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UNITED STATES COPYRIGHT OFFICE

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HEARING ON EXEMPTION TO PROHIBITION ON
CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS
FOR ACCESS CONTROL TECHNOLOGIES

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DOCKET NO. RM 9907

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Wednesday, May 3, 2000

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The hearing in the above-entitled matter was held in Room 202, Adams Building, Library of Congress, 110 Second Street, S.E., Washington, D.C., at 10:00 a.m.

BEFORE:

MARYBETH PETERS, Register of Copyrights

DAVID CARSON, ESQ., General Counsel

RACHEL GOSLINS, ESQ, Attorney Advisor

CHARLOTTE DOUGLASS, ESQ., Principal Legal
Advisor

ROBERT KASUNIC, ESQ., Senior Attorney Advisor

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2
3 MS. PETERS: Good morning. We come to
4 our second day of hearings on the potential
5 exception to the protection of access control
6 technology.

7 Yesterday I had a fairly lengthy
8 introductory remark that is at the back for people
9 who didn't get it. It basically sets out the time
10 table for what we're doing and the fact that we will
11 be making the transcript available online as soon as
12 we get it and, when the witnesses have had a chance
13 to correct their statement, we will be putting
14 substitute statements out. The fact is that we are
15 capturing this and hope to have it streamed on our
16 website as soon as technologically possible. That
17 means as soon as the Library's technology people
18 figure out how to ensure that we are able to do it.

19 MR. CARSON: Will you be encrypting
20 that, Marybeth?

21 MS. PETERS: No, we are not encrypting
22 that. The access will be totally open.

23 This morning we have two witnesses. The
24 first one will be Cary Sherman representing the
25 Recording Industry Association of America. The
26 second one is Robert Hildeman representing

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1 Streambox. And so let's start with you, Cary.

2 MR. SHERMAN: Thank you very much.

3 My name is Cary Sherman. I'm Senior
4 Executive Vice President and General Counsel of the
5 Recording Industry Association of America. I would
6 like to thank the Copyright Office for giving me the
7 chance to speak today and for your hard work in both
8 helping to enact the Digital Millennium Copyright
9 Act and in conducting this proceeding.

10 As you know, RIAA is a trade association
11 whose members are responsible for the creation of
12 over 90 percent of the legitimate sound recordings
13 sold in this country. RIAA's members are very
14 interested in the outcome of this proceeding as it
15 becomes more and more clear that new digital
16 technologies like the Internet will revolutionize
17 the way recorded music is enjoyed by consumers.

18 My prepared remarks today will be brief
19 and will address two key points. First, I will
20 explain RIAA's support for the Joint Reply Comments
21 filed by the 17 copyright owner groups. Second, I
22 will give a short description of the application of
23 technological protection measures to the electronic
24 distribution of recorded music, in particular
25 focusing on the work of the Secure Digital Music
26 Initiative, or SDMI, which was referenced in some of

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1 the comments filed in this proceeding. I would also
2 be happy to answer any questions the Office might
3 have about these issues.

4 On the first point, RIAA joins the other
5 copyright owner groups in urging the Office ad
6 Librarian to allow the prohibition against
7 circumvention of access controls to come into effect
8 in October without any exemptions. We think the
9 question that the Librarian must answer in this
10 proceeding is straightforward: Is there evidence
11 that the prohibition is likely to affect adversely
12 non-infringing uses of any particular class of
13 works?

14 There's no question that Congress placed
15 the burden of producing such evidence on the parties
16 who seek an exemption. It is also clear to us that
17 Congress expected a claimed exemption to be
18 supported by more than speculation, guesswork or
19 vague predictions. Indeed, legislative history
20 clearly requires highly specific, strong and
21 persuasive evidence to be produced. That kind of
22 evidence has not been produced for any class of
23 works and certainly not for sound recordings.

24 As explained in the Joint Comments, much
25 of the commentary in this proceeding strays from the
26 confines of this proceeding and asks the Librarian

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1 to do things well beyond his authority, such as
2 repeal provisions of the DMCA or overturn court
3 rulings applying provisions of the DMCA other than
4 those at issue here. Even the comments that address
5 the general question before the Librarian have taken
6 liberty with and confused the scope of this
7 proceeding. For example, rather than propose
8 particular classes of works that might be subject to
9 an exemption, they instead offer general categories
10 of users who could rely on an exemption for all
11 types of works.

12 Also, it has been argued that the
13 Librarian should not consider the very benefits the
14 DMCA was intended to bring about; increased access
15 to and availability of digital copyrighted works
16 through the use of technological protection
17 measures. When the proper question is considered
18 and the proper standard applied, an exemption is not
19 warranted.

20 This result should not be a surprise.
21 The House Judiciary Committee specifically
22 contemplated just that outcome and explained, and I
23 quote, "such an outcome would reflect that the
24 digital information market place is developing in
25 the manner which is most likely to occur, with the
26 availability of copyrighted materials for lawful

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1 uses being enhanced, not diminished, by the
2 implementation of technological measures and the
3 establishment of carefully targeted legal
4 prohibitions against acts of circumvention."

5 This result is especially appropriate
6 for sound recordings because there is no evidence of
7 any adverse effect on access to recorded music.

8 To the contrary, the market place is
9 working to develop new ways to enjoy recorded music
10 and increase access by consumers, which brings me to
11 the second point of my remarks. Some commenters
12 mentioned SDMI as an example of something that might
13 restrict access to copyrighted music. Nothing is
14 further from the truth. Recording artists and
15 record companies make their living by providing
16 access to their copyrighted works in the broadest
17 possible way. For example, right now consumers can
18 enjoy their favorite music in a wide variety of
19 ways, including from CDs, cassettes, radio air play,
20 juke boxes, music videos, digital cable services
21 and, more recently, through Internet-based sources
22 like webcasting.

23 The Internet and digital technologies
24 are making significant changes in the music business
25 but, unfortunately, not always in a good way.
26 Access to pirated copies of popular music has

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1 flourished on the Internet and, because of that,
2 record companies have been reluctant to make
3 available over the Internet legitimate downloads of
4 the world's favorite music. This lack of access to
5 legitimate forms of new digital music is not the
6 result of an excess of security measures or over-
7 zealous enforcement of the DMCA. Rather, it is the
8 lack of widely supported security standards and the
9 legal means to back them up that has created this
10 situation. And that is, in large measure, what
11 prompted SDMI.

12 What we are trying to do with SDMI is
13 exactly what Congress envisioned in the DMCA: a
14 voluntary, multi-industry endeavor that has the
15 ultimate goal of improving access to sound
16 recordings for consumers. SDMI is truly a ground-
17 breaking effort. Over 160 companies representing a
18 broad spectrum of information technology and
19 consumer electronics businesses, Internet service
20 providers, security technology companies, and
21 members of the world-wide recording industry have
22 come together in SDMI to develop open technological
23 standards for digital music distribution.

24 SDMI is not an effort by record
25 companies to lock up their music so that it will
26 unavailable to consumers. Such a broad array of

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1 companies would not be participating if that were
2 the case. The reason there has been such widespread
3 participation in SDMI is because they all see in
4 SDMI the promise of increased availability of music
5 in digital form.

6 SDMI began its work by developing a
7 specification for portable devices that record and
8 play digital music, but its ultimate goal is much
9 broader than that. We hope it will eventually
10 develop a framework for playing, storing and
11 distributing secure digital music in many different
12 ways and on many different devices. This will
13 enable the emergence of a new market that meets
14 consumer demand for high quality digital music.

15 One of the core principles of SDMI is
16 that its standards are open and voluntary, and SDMI
17 does not require the use of protection technology or
18 exclude unprotected formats. Copyright owners are
19 free to distribute their music in an unprotected
20 format if they so choose, and both protected and
21 unprotected music will play on SDMI-compliant
22 devices.

23 I should note that although some
24 commenters mentioned SDMI along with the DVD copy
25 protection scheme known as CSS, the two are
26 fundamentally different. CSS is a specific security

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1 technology, while SDMI is an organization to develop
2 certain voluntary minimum security standards that
3 may be implemented in any number of specific
4 technologies or products.

5 As further evidence that SDMI is all
6 about improving the consumer experience, SDMI also
7 seeks to provide consumers the access and uses to
8 which they have become accustomed with traditional
9 media. For example, the SDMI Portable Device
10 Specification permits a user to make an unlimited
11 number of copies from an original CD for personal
12 use on his or her PC, portable device or portable
13 media.

14 I must stress, however, that the point
15 of SDMI is not simply to improve the access to music
16 afforded by CDs. Electronic music delivery will
17 only succeed if it creates new business models and
18 consumer experiences that are simply not possible
19 today. In other words, those who distribute music
20 electronically need to be able to offer consumers
21 entirely new ways to enjoy even more convenient
22 access to music delivered in SDMI-compliant formats.

23 One good example of such a completely
24 new experience is a "try before you buy" program.
25 This would give a consumer access to music for free
26 for a limited time while the consumer decides

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1 whether to purchase a permanent copy. This new
2 consumer experience is made possible by delivering a
3 protected digital version of a recording. What is
4 important for this proceeding is that this business
5 model would be impossible if the Librarian were to
6 authorize consumers to hack SDMI-compliant security
7 systems to keep promotional copies without paying
8 for permanent retention.

9 Another example of new opportunities
10 possible with SDMI involves the huge back catalogs
11 of music owned by many record companies. These
12 works can not be promoted and sold cost effectively
13 through traditional retail channels. Digital
14 distribution, with no limits on shelf space or
15 inventory and the ability to target niche markets,
16 can unlock this music and give its fans access where
17 none was possible before. These are just the kinds
18 of developments that Congress directed the Office to
19 consider on the positive side of the equation in
20 this proceeding.

21 It must be stressed, however, that
22 access only can be achieved if technological
23 protections that respect the copyright in these
24 works are available and effective. Thus, Section
25 1201(a) promotes new forms of access to digital
26 music, and delaying its effectiveness would hamper

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1 such access. Indeed, press reports are issued
2 almost daily announcing record company plans to
3 begin electronic music distribution services.
4 Nothing would have a greater chilling effect on
5 those plans than a decision by the Librarian
6 excluding sound recordings from the protection of
7 Section 1201(a)(1). No evidence for such an
8 exemption has been produced, and no such exemption
9 should be adopted.

10 Again, thank you for the opportunity to
11 appear before you today, and I welcome any questions
12 you might have about RIAA's comments or my remarks.

13 MS. PETERS: Thank you.

14 Mr. Hildeman.

15 MR. HILDEMAN: Thank you. I want to
16 thank the Copyright Office for this invitation. My
17 name is Bob Hildeman. I'm the CEO of Streambox,
18 Inc. The purpose I'm here today is to discuss with
19 this body several components. One is Streambox
20 fully supports adequate and effective copyright
21 protection. The second is that we want to see a
22 balanced approach for fair use and also our ability
23 as technology companies for reverse engineering.

24 Streambox is an Internet and broadband
25 technology company focused on developing the
26 building blocks for Internet and broadband markets.

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1 We are a technology enabler and an infrastructure
2 builder. Our technologies are open and flexible,
3 and we work with real networks, Microsoft, Apple,
4 MP3 and others, and Streambox.com is the leading
5 media search technology for searching, indexing and
6 categorizing streaming media content on the
7 Internet.

8 Streambox TV is a family of broadband
9 technologies that contain consumer software and
10 hardware devices, encoding and aggregation engine
11 and digital delivery components. Stream VCR the
12 client side technology contained within Streambox TV
13 contains streaming and recording technology that
14 allows consumers to record live and on demand
15 streaming content for later view. Streambox VCR
16 works just like a regular VCR that is used by
17 hundreds of millions of consumers in the U.S.

18 And again, I want to thank this office
19 for hearing some of the comments that I have to
20 provide. As far as my testimony on rulemaking
21 process for Section 201(a)(1) of the Digital
22 Millennium Copyright Act, let me say at the outset
23 that Streambox fully supports the desires of content
24 owners to effectively protect their copyrighted
25 material in the digital realm. At the same time, we
26 believe that it is very important that the

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1 traditional copyright principles of first sale and
2 fair use also survive in the digital realm.

