see a difference there in terms of how should
19 we approach this versus when we have a negotiated
20 contract versus a non-negotiated contract?

21 MS. WALSH: That's exactly -- the
22 distinction that you just arrived at is exactly
23 the way that I think about it. Do we have a
24 contract of adhesion where there is -- which is a
25 term of art that courts are pretty good at

1 figuring out, when we have a contract of adhesion,
2 when it's non-negotiated. There's a difference in
3 bargaining power.

4 The conditions of the transactions
5 suggest that it's -- that it's take it or leave it
6 and that there's not an opportunity to alter the
7 terms, which is the norm with respect to EULAs,
8 terms of service and so on. Then, it's appropriate
9 for a different set of rules to apply.

10 And in that context, you ought not to be
11 able to waive fundamental rights, including fair
12 use, including the other rights that are granted
13 to you under copyright law. If it's a contract of
14 adhesion, you cannot. You should not be able to
15 waive those rights. But to honor freedom of
16 contract, if you have parties who are engaging in
17 an actual negotiation, then that's the kind of
18 scenario where you could engage in trading,
19 freedom to operate, as long as it's conspicuous
20 and transparent.

21 It's not something that's slipped in or
22 imposed on someone through a contract of adhesion
23 or other inappropriate bargaining practice. So the
24 clear per se rule for contract of adhesion is a
25 non-waiver of these rights. And then, if you want

1 to do a business-to-business, truly negotiated
2 transaction between sophisticated parties, then
3 you can order that as you like.

4 MR. RILEY: And did you have any -- well,
5 maybe this is for other people, as we go down the
6 panel. Is there ever any evidence that non-
7 business-to-business consumers have negotiated
8 terms out of contracts or no? Not that you know
9 of, or --

10 MS. WALSH: The non-business entities
11 that I know of that can negotiate these terms are
12 government entities, but not individual consumers.

13 MR. RILEY: Okay.

14 MR. DAMLE: I mean, so one question this
15 sort of conversation raises is -- to go back to
16 Ms. Rowland's two buckets, right -- I mean, we've
17 got the contract law bucket and we've got
18 copyright law.

19 And so, just to go back to what you said,
20 that courts are pretty good at figuring out what's
21 a contract of adhesion and declining to enforce it
22 -- to the extent that these terms are improper as
23 a matter of contract law, then -- so what would be
24 the -- well, I mean, assume that they're
25 enforceable as a matter of contract law. What's

1 the copyright implications of those terms?

2 MS. WALSH: To rewind one second --

3 MR. DAMLE: Right.

4 MS. WALSH: The courts are good at
5 figuring out when something is a contract of
6 adhesion. In terms of figuring out whether it's
7 enforceable or not, that can be very
8 unpredictable. And so, I wouldn't --

9 MR. DAMLE: Okay.

10 MS. WALSH: -- go so far as to say that
11 they've actually been good at vindicating the
12 rights that we're talking about here, particularly
13 when it's in the specialized area of copyright.

14 But to address your question about how we
15 think about contractual and copyright
16 restrictions, one of the most harmful practices
17 that emerges is companies essentially writing
18 their own law of copyright infringement, both by -
19 - so in a private contract, one means of doing
20 this is saying you're waiving defenses to
21 copyright infringement. You're waiving your right
22 to reverse engineer. You're waiving your right to
23 circumvent lawfully, to prepare lawful derivative
24 works.

25 And so, not all of the courts have gotten

1 it right in saying we should treat that just as a
2 contractual violation as opposed to --

3 MR. DAMLE: Yeah, so I'm curious about
4 that. So let's say I have a contract that says you
5 waive your right to fair use and I engage in
6 something that is a fair use. Is it your -- is it
7 your claim that that -- that courts might consider
8 that a copyright infringement, not just a contract
9 violation?

10 MS. WALSH: Courts -- so the Eighth
11 Circuit would and the rightsholders insist that
12 that's the appropriate rule. I disagree with that.
13 I think that's extraordinarily harmful to take the
14 private contract and use it as a means to
15 bootstrap into copyright infringement where you
16 have statutory damages. You have the ability to
17 take speech down with the DMCA takedown notices.

18 You have doctrines of secondary liability
19 that wouldn't attach otherwise and that was
20 actually at issue in *BnetD*. It was someone who
21 created software that interoperated with
22 Blizzard's online game.

23 And even if they themselves were not the
24 party to the terms of service, Blizzard
25 successfully argued that they were contributing to

1 the copyright infringement on the part of users
2 who were in violation of their end-user license
3 agreement and therefore when the software -- when
4 they engaged with the software, they needed a
5 license to do that, they were unlicensed. It was
6 infringement. BnetD was liable.

7 Now, the Ninth Circuit, in *MDY v.*
8 *Blizzard*, rejected that argument, saying that in
9 order for copyright liability to attach, the Act
10 has to have a nexus to copyright infringement. It
11 has to be within the scope of the exclusive rights
12 and --

13 MR. DAMLE: Do you think that's -- so the
14 Ninth Circuit's *MDY v. Blizzard* is the right mode
15 analysis, do you think, for courts to take when
16 they're analyzing these contracts?

17 MS. WALSH: So I think that *MDY* gets us
18 part of the way there. So in *MDY*, you could only
19 have copyright liability for acts that fell within
20 the scope of the exclusive rights of copyright.
21 And if you tried to get someone to waive -- if you
22 tried to attach copyright liability to something
23 totally unrelated to copyright, like cheating in
24 the game, then that would be clearly rejected
25 under *MDY*. If you tried to get copyright liability

1 to attach for a fair use, then by the logic of
2 *MDY*, that would also be rejected.

3 MR. DAMLE: Right. It's interesting
4 because --

5 MS. WALSH: That --

6 MR. DAMLE: Sorry. The representative - -
7 I will say the representative from Copyright
8 Alliance, and my colleagues can correct me if I'm
9 wrong -- at least the representative from
10 Copyright Alliance suggested that in that
11 situation, it would not be -- or he had a hard
12 time imagining why that would be a copyright
13 infringement, view at least that it would be a --
14 that, in his at the hearing, he suggested that
15 that would be just a contract violation.

16 MS. ROWLAND: Yeah. I do believe he and
17 Mr. Band had a back-and-forth about whether or not
18 it was something that the -- in litigation. I
19 think Mr. Band was saying kind of the same thing

20 Ms. Walsh is saying --

21 MR. DAMLE: Right.

22 MS. ROWLAND: -- that there is a concern
23 about what happened.

24 MS. WALSH: So --

25 MR. DAMLE: Right, right.

1 MS. WALSH: -- there are sort of two
2 reasons why *MDY* doesn't fully resolve the issue.
3 The first is that the theory that you need a
4 license to use a copyrighted work that you've
5 bought is a dangerous theory. That's not one of
6 the exclusive rights granted under copyright law.

7 And it depends -- it's software-specific.
8 It depends on the idea that you need a license to
9 copy your software into RAM, even though the RAM
10 copy exists for less than transitory duration. It
11 vanishes when there's no longer electricity to the
12 RAM. It ought not to be considered within the
13 scope of the reproduction right. And *MAI v. Peak*
14 is the Ninth Circuit case that said in this
15 scenario, we're going to consider this to be a
16 reproduction.

17 The Second Circuit has distinguished that
18 in the *Cartoon Network v. Cablevision* holding by
19 giving some life to the statutory requirement that
20 something actually persists for more than a
21 transitory duration. And if, as you should, you
22 can continue to use a copyrighted work without
23 infringing anyone's exclusive rights -- you can
24 read your book, you can use your software on your
25 computer, you can read your e-book on your tablet

1 -- then that takes away the leverage that
2 companies have to assert copyright infringement if
3 you violate the terms of service or the end-user
4 license agreement.

5 You're not engaging in any act that
6 implicates the exclusive rights of copyright when
7 you read an e-book, when you run software on your
8 device, except under the incorrect theory that
9 copying into RAM is an infringement of the
10 reproduction right. So that is one of the two
11 things that needs to be --

12 MR. RILEY: Yeah, and the other -

13 MS. WALSH: -- needs to be resolved.

14 MR. RILEY: Sorry.

15 MS. WALSH: And the other is the idea
16 that it would be helpful if the explanation that
17 you cannot waive fair use or your other free
18 speech rights that attach, as a user of
19 copyrighted works, is something that should be
20 extended to the contract realm as well with
21 respect to contracts of adhesion.

22 MR. RILEY: So I just have one more
23 question before we move on. You said before that
24 these rights were -- or these licensing terms
25 might have been hidden. But they're not hidden.

1 It's just that they're not very visible.

2 Is that right? Would you -- I guess my
3 question is for these contract terms to get people
4 to assent to them, would you have them look like a
5 disclaimer of warranty or would that even matter?
6 Are people going to read the terms whether they're
7 there or not?

8 MS. WALSH: Yeah. So at present, in the
9 marketplace, there's a spectrum of visibility for
10 terms. They could be buried at the back of a
11 manual, which is sort of the least visible, or
12 they might not even exist. In the 1201 hearings,
13 we heard Auto Alliance claim that when you bought
14 software, there was an implied license, that you
15 don't actually own it, even if there's no written
16 agreement. I think we can probably move that off
17 the table. There's when it's hidden at the back of
18 the manual, when it's in browse-wrap or clickwrap.

19 So there are tiers of visibility. But
20 even at the level of clicking through "I agree",
21 we know that people don't read those. We know
22 there have been studies. There was a study
23 released -- actually, for years we've known that
24 people don't read privacy policies in terms of
25 service because it would take you six weeks out of

1 every year to read all of the things that
2 purportedly bind you. So that's not an efficient
3 means of ordering relationships between vendors
4 and purchasers. And the citation for that is in
5 our written comments.

6 We also know more recently from a paper
7 that came out of UC Berkeley and Case Western that
8 when people click "buy now", so when they're
9 engaging in a transaction for consumer goods,
10 which could be software-enabled devices or other
11 media, then their expectations about their rights
12 at that media are most of them think they still
13 have the rights that they have with respect to
14 physical goods, even if there's a click-through
15 that's purporting to restrict their rights to
16 resale, of lending, et cetera.

17 So we know that people aren't reading
18 them. We know that people are buying things,
19 expecting that they're going to get the incidence
20 of ownership that they always had. And so, the
21 idea that this is a business model and consumers
22 are knowingly getting less for their money is
23 actually wrong. Consumers think they're getting
24 what they used to get for their money and then
25 they're surprised later on when their Wii stops

1 working, when someone says they don't have the
2 right to repair their tractor or other software-
3 enabled device.

4 MR. RILEY: Thank you.

5 MR. DAMLE: So Mr. Cox, I know that you
6 don't have your placard up now, but I thought that
7 this might be a good breaking point, if you wanted
8 to kind of respond to some of the points that were
9 made before we move on to some of the others.

10 MR. COX: Yeah, a couple of points to
11 make. Going back to something I said earlier, you
12 have to look at these situations and distinguish
13 whether what you're really dealing with is a
14 contract driven by software and copyright and the
15 fact that there's embedded software in the thing
16 and how much you're dealing with a service
17 contract because increasingly these are service
18 contracts. That's not to say that there aren't
19 issues with contractual terms in these.

20 But very often, what you're getting is
21 not just the thing and the software in the thing
22 but a continuous stream of services, access to
23 databases, access to content, access to upgrades
24 and updates. It's also tied to a business model
25 where oftentimes a lot of this is free and what

1 you're paying for -- what you're -- the way you're
2 paying for it is by being connected to a stream of
3 advertising or something else.

4 So oftentimes it's a service. Oftentimes
5 it's a business model issue. And those are things
6 that I think become a step removed from copyright
7 as such and therefore are not best addressed by
8 changes to copyright law.

9 MR. DAMLE: If I could just cut in there--

10 MR. COX: Sure.

11 MR. DAMLE: I'm sorry. Do you have a
12 specific response to Ms. Walsh's point that it's
13 really the RAM copy doctrine that allows these
14 contracts to happen, that that's sort of the hook
15 that allows a software company to engage -- to
16 essentially require a license from consumers?

17 MR. COX: I don't think it's the only
18 hook. I mean, you have to get pretty granular
19 about specific terms and specific provisions
20 before you get into whether what's being addressed
21 is use and therefore the *MAI* case is why that is
22 an issue.

23 I also think the discussion about *BnetD*
24 and *MDY v. Blizzard* is an important one because it
25 demonstrates the courts know how to look at these

1 things and draw distinctions between what's a
2 copyright issue and what is a contractual issue.
3 So there are mechanisms other than changing the
4 copyright statute to address these things.

5 MR. DAMLE: Does BSA have a view about
6 the hypothetical that Ms. Walsh and I were
7 exchanging about if I enter into a contract that
8 says I waive my fair use rights and then I engage
9 in some activity, that is violation of the
10 contract a fair use, whether my is a violation of
11 the contract and infringement or whether it's just
12 a violation of the contract?

13 MR. COX: I can't speak to that one. I
14 can get them to follow up with you on that.

15 MR. DAMLE: All right. Thank you.

16 MR. SHORE: Can I offer a specific
17 example in response to that?

18 MR. DAMLE: Yeah, Mr. Shore?

19 MR. SHORE: Okay. Because there are
20 instances where the rightsholders have used
21 copyright as a mechanism for enforcing contractual
22 rights. There was a case where Avaya brought suit
23 against a company called Continuant. And if you're
24 not familiar with the case, what Avaya -- Avaya
25 had a regime where it was -- these were post-

1 warranty contracts that you were required to
2 purchase if you wanted security patches.

3 And Continuant was a company I think in
4 the Northwest that was offering alternative
5 service contracts. And Avaya brought suit,
6 claiming that Continuant was violating the DMCA in
7 offering these -- their version of a post-warranty
8 service contract. So I mean, it's not a binary sort
9 of thing but -- MR. DAMLE: What was the DMCA
10 claim in that? I'm sorry. I'm having trouble
11 understanding what the DMCA claim would be.

12 MR. SHORE: And it was all dismissed.

13 MR. DAMLE: Okay.

14 MR. SHORE: So it wasn't founded. And
15 that was the point. But they tried to sort of
16 jerry-rig their contract almost of adhesion into
17 the DMCA. And the court said it failed. But we
18 shouldn't sit here and think that -- MR. DAMLE:
19 I mean, people --

20 MR. SHORE: -- one is contract --

21 MR. DAMLE: Yeah.

22 MR. SHORE: -- and one is copyright. I
23 think that the rightsholders can and do, as in
24 this case, use it interchangeably. Now, the courts
25 didn't recognize it. But --

1 MR. DAMLE: Okay.

2 MR. RILEY: So I guess to follow up with
3 you, what is your response to arguments where Mr.
4 Cox brought up in the last panel some devices are
5 sold as loss leaders and the follow-ons are where
6 they make their money back. His example was for a
7 videogame system.

8 Are those sorts of economic models -- how
9 do they work with -- if there was no contractual
10 prohibitions or --

11 MR. SHORE: I guess I'm not -- I'm not
12 wholly sure what the point was that he was making.
13 I mean, they can design -- they're the ones who
14 decide how many game systems to make. They're the
15 ones who decide what these game systems look like.
16 They're the ones who negotiate with their
17 suppliers. Like, they --

18 MR. RILEY: So if there was a contract
19 that said you cannot use any interoperable games,
20 right, and but for that contract, the loss leader
21 of the videogame console being sold would make its
22 money back. How do you approach --

23 MR. SHORE: But see, the delta is the
24 loss leader. And I don't -- I don't understand why
25 that it's sort of government's responsibility to

1 step in and protect the game manufacturers because
2 they've opted to make the -- or sell the consoles
3 at less than the market price, right? Why not
4 simply -- if the consoles cost \$200 to make, why
5 not sell them for \$201? Right? I mean, they're
6 relying on government to them step in and allow
7 them to make a business decision predicated on the
8 notion that we're going to sell the console at a
9 loss leader but we're going to license the games
10 because the government protects us, protects the
11 license.

12 MR. DAMLE: But I mean, are you denying
13 that there's consumer -- I mean, just as a basic
14 sort of --

15 MR. SHORE: Yeah.

16 MR. DAMLE: -- business proposition,
17 there are consumer benefits to having that kind of
18 business model, right? It requires less upfront
19 investment and you can sort of get in on a
20 particular game system --

21 MR. SHORE: Yeah, but I have a 14-year-
22 old son. I mean, the investments -- the long-term
23 investments substantially outweigh the short-term
24 savings. I mean, if you've ever bought games for a
25 14-year-old boy, I can tell you with reasonable

1 certainty that it's a very expensive proposition.
2 And again, these are like subjective -- again, I
3 find these to be fairly subjective notions.