3 As part of the Section 1201(a)(1)
4 rulemaking, the Copyright Office has a difficult
5 task of maintaining the balance between the rights
6 of content owners and consumers in the digital
7 realm.

8 The focus of the Copyright Office in its
9 Section 1201(a)(1) rulemaking is clearly centered on
10 the task, described by the House Commerce Committee
11 Chairman Bliley, of "creating a mechanism that would
12 ensure that libraries, universities and consumers
13 would generally continue to be able to exercise fair
14 use rights and other exceptions that have ensured
15 access to copyrighted works."

16 There is no doubt that the protection of
17 fair use rights in the digital realm would be a
18 benefit to content owners, consumers and companies
19 such as Streambox.

20 This brings me to the most important
21 issue that I wish to stress to the Copyright Office.
22 In its quest to satisfy the legitimate concerns of
23 both content owners and users in its deliberations
24 on Section 1201(a)(1), the Copyright Office must
25 also protect the legitimate fair use rights of
26 technological innovators and solutions providers.

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1 In its commentary on fair use in the digital
2 environment, the House Commerce Committee Report
3 accompanying the DMCA astutely notes that:

4 "Fair use is no less vital to American
5 industries, which leads the world in technological
6 innovation. As more and more industries migrate to
7 electronic commerce, fair use becomes critical to
8 promoting a robust electronic marketplace."

9 Specifically, what I am advocating is a
10 point that has already been raised and several of
11 the comments bear repeating. Whatever the final
12 Section 1201(a)(1)(A) rulemaking may or may not
13 allow in terms of circumventing technological
14 measures controlling access to copyrighted works, it
15 is vitally important that the legitimate rights of
16 companies to reverse engineering be protected.
17 While there is a specific exception to Section
18 1201(a)(1)(A) for reverse engineering contained in
19 Section 1201(f), the Copyright Office will need to
20 enhance this exception in the Section 1201(a)(1)(A)
21 rulemaking in order not to adversely affect the non-
22 infringing right of companies to reverse engineer
23 copyrighted material to which access is prohibited.

24 System interoperability is the driving
25 force behind the continuing evolution and growth of
26 the Internet industry, and the ability to innovate

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1 is directly tied to the ability to reverse engineer.
2 Companies must have access to other systems, and the
3 law can not favor one system over another.

4 Thank you.

5 MS. PETERS: Thank you.

6 Now we get to start the questions.

7 Robert, you get to start.

8 MR. KASUNIC: Thank you. Good morning.

9 My first questions are for Mr. Sherman.
10 As you might have noticed, we received a few
11 comments from DVD users throughout this proceeding.
12 Some expressed concerns about the interoperability
13 issues and the access and use controls involved with
14 CSS encryption on DVDs containing, among other
15 things, audiovisual works.

16 I noticed on the RIAA's website that
17 there is the intention of beginning to develop -- or
18 you're in the development stage -- of implementing
19 DVD audio and/or super audio CDs. Will CSS
20 encryption be used on audio DVDs?

21 MR. SHERMAN: Given what has happened
22 with CSS, I would feel confident in saying no. In
23 fact, it was the very hack of CSS that caused a
24 delay in introduction of DVD audio into the
25 marketplace. The music companies and the technology
26 companies all came to the conclusion that they

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1 needed to beef up the security system for this new
2 format before it was released and, as a result, they
3 have an example of a situation in which
4 circumvention of a technological protection measure
5 has actually impeded access to a wonderful new
6 format that consumers are going to love.

7 There will be something else. Exactly
8 what it is, I do not yet know. It is being studied
9 and tested, but there will be some form of
10 protection in DVD audio and, I assume, in super
11 audio CD as well.

12 MR. KASUNIC: Following that up, will
13 those audio DVDs be something that will be
14 compatible with currently sold DVD devices that are
15 authorized to decrypt CSS? Will those devices be
16 able to play audio DVDs?

17 MR. SHERMAN: They will not be
18 compatible, but that has nothing to do with the
19 protection technology. That has to do with the
20 format of the DVD technology itself. DVD video is
21 one standard. DVD audio is a completely different
22 standard. We expect that the devices that will be
23 sold in the marketplace will be universal players
24 that will play both DVD video and DVD audio, but the
25 new DVD audio format will not play on existing DVD
26 video players.

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1 MR. KASUNIC: So new devices will need
2 to be purchased.

3 MR. SHERMAN: Right. I should mention
4 that there is the possibility of record companies
5 releasing content that would be backward compatible
6 because it's a fairly flexible format, and the sound
7 version, the audio track of DVD video, could be used
8 by record companies so that that same music would be
9 available in DVD -- DVD audio might be playable on
10 the DVD video if they used the same compression
11 technology that is presently being used on DVD
12 video. That would not take full advantage, however,
13 of the extraordinary improvement in sound quality
14 that will be possible with DVD audio disks.

15 MR. KASUNIC: I read recently that Sony
16 Music is beginning to offer digital music over the
17 Internet that incorporates the SDMI technology.
18 What specific access control technologies or
19 measures are included with this distribution?

20 MR. SHERMAN: One really has to
21 distinguish between SDMI standards and ordinary
22 protection technologies that are available in the
23 marketplace. At this point, there is no SDMI
24 standard for protected content. There is no
25 specific standard with regard to what makes content
26 SDMI-compliant. Therefore, the only thing that

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1 would be relevant in terms of SDMI to the content
2 being provided by Sony is that at some point in the
3 future a Watermark would be incorporated in that
4 content. That is not something that is to happen
5 now. That is something that is to happen only later
6 when certain Phase 2 technology becomes available
7 and is ready for implementation and, at that point,
8 Watermarks will be incorporated in the content.

9 Therefore, what Sony is doing now is
10 simply providing its music in some kind of protected
11 format that would be compatible generally with the
12 SDMI system of protection. That will include things
13 like encryption, it will include digital rights
14 management systems and so on and so forth, but these
15 are just technological protection measures that are
16 available in the marketplace. They're not SDMI-
17 specific.

18 MR. KASUNIC: So SDMI is a group of
19 different organizations that compose this initiative
20 and that initiative involves a number of different
21 technologies. Can you be any more specific about
22 what the specific access control technologies are
23 that will be used? There'll be encryption and --

24 MR. SHERMAN: Well, this is not SDMI
25 now, but most of the delivery systems that are being
26 contemplated involve some form of encryption and

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1 some form of digital rights management system.
2 There are also decisions to be made about which code
3 to use. That is, a compression, decompression,
4 algorithm, that is the mechanism by which a very
5 high, very large file is reduced to a very small
6 file so that it can be transmitted quickly over the
7 Internet and other mechanisms. And then there are
8 decisions about file formats, as well. So there are
9 lots of different factors that go into a delivery
10 system. But the protection elements are largely
11 encryption and digital rights management.

12 The digital rights management component
13 is what enables entirely new types of business
14 transactions between content providers and users.
15 One could sell, for example, the right just to
16 listen to a song rather than the way we do it now,
17 which is to sell a copy. Right now we have a very
18 limited form of making music available to consumers.
19 We basically either sell it to them on a disk that
20 they keep forever, or they don't get it other than
21 radio and things like that. And that's really a
22 very limited business model when you think about it.

23 With digital rights management, you
24 would be able to sell a single listen or a week of
25 listens or a month of listens or a rental thing
26 where, after a certain point, you can buy it for a

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1 small additional price. You could do "try before
2 you buy" where you'd be able to listen to something
3 for a day or so and then it would time out, and then
4 you could decide whether you want to buy it. You
5 have the possibility of super distribution where you
6 can email things to a friend and a friend can decide
7 whether he's interested in it and wants to buy it as
8 well.

9 You can have subscription models where
10 you can have all the music that you can consume but
11 for a certain period of time, at the end of which
12 that subscription can either go on or end. All
13 those would be new ways of allowing consumers to
14 tailor their particular interest in the particular
15 business transaction for how that music gets
16 consumed. And digital rights management systems are
17 very flexible ways of implementing those business
18 models, and that's why they'll be a key element in
19 electronic delivery systems in the future.

20 MR. KASUNIC: Can you just briefly
21 explain what the difference is between -- you had
22 mentioned Phase 2 technology. What is Phase 1
23 technology and what is Phase 2?

24 MR. SHERMAN: Okay. As part of the
25 effort to arrive at a system that would enable the
26 variety of new portable devices coming to market to

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1 be able to obtain SDMI-compliant music, that is
2 music that is going to be compatible with SDMI-
3 compliant systems, the idea was to come up with a
4 mechanism by which pirated versions of music could
5 be filtered out. The underlying concept here was
6 that personal use of music would be okay. If you
7 want to rip your CD to a hard drive and then load it
8 from the hard drive to a portable device or to
9 multiple portable devices for your own use, that
10 would all be fine. But to rip it to your hard drive
11 and then distribute it on the Internet to your
12 million best friends for free and become a worldwide
13 publisher, that was not okay.

14 And the idea was to find a way to
15 distinguish between the legitimate personal uses
16 versus the illicit Internet distribution. The
17 mechanism that is being used for that is a screen
18 technology that will filter out pirated content. And
19 I won't bother going into how that might be done,
20 but there are mechanisms for identifying that which
21 was distributed on the Internet without
22 authorization. That technology is now being
23 developed. There's a call for proposals out.
24 Preliminary responses have been received and further
25 evaluation will be done through the next several
26 months and a technology will be selected.

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1 Once that screen technology is available
2 for implementation, that is the Phase 2 technology
3 and, in order to be SDMI-compliant, a portable
4 device will have to incorporate that technology so
5 as to filter out pirated music that is distributed
6 illicitly.

7 We are presently in Phase 1, and Phase 1
8 simply requires portable device manufacturers to
9 incorporate a technology to look for a signal that
10 the Phase 2 technology is now available. That's a
11 Watermark Reader, and when the Watermark is included
12 in content in the future saying Phase 2 technology
13 is now available, it will basically encourage
14 consumers to upgrade to the Phase 2 technology
15 because content that's marked with that Watermark
16 will not play in the new generation of -- will only
17 play in the new generation of devices. It won't
18 play in the old generation of devices.

19 So the idea is that you could buy
20 portable devices now. You can use them to listen to
21 anything and everything and then you will be
22 encouraged to upgrade the software that accompanies
23 the new portable device so that you will get all the
24 benefits of the new music that's distributed that is
25 compatible with SDMI but that will filter out
26 pirated content. That's the Phase 2 that's in

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1 development right now.

2 I apologize for the complexity of this,
3 but it is complex.

4 MR. KASUNIC: Just one last question for
5 Mr. Hildeman. How has fair use been adversely
6 affected or is it likely to be adversely affected by
7 access control measures?

8 MR. HILDEMAN: Probably a number of
9 ways. One, if it's freely available on the
10 Internet, I think that devices would view or record
11 should have some compatibility or interoperability.
12 I think that in order to fair use that content, the
13 technology companies need to first publish what it
14 is that their protection mechanism may be. In many
15 cases, as technology companies, we do not know
16 another company's technological measure. So again,
17 access will be critical that systems will be
18 published or systems will be acknowledged that it is
19 in existence.

20 MS. PETERS: Thank you. Before I turn
21 to Charlotte, I wanted to follow up with a question
22 to you, Cary. When you were talking about the
23 delivery mechanisms and you were talking about that
24 there would be some encryption and some rights
25 management schemes, I wanted to go to libraries. We
26 heard yesterday that libraries are kind of like

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1 where people go when they can't afford to buy. It's
2 the alternate method of getting material, so it's
3 critical to access information. In your delivery
4 mechanisms that have some encryption and some rights
5 management, what's going to be the model for sale or
6 delivery to libraries for the use of library
7 patrons?

8 MR. SHERMAN: I don't know. I mean this
9 is the marketplace at work. The companies are just
10 beginning to come online with their digital
11 delivery. It's a very, very complicated thing to
12 do. There are patent issues associated with all
13 these as well as with whom you're going to be the
14 technology partner, what kind of portable devices
15 will the music play in. I mean these are very, very
16 complex issues. The licensing issues are complex.
17 So it's taken a long time.

18 Now that they are finally coming online,
19 the question is, how is the marketplace going to
20 respond? I think that we're going to see a period
21 of pricing experimentation where you're going to see
22 lots of different pricing approaches to see what
23 consumers want. You're going to see the added value
24 of lyrics and album art and photographs and other
25 graphics and audio/video material that will
26 accompany some of the content to see what kind of

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1 change that makes in consumer response.

2 So I think we're in a period of
3 experimentation, and there are many different
4 marketplaces that one might be appealing to, the
5 library community being only one of them. I think
6 it will be a while before this becomes a routine
7 mechanism by which libraries obtain their content.
8 The CD world is going to be with us for a very long
9 time to come. There are some 600 million CD players
10 around the world, and the worldwide industry is not
11 about to stop serving that marketplace.

12 So I think that libraries will probably
13 continue to get most of their content in the old-
14 fashioned way, and it will be a little while before
15 the system is up and running sufficiently where
16 libraries will want to get into the digital
17 distribution system itself.

18 MS. PETERS: Is your estimate that
19 within the next three years that the traditional
20 marketplace will be the dominant form for libraries?
21 In other words, that they will be purchasing CDs
22 which they can then lend and make available to
23 patrons under the conditions that they do today?

24 MR. SHERMAN: At the very least, the
25 next year. I would say for the next decade minimum,
26 maybe two decades. I think CDs are going to be with

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1 us for a very long time to come, and the gradual
2 introduction of digital delivery mechanisms is
3 really very, very slow upward.

4 MS. PETERS: Okay. Thank you.
5 Charlotte.

6 MS. DOUGLASS: Thank you.

7 Cary, I understand your comment to say
8 that you don't believe that there's been any adverse
9 effect with respect to technological measures on
10 sound recordings. Congress asked us to, however,
11 specify particular classes of works. Do you think
12 that if there were any effect, adverse effect, the
13 category should be sound recordings, or should it be
14 something narrower, or should it be sound recordings
15 combined with anything else?

16 MR. SHERMAN: I really don't have an
17 answer to that question because I regard the fact
18 that Congress didn't provide too much guidance on
19 this as an opportunity be innovative in how you
20 respond to the problem. Certainly, the category
21 should be no broader than something like sound
22 recordings. But if one is able to find that there's
23 a particular problem in a particular genre or a
24 particular type of sound recording, that might be an
25 appropriate response, and I think that the Copyright
26 Office should retain the discretion to figure out

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1 how best to respond to the need.

2 The idea here is to effect an
3 appropriate balance and, until you know what the
4 particular facts are that you're worried about, you
5 shouldn't hem yourselves in with an interpretation
6 about how you have to define those categories. I
7 would leave it open as much as you can.

8 MS. DOUGLASS: Thank you.

9 Mr. Hildeman, do you believe that sound
10 recordings, if there were an adverse effect, would
11 be an appropriate category, or should there be
12 something else?

13 MR. HILDEMAN: I think it probably
14 should be much broader. I think when a person looks
15 at that issue, it should be addressed with probably
16 three components: content owners, copyright
17 protection, one; second, as a consumer to fair use;
18 and third, the solution provider like us as
19 technology innovators. So as such, I think that
20 looking at all three, the technology innovator needs
21 full access to all the content where I think by
22 providing better solutions, the consumers benefit
23 greatly. In that sense, there's a fair use issue.

24 MS. DOUGLASS: So you think that sound
25 recordings as a broad class is okay?

26 MR. HILDEMAN: Yes.

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1 MS. DOUGLASS: Another question I have
2 is that Congress asked us to consider not just the
3 adverse effects of using technological measures but
4 also positive effects of using technological
5 measures. For example, availability of works or
6 enhancing lawful use. How should that be calibrated
7 in trying to determine overall whether there is any
8 particular class of works which there has been an
9 adverse effect? In other words, how do we factor in
10 or account for or work with the positive effects
11 from technological uses?

12 MR. SHERMAN: In the case of sound
13 recordings, I've sort of addressed that in my
14 previous comments about the multiple new business
15 models that will be enabled and, therefore, looking
16 at those business models and whether consumers will
17 actually be using them to gain access would be
18 something to be weighed into the balance, just like
19 the availability of a new format like DVD audio,
20 because of the availability of some technological
21 protection measure, should be weighed in the
22 balance.

23 How you do it with respect to other
24 classes of works I think would depend upon the
25 particular category of work. When you think about
26 scientific journals, for example, the fact that they

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1 are available now -- I mean I have a basement filled
2 with scientific journals because my wife is a
3 scientist and we have years of these bound volumes
4 of things that she never goes down to look for
5 because there would only be one article every three
6 issues or so that she had any interest in, but she
7 had to subscribe to a year's worth of journals.
8 Well, she doesn't subscribe any more because she has
9 database access to get just the article that she
10 needs.

11 I think that that kind of capability is
12 one of the great things that technological
13 protection measures are enabling, and that would
14 need to be weighed in the balance. But that would
15 be a little different kind of analysis than would be
16 the case for sound recordings.

17 MS. DOUGLASS: Do you have a comment,
18 Mr. Hildeman?

19 MR. HILDEMAN: Again, I guess going back
20 to the needs of all three parties: copyright
21 owners, the technology innovators, and consumers.
22 When we look at a file format, when we look at
23 technological solution, we're looking at essentially
24 one solution that contains -- it may be a
25 copyrighted work. So it's difficult from our
26 perspective to separate the two out, that when you

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1 look at technological measure, that that
2 technological measure is a container for copyrighted
3 work to be digitally delivered.

4 So to look at a class of work in just
5 recording, I think it's a good place to start, but
6 it needs to be broadened.

7 MS. DOUGLASS: Thank you.

8 MS. PETERS: Anything else?

9 MS. DOUGLASS: No.

10 MS. PETERS: Rachel.

11 MS. GOSLINS: Mr. Hildeman, in your
12 testimony you are concerned with the ability of
13 technology companies to reverse engineer in order
14 for interoperability. You note that there is
15 already an exception in Section 1201 for reverse
16 engineering but say that we need to enhance that.
17 I'm just curious. In what way should we enhance it
18 and how is the existing exemption deficient?

19 MR. HILDEMAN: Section 1201(f)
20 physically addresses that in order for me to reverse
21 engineer a product, I must gain access to that
22 product legitimately. As you know, many times
23 there's issues involved where companies do not share
24 proprietary information. In our case, I think that
25 innovations come about because we're able to figure
26 out how that system works independently. So I think

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1 in that sense it needs to be broadened.
2 Essentially, the 1201(f) states almost that you need
3 to be licensed to reverse engineer, and I think it
4 needs to be broadened since they should be open.

5 MS. GOSLINS: All right. I just want to
6 follow up on that a little bit so I'm sure I
7 understand what you're saying. Subsection (f)
8 requires that the person has lawfully obtained the
9 right to use a copy of the computer program. And so
10 your assertion is that somebody who has not lawfully
11 obtained the right to use a computer program should
12 also be allowed to reverse engineer it? Is that
13 what you want us to do with the rulemaking?

14 MR. HILDEMAN: Yes. Again, proprietary
15 secrets are not exchanged so, therefore, in order to
16 figure out how that system may work is that, you
17 know, it comes down to innovations of that engineer
18 as to how that --

19 MS. GOSLINS: I'm not a computer expert
20 at all, but is what's necessary to reverse engineer
21 an exchange of proprietary information or only that
22 you have access to a copy that you can then --

23 MR. HILDEMAN: The question that comes
24 about is if I were to take a product or if I was to
25 develop a product that was compatible with another
26 existing product and that compatibility came about

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1 becAUse my innovation or our innovation. According
2 to 1201(f), what is the standard that would be
3 measured whether my product is legitimate or
4 illegitimate. I think that's the issue. If I
5 haven't gone through the steps of gaining a proper
6 license for that, does that make my product
7 illegitimate?

8 MS. GOSLINS: Are you talking about
9 gaining a license to reverse engineer or a license
10 to have a copy of the work?

11 MR. HILDEMAN: I'm saying whenever you
12 buy a product, essentially there's end user license.
13 But many times companies do not buy a product. They
14 essentially figure out a system because of the tools
15 that's available so, therefore, you do not have --
16 it's not a licensed product. So according to DMCA,
17 would that make my product illegitimate because I
18 innovate it without getting a license.

19 MS. GOSLINS: I'm sorry. I'm just going
20 to ask one more question. I'm just still a little
21 confused.

22 MR. HILDEMAN: Sure.

23 MS. GOSLINS: Is your concern that if
24 you did not have a license to reverse engineer that
25 your product, the product you ultimately arrived at,
26 would be illegitimate or that if you did not have a

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1 license to actually just open the computer program?

2 MR. HILDEMAN: I think it's the first.
3 My concern would be that I should not have to
4 license a product to reverse engineer a product for
5 the fact I think innovation many times that you
6 understand the compatible systems so, therefore, you
7 tend to or you do come about with solutions that
8 would be compatible.

9 MS. GOSLINS: Mr. Sherman, I have a
10 couple of questions for you. As you may have noted
11 reading through the comments, many commentators have
12 actually pointed to the recording industry as an
13 example of why criminalizing access control
14 protections are not necessary and specifically they
15 point to the availability of CDs, which is a high
16 quality form of digital music which have been around
17 for many years without any demonstrative negative
18 impact on the recording industry and without any
19 access control protections. I'm just curious as to
20 how you would respond to that argument.

21 MR. SHERMAN: That argument may have
22 been true five years ago, but it ain't true today.
23 The fact is that CDs have become the source for an
24 entire generation of kids who think that they're in
25 the publishing business and that it's okay for them
26 to publish somebody else's work for free worldwide.

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1 CDs are the source.

2 In SDMI when we ask for help in creating
3 technological measures that will expand the market
4 for everyone, the response is, well, you've got to
5 stop selling CDs. Why put in technical measures if
6 somebody can get the same thing on a CD? Well,
7 they're right. We should just stop selling CDs, but
8 that's not going to happen. It's not the
9 marketplace at work and, in fact, it's a very good
10 illustration of why the marketplace really does
11 control and why the notion that technical measures
12 are going to be used to lock up works is really
13 mistaken.

14 Record companies are making available
15 works, even though they know that that continues to
16 be the source of the piracy problem on the Internet
17 because they are in the business of making the works
18 available to the public. They don't benefit from
19 creating something wonderful and then not allowing
20 people to gain access to it. So they continue to
21 sell CDs, notwithstanding the impact on the piracy.

22 But there's no question but that the
23 piracy will have a devastating long-term impact on
24 this industry if it's not reigned in at some point.
25 We think that we've done a great job in terms of
26 beginning to do that, but new technologies keep

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1 arising that make the problem greater once again.
2 This will be a continuing challenge. It's not going
3 to be responded to by laws. It's not going to be
4 responded to just by technical protection measures.
5 It's going to be responded to in the marketplace
6 with legitimate businesses that are somehow going to
7 attract consumers towards the convenience and
8 greater value of participating in the legitimate
9 marketplace rather than in the illegal one. But I
10 hardly regard CDs as a model for the fact that we
11 continue to sell CDs indicating that there shouldn't
12 be criminal liability for circumvention.

13 MS. GOSLINS: Maybe you could just help
14 me with a chronological matter. When did recordable
15 CDs and CD burners become widely available in the
16 marketplace?

17 MR. SHERMAN: Well, they became
18 available a number of years ago, but they were very,
19 very expensive and their performance was uneven.
20 They've become more of a mass market phenomenon over
21 the past two to three years, and they are increasing
22 by leaps and bounds every year.

23 MS. GOSLINS: And I just have one final
24 question about the kind of technologies concerned or
25 involved in the SDMI. Yesterday, we heard from some
26 commentators who distinguished between first level

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1 access control protections, which just controlled
2 access to the content but wasn't actually embedded
3 in the content itself and so, once you had access to
4 the content, then you had to have a copy control or
5 use restriction in place if you wanted to control
6 that, and what they called second level access
7 protections, which is an initial level of access
8 control and then a second level that actually
9 remained with the content and so, even if you
10 downloaded it or made a fair use copy of it, the
11 embedded commands would still require
12 reauthorization every time you tried to open that
13 up.