4 I mean, should we -- should we be in a
5 position where because large companies have said,
6 well, we're going to sell it as a loss leader.
7 You're going to protect us on the back end. I
8 don't know that that makes a whole lot of sense
9 because that's what they're suggesting, right,
10 that they should be able to -- that they should be
11 able to sell -- to license the games -- they
12 license the games because they've made this
13 decision to sell the unit at a loss.

14 MS. ROWLAND: Well, I -- you keep saying
15 that "why should it be the government's place?"
16 But I'm not really sure why it would be the
17 government's place anyway. It's a matter of
18 contract law, which you could argue could be a
19 contract of adhesion or whatnot or --

20 MR. SHORE: No, because the license is
21 exempted from the first-sale doctrine.

22 MS. ROWLAND: So you're going to the
23 other issue where --

24 MR. SHORE: Yeah, right --

25 MS. ROWLAND: Which is a whole other

1 conversation.

2 MR. SHORE: They have -- they have
3 blurred the line between -- they've used license
4 to obviate sale.

5 MS. ROWLAND: Well, that's actually the
6 courts, right? So "what is a license" is really a
7 court distinction which is another topic that we
8 would be discussing during this panel, like in the
9 *Vernor* or in the auto or in the *Krause* doctrine
10 and --

11 MR. SHORE: Yeah, but that's sort of
12 where the yellow brick road leads, right, because
13 I mean, the more you have licenses, the less you
14 have ownership. And that's the real question that
15 somebody has to decide eventually.

16 MR. RILEY: We'll go back to Mr. Wiens.
17 Do you want to follow up on that before --

18 MR. WIENS: I was going to answer your
19 original question. I don't know if the one that -

20 MS. WALSH: I'd just be happy to very
21 quickly follow up on that point, if I may, which
22 is when you ask, well, but manufacturers want to
23 bind people to a contract that says you can't make
24 interoperable games, that sounds like copyright
25 misuse to me.²¹ That sounds like we want to

1 prevent competition with respect to video games
2 for this console because it's going to make us
3 more money because monopolies tend to make us more
4 money. But that's not an exclusive right that
5 Congress has granted to device manufacturers. You
6 don't get the right to decide who can create
7 things that interoperate. In fact, Congress has
8 rejected the idea that it's a good idea to grant
9 people the right to restrict interoperable
10 software and hardware.

11 So that doesn't strike me as a business
12 model that we need to bend over backwards to
13 protect. It actually strikes me as something where
14 it gets me thinking if companies are trying to use
15 copyright in order to impose restrictions that
16 keep other companies from competing in lawful
17 ways, then we should consider copyright misuse as
18 a way of giving a stick to people who are
19 improperly kept out of the market or to consumers
20 who are improperly deprived of their rights
21 because if we just say, okay, you can try -- you
22 can put whatever you want in your terms of
23 service.

24 You can intimidate people with the legal
25 language. But ultimately, if they spend the money

1 to defend themselves in court, we're going to
2 vindicate it, companies are still going to get a
3 benefit from putting that language in there.

4 If there's no penalty to putting in
5 effective language in there, if there's no penalty
6 to sort of claiming to people that they don't have
7 rights they actually have, then that's going to
8 lead to a continuation of bullying and that would
9 be worse than if the terms were actually
10 enforceable. But it's still a problem and
11 copyright misuse is one way of getting back at
12 pushing back on that, providing a disincentive to
13 such practices. Thanks.

14 MR. RILEY: Mr. Wiens?

15 MR. WIENS: Okay. So your original
16 question was just give examples of EULAs. So we're
17 seeing EULAs in a broad spectrum of products. We
18 have a CatGenie kitty litter box that is robotic
19 and automatically cleans the cat litter. And the
20 EULA says -- I've got it here -- but it says
21 basically any modification of the CatGenie exceeds
22 the scope of the license granted to you by
23 PetNovations, Inc. So we're innovating in the cat
24 box arena. And you know, there's a few ways of
25 fixing this. It turns out that the cartridge -- I

1 mean, this is like the ink cartridge model. The
2 cartridge, if you just replace the fluid in the
3 cartridge with water, the thing is totally fine,
4 or you can modify the software to reset the
5 counter.

6 Barnes & Noble, in the Nook product, in
7 the EULA, it specifically says that you're not
8 allowed to repair the product. And I don't know
9 why they would do that. They don't actually
10 provide the repair option themselves. So they're
11 not even preventing competition. It seems like
12 it's a form of planned obsolescence baked into the
13 EULA.

14 The way that electronics recyclers work -
15 - I spend a lot of time in the recycling community
16 and they end up as the owners of vast quantities
17 of product. And if you were to walk through an
18 electronics recycler's warehouse, you have 100,000
19 square feet and there would be 100,000 different
20 types of products in there. And not a single one
21 of them has the EULA still with it.

22 So the recycler is the owner of the
23 product and recyclers actually fund the recycling
24 work they do by repairing and restoring --
25 sometimes they're restoring software. They're

1 doing security updates on products and then
2 reselling them. And they have no idea what, you
3 know, was waived by the original owner in the
4 license or whether that license has been passed
5 along to them.

6 So a big part of the distinction between
7 embedded software maybe and traditional software
8 is that the embedded software is required for the
9 product to function and the license is not
10 generally available at the time that you're using
11 or repairing or maintaining the product.

12 MR. RILEY: Ms. Sollazzo?

13 MS. SOLLAZZO: Sure. I'd actually like to
14 follow up on Mr. Wiens' point, which I think is
15 very important. We've talked a lot about consumers
16 so far. But I think it's important to keep in mind
17 that these license agreements have a really big
18 effect not just on consumers but also on secondary
19 markets and innovators who are looking to make
20 products that are interoperable with devices
21 currently on the market. So the company that makes
22 a fridge that talks to the lamp, that talks to the
23 car.

24 I'd also like to return briefly to Ms.
25 Walsh's discussion on how courts have been

1 characterizing or been treating breach of a EULA
2 and whether they deal with it in contract law
3 purely or whether they treat it as a copyright
4 violation. And I just wanted to point out that in
5 a way, that almost doesn't matter because
6 companies are characterizing this as a copyright
7 violation. And that's the message consumers are
8 hearing.

9 So consumers and small businesses and
10 startups can be chilled from making legitimate
11 uses just by the fact that a company may attempt
12 to enforce it as a copyright violation, which has
13 this huge specter of statutory damages attached to
14 it.

15 MR. RILEY: Thank you. Ms. Ailsworth?

16 MS. AILSWORTH: I just wanted to bring up
17 the example of EULAs being used in vehicles. And I
18 know that traditionally they haven't been used to
19 a great extent except with telematics systems and
20 navigation systems. You'll see it a lot there.

21 There is an increasing use of a user
22 interface that involves a computer screen in cars.
23 And so, with modern vehicles -- not going to name
24 any manufacturers by name but some of them you
25 can't buy one of their cars without these in the

1 center of the vehicle. And you need to push a
2 button to agree to certain things. And so, this is
3 going to become more prevalent in automobiles,
4 which are a type of product that really do -- are
5 monopolized by a few manufacturers.

6 And so, if there's any rule that can be
7 put in place to protect the ability to make fair,
8 non-infringing uses, that would be important
9 because if you can't start your car without
10 pressing a button to agree, that's really not a
11 choice. So that's just something to think about.

12 MR. DAMLE: So are you seeing the license
13 agreements -- are you saying you're seeing the
14 license agreements extend to things like the ECU
15 or the emissions -- the emissions- like systems,
16 things like that? Is that what's happening in the
17 marketplace?

18 MS. AILSWORTH: I'm not sure what they
19 cover.

20 MR. DAMLE: Okay.

21 MS. AILSWORTH: But they're there and you
22 have to agree to them. So you know, you have to
23 read through -- scroll through by using this
24 little knob and scrolling all the way down and
25 reading exactly what it's covering.

1 So if it's not covering the ECU at this
2 point, I know that the warranty -- a lot of the
3 warranties have attempted to do that. But these
4 agreements could be used in that fashion and
5 they're easier to put in place in the vehicles now
6 and easier to force a consumer to have to agree to
7 it before you can use certain functionality of the
8 vehicle.

9 MR. RILEY: Thank you. Mr. Sheffner?

10 MR. SHEFFNER: Thank you. I think we set
11 a world record today for the longest discussion of
12 copyright at a Copyright Office event without any
13 mention of motion pictures. We've heard a lot
14 about computer software and cars and tractors. But
15 it's --

16 MR. DAMLE: No, this is a software -- I
17 will say.

18 MR. SHEFFNER: Yeah, this is. So why am I
19 here? The reason is not because the studios that
20 we represent have any particular interest in
21 tractors or refrigerators or what have you, but
22 because some of the legal principles that have
23 been discussed here have at least a potential to
24 spill over into the way that our studios
25 distribute and profit from their works.

1 The thing that actually made me flip my
2 name card up a few minutes ago was a statement
3 that Mr. Shore made. And he says that as we have
4 more licenses, we have less ownership. And I think
5 he said it as -- I think as a criticism. But I
6 want to tell you it's true. But it's a good thing,
7 or at least it's a neutral thing. It describes the
8 way that the world is shifting.

9 And I would recommend that you all take a
10 look back at the White Paper that the PTO released
11 several months ago. And there was a quite
12 extensive, and I thought very good, discussion of
13 the move in many industries that involve
14 copyright, but as well as outside the copyright
15 sphere, from ownership-based models to access-
16 based models. And that's certainly an accurate
17 description of what's happening in the motion
18 picture industry.

19 If you go back 15 to 20 years, at least
20 as for home entertainment, it was largely about
21 the sale of physical objects -- DVDs or Blu-Ray
22 discs later. Those still exist. They're still a
23 major part of the studios' home entertainment
24 businesses. But what we have seen over the last
25 say 10 years or so is the rapid rise of access-

1 based models. There are now about 115 legal ways
2 for consumers here in the U.S. to access movies
3 and television shows legally, about 400 worldwide.

4 Every single one of those is based on a
5 complex web of agreements. I think people have the
6 impression of motion picture studios as employing,
7 you know, vast armies of antipiracy lawyers.

8 That's actually not true. They employ a small
9 handful of antipiracy lawyers. What they do employ
10 vast armies of is transactional lawyers who are
11 negotiating all these agreements with all these
12 various distributors as a way to distribute their
13 content to the public.

14 My point is those agreements are, in
15 general, very good for the public. They have
16 resulted in an explosion of new ways for the
17 public to access motion pictures and television
18 shows at a variety of price points and at a
19 variety of different ways of doing it. Just to
20 give an obvious example, iTunes -- it used to be
21 that I'd have a choice. I could either buy or not
22 buy for approximately \$15, \$20 the physical disc.

23 Now, I have various options. I can pay,
24 say, \$5 or \$6 and to rent the movie, watch it over
25 a 48-hour period. But if I want to keep it longer,

1 keep it permanently, I can pay a little bit more
2 and do that. Again, these licenses -- the move
3 away from the physical ownership -- the ownership
4 of a physical item towards access-based models,
5 which are again, governed by a web of license
6 agreements, is a good thing and it's benefited
7 consumers.

8 And I would just ask in closing, ask that
9 when you consider the implications of copyrighted
10 software for all these other industries that don't
11 have -- necessarily have anything to do with our
12 industry, to think about the spillover effect that
13 it may have on an industry where the licensing
14 practices, again, have resulted in great benefit
15 for consumers.

16 MS. ROWLAND: Can I ask a follow-up
17 question on that, which is, a lot of the case law
18 really doesn't focus on -- it focuses on kind of
19 like the software as software. So you've got the
20 *Vernor* and you've got the *Krause* and whatnot.
21 Would you think that perhaps a distinction in how
22 that's applied to various types of goods -- like
23 what would you think -- this is kind of a
24 theoretical.

25 So somebody comes in and they are trying

1 to enforce the -- they bought a refrigerator,
2 okay? We all love a refrigerator apparently. So
3 they buy a refrigerator and there's some sort of
4 software. And maybe, when you open the
5 refrigerator and you can like pick out your
6 tomatoes and you pick out your garlic and spinach,
7 then maybe some sort of like motion picture comes
8 up on your computer saying this is how you like
9 put together this great recipe.

10 And so, this person who bought the
11 refrigerator wants to kind of start messing with
12 it. Would there be a different, or should there be
13 a different analysis than kind of this *Vernor*
14 thing because it was -- it's not the same thing.
15 It's not software as software. But is that logic
16 kind of able to be used with this kind of
17 different good and use?

18 MR. SHEFFNER: Yeah. Well, I should
19 mention the MPAA actually filed an amicus brief in
20 the *Vernor* case because, again, although it was
21 about the sale of a particular kind of software,
22 the rules about what counts as a license versus a
23 sale are obviously very important to us.

24 It's funny that you mention the
25 refrigerator example. You'd think, oh,

1 refrigerators have nothing to do with motion
2 picture studios. In drafting the written comments
3 that we submitted, I learned that there are now
4 actually refrigerators that have televisions in
5 them, which of course can play all sorts of
6 content.

7 So look, I understand at a very high
8 level that there are differences between, you
9 know, functional software versus, say,
10 entertainment products. But it's interesting.
11 Reading through all the comments, there was a lot
12 of disagreement about various things. There was
13 almost unanimity that it's extremely hard, if not
14 impossible, to draw distinctions in the law
15 between, say, everyday consumer devices and other
16 kinds of consumer devices.

17 It's also maybe a little bit less
18 difficult, but still difficult to draw
19 distinctions between, say, functional software and
20 the kinds of expressive works that the companies
21 that I represent put in the marketplace.

22 MS. ROWLAND: Well, therein lies the
23 problem, right? Because it's almost like a "you
24 know it when you see it" thing. We were talking
25 about in the other hearing where you can't have a

1 law -- you can't have, except apparently for
2 obscenity, you can't have you know it when you see
3 it kind of doctrine for do you own it, do you not
4 own it.

5 But there's obviously -- there's
6 something there. There's something where people
7 know it's a tractor. Oh, most people would
8 disagree -- John Deere not -- but most people
9 would disagree that that was where copyright was
10 headed versus perhaps like the business model
11 you're talking about where I think perhaps a lot
12 of the public and people would think, well okay,
13 that's more protectable because it's more about
14 traditional copyright interests.

15 And so, the problem that we've been
16 struggling with, and we would really love some
17 help with, is we understand it's a "you know it
18 when you see it" and it's hard to make a line.

19 But the farther we go into the future,
20 you never know what's going to happen. It's going
21 to get more embedded in everything. And we can't -
22 - it seems difficult to kind of just throw up your
23 hands and be like, oh well, it gets hard because
24 it's going to become probably more and more of an
25 issue.

1 MR. SHEFFNER: Yeah. I mean -- well, just
2 one last thing. One thing that I did take from
3 reading a lot of the comments in the first round
4 is that there are a lot of hypothetical scenarios
5 that people have come up with that do sound kind
6 of scary.

7 But you know what, we have not had a
8 situation that I'm aware of, of somebody being
9 sued for copyright infringement for infringing the
10 distribution right because they gave away their
11 secondhand refrigerator to a friend or sold it on
12 eBay. And although no one will claim that the
13 market is perfect, I think that there is a lot of
14 self-correcting mechanisms in the market, in that
15 anyone -- anytime anybody tries to use their
16 rights under copyright law or contract law in a
17 particularly sort of oppressive way, there is an
18 outcry.

19 And I know it's an example that's been
20 mentioned in some of the written comments --
21 Keurig, the coffeemaker manufacturer, a few months
22 ago tried something where they essentially made it
23 so through the use of software that you couldn't
24 use a competing pod. There was an outcry. It was
25 like every blog and tech publication on Earth said

1 this is a terrible thing.

2 And my understanding is that within a
3 couple of weeks, if not months, they reversed that
4 policy. So again, I think that the market isn't
5 perfect but there's largely a self-correcting
6 mechanism when consumers perceive that the company
7 trying some tactic like that has overstepped.

8 MS. ROWLAND: What do you think of Ms.
9 Walsh's discussion of copyright misuse and its
10 place in kind of this discussion?

11 MR. SHEFFNER: The copyright misuse
12 doctrine exists. It hasn't been fully developed. I
13 mean, our concern is that -- one concern we have
14 with that is that it essentially tries to create
15 sort of a parallel body of antitrust law that
16 doesn't have the great body of antitrust law and
17 case law behind it.

18 So courts are kind of making it up as
19 they go along without a whole lot of guidance. I
20 think when it's more closely tied to antitrust
21 law, which of course still exists and governs what
22 our companies and every company in the country I
23 think do, I think that's probably a more -- from
24 our perspective, a more appropriate way of
25 governing anticompetitive behaviors. But you know,

1 we certainly haven't called for the abolition of
2 the copyright misuse doctrine. I think it can be
3 applied in appropriate circumstances.

4 MR. BERTIN: One issue that Mr. Sheffner
5 just raised in my own mind as far as line drawing
6 -- the examples that you cited of the different
7 means by which you can access motion pictures, be
8 it the physical DVD or from a Hulu subscription or
9 from various service models -- there's really kind
10 of a substitution issue. It seems to me that what
11 I'm really after is that episode of Curious George
12 that will placate my child. And I don't really
13 care how I get it. I just need it -- I know that I
14 need it right now.

15 And that's very different than saying --
16 because I'm getting the same experience regardless
17 of where I go -- as opposed to this physical
18 device which I'm interacting with, be it my Nest
19 or my refrigerator -- that what I need is my
20 relationship with that physical object, that I
21 need that physical object to work.

22 And that's what I really care about at
23 the end of the day. Mr. Shore, I wonder if you
24 might speak to that, that distinction between sort
25 of the creative side and the -- sort of the more

1 practical side of this type of software.

2 MR. SHORE: So I apologize. I was looking
3 for a statistic to rebut Mr. Sheffner. So I'm
4 going to have to ask you to play that back for me.

5 MR. BERTIN: Sure. So the question was
6 whether there's a distinction between creative
7 works where you're -- sort of the license is
8 providing access to the work itself, which is what
9 you care about, the experience of the work, as
10 opposed to the functionality of the physical
11 object.

12 MR. SHORE: I don't -- I mean, for our
13 purposes, know that -- I mean, we view that these
14 things are sales. And so, the motivations -- I
15 think are you trying to get at what the motivation
16 is for why somebody bought or licensed the good?
17 Is that your question?

18 MR. BERTIN: Well, I don't know that
19 that's -- I don't know that we would ever really
20 know what -- or that copyright would care about
21 what people's motivation is --

22 MR. SHORE: Yeah.

23 MR. BERTIN: -- in terms of making a
24 decision as to whether to purchase or license,
25 right? That's not something that copyright would

1 do very well, I wouldn't think.

2 MR. SHORE: Yeah. I mean, I don't -- I'm
3 not sure I have an answer to your question.

4 MS. ROWLAND: I think --

5 MR. SHORE: I'd defer to someone else on
6 the panel.

7 MS. ROWLAND: I think what Erik is saying
8 is that you go out and you expect to buy that
9 refrigerator, right? Or most people do.

10 MR. BERTIN: Right.

11 MS. ROWLAND: And instead of going to one
12 of those rental places and rent to own or
13 something, versus perhaps a movie that you would
14 stream for your kid, who's freaking out and
15 wanting to watch a Curious George episode where
16 they went to the pond or something. So the
17 question is you probably don't expect to own like
18 that streamed content. Most people I think would
19 not.

20 MR. SHORE: Sure.

21 MS. ROWLAND: So I think that's kind of
22 what you were discussing.

23 MR. SHORE: Yeah. We have no problem with
24 that. I'm not sure that there is any problem with
25 that. I think the problem exists on creative

1 works, for instance, where you've now got efforts
2 underway to pass resale royalty acts, right, where
3 that, in these creative works, they want to
4 constantly control downstream distribution.

5 MS. ROWLAND: Well, that is limited. But
6 so, the Copyright Office, for those of you who do
7 not know, we have done a resale royalty report and
8 whatnot --

9 MR. SHORE: Yes.

10 MS. ROWLAND: But those were limited to
11 works of fine art that were in a rarefied air.

12 MR. SHORE: But again, it's this constant
13 notion of encroachment, okay? It's this constant
14 notion of expansion. And I actually had a question
15 for Mr. Sheffner on that because he said licenses
16 are such a good thing.

17 I'd be curious to know where the MPAA
18 believes ownership is a good thing. I mean, it has
19 to be somewhat binary. It can't always be about
20 licenses or are licenses always good because
21 consistently the MPAA has only sided -- I mean,
22 you start with *Vernor v. Autodesk*. You have
23 *Kirtsaeng*, which, by the way, was a student and a
24 consumer, not some big behemoth business that they
25 brought suit against.

1 So we're seeing, yeah, it may be
2 streaming. You may be able to distinguish between
3 streaming a creative work today and embedded
4 software in a refrigerator. But those lines are
5 constantly being blurred and they're constantly
6 expanding the scope. And I think we have to have
7 some fairly bright lines, again, that don't
8 distinguish between -- sorry, Mr. Riley --
9 consumers and businesses, that don't distinguish
10 between -- but give very clear rules.

11 Another -- a final point I need to make
12 is most businesses don't go from zero to 60,
13 right? Like I think we're all taking the view
14 that, well, a business can handle -- it can make
15 these decisions. It can hire lawyers, can defend
16 themselves in a lawsuit, right? The Continuant
17 case was a small, somewhat family-owned business
18 where the CEO was being dragged back and forth
19 across the country almost on a weekly basis,
20 nearly bankrupted him. These are not situations of
21 economic parity, right? In many instances, you're
22 talking about -- you need to create bright-line
23 rules because you're talking about businesses that
24 don't have the deep pockets or the resources to go
25 into the legal system and get an answer spit back

1 at them.

2 And it's somewhat sort of disconcerting
3 that we tend to look at it and say, "well, if
4 they're businesses, they can handle it." That's
5 not really the case because, you know what,
6 businesses start small. And we need to create an
7 environment where they can be successful, they can
8 have access to the secondary markets, that they
9 can own the things that they need to own, that
10 they don't get ensnared and entangled by
11 complicated EULAs. I mean, just because they have
12 LLC after their title doesn't mean that they have,
13 the resources to take on, big, giant
14 rightsholders.

15 MR. RILEY: Did you have a question or -
16 - thank you, Mr. Shore. I know Ms. Walsh is
17 chomping at the bit, but I want to let Mr.
18 Sheffner respond really quickly.

19 MR. SHEFFNER: Yeah, just very briefly.
20 Mr. Shore said there's this binary choice between
21 licensed services and physical things that they
22 own. I don't think it's binary in the sense that
23 those two things coexist at the same time, those
24 two markets. And I think it actually gives
25 consumers more choice.

1 I mean, our companies, although there is
2 this move towards more access-based services,
3 selling physical DVDs and Blu-Ray discs, which the
4 consumer owns -- those are not licensed
5 transactions. They own it. They own the copy.
6 That's still a big part of our studios'
7 businesses.

8 Again, it gives the owner -- it gives the
9 consumer choice. There may be -- what, if it's
10 that one time you want to watch that Curious
11 George episode, there's probably a way you can go
12 in iTunes or Amazon and pay 99 cents, \$1.99 and
13 watch that one episode. But you know what, if you
14 know that your kid is going to want to watch
15 Frozen 200 times and --

16 MS. ROWLAND: Two million.

17 MR. SHEFFNER: It probably makes more
18 sense to go and pay the \$15 or \$20 or whatever it
19 is to own that DVD. Again, that spectrum of
20 choices -- you have the choice that you can own
21 it. You have the choice that you can access it
22 through a license-based model. Again, it's an
23 array of choices and it doesn't necessarily have
24 to be binary one or the other.

25 MR. SHORE: But that wasn't your argument

1 in *Kirtsaeng*, right? Your argument in *Kirtsaeng*
2 was goods made overseas are not subject to the
3 Copyright Act. DVDs printed and pressed overseas
4 we can license. You don't own them because the
5 Copyright Act doesn't apply extraterritorially.

6 MR. SHEFFNER: But that -- I mean --

7 MR. SHORE: So that was your argument
8 there.

9 MR. SHEFFNER: It was.

10 MR. SHORE: Okay.

11 MR. SHEFFNER: I mean, that was an
12 argument about statutory construction about how
13 you construe section 109 and, what is it, 601-2? I
14 forget. Anyway, but that doesn't mean that -- I
15 mean, we acknowledge and I will acknowledge once
16 again here that DVDs and Blu-Ray discs, when a
17 consumer goes to Best Buy or Target and buys one,
18 they own that copy. That is not a licensed
19 transaction. And the first-sale doctrine applies
20 and I don't think we've ever denied that.

21 MS. ROWLAND: Right. No one's going to
22 come to your door and like knock and say, okay,
23 it's been five years, give me the tape.

24 MR. SHEFFNER: Not with the physical disc
25 that you own.

1 MR. RILEY: Right. Ms. Walsh, you've been
2 very patient.

3 MS. WALSH: Yeah. So there are a number
4 of reasons why ownership is important and valuable
5 in all contexts and in specific I'll talk about
6 how that relates to the software-enabled devices
7 context.

8 In sort of general, the rights that you
9 get with ownership are the default. They're what's
10 set, people's expectations when you buy something.
11 This is something that's borne out by the UC
12 Berkeley-Case Western study about what people
13 think they're getting when they buy now. And
14 licenses are often about taking away rights that
15 you otherwise have when you are an owner of a copy
16 of the work.

17 And as we've discussed, many of those
18 rights are obviously important. Those are the
19 rights that give us permission-less innovation.
20 This is why we get to have Netflix. This is why we
21 got to have Comcast video rentals. It's what makes
22 libraries work and it's what let people engage in
23 the full scope of reuse, of remix of materials, of
24 criticism, of converting something for
25 accessibility and so on. These are all the kinds

1 of rights that we've seen in earlier discussions
2 try to get taken away in license agreements and
3 that people expect that they have nonetheless when
4 they're buying things that it turns out that are
5 subject to a click-through agreement.

6 Now, in the software-specific context,
7 there's another important reason why the owner of
8 the physical device in which the work is
9 instantiated ought to have full scope of
10 copyright-related rights to control, audit and
11 manipulate that software and it's because the
12 device has sensors that can monitor what they're
13 doing all the time, can control their
14 communications, can record their habits.

15 What are you getting out of your smart
16 fridge at each time? When are you home? And the
17 ability to tell what your hardware is doing is
18 important for your rights, both with respect to
19 the original manufacturer, who configured it in a
20 certain way that accords with their business
21 interests, but also with respect to the
22 vulnerabilities that are quite prevalent in the
23 internet of things.

24 Hewlett-Packard did a study and found
25 that 60 percent of the most common internet of

1 things devices contained vulnerabilities, and the
2 more that those devices include limitations,
3 either contractual or technological, that prevent
4 the end user from detecting and addressing those
5 considerations, the more that's harmful to
6 consumers, the more that their personal financial
7 information is exposed.

8 MR. DAMLE: But is it --

9 MR. BERTIN: So can I -- I'm sorry. But
10 is it reasonable to think that the consumer, the
11 average person would be detecting and looking for
12 those deficiencies where they exist? I mean, isn't
13 it more likely that the onus is on the
14 manufacturer of the device to say, oh, you know
15 what, either we found it or other people have
16 pointed out to us -- security researchers or what
17 have you -- and here's the patch.

18 And we're going to provide it to you down
19 the line. And sort of what allows that to happen
20 is the expectation that there is a licensing
21 arrangement that allows us to provide that fix to
22 you.

23 MS. WALSH: So you mentioned that
24 security researchers might bring vulnerabilities
25 to the attention of manufacturers, and that's

1 often how it goes because security is often not
2 sort of a high investment priority for people who
3 are deploying internet of things devices.

4 You can introduce these cool, nifty new
5 features, put them on a selling point, ship them
6 and this is why the University of Princeton
7 Research Center labeled it "the internet of
8 unpatched devices" because it's not actually
9 common that manufacturers will take it upon
10 themselves to go out, find these vulnerabilities
11 and patch things. There are obviously responsible
12 companies that do that.

13 But the force -- the countervailing force
14 that forces manufacturers to acknowledge and patch
15 security vulnerabilities is the freedom of the
16 public, which includes professional security
17 researchers, but also lobbyists -- we went through
18 this last year in the 1201 rulemaking.

19 You heard from a whole bunch of security
20 researchers about the need for members of the
21 public, without permission, to be able to audit
22 and analyze the features of the device in order to
23 detect these vulnerabilities and put pressure on
24 the company. Sometimes public pressure is
25 sometimes enough to just say you have a

1 vulnerability, you'd better fix it.

2 Sometimes the company will respond by
3 threatening you, trying to silence your disclosure
4 of that research using copyright law or DMCA. And
5 sometimes, you actually do have to go public.

6 Sometimes you have to publish your
7 results, get Senator Markey to write a letter to
8 the automakers asking them why they're not
9 securing cars better before you start to see
10 improvement.

11 MR. DAMLE: Do you think -- I mean, just
12 to Mr. Sheffner's point and Mr. Cox's point
13 earlier, do you see any room for a licensing
14 arrangement sort of in a -- we're talking about
15 software now. But the same could be true of
16 movies, either a rental arrangement, subscription
17 models for software where you say you pay for
18 continual access, even though, as a technical
19 matter, like a copy of the software may be on your
20 device itself.

21 But you still want some sort of licensing
22 arrangement around it to enable that kind of
23 ongoing relationship, or in the examples that Mr.
24 Cox gave, of sort of a continuing service
25 arrangement, where you say "I want to -- I need to

1 have some sort of contractual structure around the
2 continuing relationship between some cloud service
3 and the device itself." Do you see any room for
4 that or could everything just be owned?

5 MS. WALSH: I think sometimes it's
6 worthwhile for customers to engage in a sort of
7 ongoing subscription for improvements to the
8 device. Sometimes a device ships and there's an
9 expectation of continual improvements just to keep
10 it working at the default level, keeping it secure
11 and so on.

12 And that's something that should not
13 undermine your rights of ownership. That's
14 something that the manufacturer is keeping the
15 device functioning in the way that you expected
16 when you paid for it. If we're talking about a
17 subscription to get new updates, then that's
18 potentially a different question.

19 MR. DAMLE: And what about sort of like a
20 subscription model that's like kind of more of a
21 lending model where you say "I'm paying you a
22 certain amount."

23 It downloads it to my -- to my computer.
24 Like movies that work this way, and there may be
25 software that works this way as well where the

1 work gets downloaded to my computer. I can use it
2 for a certain period of time and then it deletes
3 itself. Is that -- do you think that that's an
4 appropriate sort of realm for licensing?

5 MS. WALSH: I think certainly the idea
6 that you can rent or lend copies of copyrighted
7 works to people is something that's important
8 that's actually part of this secondary market that
9 libraries and Netflix relies on, so --

10 MR. DAMLE: Right. Yeah.

11 MS. WALSH: So the idea that you can
12 become a rightful possessor of a copyrighted work
13 without necessarily being the owner of that copy
14 is something that can happen.

15 MR. DAMLE: Okay.

16 MS. WALSH: One of the reasons that it
17 gets quite confused is because the Copyright
18 Office defines copies as physical objects. But the
19 metaphor for software and for a lot of digital
20 goods is that the object that's being transferred
21 or lent is the file.

22 And so, that's what got the *ReDigi* court
23 confused when it was analyzing the question of a
24 first sale of digital products is it said, well,
25 it has to be a copy, even if you sell something

1 your MP3 and delete your copy and there's only one
2 copy left, we don't think this fits within the
3 statutory definition of first sale.

4 And I think identifying the fact that for
5 software and digital products, we're running with
6 a little bit of fiction with respect to the way
7 that copies are defined in the Copyright Act is an
8 important thing to do.

9 MR. RILEY: All right. I have one follow-
10 up question for you, Ms. Walsh, and I think we'll
11 do a bit of a speed round because we're running --

12 MR. DAMLE: Well, we can extend - we
13 should -- we did this in Washington, D.C., because
14 obviously a lot of issues come up in this panel.
15 And so, I think we can go ahead and extend this
16 one for -- let's say until we're sort of wrapped
17 and then adjust the schedule accordingly.

18 MR. RILEY: My question is -- I'd like
19 you to respond, if you could to Mr. Sheffner's
20 suggestion about copyright misuse, that it's
21 frequently tied to an antitrust cause of action.
22 Do you see that copyright misuse should be in the
23 situation where a company has market power? Do you
24 see it as not so -- is that --

25 MS. WALSH: Yeah. I think that it should

1 not be so restricted because of the ways that
2 antitrust doctrine has generally been confined,
3 that would make it an inadequate tool for
4 addressing the abuses that we've identified.

5 I don't think it needs to be tied to
6 market power or that the only harms that ought to
7 be cognizable are harms to competitors because so
8 many of the harms that we've identified are harms
9 to individuals or to speed interests.

10 I'd also point out that Ms. Rowland asked
11 the question about the different ways of thinking
12 about the *Vernor* question with respect to non-
13 software works and *Vernor* was actually a departure
14 from the Ninth Circuit's decision earlier that
15 year with respect to entertainment discs where
16 there were transfers -- there was an attempt to
17 insist in a one-sided way that they could not be
18 further distributed and the court rejected that
19 contention. The citation for that is in our
20 written comments.

21 MR. DAMLE: Sorry, just one more, but do
22 you think that the *Krause* analysis -- *Krause* is
23 built on an assumption that you can license
24 software in particular circumstances, but
25 obviously it found that there wasn't a license

1 under the facts of that case. But do you think
2 that's the appropriate way for courts to look at
3 and analyze the question of ownership?