14 You've talked about a couple of
15 different kinds of technologies, the Watermark
16 technology, the digital rights management systems,
17 and I'm just curious. Do those all involve an
18 element of the second level access protection? I
19 was hearing you say that, but I just wanted to make
20 sure that I was correct.

21 MR. SHERMAN: For the most part, yes.
22 They are designed essentially to protect rights
23 against copying that isn't authorized or rights
24 against copying in numbers that aren't authorized.
25 I mean one of the beauties of these things is you
26 can sell a copy that has unlimited copying

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1 capability or you're allowed to make 10 copies or
2 you're allowed to make five copies, you're allowed
3 to make two copies or no copies. That could then be
4 reflected in the price that you pay for the product.

5 So there will be some element where
6 digital rights management systems enable that kind
7 of business model flexibility, and that would be a
8 copyright right rather than just access.

9 MS. GOSLINS: Thank you.

10 MR. CARSON: Mr. Hildeman, I think I
11 understand that you would like us to create some
12 form of exemption to the anti-circumvention
13 provision. Is that correct?

14 MR. HILDEMAN: I think the provisions
15 should be expanded on.

16 MR. CARSON: I'm sorry. You think what
17 should be expanded?

18 MR. HILDEMAN: Provisions should be
19 expanded.

20 MR. CARSON: Are you saying you think
21 Congress should expand it, or do you think we should
22 expand it?

23 MR. HILDEMAN: I think we should look at
24 ways to expand on that. I think it should include
25 additional language for reverse engineering. I
26 think the reverse engineering portion is too

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1 limiting. It's too general right now.

2 MR. CARSON: Okay. Let's first make
3 sure we have a common understanding of what the
4 mission of this particular rulemaking proceeding is
5 and then figure out whether there's something we can
6 do for you. Section 1201(a)(1), which is all we're
7 really concerned with, is all we have a mandate to
8 do anything with, says that we are to make a
9 recommendation to the Librarian, who will then
10 determine whether there are any classes of works,
11 particular classes of works with respect to which
12 persons will be adversely affected by virtue of the
13 prohibition on circumvention of access control
14 devices and their ability to make non-infringing
15 uses.

16 We don't have the ability to expand any
17 of the statutory language you see. We have a
18 specific mandate to find out whether there are
19 particular classes of works with respect to which
20 people are adversely affected.

21 So I guess my question is, in the
22 context of what we are being told by Congress we
23 must do, what are you asking us to do, if anything?

24 MR. HILDEMAN: I think I'm here to share
25 with you market information from technology's point
26 of view. I'm not sure what needs done to correct

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1 the language of the law. I think that's for the
2 body to figure out. I think I'm here to share with
3 you from technology point of view that there needs
4 to be a balanced approach, right now that the laws
5 are not balanced.

6 MR. CARSON: Then I think I understand
7 but I just want to make sure I'm clear. You're not
8 asking us to find any particular class of works that
9 is to be exempted from the provision. Is that
10 correct?

11 MR. HILDEMAN: That's right.

12 MR. CARSON: Okay. Mr. Sherman,
13 yesterday we heard from Professor Jaszi who had a
14 proposal I just want to run by you and get your
15 reaction to. He suggested that we exempt from the
16 operation of Section 1201(a)(1) works embodied in
17 copies which have been lawfully acquired by users
18 who subsequently seek to make non-infringing uses
19 thereof. Do you follow the proposition?

20 MR. SHERMAN: If you could repeat it
21 once.

22 MR. CARSON: Sure. Exempt works
23 embodied in copies which have been lawfully acquired
24 by users who subsequently seek to make non-
25 infringing uses thereof. If you want Rachel to put
26 it in front of you, she's got a copy of his

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1 testimony. If you want to take a moment to reflect
2 on it, I'd just like to get your reaction to that.

3 MR. SHERMAN: I guess my initial
4 reaction is that would sure be a far cry from the
5 particular classes of works that I think Congress
6 had in mind in the enactment of Section 1201 and the
7 mandate for this proceeding where the idea was to
8 look at particular situations where there were
9 adverse effects that were clearly going to be
10 incurred and could be clearly demonstrated. This
11 would include any kind of work, just because it had
12 to be embodied in a copy which has been lawfully
13 acquired by users. That's every work.

14 I'm also wondering what would be the
15 basis for demonstrating that there was really good
16 cause to believe that there was going to be an
17 adverse effect on those non-infringing uses. Take,
18 for example, sound recordings. If somebody were to
19 download a protected file of music that didn't
20 enable that person to make copies -- which, by the
21 way, is not a foregone conclusion at all because
22 SDMI and our member companies have been extremely
23 focused on consumer expectations and what consumers
24 want to do with their music. SDMI specifically
25 allows the making of an unlimited number of copies
26 from an original disk. We can't assume that there

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1 would be any inhibition.

2 But assume that there was. Assume that
3 a particular downloaded file could not be copied.
4 What about the fact that that same thing is
5 available at the corner store in CD form? Does this
6 mean that there would be now a circumvention right
7 with respect to the downloaded copy when the person
8 could have gone to the corner store and gotten an
9 unprotected copy from which fair use would be able
10 to be exercised? What about the fact that you might
11 just ask permission? I want to make a fair use.
12 I'm writing a review. I'm doing a multimedia
13 project. What about asking?

14 I mean all of those things seem to be
15 prerequisites before finding that there is such a
16 certainty that there's going to be an adverse effect
17 that we should exempt the application of the anti-
18 circumvention rule to all works. So I guess I come
19 to the conclusion that this is over-broad,
20 premature, and probably not supported by the
21 evidence.

22 MR. CARSON: To be fair, of course,
23 you've just read an excerpt and you might want to
24 take a look at the rest of his testimony and, if
25 appropriate, you can comment later. But I gather
26 your first impression is not necessarily favorable.

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1 We received comments from the Public
2 Broadcasting System I'd like to get your reaction
3 to. They point out that under Section 114(b) of
4 Title 17 the reproduction, distribution and
5 derivative work rights in Section 106 do not apply
6 to sound recordings included in educational
7 television and radio programs, and they express a
8 concern, and I think that's probably as far as it
9 goes, but a concern at the very least that their
10 ability to make non-infringing uses of published
11 non-dramatic musical works, which they say depends
12 in part on access to sound recordings, that might be
13 endangered by technological protection devices.

14 What can you tell them to allay their
15 fears and what can you tell us to deter us from
16 deciding that there's anything we need to do in the
17 context of this rulemaking?

18 MR. SHERMAN: CDs in unprotected form
19 are going to be available for a very long time to
20 come and, therefore, the traditional mechanism by
21 which they've gained that kind of access is going to
22 continue. Furthermore, record companies are in the
23 business of promoting their works in every work
24 possible. That includes on public broadcasting as
25 well as commercial radio. Record companies have
26 been accused of being too generous in terms of

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1 providing their music to radio stations and the
2 like, and there doesn't seem to be any cause for
3 anybody to be alarmed that this commercial
4 imperative is going to change just because
5 technology enables protection measures to exist.

6 MS. PETERS: I just want to follow up on
7 one of the questions that David had which had to do
8 with Peter Jaszi's proposal and your answer that CDs
9 are available maybe at the corner store and they're
10 going to be available for a long time. In the DVD
11 context, what we heard is that that's not an answer
12 with regard to videos and getting videotapes because
13 the DVD always has more stuff. It's got out-takes,
14 it's got multiple languages.

15 With regard to the product that's going
16 to be delivered with regard to sound recordings, if
17 there's a distinction between the product and only
18 the encrypted product has the extra stuff, what
19 would your response be? In other words, it's not
20 the equivalent product that you can go out and buy
21 on the market. There's more in the access
22 controlled product.

23 MR. SHERMAN: I'm sort of mystified by
24 the proposition. It seems to start from the
25 proposition that the Salinger case was all wrong,
26 that if you write a letter, that it's got to be

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1 available to the world because you wrote it and,
2 therefore, there's an obligation to libraries and
3 anybody else to have access to it and to be able to
4 use it for all the beneficent purposes that are
5 somehow embodied in fair use doctrine and the like.

6 I don't see it that way. I mean it
7 seems to me that there's a balancing between the
8 right of the copyright owner to create something
9 that's never published or that's published with
10 restrictions versus the right of the public to use
11 that which the public acquires. And just because
12 additional content is made available because the
13 medium allows for it doesn't mean that there should
14 be a concomitant obligation to never impose
15 restrictions on that. So I just don't buy into the
16 fundamental underpinning of the position.

17 MS. PETERS: Thank you. Does anyone
18 else here have any other questions? If not --

19 MR. HILDEMAN: I would like to comment
20 on that, just regarding Mr. Carson's question. I
21 would like a class of work that added to -- would be
22 reverse engineering. Okay. That under Section
23 1201(a)(1) should be copyrighted material which can
24 be reverse engineered for legitimate interoperable
25 uses. Okay.

26 MR. CARSON: So that would be

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1 copyrighted material of any kind --

2 MR. HILDEMAN: Right, for the reverse
3 engineering. Yes.

4 MR. CARSON: So that suggests that if a
5 piece of music was available in an intertrust DRM,
6 it would be okay to reverse engineer that DRM.

7 MR. HILDEMAN: I think in order to
8 develop a compatible DRM system for legitimate
9 purposes only.

10 MR. CARSON: But it's the conduct that
11 would be allowed by a 1201(a)(1) and how would we
12 know that that was the legitimate purpose for that
13 particular use and that this was a legitimate user
14 action intended to make compatible DRMs or whatever?

15 MR. HILDEMAN: As you know, when we talk
16 about copyright content, in software and the
17 copyright content all in one. So in order for a
18 company to reverse engineer, I think they need to
19 have full access.

20 MR. SHERMAN: I guess I would just
21 comment broadly that I thought that this was a
22 debate that had already occurred. It occurred in
23 Congress where a great deal of time was spent by a
24 great many people trying to figure out the right
25 balance and what this 1201(a)(1) proceeding should
26 be all about, and the statute speaks pretty clearly

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1 to the fact that one is looking at particular
2 classes of works and, instead, we're hearing that
3 particular classes of users should be given certain
4 rights and, when it comes down to works, we're being
5 told that it's basically all works that somehow fall
6 into some broad category, whether it's the category
7 of copies which have been lawfully acquired by users
8 or whether it's copies that can be reverse
9 engineered.

10 I really do not think that that was the
11 balance that was struck by the Congress, and I think
12 it would be a dis-service to the law, as well as to
13 policy, to go in that direction.

14 MR. CARSON: Mr. Hildeman, do you have
15 any response to -- I think part of what Mr. Sherman
16 was saying was Congress set up the rules with
17 respect to reverse engineering. Given that Congress
18 certainly does have a specific provision on that,
19 what empowers us to broaden -- in effect, isn't it
20 fair to say you're asking us to broaden Section
21 1201(f) and, if that is what you're asking us to do,
22 why should we think we have the power to do that
23 when Congress has arguably written the ground rules
24 on the first engineering?

25 MR. HILDEMAN: I guess I'm just pointing
26 out conditions we would like to see. I guess I

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1 don't have any clear answer for you how --

2 MS. PETERS: It is his wish.

3 MR. CARSON: Sure. Putting myself in
4 your chair, the Copyright Office will do it for you
5 and the Librarian will do it for you. Then why not?

6 MR. HILDEMAN: Sure.

7 MS. PETERS: Rob has one question.

8 MR. KASUNIC: I had one more question,
9 just following up about Marybeth's question about
10 access and talking about the underpinnings of a
11 right to access for a work and mention of the
12 Salinger type situation. But isn't there a
13 distinction that we're dealing, as in Salinger, with
14 an unpublished work where here we're dealing with
15 works that are distributed and available and we're
16 also talking about, in that particular example, of a
17 sole source situation where that is distributed and
18 it's not something that is kept in a locked box?

19 MR. SHERMAN: You're certainly right,
20 and I was over-stating the proposition when
21 comparing unpublished with published works. But the
22 principle really ought to be the same. A copyright
23 owner might want his or her copyrighted work to only
24 be available in certain forms. When the Director's
25 Guild came in and said they hate the reformatting
26 for TV because it is a disgrace to their work which

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1 was designed for a different kind of screen and that
2 it reflected on their capabilities as directors and
3 cinematographers and so on, people respected their
4 right to have some ability to at least let it be
5 known that this was not their original work or
6 whatever.

7 Recording artists might want their music
8 to be available or seen only in a certain way.
9 There might be video footage that they only want to
10 see when it's combined with the music itself because
11 it makes a certain kind of statement to them, or
12 they might want it only heard in its entirety, or
13 they might want the photographs limited in certain
14 kinds of ways.

15 Artists feel very strongly when they
16 create an album that it is a form of their
17 expression, and they don't like it when a particular
18 piece is plucked out of context and the album isn't
19 viewed as a work in its entirety. They regard the
20 graphics as an integral part of the music and so on
21 and so forth, and I think that we have an obligation
22 to try and respect those kinds of creator's wishes
23 and, if that means that not every piece of
24 everything can be taken separate and apart, I think
25 that's part of the calculus that would go into a
26 fair use analysis. But the mere fact that it's out

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1 there doesn't mean that there are obligations with
2 respect it forever being made available in any form
3 to anybody.

4 MR. KASUNIC: 1201(a)(1) will then begin
5 to protect moral rights in terms of that integrity
6 and respecting the artists' wishes? Whereas with
7 fair use, you could take a portion of the work,
8 rather than that particular view that the artist
9 might have wanted portrayed?

10 MR. SHERMAN: That's a discussion that
11 we can have in three years, six years, nine years,
12 12 years, at such point as there's even a glimmer of
13 risk that there would be an adverse effect on users
14 being able to enjoy fair use. Thus far, that just
15 hasn't happened. It is a good, long-term issue that
16 we could talk about, and the moral rights component
17 will be very interesting. But that certainly isn't
18 a present day issue.

19 MS. PETERS: Thank you very much.

20 The hearings will resume this afternoon
21 at 2:00.

22 (Whereupon, the hearing was recessed at
23 11:10 a.m. to resume at 2:00 p.m.)

24 MS. PETERS: Good afternoon. Welcome to
25 the afternoon session of our second day of hearings.
26 This afternoon, we have actually I guess five

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1 separate speakers, although a number of you
2 represent CCMC. I'm going to go in the order that
3 it shows on our witness list, which is to start with
4 the University of Maryland and then go to the
5 University of Michigan and then move over CCUMC. So
6 why don't we start.

7 MR. PETERSEN: Thank you. Good
8 afternoon. My name is Rodney Petersen. I'm the
9 Director of Policy and Planning in the Office of
10 Information Technology at the University of
11 Maryland, College Park. Although I hold a law
12 degree, my role there is as an administrator and
13 educator.

14 In my administrative role, I'm
15 responsible for our policies and practices as they
16 relate to the legal and ethical uses of information
17 technology. In that capacity, I have the
18 distinction of being the University's registered
19 agent under Title II of the DMCA, and I also direct
20 a team called Project NETHics, and attached to the
21 written testimony is some further information about
22 that group who responds to allegations of
23 information technology misuse including copyright
24 infringement. So as you can imagine, some very
25 interesting things come my way on a regular basis.

26 Similarly, my responsibilities entail an

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1 educational and outreach function that include
2 conducting workshops, lecturing in classes,
3 consulting and writing for publications on a variety
4 of topics that concern Internet law and policy.
5 Issues of intellectual property, especially the
6 application of copyright law in institutional
7 policies in the digital environment, are an ever-
8 increasing part of my portfolio.

9 In case you're not aware, the University
10 of Maryland, College Park is the flagship
11 institution of the university system of Maryland.
12 The University is a land grant Research I
13 institution and a member of the Association of
14 American Universities, the Association of Research
15 Libraries and the National Association of State
16 Universities and Land Grant Colleges.

17 The Office of Information Technology
18 supports the teaching, research and outreach mission
19 of the University through the provision of
20 information technology infrastructure and support
21 services necessary for the educational enterprise.

22 While I'm here today principally to
23 support the concerns that have been raised by the
24 library community, I'm also here to share some of my
25 views of how the outcome of the rulemaking process
26 will impact on higher education information

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1 technology community as well as the faculty and
2 staff and students that we serve at our institution.

3 It should be exceedingly obvious by now
4 that each of the people who testify before you or
5 who have written testimony that you've reviewed
6 bring a certain set of biases or values that are
7 shaped by our training, by our experiences or by our
8 institutional cultures. So, therefore, I should
9 disclose in advance of my discussion of the issues
10 what are perhaps some obvious but important points
11 of reference.

12 The higher education IT community, as I
13 view it in general, is, as you can imagine, very
14 enthusiastic about the use of technology to enable
15 intellectual discovery, the use of technology to
16 support scholarship and the creation of new content,
17 the use of technology to facilitate the distribution
18 of copyrighted works, and the use of technology to
19 manage access and control to information and
20 services.

21 On the other hand, I think the IT
22 community, in general, as I see it, also disapproves
23 of certain uses of the technology including uses
24 that engage in illegal activities, technology to
25 invade personal privacy, technology to interfere
26 with open access to information, and technology to

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1 unduly regulate the free exchange of ideas.

2 In my conversations with colleagues
3 about the impact of this Section 1201(a)(1) --
4 which, by the way, I wouldn't dare call it that to
5 them, they wouldn't begin to understand what I was
6 referring to-- but when I talk to people about the
7 issues of general concern, the discussions center
8 around three themes, and I recognize, having been
9 here yesterday and reading a lot of the testimony,
10 that some of these themes are much broader than the
11 issue before you, but I feel they're important to
12 put on the record, particularly from a person who
13 works in information technology perhaps in addition
14 to what you've already heard the Librarian say.

15 The first thing I would emphasize is
16 that any time any place learning necessitates access
17 to digital information. You right away think I'm
18 probably going to go off into your distance
19 education study, and I recognize that work has
20 already been done, but it's a very important issue.
21 Many colleges and universities are developing online
22 degree programs, seeking ways to expand their
23 student base or enhancing their current curriculum
24 through distributed learning techniques.

25 At the University of Maryland, for
26 example, we expect that our primary mission will

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1 continue to be fulfilled as a residential campus.
2 Nonetheless, we are aggressively seeking ways to use
3 technology to enhance the learning experience for
4 our residential community, although I must note that
5 a majority of our students are still commuter
6 students who don't actually live on campus. As well
7 as we're looking at ways we can do outreach to the
8 citizens of the state that helps us fulfill our land
9 grant mission.

10 Other institutions such as our
11 neighboring university system of Maryland
12 Institution University College, who I believe
13 testified before you on the distance education
14 study, they're already conducting a majority of
15 their courses online and will continue to move in
16 that direction. So the system of distributed
17 learning that's being anticipated at our university,
18 the University of Maryland, and several other
19 research institutions will increasingly depend upon
20 information that's accessible on the Internet and
21 through our digital libraries.

22 Consequently, the legal and public
23 policy framework that governs access preservation
24 and the use of digital information is of paramount
25 interest to the higher education and IT communities.

26 Secondly, the difference between buying

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1 a work and licensing it is significant. A recent
2 report of the National Research Council summarizes
3 this development as follows. "The sale of a
4 physical copy of a work has been the dominant model
5 for transferring intellectual property to the
6 consumer for more than 200 years. Sales involve the
7 complete transfer of ownership rights in the copy.
8 Copyright law explicitly anticipates the sale of
9 intellectual property products and, by the first
10 sale rule, constrains a copyright holder's rights in
11 copies of the work that have been sold.

12 So, for example, the purchaser is to
13 free to lend, rent, or resell the purchased copy.
14 In that sense, copyright law follow IP products into
15 the marketplace and promotes the continued
16 dissemination of information." And I'm still
17 quoting from this report where it goes on to say,
18 "Licensing, however, constitutes a limited transfer
19 of rights to use an item on stated terms and
20 conditions. Licenses are governed by contract law
21 and, as such, are essentially a private agreement
22 between two parties. That agreement can involve a
23 wide range of terms and conditions and need not
24 incorporate any public policy considerations beyond
25 some basic limits on what constitutes an enforceable
26 contract." And that ends the quote from that

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1 report.

2 While the higher education community has
3 become accustomed to the use of sight licenses for
4 computer software programs, an area that in the
5 Office of Information Technology we deal with quite
6 regularly, the concept of licensing books, journals
7 and databases is a proposition that we have not
8 fully embraced. And at the core of our resistance
9 is that in the fear of the process of shifting from
10 a paradigm of buying a work to one where we license
11 its use may also lead to the forfeiture of the
12 exemptions we presently enjoy under the federal
13 copyright law.

14 Accordingly, access control technologies
15 further erodes our confidence that the balances
16 contemplated under the copyright law will be
17 maintained when it comes to access and use of
18 digital works.

19 Thirdly and finally, the move to
20 commercialize information must work for the public
21 good. The oft-cited phrase from the United States
22 Constitution in support of copyright protections
23 claim that its intended purpose is to, quote, "To
24 promote the progress of science and the useful
25 arts." Unquote.

26 Yet, the exclusive rights under the

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1 Copyright Act or the limited monopoly in vision by
2 the framers of the Constitution often resides, not
3 with the original author or creator, but commercial
4 publishers or information distributors. The present
5 effect has been to misappropriate the protections of
6 copyright law to, quote, "To promote corporate
7 profits and protect commercial interest." Unquote.

8 The higher education community has
9 fallen victim to this present state of affairs when
10 its own faculty scholars who generate copyrightable
11 works assign the rights to for profit publishers who
12 turn around and resell the publication back, at
13 considerable cost, I might add, to the same colleges
14 and universities that generated the intellectual
15 capital.

16 Another troubling aspect is the
17 placement of public domain materials, including
18 facts and government information into digital
19 formats that proclaim a form of legal protection not
20 heretofore acknowledged under federal copyright law.
21 The exploitation and commercialization of
22 information accessible by means of a computer
23 network and information technology is precisely what
24 the Uniform Computer Information Transactions Act,
25 or UCITA, that is being proposed to the 50 states as
26 a uniform state law anticipates.

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1 The State of Maryland General Assembly
2 recently voted to be among the first in the country
3 to adopt UCITA, with significant amendments, I might
4 add, and UCITA will establish a new legal framework
5 centered around state contract law for transaction
6 in computer information, which would include classes
7 of works already covered under federal copyright law
8 and then some.

9 As I said at the outset, I recognize
10 that these broader themes are part of other debates
11 in the states as well as recent studies under the
12 purview of this office, the Copyright Office. But
13 while these themes touch on issues much broader and
14 more philosophical than the specific purpose for
15 this rulemaking, it is an important backdrop as to
16 why the higher education and IT communities seek to
17 secure an exemption to prohibition and circumvention
18 of copyright protection systems for access control
19 technologies. So I will now comment very briefly on
20 some of the specific questions identified in your
21 Notice of Inquiry.

22 First, a majority of the questions seek
23 information pertaining to the present effects of
24 technological measures, and the University of
25 Maryland has employed technological measures to
26 limit access to its online resources in an effort to

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1 comply with its license agreements. We have also
2 devised simple and secure methods to restrict access
3 to course websites that make fair use of copyrighted
4 works as well as that contain private information in
5 the form of student education records.

6 We are becoming increasingly
7 sophisticated in our ability to use password
8 protection, certificate authorities, and proxy
9 servers for our own purposes of authentication and
10 authorization.

11 On the other hand, the technology that
12 Section 1201(a)(1) anticipates is still in its
13 infancy, and we expect to see further developments
14 and ongoing introduction of such measures as the
15 technology matures. For example, public key
16 infrastructure, or PKI, is still a clumsy and not
17 well understood technology, but there are
18 experimentations under way that could make it a more
19 widely used technology in the near future.

20 Additionally, the rapid adoption in the
21 states of the Uniform Electronic Transfers Act, UETA
22 as opposed to UCITA, is likely to further facilitate
23 commercial Internet transactions, including access
24 to digital information. So, in other words, we are
25 on the verge of seeing an explosion of the uses of
26 technological measures not realized today.