4 MS. WALSH: I think that *Krause* will
5 typically lead to the right results in the
6 software-enabled device context.

7 MR. DAMLE: Right.

8 MS. WALSH: So by focusing on whether the
9 person has ownership of the physical object in
10 which the software is instantiated and whether
11 they have an ongoing right to possess it, whether
12 they paid consideration, those are -- those are
13 typically all present for software-enabled
14 consumer products and then under the *Krause*
15 analysis would lead to a conclusion that there's
16 not a license, that you are an owner.

17 MR. DAMLE: So I think, Mr. Cox, you've
18 been waiting very patiently. I wonder if you could
19 address that last point first, which is *Krause* and
20 whether that's -- the *Krause* versus *Vernor*
21 analysis, whether *Krause* is an appropriate
22 analysis for software ownership versus licensing.

23 MR. COX: So if I could, since I have
24 been waiting patiently --

25 MR. DAMLE: Okay, yeah --

1 MR. COX: -- I'd like to address that in
2 context.

3 MR. DAMLE: Okay, sure.

4 MR. COX: So I think it's an interesting
5 linguistic approach to say that licenses take away
6 rights. Licenses give rights.

7 They state things that you can do, that
8 otherwise you can't do without permission.
9 Licenses have the advantage over -- and the idea
10 that ownership is always good, licensing is always
11 bad, I just think is fundamentally wrong.

12 Licenses provide flexibility. They can
13 give more rights, less rights. They can give a
14 range of rights. They can allow giving the degree
15 of rights at a price that people want. The idea of
16 rent versus own is correct and you can -- in the
17 software area, in the United States fortunately,
18 we still have *Vernor* and you can price software
19 very low to educational users. You can give it
20 away free to community colleges and so on.

21 The idea that most business people will
22 deprive consumers of their expectation of
23 ownership-like rights, contrary to consumer
24 expectations, I think is basically not true. I
25 mean, most packaged software, to the extent it

1 still exists, has almost always said, "yes, you
2 can of course transfer your copy to somebody else,
3 as long as you delete yours and pass it on and so
4 on and they're not trying to take a cut at that."
5 But a lot of the consumer demand is actually in
6 the other direction.

7 On the business side particularly, people
8 don't want a one-time fee for their software. They
9 don't want to buy a one-time version and pay a
10 price and have it perpetually.

11 That's why things are moving to the
12 cloud. On the cloud, you can pay what you need, as
13 you need it and only that and you get this
14 incredibly nuanced, metered pricing.

15 Now, in the cloud context, because
16 copyright doesn't protect against use, that's
17 almost completely a non-copyright transaction.
18 That's a service relationship with software
19 functionality provided to you from the cloud. But
20 on the consumer side, I would say the trend in
21 demand is not to pay a price and get a copy and
22 keep it. I think the biggest trend is we want it
23 for free. I want free software. I want a free
24 operating system. I want a subsidized phone and I
25 want to pay for it some other way. And if that is

1 looking at a lot of ads, I'm willing to look at
2 the ads or if I really don't like ads, then I can
3 pay for the ad-free version.

4 But it's nuanced pricing and it's enabled
5 by licensing rather than ownership. You know, you
6 want to harvest my data and make the money that
7 way? Fine. Most consumers, for better or worse,
8 they might be better off if they knew more about
9 what was going on. But free is good. They want
10 free. And that happens more with licensing than
11 ownership.

12 So back to *Vernor*, I think the ability of
13 the software industry to rely on licensing models
14 has worked incredibly well for the software
15 industry. It's produced a very vibrant software
16 industry with a lot of choice. And as I said at
17 the outset, it usually includes the right of
18 ordinary consumers to take an ordinary copy of
19 software that they bought in their mind and pass
20 it on to somebody else. That's been included in
21 the license rights.

22 I'd say preventing that is the exception
23 rather than the rule and it is either a bad
24 business choice or a good business choice,
25 depending on how many people push back.

1 MR. DAMLE: And what are your thoughts
2 about the *Krause* test and whether -- I mean, one
3 thing -- I think it was the Copyright Alliance
4 said in their papers was the tests are -- there's
5 a lot of overlap in the tests and that the *Vernor*
6 case would have come out essentially the same way
7 even if you applied the *Krause* analysis. Do you
8 agree with that? What do you think of --

9 MR. COX: Again, that's a point on which
10 I'm going to say I haven't thought deeply about
11 that one and Emery Simon has.

12 MR. DAMLE: Okay. I'm sure he has.

13 MR. RILEY: All right. Mr. Wiens?

14 MR. WIENS: If you look at the American
15 economy as a whole, we're in an ownership economy,
16 not a licensing economy. I mean, what portion of
17 the economy is the entertainment industry? It's in
18 like the 5 to 7 percent, I think.

19 MR. SHEFFNER: I don't know that
20 statistic.

21 MR. WIENS: See, but across the board,
22 all of the things that we buy, everything from
23 bulldozers to things like this microphone are
24 things that we are buying. And as software is
25 moving into all of them, licenses are moving into

1 all of them and this is really causing a
2 challenge. We have to have a floor that is
3 expected fair use of what we can do with the
4 things that we buy.

5 And yes, there are cases for cloud
6 services and Gmail. So there's a license involved
7 in that because they're providing ongoing service
8 for free and that's fine. But that's not most of
9 the economy. And what is -- what's happening --
10 and all of you, all of a sudden, are in a very
11 pivotal moment I think in history because
12 copyright is expanding from a -- the section of
13 the economy that is the entertainment industry and
14 arts and literature to the entire material
15 economy.

16 And I would invite you to like go to an
17 electronics recycler and see the spectrum of
18 products that come into electronics recyclers
19 because that Keurig that you mentioned actually
20 has more electronics in it than my iPhone. And so,
21 what are the implications when -- I understand
22 what you're saying, that you want licenses when it
23 comes to movies. And that makes sense.

24 But this is a real slippery slope. And
25 you start getting into licenses where they say you

1 don't have the ability to repair it. And if we
2 didn't have the ability to repair everything,
3 every single product that we own, it would be a
4 massive, massive problem. And so, that's where

5 Ms. Walsh is suggesting we cannot be
6 allowed to waive our fair use rights in these
7 licensing agreements. That's just not going to
8 work.

9 MR. RILEY: Okay. I'm actually going to
10 Ms. Ailsworth.

11 MS. AILSWORTH: Thanks. I just wanted to
12 bring up a situation that didn't affect
13 transferability but it does affect ownership. So I
14 think this is the right time to provide the
15 example. There's a situation where a vehicle was
16 transferred and the software in the vehicle was
17 transferred.

18 The purchaser experienced issues with the
19 performance of the vehicle, made changes to the
20 ECU, invested significant funds in making those
21 changes to achieve the functionality that they
22 needed. And then, because of this complex
23 ownership of software between the seller and
24 buyer, the seller was able to remotely flash the
25 software, re-flash the ECU and wipe out all the

1 changes that the consumer had made and the
2 consumer, if he had had a choice, would not have
3 permitted that to happen.

4 So there are other issues involved with
5 the ownership -- sharing of ownership of the
6 software that don't involve the ability to
7 transfer it and just go to ability to use the
8 product.

9 MR. RILEY: Thank you. Ms. Walsh?

10 MS. WALSH: Yeah. So this isn't a
11 referendum on licensing, whether it's always bad.
12 That's derailing if we try to get into that
13 question and no one is actually saying that
14 licensing is always bad.

15 What we've done is we've identified
16 several very specific ways that licenses are
17 asserted to strip certain consumer protections, to
18 create barriers to competition and we've proposed
19 specific ways, like preventing licenses that are
20 contracts of adhesion from waiving fair use and
21 your rights under copyright law, that we can
22 ameliorate those harms.

23 So it's not a referendum on licensing.
24 It's licensing has gotten out of whack,
25 particularly some of the more aggressive theories

1 about how licenses can be used to bootstrap into
2 copyright infringement and that degree to which
3 it's out of whack needs to be reined in, in order
4 to continue to protect the values of copyright law
5 and new interests of consumers that are implicated
6 by software-enabled devices that previously were
7 not threatened by copyright law but now are.

8 MR. DAMLE: Is that -- so sort of to your
9 point about that, about the perhaps misuse of
10 licensing, is that something that should happen in
11 the Copyright Act or is that something that really
12 is -- the jurisdiction properly lies elsewhere, as
13 like an FTC matter, as a -- I mean, FTC is the one
14 that -- the agency that sort of comes quickest to
15 mind in terms of dealing with those types of
16 issues.

17 MS. WALSH: Well, I think it's
18 appropriate for the Copyright Act to articulate to
19 what degree it preempts contract law and in
20 addition for the Copyright Act to be a place where
21 the doctrine of copyright misuse is fleshed out.

22 So as Congress is defining rights that
23 users of copyrighted works have, it's helpful to
24 explain that you cannot take away these rights
25 through contracts of adhesion.

1 I would also -- I would also point out
2 that a lot of this goes back to the RAM copy
3 issue. And one of the underlying issues that
4 licenses have grown so out of whack is the idea
5 that if a RAM copy is reproduction, now you need a
6 license. You need permission to engage in a whole
7 range of uses that previously were not governed by
8 copyright law because the use of a copy of a
9 copyrighted work is not within the scope of the
10 exclusive rights.

11 MR. DAMLE: But I mean, just to Mr. Cox's
12 point was I think in response to my question was
13 that there may be other hooks as well,
14 particularly as internet of things especially --
15 in the internet of things where there's a sort of
16 continual kind of communication with the cloud
17 server run by the manufacturer of the good, that
18 the inability to engage in those communications is
19 also a basis for these types of contracts.

20 So I'm wondering if whether sort of your
21 point about the RAM copy is really yesterday's
22 problem and that that's not really today the kind
23 of -- the sort of hook that software companies
24 really need.

25 MS. WALSH: So that's another potential

1 hook for consideration. It's not necessarily a
2 hook for bootstrapping into copyright
3 infringement. So the reason that I as the user of
4 a device -- so we can discuss both the sort of
5 server and non-server case.

6 So if I just own a copy of a work, I'm
7 using it locally, the copyright law doesn't have
8 anything to say about that unless copying it into
9 RAM implicates the reproduction right, which means
10 potentially that there's a hook to impose
11 restrictions on what I do with my property on my
12 device because I need, in theory, a license to do
13 that.

14 If we're talking about an ongoing
15 relationship with a server, then in the contract
16 sense, there may be ongoing consideration that can
17 support a contract, according to general contract
18 principles. And we can determine sort of what's
19 the appropriate term for that relationship in
20 terms of default contract law, but also if
21 contract law is leading to results where people
22 are waiving fair use rights and other speech
23 rights under copyright.

24 We can say that's not on the table. These
25 rights are important and in a contract of

1 adhesion, that's not on the table for a
2 contractual waiver. But the communication --
3 ongoing communication with the server isn't
4 necessarily something that you need a copyright
5 license for. It might be if you're going to
6 reproduce a copyrighted work, like a software
7 update, that you might need a license to do that.
8 There might just be implied by the fact that the
9 server is transmitting it to you. But it's
10 important to distinguish between hooks for
11 copyright liability and hooks for contract
12 consideration.

13 MR. RILEY: Just a quick question.
14 Before, when Mr. Sheffner suggested that copyright
15 misuse as case law is not developed yet, do you
16 have any response to that in terms of writing
17 something into the statute now?

18 MS. WALSH: I think one important thing
19 that the Copyright Office could do is identify
20 that it's a gap and that it's a potential means
21 for -- the copyright misuse doctrine is a
22 potential means for addressing the gap of we've
23 identified practices by rightsholders that are
24 harmful.

25 There is not a deterrent in the law and

1 whether we're going to call that copyright misuse
2 or something else, then we should figure out how
3 to disincentivize anticompetitive and anti-speech
4 behavior through the copyright law.

5 MR. RILEY: Thank you. You wanted -- I
6 think Mr. Sheffner wanted to reply.

7 MR. SHEFFNER: Sure. Just a couple of
8 brief things. Going back to Mr. Damle's question
9 from a few minutes ago about *Krause* and *Vernor* and
10 the relationship between those two, I don't have
11 an opinion sitting here today about the whether
12 the facts of *Vernor* would have -- whether the
13 result in *Vernor* would have been different under
14 the *Krause* test.

15 But I would just note that the Ninth
16 Circuit in *Vernor* analyzed *Krause*. You know, and
17 the amici supporting *Vernor* said don't rule in
18 favor of Autodesk because it would create a
19 circuit split with *Krause*. And what the Ninth
20 Circuit said is essentially, no, it wouldn't. The
21 cases are distinguishable, which I think suggests
22 that, yes, they used different verbiage. But I'm
23 not sure exactly how different in practice the
24 tests actually are. So I don't think we should
25 overstate the difference between those two

1 approaches.

2 And then, finally, in response to several
3 points that Ms. Walsh was making a minute ago
4 about sort of bootstrapping a contract violation
5 into a copyright violation, this is a difficult
6 and complicated area of law. But just a couple of
7 things that I wanted to make sure are just sort of
8 on your mind as you go ahead and write this -
9 write the report that you're ultimately going to
10 do.

11 The first is sort of a fundamental
12 principle of copyright law that I didn't think was
13 controversial, and I still don't, which is that
14 exercising -- for a licensee to exercise a right
15 outside of the scope of the agreement that they
16 have entered into is itself copyright
17 infringement.

18 I mean, an easy example is I'm a movie
19 studio and I license to a theater chain the right
20 to publicly perform a certain motion picture in
21 the city of San Francisco, according to the
22 contract. But then, they go and exhibit the movie
23 in Oakland. They have in some sense violated a
24 contract but they've also committed copyright
25 infringement. That's a pretty basic fundamental

1 rule of copyright law and I think we need to keep
2 that.

3 MR. DAMLE: So can I ask you a further
4 question? So let's say that the contract said you
5 have to serve popcorn made by Orville Redenbacher,
6 right, and I think if you were to analyze that
7 under *MDY*, or the Ninth Circuit, because it's San
8 Francisco, that they would -- the court would
9 probably say that that's not -- that's a breach of
10 contract, not an infringement. Would you agree
11 with that sort of -- that there has to be some
12 nexus of copyright?

13 MR. SHEFFNER: Well, I'm not sure I would
14 use the word "nexus." But I would say just a
15 distinction that hasn't really been made that,
16 again, I think you sort of need to look at in the
17 case law is between a covenant and a condition.

18 MR. DAMLE: Right.

19 MR. SHEFFNER: And that's exactly what
20 you were getting at with your popcorn example.

21 MR. DAMLE: Right, right.

22 MR. SHEFFNER: And again, this is a
23 complicated area of law. I'm trying to draw the
24 distinction between a covenant and a condition is
25 sometimes difficult. But essentially, what the

1 courts have said is that if the provision in the
2 contract is a condition, then violation of that
3 condition is also an infringement of copyright.

4 If it is a mere covenant, which I think
5 the popcorn example may well fall into, then it is
6 only a violation of the contract and not
7 necessarily the copyright as well.

8 But again, when you're thinking through
9 these, I wanted to make sure that, as it sounds
10 like you are, that you take into account that
11 distinction because there is a way in the law that
12 sort of divides what's a contract violation from a
13 copyright infringement. It's not that you can sort
14 of automatically bootstrap any contract violation
15 necessarily into a copyright violation.

16 MR. DAMLE: Do you have an answer to the
17 hypothetical that we've sort of been discussing
18 here about what if the -- what if the contract
19 says you shall not make fair use of this work? And
20 then you do make a fair use. Do you think that
21 that's a breach of contract or is that a -- is
22 that a copyright infringement?

23 MR. SHEFFNER: Again, it depends. You
24 know, in analyzing this distinction between a
25 covenant and a condition, the courts have said

1 that the particular wording of the contract
2 matters. So I'm hesitant to make a blanket
3 statement that that always could be or would not
4 be a copyright violation. I think in certain
5 circumstances it could be. And again, it depends
6 on the actual phrasing of the contract.

7 MR. DAMLE: Okay. I mean, that seems a
8 little -- I mean, you acknowledge that in the case
9 where it is a copyright infringement, that it is
10 sort of by contract countermanding a policy
11 decision that's been made by Congress that fair
12 uses are not copyright infringements.

13 MR. SHEFFNER: Well, that's right. But
14 look, all license agreements are gives and takes.
15 I mean, as Mr. Cox mentioned, license agreements
16 are not simply a way for the licensor to restrict
17 the rights of the licensee. Each side gives and
18 gets.

19 And the example that I come back to --
20 and I appreciate your point. Okay, Congress has
21 made this policy decision that people that --
22 certain uses are fair uses are not an infringement
23 of copyright. And I obviously -- I don't disagree
24 with that.

25 Congress has also said there's this

1 policy decision -- or not Congress, but the First
2 Amendment to the Constitution says you're allowed
3 to speak freely. Well, people enter into contracts
4 where they agree to a restriction of that right
5 because they get some other benefit.

6 I mean, people enter into nondisclosure
7 agreements all the time and courts have no
8 problems enforcing that, despite the existence of
9 the First Amendment. I mean, again, the person who
10 enters into that agreement, they're doing it
11 because they're getting some benefit. So --

12 MR. DAMLE: Sure. But violations of those
13 agreements -- I'm sorry to be extending this panel
14 -- but violations of those agreements are breaches
15 of contract, whereas here what you're saying is
16 something that, but for a contract, would not be
17 copyright infringement can be made copyright
18 infringement, not a breach of contract, because of
19 the contract.

20 MR. SHEFFNER: Yeah, but I guess you
21 could also flip it. I mean, the -- something that
22 would be a violation of copyright for the licensee
23 to engage in is made not a violation once they've
24 entered into the contract, the license agreement
25 that allows them to do it. Again, there's give and

1 take on both sides.

2 And I would not agree with the principle
3 that, well, it's sort of a one-way ratchet that
4 the licensee is somehow barred from giving up
5 certain rights because, again, both sides give up
6 something and get something that they otherwise
7 would not have, absent the agreement.

8 MS. ROWLAND: I was going to say that
9 we're -- our next panel is about fair use. So we
10 can talk about this kind of in the context of fair
11 use overall if people want to continue discussing
12 it. But I think --

13 MR. DAMLE: So yes, we've extended this
14 panel far beyond its allotted time. So when do you
15 think we should --

16 MS. ROWLAND: I think -- I mean, in D.C.,
17 we only -- we kind of kept to our 12:30 break, so
18 we could like maybe get like eight minutes?

19 MR. DAMLE: Yeah.

20 MS. ROWLAND: That's very precise. An
21 eight-minute break.

22 MR. DAMLE: So 11:50?

23 MR. RILEY: 11:50. I told you it was
24 going to be spirited. Thank you.

25 (Whereupon, the foregoing went off the

1 record at 11:43 a.m., and went back on the record
2 at 11:52 a.m.)

3 MS. ROWLAND: Are we all here? Are we
4 waiting for Mr. Cox or --

5 MR. DAMLE: Is he on this panel?

6 MR. BERTIN: He is. He switched in for
7 Mr. Green, so --

8 MR. COX: I hope you weren't waiting on
9 me.

10 MR. DAMLE: No, no.

11 MR. COX: You know what I'll say.

12 MS. ROWLAND: Okay. I think we're all
13 here now. So as was shown in our last panel, there
14 was kind of a lively discussion about fair use and
15 contractual provisions that kind of led into this.
16 And so, we know that it can be a little bit -- I
17 wouldn't say controversial, but a little bit of a
18 topic that everyone is very interested in.

19 So we decided to devote an entire session
20 to fair use because it does encompass a lot of the
21 things that perhaps some of the panelists and
22 other people are interested in doing that might
23 otherwise be a problem under copyright law -- for
24 example, reverse engineering or using things with
25 interoperability. And so, we wanted to have this

1 panel to kind of discuss the state of fair use
2 vis-a-vis this kind of embedded software in
3 everyday products and where it should be going, if
4 it's robust enough, if it's too robust and what
5 can be done about it.⁶ And so, we wanted to open
6 up the discussion with a kind of broad question,
7 which is at this point, are there any specific
8 parts of fair use or fair use overall that you
9 think are in need of alterations or that you guys
10 think would -- are working just great.

11 MR. RILEY: And I think we need to
12 introduce our one additional panelist.

13 MS. ROWLAND: Oh, I'm sorry. We have one
14 additional panelist here today. Mr. Liu?

15 MR. LIU: Oh, yeah. Stephen Liu from the
16 Stanford IP Clinic and representing Engine
17 Advocacy. Thanks.

18 MS. ROWLAND: Thank you, Mr. Liu. Does
19 anyone have any opening thoughts? Ms. Ailsworth?

20 MS. AILSWORTH: Yes. Just a very brief
21 thought. We believe that fair use is extremely
22 important and really protects our members' ability
23 to engage in -- achieving interoperability with
24 parts. The only drawback to fair use is obviously
25 that it is a defense. So if there is anything that

1 can be done in pleading standards or at the front
2 end that would help make sure that fair use is
3 taken into consideration before lawsuits are filed
4 and before innovation is chilled, that would be
5 really beneficial in this area of functional
6 products, consumer products.

7 MS. ROWLAND: Okay. Is there -- how is it
8 working with regard to like reverse engineering? I
9 don't know, Mr. Wiens, if you had any thoughts
10 about fair use and how it impacts what you do.

11 MR. WIENS: Sure. Yeah, and maybe it
12 would be interesting to share a bit of just like
13 what mechanics do on a regular basis with cars
14 because it's very frequent -- if you have an
15 issue, the first thing that you might do is re-
16 flash the firmware, so take -- you might take a
17 copy of firmware from another vehicle and put it
18 on that vehicle to see if you can isolate the
19 problem.

20 Sometimes you -- usually, there is a --
21 there is an additional diagnostic software that
22 talks to the software on the car and allows you to
23 change variables. You'd change the fan speed
24 setting, for example. But then, on some vehicles,
25 there may not be a setting in the software for

1 that. So then, you actually have to extract the
2 firmware from the vehicle, modify the byte code
3 and then re-flash the car with it. And in this --
4 there is a spectrum of repair-specific reasons you
5 might want to do that.

6 There are emissions and mileage reasons
7 you might want to do that. And there has been -- I
8 mean, within the automotive world, I mean, there
9 has been so much fear of kind of repercussions --
10 during the 1201 exemption process, Charlie Miller
11 testified and one of the things that he said was
12 that he had -- he had found security vulnerability
13 in a vehicle and he said to an American auto
14 manufacturer at the time -- he said, "hey, I've
15 violated the DMCA in the process of doing this."
16 And it was a very bold thing for him to come out
17 in the process of a formal setting and say, "hey,
18 I did this" with the Auto Alliance lawyer, who
19 could turn around and file suit the following day.
20 And it turned out that this was the GPAC that was
21 kind of known around the world last summer where
22 he was able to take control of a vehicle on a
23 highway through the cellular network.

24 And the level of bravery that was
25 required for Charlie to show up and do that is

1 astonishing. And he's a one in a million security
2 researcher.

3 Most security researchers are very
4 cautious. Most mechanics, they just want to get
5 their job done. They're fixers. They're not
6 interested in all of these issues. And so, there
7 really has been a stifling impact.

8 We have seen very little innovation
9 around farm equipment in the United States, even
10 though there's a huge amount of interest, because
11 of these locked down interfaces and the fear that
12 the people have.

13 MR. DAMLE: I have a question. So you
14 know, also in the 1201 hearings last year, we
15 heard from documentary filmmakers who had kind of
16 developed a fairly robust set of fair use
17 guidelines for documentarians, which, they relied
18 on and they felt pretty comfortable using things
19 that were within those guidelines.

20 Has there been any thought given to sort
21 of -- I mean, this is a question maybe for you as
22 well, Ms. Ailsworth, about creating those types of
23 guidelines around fair use in this space, for
24 repair, replacement parts, things like that. I
25 don't know if you know that, Mr. Wiens, or if --

1 MR. WIENS: I think the challenge has
2 been that everywhere we look, we see a TPM. And
3 so, it's been hard to identify fair uses because
4 you're always breaking through some kind of fair
5 use to get at the device.

6 And so, it's been hard to say, well, this
7 is fair for you to use. And I think that's been
8 the situation that EFF has had, is they haven't
9 been able to tell people, it's okay for you to
10 tinker with your thing in these contexts because
11 there's so much -- there's so much uncertainty.

12 MR. DAMLE: Sure, sure. And, but that's
13 specific to the 1201 -- to the TPMs. Okay --

14 MR. WIENS: But that may be --

15 MR. DAMLE: Yeah, I see. They sort of
16 interrelate in that way.

17 MR. WIENS: Right.

18 MR. DAMLE: Ms. Ailsworth, have you --

19 MS. AILSWORTH: Yeah. There hasn't really
20 been any kind of breakdown of this is specifically
21 fair use, go forward. There is a general
22 understanding that if you are just interacting
23 with the maps, with the parameters on the ECUs and
24 not changing the really hardcore software and the
25 firmware, you're just changing the parameters, so

1 if it's -- if the air comes in at this
2 temperature, you do X.

3 There's a general understanding that that
4 is a fair use and that if there is something more
5 extensive going on with the software, that it may
6 or may not be a fair use and that some further
7 analysis has to be going on. But there is a
8 general just industry understanding that if you're
9 making mere changes to the parameters and how the
10 vehicle responds to the parameters, remapping the
11 ECU, that that is a fair use.

12 MR. WIENS: Right. But I'd say in general
13 there needs to be an understanding that repair or
14 modification of a vehicle that you own is a fair
15 use or any software -- embedded software in
16 something that you own is a fair use. And that's
17 not the case now. That's not the perception in the
18 market. There should be a fair use for security
19 research and there's not really that perception.

20 So I mean, and it's causing harm. Nest
21 bought a company, Revolv, who was a company that
22 makes a smart home hub. And so, you get the smart
23 home hub and it connects to all of the things in
24 your house. And once you hook one of these things
25 up -- and I actually did this at our office, where

1 we have an automation system. Everything is tied
2 in. Unless you have this thing working, you can't
3 open the doors. The sprinklers don't work. The
4 lights don't work. Nothing works. And you're
5 saying this is the brain of the house.

6 Nest bought this company a couple of
7 years ago and then just announced that they are
8 going to be shutting down the cloud service that
9 this connects to, which is going to remotely brick
10 all of these devices. And so, you have a lot of
11 people that have built their entire homes around
12 this. And Nest is saying that they're going to
13 remotely shut off people's houses, every single
14 thing in the house.

15 And the only way, without either rewiring
16 the entire house and replacing all the devices, is
17 going to be to go into that Revolv system and
18 modify the firmware and loan in some software that
19 excludes the cloud check. Is that a fair use?
20 People are afraid.

21 MS. ROWLAND: I would like to ask a
22 follow-up question because you were talking about
23 fair use and TPMs and we're going to be doing a
24 1201 hearing tomorrow, as you probably know. And
25 one of my questions is kind of where is the

1 dividing line between 1201 and just fair use and
2 copyright law.

3 So if your concerns about a TPM were
4 stripped away magically, what would be left for
5 the fair use vis-à-vis this kind of software and
6 how do you think it's been working and what would
7 be the fears at that point?

8 MR. WIENS: Right. So one argument that
9 manufacturers might use is under the commerciality
10 factor, that by doing independent repair, you're
11 harming the manufacturer's monopoly on repair. And
12 so, I haven't seen this really be litigated.

13 But it would be I think helpful to
14 ensconce the importance of repairing. Going
15 through and evaluating repair and modification
16 under all the existing factors, I'm not sure if
17 they're sufficient or not. It would be nice to see
18 clarity as we're moving into a world where
19 electronics are in everything.

20 MR. DAMLE: Right. Well, our next panel
21 is going to discuss 117, so -- which is another
22 exemption that may be relevant. But we can wait
23 for that.

24 MS. ROWLAND: Ms. Walsh?

25 MS. WALSH: So Oracle and Google have

1 been litigating the fair use question over the
2 past week. And one of the things that we keep
3 seeing is the sort of preamble for fair use not
4 fitting into the software context, Oracle saying,
5 "look, this painting is a fair use and it says
6 criticism, commentary, et cetera. None of that has
7 anything to do with software." And for a lay jury
8 who are not copyright experts, that might be
9 persuasive.

10 So we often rely on the courts to
11 elaborate on fair use. And that's been a good
12 approach. In the software context, I think it's
13 pretty clear that research for interoperability
14 and security research is within the scope of what
15 ultimately would be found to be a fair use by a
16 court. There are places where that case law hasn't
17 gotten to develop in large part because TPMs are
18 chilling people from engaging in those things.

19 In several jurisdictions, fair use is no
20 defense to a 1201 claim. So you actually cannot
21 get to test in the Second Circuit and the Ninth
22 Circuit. You actually cannot get to a decision to
23 test your fair use claim if you would be liable
24 for circumvention anyway.

25 And the chilling effect both of 1201 but

1 also on the expense and unpredictability of fair
2 use I think is manifested in the marketplace when,
3 as Kyle said, people don't know if it's lawful
4 under copyright to repair their car or do security
5 research. I think in both of those cases, it is
6 clearly lawful by the time you get to a court.

7 But there is a significant chilling
8 effect due to the threat of copyright
9 infringement. And a large part of that again is
10 statutory damages. Statutory damages are such a
11 disproportionate punishment that they create a
12 very wide range of chill around conduct that is
13 clearly lawful. If you're not sure about your
14 conduct but the downside is up to \$150,000 per
15 work infringed, that is obviously something that's
16 going to chill you.

17 One thing that would fix that is if you
18 have a plausible defense to copyright
19 infringement, that statutory damages then be taken
20 off the table or at least dramatically reduced.
21 That means that even if ultimately you thought
22 your conduct was a fair use and the court said,
23 "no, you didn't quite get it right, but it was a
24 plausible fair use case," then statutory damages
25 could be off the table or diminished and that

1 would reduce the chilling effect when it is
2 currently present when people are trying to
3 innovate, to do new things where there isn't case
4 law out there.

5 I never had to tinker with software to
6 repair my car before. What's the new rule? I'd
7 better not test it. Or if the downside is
8 something closer to actual damages, probably well,
9 that's within my risk tolerance if I'm a mechanic
10 and I want to continue to service all these
11 vehicles that my customers are bringing to me.

12 MR. BERTIN: But don't the courts already
13 have that discretion? I mean, the only thing
14 that's said in the statute is that it has to be at
15 least \$750 and, at least for non-willful, it can't
16 be more than \$30,000. And in between that, it's up
17 to the courts to decide where the appropriate
18 range falls.

19 MS. WALSH: And that is a huge range of
20 discretion. That means that you can't predict what
21 your downside is going to be if you want to engage
22 in something that you think might be a fair use or
23 might not be. A court or a jury could award
24 crippling damages. Maybe you wind up getting
25 lucky, as long as your service isn't one where

1 thousands of copyrighted works are involved, like
2 if you're trying out digital first sale like
3 *ReDigi*.

4 Even then, when there's a minimum of
5 \$750, that can quickly add up to more than the GDP
6 of the planet. So I think reducing that minimum,
7 imposing a cap, the cap is also important just to
8 create some certainty in the marketplace for
9 people trying to innovate.

10 MS. ROWLAND: When we're talking about
11 kind of the individual kind of consumer products,
12 so we have this issue that Mr. Shore was talking
13 about, the consumer versus the business, but
14 focusing for a bit on individuals, so the
15 individual who wants to fix their car or whatever,
16 what is -- what kind of decision-making process,
17 or do -- have you heard, anyone, I suppose, do
18 statutory damages come into their decision-making?
19 Are they sophisticated enough to know, oh, there's
20 like statutory damages out there or are they just
21 kind of flying blind? I'm curious to see like what
22 that --

23 MS. WALSH: People know that there are
24 extreme penalties for copyright infringement. I
25 think they probably could not name the figure, but

1 have heard about the massive judgments against
2 like Jammie Thomas or other sort of people
3 engaging in file-sharing, Tenenbaum, for example.

4 MR. WIENS: Well, I can answer that --
5 so, I mentioned the issue with the optical drive
6 on these guys. So we sell -- iFixit sells a repair
7 part of these. So we sell the drives and the
8 boards. And we have the technical capability of
9 re-flashing these things and being able to sell
10 people just an optical drive that we've re-
11 flashed.

12 But because we're afraid of the risk, and
13 we've talked with lawyers and we're very concerned
14 about the multiplier effect, we've chosen not to
15 do that. And so, we're selling a \$300 repair
16 option instead of \$100 repair option that we could
17 provide to consumers because of the murkiness of
18 being able to modify hardware that we own.

19 MS. WALSH: To continue to answer your
20 question, we actually -- we have a Coders' Rights
21 Project. We routinely have people come in who are
22 actually clever enough to ask before they do
23 something what their risk would be if they did it.
24 And that's the case where we say we think it's a
25 fair use. If we're wrong, this is the Potential

1 penalty.

2 And as an attorney counseling someone,
3 you have to be honest. This is the potential
4 downside. It could be up to this. And we can give,
5 you know, estimates a little bit more than a
6 layperson could about what the actual risk would
7 be.

8 But you have to put that on the table as
9 a possibility and it creates a huge chilling
10 effect and there are people that decide that they
11 are not going to engage in their parody, in their
12 research, in their innovation because of the risk
13 of being bankrupted and losing their house if they
14 get the law wrong.