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1 Second, questions 11 and 16 specifically
2 ask, quote, "Should any classes of works be defined,
3 in part, based on whether the works are being used
4 for nonprofit archival, preservation, and/or
5 educational purposes or purposes of criticism,
6 comment, news reporting, teaching, scholarship or
7 research?" And my obvious reply is, yes. And the
8 purpose for my response is that these very types of
9 uses that are already contemplated and given special
10 protections under existing sections of the Copyright
11 Act, including the provisions for fair use. Digital
12 materials should be treated the same as their analog
13 counterparts for purposes of copyright protections
14 and determining acceptable uses.

15 It would seem that the, quote, "the
16 promotion of science and useful arts," unquote, is
17 most likely to flourish if we ensure an exemption
18 that fully addresses the teaching, scholarship and
19 research functions of our nation's research
20 universities.

21 And finally, question 17 asks, quote,
22 "should any classes of works be defined, in part,
23 based on whether the works are being produced in
24 ways that do not constitute copyright infringement?
25 For example, is fair use in a manner permitted by
26 exemptions prescribed by law?" Unquote.

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1 Again, my answer is yes. The
2 Association for Computing Machinery, in their
3 comments dated February 17, said it best when they
4 urged you to prohibit the circumvention of
5 technological measures only when it is done with the
6 intent to infringe. Criminal intent has always been
7 an important foundation for our criminal justice
8 system and seems to be an essential limiting factor
9 as you further define the exemption.

10 The University of Maryland remains
11 committed to policies and educational efforts that
12 denounce infringing activities and will continue to
13 condemn acts of piracy. On the other hand, we
14 vigorously defend the right of the members of our
15 education and research community to take full
16 advantage of the rights and exemptions ensured under
17 the Federal Copyright Law.

18 In conclusion, the February 10th comment
19 submitted by the National Association of Independent
20 Schools observes, and I quote, "Copyright law in the
21 21st century should enhance the ability of schools
22 to lawfully access information for appropriate
23 education purposes, not create barriers that will
24 discourage the use of new technologies in the
25 classroom." Unquote.

26 On some days I feel like a technology

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1 evangelist in my role at the University and, believe
2 me, encouraging some of our faculty to use
3 technology in their instruction and research is
4 likely to require a higher power. On the other
5 hand, the faculty and students at our nation's
6 research universities are both creators and
7 consumers of copyrighted works. Therefore, there's
8 no questioning the interest of research universities
9 in maintaining the careful balances under federal
10 copyright law that have developed over time. And to
11 keep that balance in check, a broad exemption to the
12 prohibition on circumvention of copyright protection
13 systems for access control technologies is therefore
14 essential to allow access and promote use of
15 copyrighted works for educational, scholarly, and
16 research purposes.

17 MS. PETERS: Thank you very much.

18 Aline.

19 MS. SOULES: Thank you. Thank you for
20 this opportunity to speak. I am Aline Soules, and
21 I'm currently the Librarian at the University of
22 Michigan's Business School. However, I am not
23 speaking today on behalf of my employer, but on my
24 own behalf.

25 In my summary of intended testimony, I
26 advocated that we focus on the original intent of

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1 copyright law, namely the promotion of learning and
2 the creation of new knowledge. We should also
3 strive to achieve a balance among the needs of
4 authors, creators, publishers, vendors, educators,
5 librarians, learners, and others engaged in these
6 endeavors. In the digital environment, this balance
7 should be preserved as well.

8 I would like to address some of the
9 activities in which librarians engage to provide
10 access to digital resources for our users. One of
11 the common misconceptions about electronic
12 information is that everything on the Internet is
13 free, but libraries across the country are spending
14 more and more dollars to subscribe legally to
15 electronic resources that our users demand.

16 Last fiscal year, our small business
17 library spent over \$230,000 out of an \$800,000
18 materials budget on electronic resources, and this
19 trend toward electronic access will continue. This
20 proportion would increase if vendors did not require
21 my library to maintain print in addition to
22 electronic formats.

23 The digital environment holds great
24 promise for libraries. The benefits to our users
25 are great. Digital technology allows users greater
26 ability to seek and to find information. Obviously,

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1 searching the Web or a CD-Rom using a sophisticated
2 search engine is preferable to the traditional
3 methods of searching in print indexes. However,
4 enhanced digital capabilities should not come at the
5 cost of a user's legal right to access nor should
6 fair use protections be dependent on format.

7 As a business librarian, I work with
8 vendors regularly to negotiate licenses for access
9 to electronic resources. Some vendors are
10 aggregators of information, some are original
11 creators, and some are both. Sometimes they call on
12 me to help them decide on what information to
13 include in their databases, which I am glad to do as
14 a professional courtesy and to further the interests
15 of my library customers. Some of them just try to
16 sell me their products. All of them, however,
17 charge me for the end result.

18 With many of these vendors, we come to
19 an agreement that we can both live with. As I work
20 in a public university, I seek contractual uses for
21 faculty, students, staff, and walk-ins. I am,
22 however, dependent on vendors' accommodations for
23 some of these access rights, and there have been
24 some occasions where I have not been successful.

25 Sometimes restrictions are related to
26 who can use the database. Sometimes the database

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1 can be used for teaching but not research. In an
2 environment where the two are so intertwined, they
3 should be seamless. And sometimes the vendor
4 permits information to be used in class but not for
5 projects. Further, we assume fair use rights but
6 often the original contract explicitly prohibits
7 such use, and we have to negotiate that, as well.

8 Within this licensing environment,
9 negotiation between the interested parties is still
10 relatively open. Once contracts are signed,
11 technological protection measures are cleared by the
12 vendor to make the product available. As was
13 described by David Mirshin, representing
14 SilverPlatter, librarians and vendors have worked
15 for years with passwords and other technological
16 protection measures. Librarians are concerned that
17 if Section 1201(a) is implemented without an
18 exemption, existing problems with negotiations will
19 be even more difficult to resolve. Moreover,
20 vendors will then have the strength of criminal
21 penalties to enforce their contracts.

22 For example, we have faced situations
23 where we pay for the use of a database but, through
24 the course of the year's contract, information in
25 the database disappears. Sometimes we are told,
26 sometimes we are not. The vendor will ascribe this

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1 to a publisher decision. Regardless of the reason,
2 we do not get a refund and we have lost the
3 information.

4 There are several problems here. The
5 database is paid for with public money, and the
6 public sometimes gets no access. We rent this
7 information because we can't buy it, which means we
8 pay for it over and over again. Should we be unable
9 to pay at some point, we have nothing, not even the
10 years we paid for.

11 Content is not guaranteed, even through
12 the life of the contract. Vendors are generally
13 unable to supply or guarantee that information will
14 be archived. Vendors, on occasion, choose to
15 examine our activity and exercise controls without
16 discussion or question. What happens when the
17 vendor can visit simply by examining our computer
18 activity?

19 My next example comes from my private
20 life. My brother-in-law is co-principal at an inner
21 city Detroit school. The budget for the little
22 library in his school is \$500 for the year, money
23 that comes from Title VI. His librarian buys a few
24 magazines, a couple of other items, and relies on
25 donations of material from other sources. According
26 to him, it seems to work. If he weren't going to

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1 retire this year, I would suggest that he's probably
2 in for a surprise. I could donate some books or old
3 journals to his library through the right of first
4 sale, but what do I do with electronic information?
5 What do these students do as they fall further
6 behind the digital divide? If technological
7 measures are applied so tightly that libraries can
8 not exercise first sale rights, smaller libraries
9 with restricted budgets will suffer
10 disproportionately.

11 It is obvious that our environment is
12 changing rapidly. Access, use, and content are
13 integrated in a way they haven't been in the past.
14 As a result, we have polarization between those
15 seeking control of their products and those who need
16 access, and we have growing distrust among these
17 various groups and the individuals within them.

18 We are not finished with this
19 technological revolution. Until we are farther
20 along, we can not afford to introduce restrictions
21 that will damage the abilities of each of us to
22 access information for the legitimate purposes of
23 learning and creating new knowledge. We need to
24 work together to create the technological means that
25 will maintain the balance inherent in the original
26 concept of copyright. To tip the balance too much

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1 in any one direction will deter our efforts to learn
2 and create new knowledge and will not provide the
3 incentive for us to work together, nor to continue
4 developing technology for the best interests of all.

5 Thank you again for this opportunity to
6 speak.

7 MS. PETERS: Thank you.

8 Let's turn to CCUMC and whatever order
9 works for you is fine with us.

10 MS. VOGELSONG: The Consortium of
11 College and University Media Centers appreciates
12 this opportunity to speak on the rulemaking
13 regarding Section 1201(a)(1) of the Copyright Act
14 which was added by the Digital Millennium Copyright
15 Act. Our members have important concerns regarding
16 the question of whether there are classes of works
17 as to which users are or are likely to be adversely
18 affected in their ability to make non-infringing
19 uses if they are prohibited from circumventing
20 technological measures that control access to
21 copyrighted work.

22 Representing our organization today are
23 three members of CCUMC's Government Regulations and
24 Public Policy Committee: Jeff Clark to my right and
25 your left from James Madison University, Dan Hamby
26 representing the Public Broadcasting Service, and

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1 myself, Diana Vogelsong from American University.
2 I'm actually substituting here for Lisa Livingston
3 from the University of Wisconsin.

4 The Consortium of College and University
5 Media Centers, or CCUMC as we are known, represents
6 institutions of higher education primarily in the
7 United States as well as a number of media producers
8 and distributors. In fact, many of our members are
9 involved in both creation and use of media materials
10 in the our educational institutions. Many of the
11 distributor members work closely with our academic
12 institutions to support their educational
13 objectives.

14 As Dan Hamby, my colleague here, and
15 representing PBS, has stated, "We're wrestling with
16 issues from enhanced content to new delivery
17 systems. Protecting the copyright but still making
18 the material available to as wide a base of users as
19 possible is still a key goal."

20 CCUMC's educational members acquire and
21 manage collections of material in a broad range of
22 formats. They also provide curriculum support for
23 faculty and others who wish to make effective use of
24 these materials in teaching and learning. Members
25 play an active role in educating users about respect
26 for intellectual property.

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1 Issues related to use of and access to
2 materials for educational purpose are at the core of
3 CCUMC's mission. Our organization led the
4 development of the Fair Use Guidelines for
5 Educational Multimedia in conjunction with a
6 Conference on Fair Use of the National Information
7 Infrastructure's Working Group on Intellectual
8 Property Rights. These guidelines were published as
9 part of a non-legislative report of the Subcommittee
10 on Courts and Intellectual Property of the Committee
11 of the Judiciary, U.S. House of Representatives on
12 September 27, 1996.

13 We would like to preserve the gains that
14 we made through that document by helping to define
15 fair uses, as well as other non-infringing uses.

16 The guidelines meet educators' needs for
17 better understanding and application of fair use.
18 They deal with integrated presentations created and
19 used by faculty and students, composed of their
20 original materials such as course notes or
21 commentary, together with various copyrighted,
22 lawfully acquired media formats, including motion
23 media, music, text material, graphics,
24 illustrations, photographs and digital software.

25 The purposes for which faculty and
26 students can apply these guidelines cover

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1 curriculum, instruction and study, including some
2 limited distance education application over secure
3 networks, peer conference presentation for faculty,
4 and portfolio evidence for both faculty and
5 students.

6 I'd like to now turn this over to my
7 colleague, Jeff Clark, to talk about our particular
8 concerns.

9 MR. CLARK: On the issue of possible
10 exemptions to the prohibition against circumvention
11 of technological measures that control access to
12 copyrighted works, CCUMC testimony will focus on the
13 following areas. First, the feasibility of
14 identifying classes of work to be considered for
15 exemption under this rulemaking procedure. Second,
16 concern about the ability to distinguish access from
17 use in technological implementation. Third,
18 identification of examples where educational
19 activity is or may be constrained under the anti-
20 circumvention rule if exemptions are not permitted.
21 And fourth, a recommendation for an exemption for
22 instructional media centers.