15 MS. ROWLAND: I think Mr. Liu had the
16 next turn.

17 MR. LIU: Oh, yes. So as numerous people
18 have mentioned, the issue with fair use right now
19 is that it's a defense and it's not very
20 predictable. And the main reason for that is
21 because every case is different. It's a fact-
22 dependent analysis. The best way to resolve that,
23 at least maybe the easiest way to resolve a lot of
24 the problems that come from that is by creating
25 carve-outs.

1 I'd like to just mention -- bring up a
2 couple of principles that the Copyright Office or
3 Congress, if it eventually gets there, should keep
4 in mind, especially when they're considering
5 carve-outs for interoperability. The first is that
6 when innovators make interoperable functionalities
7 for devices that have copyrighted embedded
8 software, they tend to actually increase the value
9 of the underlying device.

10 So if you have a fridge that has software
11 controlling the temperature inside the fridge and
12 someone decides to create software, an app, for
13 example, or some other device that connects the --
14 or synchs the fridge temperature with a personal
15 calendar or -- and then someone else comes along
16 and makes similar software that you can control
17 the fridge's temperature using a smartphone, these
18 two people have expanded the refrigerator's
19 utility beyond just simple refrigeration.

20 And now, the fridge can run on more
21 complex, customizable schedules. And to that
22 extent, the fridge is now more valuable. These
23 kinds of modifications -- I mean, it's the
24 consumer's choice, right? So if you don't want
25 these modifications, you don't have to have them.

1 So there's no possible negative impact on
2 the value of the fridge. And what that means is it
3 increases the demand for these fridges that now
4 have all these interoperable functionalities.

5 Another example, we saw this before the
6 Sega court where basically they were creating
7 additional videogames for a console increased the
8 value of a console because you need the console to
9 play those games.

10 So what -- interoperability basically
11 makes -- increases consumer freedom and you could
12 even argue that this is transformative in some
13 sense because you're re-contextualizing the
14 fridge. So that's the first main thing to keep in
15 mind as far as the interoperability goes.

16 The second thing would be kind of
17 following -- so the Lexmark court had made a
18 rather cursory fair use analysis because that
19 wasn't the dispositive issue in that case. But
20 they made this distinction between the market for
21 the software itself and then the market for
22 additional goods that use the software. So of
23 course the case was about printer toner
24 cartridges. There's software built into those that
25 let you use it.

1 And market harm, the court said, was not
2 -- did not reach the actual market harm to toner
3 sales. It was just about the software itself. And
4 that's another distinction to keep in mind when we
5 think about what kinds of interoperable uses are
6 clearly fair use and we can make carve-outs for
7 that.

8 MS. ROWLAND: So when you're talking
9 about carve-outs, what do you mean? Like actually
10 inserting something into the statute or --

11 MR. LIU: That's one way to do it, I
12 guess. Another way, I think section 107 has these
13 different labels for educational uses or
14 criticism, things like that.

15 So if we make some kind of -- something
16 like that where it's just a presumption of fair
17 use, then it just will help decision-makers,
18 whether it's innovators or people -- or rights
19 owners who are deciding whether to sue or not, if
20 we can tilt that balance further in favor of less
21 litigation over things that are obviously fair
22 use, then that would definitely help.

23 MS. ROWLAND: So you're talking about
24 inserting something into the preamble, like Ms.
25 Walsh was talking about how the preamble is not --

1 is being looked to --

2 MR. LIU: Sure, yeah. I think that's one
3 way that we could do it.

4 MS. ROWLAND: Okay. Ms. Gellis, I think?

5 MS. GELLIS: Thank you. I want to -- in
6 talking about fair use, I want to put out the
7 caution -- I know we've sort of moved our mind
8 down through the statute to think about, okay,
9 well, let's look at this clause and see how this
10 clause could potentially be optimized to deal with
11 real-world situations that we're encountering.

12 But again, fair use is way too late in
13 the process and that real harm is being done when
14 we've gone past the question of the
15 copyrightability in the first place. And *Oracle v.*
16 *Google* has come up at least once, and I think that
17 needs to be regarded as a cautionary tale. It is a
18 canary in the coal mine and we're all going to
19 suffocate. If we even look at how that trial is
20 unfolding, the logistics of testing that fair use
21 claim off the API usage, when only some courts
22 think that the API was even subject to
23 copyrightability, is extremely problematic.

24 How you even present that question to the
25 jury is extremely problematic. It's massively

1 expensive and very, very difficult to communicate.

2 When I was sitting in the gallery during
3 the last panel, I was looking at tweets from the
4 courthouse where the jurors can't figure out how
5 to even look at the code that they're looking at
6 to do their analysis as jurors to figure out
7 whether or not there was fair use.

8 The fact that it is this logistically
9 difficult for the jury to make a fair use analysis
10 I think tells us two things. One is that this is
11 an extremely expensive and debilitating position
12 to put fair-users in, to have to defend the use.

13 And secondly, I think it also points to
14 the fact that the extent of the copyright monopoly
15 has been implemented too far where it is this
16 difficult.

17 And I think what we were talking about in
18 the first panel is important to go back to, that
19 some of what we're talking about, about putting
20 under the rubric of copyright law, is really
21 something that should be under the rubric of
22 patent law potentially, trademark potentially or
23 no protection whatsoever and that when we look at
24 the question of, well, so we don't protect this as
25 strongly as we might have been inclined to, that's

1 not necessarily bad when you take a step back and
2 look at the overall effect to the public and to
3 the world of what the consequence of that is.

4 No monopolist wants to be told that their
5 monopoly has been trimmed or they don't have a
6 monopoly that's as extensive or as broad. But when
7 we extend the monopolies, what we've seen, and
8 even in the course of this discussion, we've seen
9 there's a creep. And we've seen creep ever since
10 we've had modern copyright law.

11 When they did the Statute of Anne, books
12 were protected. And then, next thing you know, the
13 engravers wanted some protection. So everybody
14 down the line says, well, if they got protection,
15 then I want protection. And at a certain point, we
16 dole out the protections, losing sight of why we
17 had the protections in the first place.

18 When we look at what the goal and purpose
19 of copyright is, to promote the progress of
20 science, and we've created a regime where people
21 who want to innovate and build on what's come
22 before are essentially being told no, either a
23 literal no or a functional no because they can't
24 take the legal risk to do that exploration and
25 make that next step, I think we have a problem and

1 the balance is out of whack.

2 MS. ROWLAND: Well, so that discussion of
3 *Oracle* is kind of more software without the
4 embedded software within the consumer products.
5 So my question is to kind of draw it back to the
6 subject of this study, which is how much of that
7 kind of concern and the expert testimony and
8 whatnot do you think would be at play in an
9 infringement action if it was to take place
10 against somebody who was repairing their car.

11 MS. GELLIS: I don't think we would --
12 there's any reason to think that the logistics of
13 that sort of judicial test would be any easier.
14 They're looking at software code, they're looking
15 at an enormous amount of lines of software code.

16 And I mean, I'm not an expert in how much
17 code is riding on a car, but my understanding is
18 that these -- the amount of software is growing
19 and growing and growing, depending on how --

20 MR. WIENS: It will be more complicated.

21 MS. GELLIS: Even more complicated. So
22 the test of fair use for people interacting with
23 previously existing software that's been put
24 somewhere -- I mean, even to the extent that Java
25 was embedded code because they embedded it on the

1 -- well, testing fair use off of the use of
2 software is a very, very messy proposition. And I
3 think before we thrust users into that position,
4 we need to think about whether it's a fair test
5 that they even have to go through.

6 Now, if we are looking at, yes, we think
7 it's a fair test, then I think maybe other things
8 we could do is shift the burdens on the copyright
9 owner. Right now, all the burdens seem to be on
10 the fair user, and that's debilitating. That would
11 be a fix.

12 But I don't want to push that too far and
13 lose sight of I think we've created a problem we
14 shouldn't have been creating because it's out of
15 step of why we have copyright in the first place.
16 And to the extent that we do think that it's
17 something that it's appropriate to have law to do,
18 we have other like patent law that's better
19 positioned to do it.

20 MS. ROWLAND: So are you arguing or
21 saying that you would support kind of a pullback
22 of copyright protection for software overall? Like
23 I guess that's what I -- it sounds like, but-

24 MS. GELLIS: Well, in the original
25 Federal Register --

1 MS. ROWLAND: Because that is outside the
2 scope of this study, right, because we are --

3 MS. GELLIS: Well --

4 MS. ROWLAND: -- really focused on
5 software within the embedded software in consumer
6 products. We're not trying to, you know, question
7 the legitimacy of copyright ability of software
8 generally.

9 MS. GELLIS: I might swing for the fences.
10 But I understand that's the purpose of the study
11 even within the NOI that came out, there was a
12 discussion about the extent of copyrightability
13 in the software space and that it does run into
14 some limitations, including on the limitations of
15 the copyrightable subject matter.

16 And I think what I'm saying is that the
17 limitations in how -- those limitations need to be
18 brought to bear in this discussion, particularly
19 when you apply it to embedded software. You would
20 run into similar problems in other contexts.

21 But I think what we're noticing is that
22 you see these problems in a very pronounced way
23 when you see software being overly treated as a
24 copyrightable medium and now that we've also
25 embedded it. Now we can really see the collisions

1 in a very vivid way that we might not necessarily
2 see as pronounced in some other contexts.

3 MS. ROWLAND: So, and I will turn to Mr.
4 Cox, who I'm sure has much to say. But before I
5 do, I will say that that discussion in the Notice
6 was -- it was really for more of a kind of
7 background historical process. It was not sort of
8 an indictment of copyright ability of software.

9 MS. GELLIS: It wasn't an indictment. But
10 it did note that there's tensions even within
11 that. And my point is that these tensions exist,
12 particularly even when we look at this space, and
13 that when we do look at this space, we can see how
14 those tensions play out in a way that can be
15 debilitating towards the types of uses that other
16 panelists have been describing.

17 MS. ROWLAND: Mr. Cox?

18 MR. COX: So two levels of a response, and
19 I'll try to keep these short because it is getting
20 -- drifting back to the first panel in theory. A
21 lot of these -- there's sort of two things going
22 on. One, I want to be able to make fair use by
23 interoperating in some way, and then I want to do
24 repair. Those seem to be the two scenarios that we
25 keep hearing.

1 On interoperability, I mean, I think
2 there is already a very well-developed balance in
3 that. But a lot of these comments are driven by
4 the notion that all incremental innovation is
5 inherently valuable and should be protected
6 without regard to its effect on the original
7 innovation on which it's building. If that were
8 the only value enshrined in the copyright law, we
9 wouldn't have a modification right for copyright
10 owners to enforce.

11 The problem with saying, "oh, if I do
12 this or that with the refrigerator, it makes it
13 inherently more valuable," is that that's a very
14 static notion of how things work. And the
15 copyright exists to incent the person who made the
16 refrigerator with a particular set of features to
17 go out and sell it and to compete with other
18 people who might put more features in it.

19 So if this is a really valuable
20 innovation, you're either going to be able to
21 license it to that refrigerator maker or to
22 another competitor and so on. But the copyright
23 law is incenting innovation in a dynamic system in
24 which you have to look at the first movers and
25 what their reward is versus people who can add

1 bells and whistles to it. But I don't want to go
2 too far down that road.

3 To go back to repair, though, I'll go
4 back to one of the first things I said, is we
5 should not be looking for fixes to theoretical
6 problems. How much are -- and this comes down to
7 saying chilling effect and saying huge chilling
8 effect. We can put adjectives on it. But how much
9 are we seeing in the real world, people going
10 after individuals for repairing things versus,
11 yes, there is some competition over keeping
12 authorized service within the umbrella of an
13 overall business model.

14 The courts know how to deal with that.
15 That's been an issue for a long time under
16 antitrust law. It's been done in the context of
17 software service. It's been looked at by the
18 courts. That's a very well-developed body of law
19 and it's appropriately dealt with under
20 competition law. To bring it back in here and say
21 that it should be addressed through an expanded
22 fair use I think is fixing a problem that isn't a
23 problem.

24 MR. RILEY: So, can I ask -- can you give
25 us an example of one of your companies relying on

1 fair use? Is that something you have?

2 MR. COX: Well, they're not my companies.
3 I think it's probably the case that all of the BSA
4 members have relied on fair use at one time or
5 another. They have to look at their competitors'
6 products and they have to do research and they
7 have to figure out how to compete. I can't give
8 you a specific example. But I would expect that
9 all of them think about it on a regular basis and
10 have done things that they felt was relying on
11 fair use.

12 MS. ROWLAND: Ms. Ailsworth?

13 MS. AILSWORTH: Yes. I was just going to
14 speak to the actual changes that could be made to
15 the Copyright Act. And so, the first one, again,
16 just reiterating shifting the burden of the fair
17 use from being purely a defense to having some
18 kind of front-end analysis would be really useful.

19 But then also we are speaking about
20 section 107. So in addition to the preamble
21 language and mentioning interoperability and the
22 need to reverse engineer for that purpose, if it's
23 possible to add language specifically addressing
24 interoperability -- it has been done in section
25 1201 -- I think it would be appropriate to do that

1 since section 107 was really drafted and put into
2 place before the software issue became a real
3 real-world reality. I mean, and you have the DMCA
4 that was created obviously in response to
5 software.

6 And so, there are provisions there and
7 carve-outs there that could be brought back and
8 incorporated into 107 that I think would be really
9 useful because just for being able to rely on them
10 in the 107 context -- I mean, in the 1201 context,
11 and then when you go back to 107, you have to do
12 the full four-step analysis and you have to fit it
13 into one of the categories and the purpose of the
14 use and whatnot. That's great. But it would be so
15 much more clear if there was just the same thing
16 as in 1201, just a very specific carve-out.

17 MR. DAMLE: And is it your position the
18 case law on interoperability -- and Mr. Cox
19 mentioned that there's been sort of cases that
20 have now been around for quite a while -- is it
21 your position that the case law is not
22 sufficiently clear?

23 MS. AILSWORTH: I think the case law is
24 sufficiently clear actually. But the problem is,
25 is that the fact of when you have companies,

1 especially smaller companies that are having to
2 operate in this space, and you really can't
3 predict what a court's going to do and you never
4 want to have to make that jump.

5 And if a company asks me, well can we
6 rely on fair use in this case, the answer is
7 always you could. But these are the penalties if
8 the court were to find otherwise. And you never
9 want to be in that situation where you're paying
10 that much in damages. It would sink the whole
11 business.

12 MR. DAMLE: Yeah. Well, I'm not sure
13 we're going to be able to solve the question of
14 legal uncertainty. I mean, that happens even with
15 the explicit exemptions, other than fair use.

16 MS. AILSWORTH: But there is less when
17 you have a specific language that you can point to
18 and really present it in the court at an early
19 stage and that can help hold off some litigation
20 as well. Especially in bargaining, when you have a
21 supplier or someone else coming to you and saying,
22 well our copyrights are X, you can very clearly
23 point to something and say, well, our rights to
24 use it for this purpose are Y and Z.

25 MR. DAMLE: Okay.

1 MS. ROWLAND: Ms. Walsh?

2 MS. WALSH: Yeah. I think this has sort
3 of led into something that I mentioned in the
4 first panel, which is the idea that fair use is a
5 really important backstop. It's sort of an
6 important safety net. But it's not great as your
7 first line of defense because it can be really
8 expensive. It can be unpredictable. You can wind
9 up before a jury with looking at pictures of, you
10 know, artwork, in your case about APIs.

11 And I can imagine if the Congress adopted
12 something saying you can't waive your fair use
13 rights in a contract of adhesion, but the ability
14 to enforce that as a contract were still present,
15 you could be before a jury saying, look, they
16 breached our contract with us. How can it be fair?
17 Fair use assumes good faith and they breached our
18 contract. So that's another reason why it's
19 important to not permit those fundamental speech
20 rights to be waived in a contract of adhesion.

21 I think for the most part we feel that
22 the cases are pretty good. The places where they
23 get attacked are people saying, well, it said that
24 it was necessary in order to -- you had to make
25 copies. It was necessary in order to reverse

1 engineer in order to get at those functional
2 components.

3 So if it's not an absolute necessity,
4 people try to get around the case law that way and
5 unfortunately that's been rejected in the Ninth
6 Circuit. But it's something that cropped up in the
7 statutory exemptions in 1201, where there's some
8 language it has to be necessary. You have to be
9 doing something for the sole purpose of encryption
10 research, for example. And that language is always
11 a target of attack that undermines the utility
12 when you try to build a carve-out.

13 If you have language that can be read as
14 it has to be strictly necessary or you have to
15 have just the sole purpose of doing one thing,
16 then that really undermines the certainty that
17 people can take from those exemptions. And that
18 carve-outs like that are a step up from fair use
19 in terms of certainty. They're a step down in
20 terms of breadth. But there's a place for them in
21 the regulatory regime, as long as it's clear if
22 you're within the scope of this safe harbor,
23 you're safe.