23 First, this rulemaking procedure has
24 been established in part to determine whether
25 classes of works are likely to be adversely affected
26 by the prohibition against circumvention of

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1 technological controls on access to copyrighted
2 works. The CCUMC questions the requirement to
3 restrict exemptions to only certain classes of work.

4 When examining this issue in light of
5 teaching and learning requirements, distinction
6 between classes of works affected becomes difficult
7 to determine. Some works are created expressly for
8 use in the classroom as dedicated instructional
9 materials. Some of the materials provided by my
10 colleagues at PBS fall into that category. Their
11 express purpose is to enhance the teaching and
12 learning process.

13 Other classes of works represent
14 cultural expressions which have other primary
15 purposes in the market but are useful as
16 instructional resources in two broad ways. They
17 provide rich content for teachers to draw upon to
18 achieve instructional objectives similar to those
19 achieved by so-called instructional resources and,
20 again, some of the general audience programs that
21 are produced by organizations like PBS fall into
22 that category for educators, as well. And secondly,
23 they can be analyzed and studied as cultural,
24 social, and political artifacts which reveal
25 important meaning about their human sources and
26 uses.

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1 As front line educators and producers of
2 educational materials, CCUMC recognizes the valuable
3 role that anti-circumvention technologies plays in
4 assuring protection of the rights of creators and
5 producers. However, we also recognize the value of
6 all types of media as educational resources. When
7 selecting teaching resources, educators must first
8 identify their teaching objectives and understand
9 the varied learning styles of their students. Only
10 then is the medium or delivery format effectively
11 selected.

12 Indeed, recent theories of multiple
13 intelligences stress that educators recognize the
14 importance of using a variety of teaching approaches
15 to meet student needs. With this in mind, it is
16 evident that any attempt to identify classes of
17 works to be exempted under the anti-circumvention
18 ruling imposes a burden on the educational process.

19 Two: the difficulty of distinguishing
20 access and use in the digital environment places
21 educators at a disadvantage. A distinction is made
22 in the new Section 1201(a)(1) of the copyright title
23 between access to works, circumvention of whose
24 security measures is prohibited, and the non-
25 infringing uses or effectively fair uses that may be
26 made of them which is not. This makes sense in

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1 terms of controlling circumvention of protective
2 measures for purposes of illegal access to
3 copyrighted materials that have not been properly
4 licensed. Publishers and producers have argued that
5 fair uses would be permitted, therefore, for those
6 who have acquired materials lawfully. In this
7 scenario, where a broad-based license encompasses or
8 even goes beyond the fair use criteria to meet
9 educational needs, few would have concerns about
10 protection for copyright holders.

11 The dilemma arises from evolving
12 technologies where technological measures for
13 controlling both are blended or even bound
14 inseparably. This trend may grow as the market aim
15 of some copyright holders becomes a pay per use
16 model that compromises the ability to educate
17 freely. The Committee on Commerce, House of
18 Representatives, H.R. Report No. 105-551 in 1998
19 recognized this risk in considering the DMCA when
20 it, quote, "felt compelled to address the risk that
21 enactment of the bill could establish the legal
22 framework that would inexorably create a 'pay per
23 use' society." Unquote.

24 Both of these issues are important
25 because the rulemaking proceeding will determine
26 whether classes of work are likely to be adversely

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1 affected by encryption, secure envelopes, or other
2 means of control from the digital realm.
3 Increasingly, materials are available only in
4 electronic formats and traditional media can not be
5 relied upon as back-up resources when educators seek
6 to exercise fair use options. Because decisions
7 made on this matter would hold for three years until
8 the next review process, educators will be at risk
9 if projections regarding access measures,
10 marketplace changes, or even teaching needs and
11 methodologies do not track as anticipated and pay
12 per use technologies become the norm.

13 The rulemaking process, therefore, puts
14 the counter-balancing operation of fair use as it's
15 traditionally understood and applied at a clear and
16 unnecessary disadvantage. Such an unfortunate legal
17 restriction may not be immediately quantifiable in
18 monetary terms but could substantially restrain the
19 effectiveness of educational efforts over the
20 intervening period that they may be in effect until
21 the next Copyright Office review.

22 Third, to illustrate the above issues,
23 CCUMC offers the following examples of educational
24 situations involving protected copyrighted materials
25 where fair use is or might be compromised if
26 educational activity is unreasonably constrained

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1 under the anti-circumvention rule of the DCMA.

2 First example. The in-process legal
3 action, or I should say actions of several types,
4 against the DeCSS decryption of DVD software is
5 relevant to the following teaching method that was
6 cited by a CCUMC member. Quote. "One very popular
7 method used in visual media studies is the direct
8 side-by-side comparison of two similar pieces. In
9 this instructional style, the two examples are
10 placed side by side in Quicktime windows and the
11 clips are played first on one side, then on the
12 other. The instructor then has the ability to line
13 up exact points in the two scenes to demonstrate
14 visual differences. With the proposed DMCA's
15 provisions, we would be unable to do this simple
16 task because the visual media would be protected."
17 Unquote.

18 If the provision under review in these
19 hearings applies in full force, the DVD, which is
20 the highest quality video format that's readily
21 available right now, would be unavailable for use in
22 the teaching method described here.

23 Another CCUMC colleague experienced one
24 of the unexpected effects that technological
25 security measures can have on occasion. The CD-Rom
26 version of the *Oxford English Dictionary*, though

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1 usable on an individual PC workstation, would not
2 output to a data projector for group instructional
3 purposes. While perhaps unusual, this speaks to the
4 unpredictability factor that can sometimes be
5 introduced when software security measures are
6 implemented.

7 Another example involves image databases
8 in general. They are licensed by many institutions
9 through their libraries or media centers.
10 Currently, some may not offer a full range of
11 manipulation tools for their contents that
12 accommodate different teaching goals and styles, and
13 they may not allow extraction of content to achieve
14 this manipulation, under fair instructional use,
15 through other software means.

16 For example, a sophisticated form of
17 such need for manipulation is offered by another
18 CCUMC member. In a pilot project involving an art
19 image database, images were loaded by students into
20 Adobe Photoshop software and manipulated to create
21 new designs for museum posters. Similarly, students
22 could combine the images with other materials in
23 other software to create virtual exhibitions. The
24 instructional aim met by this form of working with
25 the images was to allow students to study their
26 formal meaning and content in ways that could not be

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1 pursued had they been limited to viewing the images
2 in the original format and database only.

3 Even should databases used to meet this
4 sort of teaching and learning purpose not currently
5 prohibit this method, this manipulation
6 technologically, this status quo could change
7 unexpectedly in the future, thereby jeopardizing an
8 effective instructional method that had become an
9 integral part of instruction.

10 Many media, statistical and text
11 databases used in group instruction are currently
12 and in future will continue to be subject to
13 licensing restrictions on the number of simultaneous
14 users that are implemented technologically and often
15 rigidly. This may mean that for instructional
16 purposes the database may not be dependably
17 available for display when needed. When the primary
18 aim of the class instruction is to demonstrate how
19 to use the database features and locate or
20 manipulate its elements, the intellectual content
21 isn't an issue. Nonetheless, such a use is being
22 counted as one of the simultaneous users and subject
23 to restrictions that may make the teaching process
24 difficult if restrictions can not be readily
25 circumvented.

26 In their submitted remarks, libraries

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1 have already identified examples where off-campus
2 access by enrolled students to legally acquired
3 databases may pose a problem under the new ruling.
4 As all formats are migrating to digital and
5 electronic delivery, these restrictions have the
6 potential to inhibit access to a full range of
7 media, including music, speeches, and other recorded
8 sound, video, and still images. Circumvention
9 measures such as proxy servers can provide access to
10 legitimate users for educational purposes without
11 violating the rights of the copyright holders.

12 And finally, fourth, an exemption of
13 instructional media centers. Given these
14 aforementioned concerns, CCUMC proposes
15 consideration of an exemption for educational media
16 centers in the use of materials lawfully acquired by
17 the institution. Like libraries, of which many of
18 our members are organizationally affiliated, medica
19 centers provide many forms of curricular support
20 that generally have been acknowledged as appropriate
21 fair uses. It seems reasonable to assure that this
22 activity continue under the DMCA.

23 MS. PETERS: Thank you.

24 MR. CLARK: Thank you.

25 MS. PETERS: Okay.

26 MR. HAMBY: I'm just here to provide any

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1 answers.

2 MS. PETERS: Okay. We'll start the
3 questioning. We'll start with Rachel.

4 MS. GOSLINS: First, I'd like to ask
5 some questions of CCUMC. I was gratified to see
6 specific examples in your testimony because that's
7 something that's very helpful to us as we try and
8 figure out impact as we go along. I had some
9 questions about the specific examples you were
10 citing to, so if I could just ask you some questions
11 about those.

12 The first bullet point in your examples
13 is the DVD example of needing to play clips
14 simultaneously in Quicktime windows. I guess I was
15 unclear about how access controls are a problem in
16 doing this.

17 MR. CLARK: Well, until the advent of
18 the decryption, because of a key that was left open
19 in the DVD encryption and the cases that have
20 resulted from that, you could not copy DVD either in
21 an analog format or a digital format into another
22 piece of software like Quicktime to perform this
23 kind of teaching purpose. I guess the access issue
24 involved in this, was that that broken code is
25 what's under litigation along with the people who
26 have disseminated it.

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1 MS. GOSLINS: All right. Just so I can
2 clarify, so you needed -- the instructor in this
3 case needed to use the DeCSS in order to copy the --

4 MR. CLARK: I'm sorry. Yes, that's
5 right. In the case a teacher could use it for the
6 purpose that was cited in the example - to copy into
7 another software application - not the purpose that
8 was given by the people who had found the decryption
9 and publicized it, which was so they could play it
10 on their Linux-based computers.

11 MS. GOSLINS: Yes, we've heard of that
12 issue. So the issue there was that --

13 MR. CLARK: The mechanism that would
14 allow this purpose, teaching purpose, as well as the
15 Linux playback. Yes.

16 MR. CARSON: Let me just get some
17 further clarification. Was the problem there -- the
18 problem there wasn't one of access but of the
19 inability to copy to another medium. Is that the
20 problem?

21 MR. CLARK: Well, it has to be accessed
22 before it can be copied. In this case, clips for
23 comparative purposes into a different piece of
24 software. But do to that, you have to get into the
25 DVD which, until this DeCSS came along, was not
26 possible.

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1 MR. CARSON: Okay. We're going to be
2 talking about that issue with some other people
3 who'll be testifying specifically on that later, but
4 let me see if I can get some clarification so I can
5 understand the nature of the problem here. Had this
6 instructor been using Windows 98 operating system
7 rather than Linux, would that instructor have been
8 able to accomplish what he or she wanted to do or
9 would he or she still have had to circumvent
10 something somehow?

11 MR. CLARK: Right. No, they would not
12 be able to do that because this involved focusing on
13 simultaneous comparative playback of just specific
14 instances that had to be lined up. It's not, to my
15 knowledge -- and I'm the only one here currently
16 who's at a media center that offers some technology
17 support for these things in classroom. I don't even
18 know of a cumbersome way yet to do exactly what's
19 done in this teaching method without recopying and
20 manipulating by virtue of another piece of software
21 the clips that are needed.

22 MR. CARSON: So someone using a Windows
23 98 machine, for example, would not have been able to
24 accomplish that without in some way circumventing
25 some form of technological protection?

26 MR. CLARK: Well, what they would be

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1 able to do is, if they had Windows 98 and a DVD Rom
2 drive in their computer, they could play back the
3 DVD as they would in a normal DVD video player and
4 not have the problem that people who had a computer
5 with Linux do. But basically they'd be playing it
6 back like you'd play back two videotapes, too,
7 trying to jockey them around when the purpose of the
8 lesson is more exact -- and it may be embedded in a
9 larger presentational context, the kind of thing
10 that these fair use guidelines have outlined for
11 educational media. They'd be putting it in another
12 piece of software and having just clips of what they
13 needed lined up and replayable at certain points,
14 calibrated and set up -- rather than just
15 simultaneously spinning two disks, which is less
16 exact.