24 If you're outside of it, you still have
25 your full scope of fair use rights. We're not

1 saying that this is the only time interoperability
2 is fair use. We're just saying we've figured out a
3 way to articulate something where we can have a
4 bright-line rule and give some certainty to people
5 who are doing this kind of interoperability that
6 you're not liable.

7 Of course, the best way to generate that
8 kind of certainty is by limiting the scope of the
9 rights to exclude in the first place or the
10 copyrightable subject matter. So during the time
11 when everyone understood that APIs were not
12 copyrightable, we got buy-offs. We got the C
13 programming language. And this demonstrates both
14 the general principle that limitations on the
15 exclusive rights give the best certainty to
16 innovators, but also the specific principle in the
17 API context, which is important for embedded
18 software.

19 Software devices, particularly the ones
20 that are pinging back to the server or talking to
21 other devices in the home, communicate via APIs.
22 And an important part of interoperability is the
23 ability to re-implement those APIs to create a
24 competing non-infringing product or to create
25 interoperable products that will work alongside it

1 in the home.

2 And in terms of the scope of the inquiry
3 and excluding software that's not in embedded
4 devices, I think the way that we've been
5 approaching that is we're identifying things that
6 are problems in the context of embedded software.
7 Some of them are also problems in the context of
8 other software or even non-software copyrighted
9 works.

10 But we're focusing because of the thrust
11 of this study on things that are salient problems
12 for embedded software. And I hope that you will
13 not exclude from consideration things that are
14 also problems in other areas just because they are
15 also problems in other arenas.

16 MS. ROWLAND: Mr. Liu?

17 MR. LIU: Oh, yeah. I'd just like to
18 respond quickly to a point Mr. Cox made about
19 distinguishing between -- or looking at the actual
20 empirical state of who is getting sued. He
21 mentioned that no one is actually going after
22 individuals and they're focusing on things that
23 actually might have a market impact.

24 Well, first I'd like to say that even if
25 individuals aren't getting sued, they still have

1 to face the threat of litigation. I mean, they
2 might get sued and the probability of that
3 happening is not zero. And second, we still want
4 to protect businesses as well. I mean, people
5 should be able to start businesses that take
6 advantage of fair uses. Connectix I think was one
7 of those groups and the court found in favor of
8 them porting all of the PlayStation's
9 functionalities onto a desktop computer.

10 And so, it's not just enough that the
11 case law comes out in favor of fair use, at least
12 in that particular case. The whole point of fact-
13 dependence means that anyone can bring a suit and
14 generally avoid frivolousness because every case
15 has different facts.

16 And so not everyone has the money that
17 Google has to defend suits. And so, you're hurting
18 startups and other small business as well when
19 you're just focusing on empirical impact on
20 individuals. You have to think about the small
21 businesses that can't defend suits.

22 MS. ROWLAND: Mr. Cox, do you have
23 anything to say?

24 MR. COX: I think at the broadest level,
25 the BSA thinks that fair use is one of a number of

1 important safeguards in the existing system that
2 helps produce balance. And if the statement is
3 somebody won, that's a vindication of fair use
4 being an effective mechanism, but to say they
5 shouldn't have to win or they shouldn't have to
6 spend money for it and you should instead move the
7 line way back I think is not a supportable
8 argument.

9 MS. ROWLAND: Okay. I think with that,
10 unless there's anyone else who has something to
11 say -- okay, we will conclude this panel on fair
12 use. And I suppose we will be back at 1:30, right?
13 So, have a good lunch.

14 (Whereupon, the foregoing went off the
15 record at ___ p.m., and went back on the record at
16 1:43 p.m.)

17 MR. BERTIN: So this is our final session
18 of the day. Our focus today is on sections 107 and
19 -- 118 and 119 -- or 109 and 117, excuse me,
20 which, in addition to 107, are of course the three
21 statutory exemptions that we identified in our NOI
22 as being of particular relevance to software-
23 embedded devices.

24 One of the themes that we noticed from
25 the comments -- at least I noticed -- is that, on

1 the one hand, certain commenters were observing
2 that these statutory exemptions were fine and that
3 no changes were needed. And then, on the other
4 side, folks were saying that the statutory
5 exemptions were also fine, properly interpreted,
6 which at first blush sounds like everyone is on
7 the same page. But when you look closer, there's
8 some gap between in the middle.

9 And I wanted to go back to some of the
10 comments that were made earlier this morning from
11 Mr. Shore in particular. You said I think on at
12 least two occasions that what we need are bright
13 lines. So I would be curious to hear from you what
14 do you think the lines are, where they should be
15 and are they currently bright enough?

16 MR. SHORE: No, first. I think
17 foundationally the problem is that -- again, that
18 licenses have been expanded to subsume ownership.
19 And so -- and licenses being an exception from the
20 first-sale doctrine, if you license something, you
21 don't own it. Therefore, it's not subject to first
22 sale -- we have a problem.

23 And so, what ORI has proposed is a couple
24 of things. One, our overarching view is, look,
25 whatever rights that you took under the first sale

1 should transfer. However, we know that that might
2 be difficult in the current environment. And so,
3 we've proposed a modest step, working with
4 bipartisan members on the Hill on YODA, which you
5 guys are probably familiar with.

6 And YODA we think is pretty reasonable.
7 In fact, we think that YODA addresses many of the
8 concerns that the other side has laid out about
9 issues with giving access to people for embedded
10 software, security-type issues because YODA simply
11 says that the first-sale doctrine applies,
12 overrides the license for the purposes of security
13 patches and bug fixes, or security updates and bug
14 fixes. We think that's an incredibly modest step
15 and actually, a very positive step because it
16 ensures that as the physical good travels, that it
17 won't be susceptible to security hacks.

18 So that's probably where we would start
19 and at least give consumers and others some
20 comfort in knowing that if you take a purchase or
21 a gift in the second sale or the second transfer,
22 that at least you can get security patches and bug
23 fixes.

24 MR. BERTIN: Is it your view that YODA
25 would benefit primarily the -- (off mic) -- back

1 on? Is it your view that YODA would provide those
2 benefits to the consumer who would be receiving
3 the device downstream or would it also be broad
4 enough to allow security researchers to do
5 research on bug fixes independently?

6 MR. SHORE: Yeah, that's not -- I don't
7 believe that the -- (off mic).

8 MR. SHORE: To answer your question, I
9 think as long as the possessor has taken lawful
10 transfer subsequent to a first sale, whether it's
11 a researcher or a consumer or a business, I don't
12 think it really matters. We should be agnostic on
13 that front. Did you have a second part to that?
14 Sorry.

15 MR. BERTIN: No. Thank you.

16 MR. SHORE: Okay.

17 MR. DAMLE: I mean, do you have -- so
18 this goes back to one thing that we were
19 discussing earlier about -- just to be frank, it's
20 rare these days for Congress to act in the
21 evidence of sort of very clear problems in the
22 marketplace. They're sort of in a reactive -- tend
23 to be in a reactive mode. So I mean, just in terms
24 of the bug fix piece of it and security patches --

25 MR. SHORE: I mean, we've identified them

1 in testimony. We've identified them. I mean, it's
2 the litany of the licenses and, I mean, there's --
3 this is a common question that comes up from the
4 other side in order to deflect from the things
5 that they actually are doing, which are to use
6 licenses to control downstream distribution, to
7 engage in things like market segmentation.

8 I mean, this is just a common canard that
9 they keep raising. But the evidence is there. And
10 frankly, I would ask them, I mean, if there is no
11 problem, why do all of their terms of their
12 websites -- why do their FAQs, why do they
13 constantly bring up these issues? You know? Do you
14 pose the same question to them?

15 MR. DAMLE: I mean, yes, and we are very
16 curious about that. But I mean, I have to say,
17 that in your -- again, in your submission, there
18 were -- the examples that we looked at, if I
19 looked at the Nest one, for instance, I looked at
20 that one and it didn't have any restrictions on --
21 at least I couldn't see a clear restriction on the
22 transfer of that device to a downstream purchaser.
23 And I'm not aware -- I mean, I looked on eBay and
24 I found used Nests for sale.

25 And so, again, just in terms of the --

1 MR. SHORE: Yeah, but there are common
2 and regular examples of takedowns of all kinds.
3 And yeah, generally, a lot of it is in the non --
4 I mean, tech is everything. Tech is manufacturing.
5 We use tech interchangeably, and often in the
6 wrong way.

7 But if you go on eBay, I mean, the
8 largest manufacturer of paper towel dispensers is
9 one of the most aggressive protectors of their IP
10 and is constantly filing to have stuff taken down.
11 We -- it's a -- again, I find the question -- I
12 can only present so much evidence so many times
13 over and over without seeking the same sort of --
14 and seeking answers from the earlier side.

15 I mean, earlier today, somebody -- I
16 think Mr. Riley -- was the notion about John Deere
17 and people don't want -- John Deere doesn't want
18 farmers repairing their tractor because they might
19 do something to it, might damage the brand. And
20 the question from you at the time was do you have
21 any examples. And you asked Mr. Wiens. And I would
22 ask John Deere, do you have any examples of where
23 your brand has been damaged in actuality because
24 somebody tinkered with the tractor.

25 I mean, we really need some parity in

1 this debate. Remember, what *Kirtsaeng* was about,
2 right? Remember what Breyer said in his opinion,
3 that if *Kirtsaeng* had -- that if the outcome had
4 gone the other way, that manufacturing would have
5 -- for copyrighted goods would have completely
6 shifted overseas, enabling the rights holders to
7 claim Copyright Act did not apply, first-sale
8 doctrine did not apply because the Copyright Act
9 did not apply extraterritorially.

10 In response to your point earlier, where
11 you said that you didn't think that studios would
12 be knocking down people's doors after five years
13 to get their movies back, that's exactly what
14 *Kirtsaeng* was about, right? They went to Supap
15 Kirtsaeng and they said, give us the books plus
16 damages.

17 You can envision a world where the
18 erosion of the first-sale doctrine leads to
19 corporate counsels sending letters to places like
20 Goodwill saying, hey, you need to pull every -- in
21 a world where *Kirtsaeng* had lost or Wiley had
22 prevailed, you need to pull every Mickey Mouse t-
23 shirt that was manufactured overseas.

24 Well, if you've ever peeked in the back
25 of a bin room at Goodwill or if you've ever

1 donated to Goodwill, which I'm sure many of us
2 have, you don't know where these things came from.

3 Often the tags are gone. So you know, we
4 need to sort of start to shift and equalize the
5 presumptions a little bit here in this debate and
6 know that to the extent that the other side is
7 constantly saying show us the problem, show us the
8 problem, the problems are real.

9 The problems are documented. We can only
10 document them so many ways. But we can talk about
11 the things, also very specifically, where the
12 rightsholders, for instance do bring suit and they
13 do force the other side to spend millions and
14 millions of dollars in defense of their rights,
15 oftentimes for businesses, dollars they don't
16 have.

17 So I'm kind of -- I apologize for my
18 exasperation. But we have been testifying ad
19 nauseam on this issue since 2013. And I have yet -
20 - I'll make one final point. I have actually not
21 seen any overt or public opposition to YODA. So
22 I've not seen a letter in opposition. I mean, they
23 may come and they may talk behind closed doors in
24 meetings and there may be a letter in such
25 circulation. But I have yet to see any actual

1 opposition to the bill.

2 So if it's such a threat, if it's such a
3 law in search of a problem, why aren't they
4 publicly opposing it? I'll defer to others.

5 MR. DAMLE: Sorry, you were going -- you
6 were going to look into being able to discuss one
7 of your clients. Were you able to get that?

8 MR. SHORE: They cannot get a hold of
9 their attorney.

10 MR. DAMLE: Okay. That --

11 MR. SHORE: But I -- but I assume you'll
12 have other opportunities down the road and I will
13 work on it.

14 MR. DAMLE: Okay. Thank you.

15 MR. SHORE: Yeah.

16 MR. BERTIN: So obviously *Kirtsaeng* came
17 out the other way --

18 MR. SHORE: Yeah.

19 MR. BERTIN: -- much to your clients'
20 delight, I'm sure.

21 MR. SHORE: Yeah.

22 MR. BERTIN: In the wake of that
23 decision, have you seen or are you aware of any
24 move by rightsholders to obtain, through licenses
25 or by contract, that which they would otherwise

1 have enjoyed under an interpretation of the
2 copyright law itself?

3 MR. SHORE: Well, I mean, *Lexmark* is a
4 patent case. But *Lexmark* is I think one could
5 argue in very much the same vein --

6 MR. BERTIN: Are you talking about
7 *Lexmark* today or from 2003?

8 MR. SHORE: The current *Lexmark* -- very
9 much in the same vein, right? And so, I'm not sure
10 that it's a question of any one particular tool.
11 But it's that -- it's the opportunity, when you
12 have very, very deep pockets, you can throw them
13 at a lot of different channels. We, for instance,
14 constantly see examples where goods are held at
15 customs, right? Authorized goods -- I'm sorry,
16 unauthorized but legitimate goods are held at
17 customs. And the customs agent will call the
18 rightsholder and say, we have a pallet of XYZ
19 computers here. And the rightsholder will say,
20 well, we're not so sure. We have to check the
21 serial numbers. Oh, well can't you just check
22 them right now? No, it'll take several days.

23 I mean, there are -- in sort of the real
24 world, in the world where the rubber meets the
25 road, there are a lot of nuanced things that the

1 rightsholders can and often do deploy, not just in
2 the legal system, to make it harder for people to
3 engage in legal, legitimate commerce with
4 legitimate goods that have gone through a first
5 sale.

6 MR. BERTIN: Ms. Sollazzo?

7 MS. SOLLAZZO: Sure. We agree with much
8 of what Mr. Shore has said. One thing I would
9 emphasize is the importance of being proactive
10 here in such a fast-moving tech industry. And no
11 one's denying that the software industry has been
12 innovative. But there's no evidence that this is
13 the optimal scheme or that we couldn't have had
14 more innovation with fewer copyright restrictions.

15 We would also support YODA, though we do
16 think it's a good and important step in the right
17 direction. Though we would say that it doesn't
18 necessarily address the entire problem, since YODA
19 really only deals with alienability and whether
20 you can transfer the device. And we would hope
21 that more representatives might step in to
22 introduce new legislation that might allow for
23 tinkering or modification for non-infringing
24 purposes.

25 MR. DAMLE: So I mean, is it -- one of

1 the things that the Second Circuit's opinion in
2 *Krause* says is that the 117 right includes the
3 ability to maintain the software in a working
4 state but also to add improvements to make it more
5 useful. Do you think that that's -- do you think
6 that that's good enough in terms of being able to
7 have some sort of right to repair in the software
8 space? Do you think that 117 could -- that more
9 could be done in that -- with that exception?

10 MS. SOLLAZZO: Right. Well, I think one
11 of the big problems right now is that consumers
12 aren't able to take advantage of the limitations
13 in section 109 and section 117 because they aren't
14 considered owners. So maybe that could be a way to
15 actually bypass Congress altogether and just
16 interpret the word "owner" in those sections to
17 mean the owner of a copy of software contained
18 within a device regardless of any license language
19 to the contrary.

20 MR. DAMLE: And while one of the things
21 that *Krause* says on the ownership point is that
22 the license language is not necessarily
23 controlling, that that's not the end-all, be-all
24 of the analysis. Do you have a sense -- I mean, do
25 you have an opinion on the *Krause* sort of test for

1 ownership?

2 MS. SOLLAZZO: Sure. So I think that
3 could go a long way. And I think having official
4 interpretative guidance coming from the Copyright
5 Office saying that -- or interpreting the word
6 "owner" in this way could be very powerful and
7 could serve as a useful signaling function to
8 courts as well.

9 MR. DAMLE: Okay.

10 MR. BERTIN: Ms. Walsh?

11 MS. WALSH: Yeah. I want to echo
12 something that Mr. Shore said earlier about sort
13 of evidentiary presumptions in making policy
14 because, as I mentioned during the first panel,
15 this is an area where some of the traditional
16 justifications for copyright law don't apply. And
17 I think it's dangerous to think of copyright as
18 something where it's going to apply to the maximum
19 possible extent.

20 It's going to cover this and this and
21 this unless you can show some good reason why it
22 shouldn't because copyright law is a regime that
23 restricts speech and it restricts innovation. And
24 the government can only restrict speech when
25 there's a very good reason to do so.

1 And taking the approach that the default
2 is we're going to have this speech-restrictive
3 regime unless the proponents of speech are able to
4 come up with reasons why they ought to be allowed
5 to speak is backwards from a constitutional
6 perspective and also outside of the speech context
7 just from a good policy perspective.

8 We're talking about copyright is an
9 exception to the ordinary functioning of the free
10 markets, government-granted limited monopolies.
11 And it needs to be justified with respect to some
12 proven need to deviate from those basic
13 principles.

14 MR. BERTIN: Sorry --

15 MS. WALSH: Yeah.

16 MR. BERTIN: Is it your view that
17 alienating property should be viewed as speech or
18 that repairing property should be viewed as
19 speech?

20 MS. WALSH: I don't think either of those
21 activities are inherently or always speech.

22 However, I don't think you can deny that
23 copyright law is a regulation of speech. And in
24 the embedded software context, when you publish
25 information about a security vulnerability, when

1 you publish code, which is speech, that may patch
2 or add new functionality to the device, this is an
3 arena, just like all other areas of copyright law,
4 where speech is implicated by the regulation.

5 MR. BERTIN: But does copyright really
6 reach those kinds of scenarios? I mean, if you're
7 saying I'm a security researcher and I've
8 discovered this vulnerability and here's,
9 basically, here's the facts and here's my view on
10 how you would fix it, I mean, isn't that covered
11 by 102(b)?

12 MS. WALSH: In the -- are you saying --

13 MR. BERTIN: Well, I mean, you're talking
14 about a fact and here is the process for fixing
15 the problem that I have identified.

16 MS. WALSH: Yeah, so and that's actually
17 the reason why reverse engineering and research
18 has been consistently found to be fair use is
19 because fair use is sort of the First Amendment --
20 one of the First Amendment accommodations of
21 copyright law.

22 And so, it would not be proper, and
23 courts have held that it is not proper, to
24 restrict security research from a copyright point
25 of view. Of course, in the 1201 context, you have

1 had discussions where disclosures of
2 vulnerability, like in the *Corley* case, 2600,
3 where you're sharing a prime number and the court
4 issued an injunction that keeps people from
5 publishing information about how to circumvent
6 technological protection measures.

7 So I wouldn't say that -- I wouldn't say
8 that because fair use exists as a safety net, you
9 can apply, willy-nilly, a broad regime of
10 copyright restrictions and just sort of count on
11 the courts to figure it out, in large part for all
12 of the reasons we've talked about where fair use
13 is expensive and unpredictable and it's not always
14 -- it doesn't always do as good a job as we would
15 like at protecting these fundamental rights.

16 MR. DAMLE: So I mean, just to be clear
17 we were talking about the first-sale doctrine and
18 117, and a lot of which hinges on this question of
19 ownership.

20 And I guess the point is if the court --
21 if the courts are kind of getting those questions
22 generally right in terms of like what the scope of
23 the first-sale doctrine is, what the scope of the
24 117 right is then I'm just -- I'd be curious to
25 know whether there's evidence that notwithstanding

1 -- like, that either courts are getting it wrong -
2 - and maybe *Vernor* -- I'm sure, from your point of
3 view, *Vernor* is an example of that. But then we
4 have *Krause* in the Second Circuit.

5 But to the extent that the courts are
6 getting it wrong, that that's causing A, that
7 courts are getting it wrong and, B, that's causing
8 problems for consumers --

9 MS. WALSH: Yeah. I think *Krause* did a
10 good job with section 117. I think when I think of
11 109 and a court getting it wrong, I think of
12 *ReDigi*, where there was an attempt to create a
13 market for used works, which is the norm that the
14 court decided was not within the scope of 109. I
15 think that that is less of a problem in the
16 embedded software, though it depends on how you
17 think about embedded software.

18 So if you have sort of a one-to-one, this
19 is the software, this is the device, that I'm
20 always sort of transferring them together, then I
21 think even the *ReDigi* court would have no problem
22 figuring out that that's a fair use. One question
23 is when you have embedded software --

24 MR. DAMLE: Sorry, that's a fair use or
25 that's --

1 MS. WALSH: That's first-sale. Thank you.

2 MR. DAMLE: Yeah, okay.

3 MS. WALSH: Yeah.

4 MR. DAMLE: That the person owns that
5 software because it's embedded in the device, that
6 that's --

7 MS. WALSH: Right, that when you transfer
8 the physical copy that you own --

9 MR. DAMLE: Right, right.

10 MS. WALSH: -- that you're engaging in a
11 first-sale-protected act. Now I've lost my train
12 of thought.

13 MR. DAMLE: Sorry. I apologize.

14 MS. WALSH: No. Thank you for the
15 correction. That's the correct -- oh, so the other
16 -- so I was talking about embedded software that's
17 sort of one-to-one, maps onto the hardware. And it
18 might be a different question where you have a
19 software-enabled consumer product where you can
20 get apps or something to install on it. And you
21 say, "okay, I want to resell my app and send it
22 off to someone else's Android phone."

23 Then that's the kind of place where the
24 *ReDigi* error would enter the world of embedded
25 software and it would require either judicial --

1 going back to the judicial doctrine of first-sale
2 or congressional action to clarify the scope of
3 109 to include cases where you are -- excuse me --
4 transferring digital property and you delete your
5 own copy and there's only one copy out there.

6 MR. BERTIN: Mr. Shore?

7 MR. SHORE: So I wanted to go back to
8 your question about bright-line rules. And I just
9 wanted to articulate why it's important to have
10 those rules. I mean, it may seem obvious.

11 But businesses -- my members crave
12 certainty. And while they would like certain
13 outcomes obviously, I think having certainty is as
14 critical as getting the outcomes that we desire so
15 that they don't end up in court, right, so that
16 they can make decisions that they can hold up
17 against a piece of paper and say, "okay, if we do
18 this, we're going to be fined or we should be
19 fined."

20 One of the biggest problems in the three-
21 year anti-circumvention review is not the
22 substance of the review but the review itself
23 because nobody plans a business on three years,
24 right? Nobody would ever wake up and say, you
25 know, I'm going to sell a product that you can

1 unlock today because -- and I'll go buy 50,000
2 units of it and plan to put my kids through
3 college on it, knowing that it may go away in
4 three years.

5 And so, those are the -- and I know
6 that's not -- you just do the work, right? I'm not
7 putting that at your doorstep. But I mean, those
8 are the real challenges when you don't have
9 certainty. Those are the challenges when you have
10 things like fair use, which is, as Ms. Walsh said
11 earlier, a great backstop and a critical backstop.

12 But it doesn't engender certainty for
13 businesses that need it in order to make decisions
14 and hire people and grow and expand and all of
15 that stuff. So the outcomes are as important, I
16 think, as having some direction.

17 MR. BERTIN: Well, there's also a risk
18 though. I mean, anytime you're creating a
19 certainty for one particular model or product as
20 it exists today -- six months or a year or five
21 years from now may seem quaint.

22 I mean, you think about the exception
23 that was put in, I think, section 110 for the DVD
24 player that would allow you to skip over the parts
25 of the video that you find objectionable.

1 At the time, the Office said, well, this
2 is really not something that copyright protects or
3 touches because you're not creating a derivative
4 work. But nevertheless, the owner of that company
5 felt that there was a need for a statutory fix.

6 MR. SHORE: Yeah. And look, the more
7 granular you get, the more problematic it is. But
8 there are broad brush strokes you can take. You
9 can change the presumption for the review, right?
10 You could -- instead of having a de novo review
11 every time, you could make the presumption
12 rebuttable.

13 You could change the presumption in the
14 first-sale doctrine that ownership lays over
15 license, not the other way around. I mean, there
16 are things that you can do that don't speak to
17 we're going to write a statute that talks about
18 DVD players when I don't -- I'm sure my kids don't
19 even know what a DVD player is anymore. There are
20 other things you can do to create certainty that
21 don't have to be so granular and so specific.

22 MR. BERTIN: So speaking of granularity,
23 one sort of peculiarity of 109 and 117 is that 109
24 talks about the owner of a "particular copy,"
25 whereas 117 just talks about the owner of a

1 "copy." And in, I believe it was either *Vernor* or
2 *Krause*, the parties -- the court raised the
3 question and the parties sort of agreed -- that,
4 well, the word "particular" is meaningless here,
5 so no need to get into it. Do any of you have any
6 views on whether there is a difference between a
7 "particular copy" versus the owner of a "copy?"

8 MR. SHORE: Do you want to -- do you have
9 views on this one? Okay. I -- so I'm going to
10 speak personally on this one, not necessarily the
11 coalition I represent. And this might color --
12 this will actually be contrarian to most of my
13 positions earlier. So prepare to be surprised.

14 I actually do believe that technology has
15 some role to play in that issue. For instance --
16 and I don't know if it was raised in *ReDigi*, but
17 I'm going to apply it to *ReDigi*. I think to the
18 extent that you can't identify the copy as that
19 copy, you can't be particular about that copy, you
20 have a problem in then transferring it.

21 And I think the challenge for a platform
22 like *ReDigi* is that they couldn't say, "yeah,
23 that's the copy that Andrew downloaded from iTunes
24 and that he's going to then transfer." Now, I do
25 believe that as technology catches up in these

1 areas and that we can with particularity point to
2 the copy and say it's extinguished here, it moves
3 on here, that we should revisit some of that. But
4 yeah, I mean, I think "particular" does have
5 context. Particular -- particularly, right, sorry
6 -- in a more ephemeral environment where things
7 sort of float in the ether and they're not as this
8 is my phone and I can bang it on the table.

9 MR. BERTIN: Ms. Walsh?

10 MS. WALSH: So I think that the *ReDigi*
11 court actually sort of took it for granted that
12 ReDigi's technology that was designed to make sure
13 that you uploaded your thing and then they would
14 verify that only one copy existed at the end, they
15 sort of -- the court said "let's take all that as
16 true." But the problem here is in the way that
17 109 is drafted to only relate to distribution,
18 whereas technically what's happening was a copy
19 and then the original is destroyed.

20 So even though from a market
21 functionality standpoint, it looks exactly the
22 same as transferring a copy, it implicates a
23 different exclusive right. And the ReDigi -- that
24 was, I think, the reason that the ReDigi court
25 found that it wasn't enough as opposed to -- as

1 opposed to concluding that you couldn't verify
2 that what ReDigi said was taking place was
3 actually taking place. But I don't -- I have not
4 given thought to and don't have an opinion on the
5 distinction between "particular copy" and "copy"
6 in the two sections.

7 MR. SHORE: I mean, I think it's to our
8 benefit -- to the benefit of my members to be able
9 to have -- to be able to lean on the word
10 "particular," regardless -- I mean, that is how
11 they used it, now that you've refreshed my memory.
12 And I think it's helpful because we are often
13 identifying specific products with specific serial
14 numbers and saying these are legitimate goods. We
15 should be able to transfer them.

16 MR. BERTIN: Open-source software is
17 often accompanied by conditions on the free
18 transfer and reproduction of such software, such
19 as requiring the disclosure of any software
20 modifications or the downstream licensing of such
21 software. Would YODA or an amendment like YODA
22 affect the development and use of open-source
23 software?

24 MR. SHORE: I mean, would it have gone
25 through a first sale? Because YODA applies to -- I

1 mean, often, my understanding of open-source --
2 and I'm not a deep tech guy -- but open-source is
3 often stuff that's given away freely. That's the
4 whole point, right? So it never actually went
5 through a first sale. So I'm not sure. But I mean
6 --

7 MR. DAMLE: Yeah, it is subject -- I
8 mean, there's open-source licenses, which could --

9 MR. SHORE: Okay. Well, then I --

10 MR. DAMLE: Yeah.

11 MR. SHORE: -- I'll defer to someone on
12 the panel.

13 MS. WALSH: Yeah, I think that the open
14 source licenses typically trigger when you are --
15 when you're implicating the derivative work right.
16 So if you're a person who wants to make a
17 derivative work of something that is GPL-ed, then
18 the license requires that you share back your
19 contribution.

20 So the derivative works right is sort of
21 not -- is not one that we have been talking about
22 in the context of a first sale. Yeah, if there --
23 are there particular open-source license
24 provisions that might be implicated by first sale
25 that you have questions about?

1 MR. DAMLE: Well, I guess the question is
2 just generally about the GPL and the ability to --
3 I mean, it sort of relates to 117, right? I mean,
4 if you've made a modification or an improvement
5 relying on the 117 right, which includes the right
6 to create adaptations, right, that although the
7 transfer might be under a GPL, that if it's a
8 transfer of ownership, then you might say, "well,
9 I'm not bound by the terms of that license." And
10 so therefore the expectation that those kinds of
11 adaptations would be shared back to the community
12 are not fulfilled.

13 So I mean, and so, there is some concern
14 I think there that we may be unwittingly
15 undermining the open-source kind of system,
16 particularly since open-source software is very
17 common in these types of embedded devices. I mean,
18 we talked about in the 1201 hearing about how GPL
19 software is being used in smart televisions, for
20 instance, and in fact the Free Software Foundation
21 came in and said it's very important for us to be
22 able to assert the rights that the license gives
23 us.

24 I mean, this sort of goes to Mr. Cox's
25 point that sometimes licenses give the users more

1 rights than they might ordinarily have and puts on
2 them some obligations as well in exchange. So I
3 guess that's sort of in a nutshell the concern I
4 guess.

5 MS. WALSH: Yeah. I think for the most
6 part, the open-source communities are quite
7 comfortable with the idea that if you're doing
8 something that's a fair use or that is not an
9 infringement of copyright or is a 117 right, that
10 those are your rights and they're not trying to
11 sort of enlarge the scope of what they're able to
12 restrict beyond copyright law.

13 I do appreciate the concern about
14 recognizing the value of licenses that require
15 that you share back to the commons the
16 improvements that you make. That's something that
17 we have traditionally seen -- the places where the
18 open-source communities really want to enforce
19 that is where someone commercializes the product
20 and makes improvements and wants to keep them
21 secret. And that's the target of the open source
22 licenses.

23 I think if we saw a world where we're
24 talking about individuals or noncommercial users
25 who found themselves facing a burden of sharing

1 back to the commons whenever they did sort of
2 ordinary repairs or tinkering or patching, that
3 that is a place where the licenses might be less
4 vigorously enforced.

5 Again, we have what is the concern here.
6 The concern is about the thing getting exploited,
7 taken out of the commons, which is the open-source
8 version of getting competed with, like Mr. Cox's
9 someone sells is going to build a competing
10 router. And so, I don't think the open-source
11 community would be upset if we had something like
12 the carve-out for noncommercial or for low
13 commercial uses that we were discussing earlier.

14 MR. BERTIN: Mr. Shore?

15 MR. SHORE: Yeah. I was struck by Mr.
16 Cox's statement that licenses sometimes give more
17 rights than ownership. I'm inserting that word.
18 I don't think he said that they give more rights.

19 And I've struggled to find examples
20 because ownership is very finite, right? I own it.
21 I can do with it as I will. A license still
22 requires sort of a bilateral agreement. I don't
23 know if they've provided you any examples.

24 MR. DAMLE: Well, I mean, I think the
25 right to -- even in a world where you own a copy

1 of software, that doesn't necessarily give you the
2 right to make derivative works.

3 MR. SHORE: Yeah.

4 MR. DAMLE: And so, the GPL is an example
5 where I can -- by purchasing that software, it
6 comes with the right to make those derivative
7 works. So that's an example I think.

8 MR. SHORE: Okay. Were there others?

9 MR. DAMLE: That seems to be an important
10 example, but yeah.

11 MR. SHORE: Okay.

12 MR. BERTIN: So section 109 is expressly
13 framed by the Congress as a limitation on the
14 distribution right and 117, interestingly, is not.
15 It just applies to 106 broadly. And then 106(3) --
16 the distribution right itself -- states that it
17 gives copyright owners the right to distribute
18 copies or records of the copyrighted work to the
19 public by sale or other transfer of ownership, and
20 then there's the second clause, or by rental,
21 lease or lending.

22 I would appreciate hearing your views on
23 whether licensing broadly stated, where in that
24 provision does licensing fit in? Is it a part of
25 sale or other transfer of ownership or is it on

1 the rental, lease, or lending side of that
2 statement, of that clause?

3 MR. SHORE: I mean, I put it in the
4 second part of the clause. But it's been a while
5 since I've looked at the specific language of the
6 statute.

7 MS. WALSH: Yeah. I think if you sell
8 someone a copy of a work and it's a refrigerator
9 that has software in it and you purport to attach
10 a license to that, that's on the sale or other
11 transfer of ownership side of things. You have
12 sold them a copy of that work, even if you are
13 attempting to restrict what they can do with it.

14 MR. BERTIN: So it's a sale but
15 restricted by contract essentially. Is that what
16 you're saying?

17 MS. WALSH: If the contract were
18 enforceable, then yes.

19 MR. BERTIN: I think that that concludes
20 this panel. We'd like to open the floor up to any
21 other members of the audience who might like to
22 offer remarks. Hearing none, we will declare this
23 roundtable at an end, and we thank all of our
24 panelists for their comments and their enthusiasm
25 for the topic. And we are adjourned.

1 MS. WALSH: Thank you.

2 MR. SHORE: Thank you.

3 (Whereupon, the foregoing adjourned.)

4

5

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