17 MS. GOSLINS: Okay. The second bullet
18 point talks about problems working the *Oxford*
19 *English Dictionary* on a data projector. And while
20 I'm entirely sympathetic to the problems of trying
21 to get technologies to work together, I guess I'm a
22 little unclear on how that's an access control
23 problem. Was it that they couldn't access -- there
24 was access controls that were preventing them from
25 projecting?

26 MR. CLARK: It was an unidentified

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1 problem - perhaps should be limited and not
2 generalized too much as an example. It's an
3 unidentified control problem of some kind in the
4 set-up they use repeatedly for other CD-Roms that
5 worked fine, but it would not play back this
6 particular title.

7 MS. GOSLINS: So it's not clear whether
8 that was a problem of access controls or inability.

9 MR. CLARK: It's not clear entirely, or
10 could be another anomaly in the software encoding.

11 MS. VOGELSONG: I think one of the
12 things that media centers are constantly dealing
13 with is trying to anticipate all the needs at your
14 educational institution and buy a range of software
15 that's going to fit the classroom, but you find
16 yourself in unusual situations where there is a
17 disabled student in a class and suddenly the class
18 gets shifted to another classroom and it's coming up
19 in the next afternoon and you have to prepare the
20 material that the faculty member is anticipating so
21 you might not be using the equipment you thought you
22 were using and you need to exercise fair use to be
23 able to make it accessible. Those are the kinds of
24 unexpected situations that come up where if you're
25 dealing with encrypted information, you can't have
26 any flexibility in having access to it. You're

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1 really limited in what you can do for that class.

2 MS. GOSLINS: The third bullet point
3 talks about the Adobe Photoshop software and, as far
4 as I can tell, students were copying images out of a
5 database to which they had licensed access into
6 another program and then manipulating the images in
7 that program. Is that correct?

8 MS. VOGELSONG: In that particular case,
9 yes.

10 MS. GOSLINS: So again -- I'm sorry to
11 keep harping on the same thing but again, my
12 question is how is access control at issue there?
13 Assuming you had licensed access to the database, if
14 you're copying the images into another program, that
15 would seem to be an issue about copy controls.

16 MS. VOGELSONG: Actually, in that
17 particular case, it wasn't but the person who
18 brought this example forward was saying for some
19 other image databases, if there were encryptions or
20 limits on their ability to put it in other software,
21 then that would preclude that kind of study.

22 MS. GOSLINS: But that would be a
23 copying issue. Right? I mean controls that
24 precluded you from taking an image out of one
25 database and putting it somewhere else would be a
26 control that affected your ability to copy it and

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1 not your ability to access it. Right?

2 MS. VOGELSONG: I suppose to some
3 degree. I have problems sorting that out as a media
4 facilitator.

5 MS. GOSLINS: On the fourth bullet
6 point, which is the restrictions on number of
7 simultaneous users, you describe these as licensing
8 restrictions and I just want to make sure that I
9 understand whether these are restrictions operating
10 through contract or whether these are actually
11 technological restrictions, you know, after 20 users
12 are on the server, it refuses access.

13 MR. CLARK: They can be both kinds of
14 restrictions, both technological and licensing.

15 MR. CARSON: To clarify, I assume that
16 the technological restriction, if it's there, is
17 there because you had a license which said you can
18 use up to X users and a technological restriction
19 was placed on that saying, after X users, nobody
20 else gets on.

21 MR. CLARK: Right.

22 MR. CARSON: And, therefore, I assume
23 there would have been freedom to contract for more
24 users had you determined it was necessary. Is that
25 accurate or not?

26 MR. CLARK: That would be accurate, but

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1 the example we were trying to point up is that the
2 in-class instruction on how to use the database is
3 more comparable to a fair use of it. It is not
4 using its intellectual property for the content but
5 showing the students how to use it -- now, when you
6 go to the reference area, this is how you do it.
7 But if they can't access it while they're in class,
8 they're losing real time because there are already
9 too many users in the reference area on the
10 database.

11 MS. GOSLINS: And then my last point is
12 actually a different question but it's based on the
13 last bullet point. The suggestion was interesting
14 to me of using circumvention measures such as proxy
15 servers to gain access for remote students who would
16 not otherwise have access, and it's great to hear
17 that because I asked the question to another panel
18 about in what instances now under the state of the
19 laws that exist now in which it's not criminal to
20 circumvent access control protections are libraries
21 being forced to either circumvent these access
22 controls or forego what they consider a fair use.
23 And I think I phrased the question wrong because
24 nobody wanted to admit to circumventing anything
25 because I was going to make a citizen's arrest or
26 something.

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1 But putting it on the table that you're
2 not confessing to anything, it would be very helpful
3 for me to know from the functioning librarians in
4 the group what situations you currently find, given
5 that access controls are around and have been around
6 already for a little while, you find it necessary to
7 circumvent these kind of controls in order to make
8 what you consider fair uses of the work.

9 MR. CARSON: And we know you won't be
10 doing it after October -- don't worry about it.

11 MS. VOGELSONG: Clearly, it's the same
12 situation. Most of the databases that we acquire
13 are run off a campus server and are identified by IP
14 address or it could be password, and the only way
15 our users, who increasingly work from home or even
16 campuses that are not adjacent to our main campus,
17 even though we've licensed for that number of users
18 or to accommodate them, can reach those databases
19 and is to resort (in my particular case, on a
20 consortium-wide university basis) to using proxy
21 servers to help provide access to those materials.
22 I don't think any of the people we're licensing
23 products from have any problem with that, but it, as
24 I read the provision, would technically be a
25 circumvention.

26 MS. SOULES: You're looking to me now, I

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1 can see. I think the difficulty here is -- well, in
2 one of my examples, when I'm talking about vendors
3 who say, well, you can use this for teaching but you
4 can't use it for research. How is a faculty member
5 or a Ph.D. student or an MBA or even a BBA student
6 supposed to make such a distinction? It gets
7 tougher and tougher as you get up through the higher
8 education ladder, you know, once you get to Ph.D.
9 And if you're a faculty member and you're in an
10 institution like the University of Michigan, whose
11 primary mandate is research and secondary mandate is
12 teaching, how do you make the distinction?
13 Besides, the one feeds on the other. You're sitting
14 there and you're saying, well, I'm preparing this
15 class but, you know, I was doing this research and I
16 need to find out XYZ, and then they find that out
17 and think, hey, I can put that in my class.

18 I mean life is synergistic, seems to me,
19 and I'm sure that all of us do that. I mean I learn
20 things from reading the *New Yorker*, for example,
21 that I bring to work as a librarian in a business
22 library, which you wouldn't necessarily think would
23 happen. I mean there are synergies taking place
24 and, in deed, your life is seamless. You don't
25 compartmentalize it to the extent that you make
26 decisions that this is for a class, this is for a

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1 project, this is for research, this is for teaching.

2 And some of it comes from the fact that
3 vendors, some of the vendors I deal with have not
4 perhaps dealt with the academic market before and
5 don't understand how it works and, of course, it
6 becomes part of my job, at any rate, to try to
7 educate them about that. But there have been
8 occasions where vendors have been quite recalcitrant
9 about these things and have been extremely insistent
10 that it's only to be used for this narrow purpose.

11 How am I going to help anybody, my
12 students, my faculty, to understand when they can
13 use it, when they can not, and how are they going to
14 continue to do their work and really learn from this
15 synergistic environment when those kind of
16 restrictions are put on?

17 MS. GOSLINS: And in those situations,
18 do you find yourself in a situation where you have
19 to actually circumvent the access control
20 protections that these database owners or publishers
21 put on their works or do you try and forego those
22 uses?

23 MS. SOULES: It's always been an ad hoc
24 case-by-case basis. Okay. I'm thinking of one
25 example in the past where we had a vendor who was
26 quite insistent on a database being used only for

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1 certain purpose and, as a result, a library in
2 California actually put up a posted sign. I'm
3 talking about posterboard right next to the
4 computer. I'm not talking about anything
5 electronic. It explained this in their choice of
6 words to their patrons walking in the door. We
7 didn't have remote access in those days. And the
8 vendor representative happened to be visiting the
9 library, saw the sign, didn't like it. Next thing
10 you knew, the contract was canceled and they were
11 not allowed to use the database at all. It was
12 taken away. And the end result was they had to get
13 their own institutional lawyers to go to bat for
14 them in order to have it restored.

15 MS. PETERS: That sounds more like a
16 contract issue than an issue of a technological
17 protection measure that a content provider adds to
18 his work in order to restrict access, like
19 passwords. So I guess this really runs through a
20 lot of when I hear you can't separate access from
21 use in a lot of the comments.

22 MS. SOULES: That's right.

23 MS. PETERS: But I guess my question has
24 to do with in many ways, isn't it really the terms
25 of the contract that you're having great difficulty
26 with as opposed to an access control? I mean there

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1 isn't access control #1 for teaching, access control
2 #2 for research, and when I go into the database, I
3 hit teaching and then when I go to do research, I
4 hit a different one. Isn't it really the contract
5 itself that has the restrictions?

6 MS. SOULES: May I ask a question back?

7 MS. PETERS: Oh, sure.

8 MS. SOULES: I guess my question back is
9 technically I think you're quite right. It is a
10 contract issue. There's no doubt about that. But
11 what I'm concerned about here is -- well, I guess
12 I'm concerned about two things. First of all, I
13 don't know how to separate them out any more. I get
14 a contract that tells me I don't have fair use
15 rights. The vendor says, well, tough petuties, you
16 don't get them. That vendor perhaps is the sole
17 source provider of information that my faculty and
18 students need. I don't think I should have to go
19 back time and time again and argue for my fair use
20 rights. So I feel that I would have to circumvent
21 technologically in order to exercise that fair use
22 right to allow a student or a faculty member to cite
23 from that work in order to do what he or she is
24 doing.

25 MS. PETERS: Okay. Take your example.

26 MS. SOULES: Okay.

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1 MS. PETERS: You wanted access to the
2 work, you resent tremendously that it says you can't
3 do what you believe to be fair use. If you sign the
4 contract, you then have, quote, "access to the
5 work." Isn't it separate from the gaining of that
6 access how you use that work and whether or not that
7 use violates your contract?

8 MS. SOULES: Well, the truth is if the
9 vendor has total control over the content and will
10 only give you use of that content under restrictions
11 entirely controlled by the vendor -- I'm back to my
12 balance issue again -- and that's all the vendor
13 will give you, then you have two choices. You can
14 sign the contract and completely give up all your
15 rights to fair use and everything else, or you have
16 to go without that information.

17 MR. CARSON: Here's the problem I think
18 we're having though. I could agree with everything
19 you've said up until now, and I agree with a good
20 deal of what I've heard, but I don't think
21 technological protection measures are so
22 sophisticated that they can detect the nature of the
23 use you're engaging in and shut you out when it's
24 for teaching and not when it's for research or vice
25 versa. You may have a very valid point about the
26 contractual restrictions that are being imposed upon

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1 you. It doesn't sound to me like it has anything to
2 do with technological measures that restrict access.
3 You either have access or you don't in terms of the
4 technology. You've got contractual restrictions
5 that say you don't. What am I missing?

6 MS. SOULES: I listened to testimony
7 this morning where a gentleman was talking
8 futuristically at your request about the things that
9 they're going to put into place. I can assure you
10 those technological capabilities are going to be
11 here long before three years is up.

12 MR. CARSON: Sounds like science fiction
13 to me, but I need more than your word for it, I
14 think, to take it seriously.

15 MS. SOULES: Okay. What do you think?
16 You're the IT guy here. I'm really being mean now.

17 MR. PETERSEN: I was waiting for that
18 question, IT guy, because that's the danger of being
19 with the Office of Information Technology, even
20 though I'm really a lawyer by training and the like.
21 One of the things that occurs to me -- and again, I
22 hate to keep harping on this relationship with the
23 UCITA experience and the contract issue, but we had
24 grave concerns during those debates about the issue
25 of self help and the ability, and I think a lot of
26 the focus here is on these negotiated licenses that

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1 are going to kind of be centrally controlled and
2 turning them on or off is going to be kind of
3 centrally managed whereas I think the reality is in
4 the very near future we're not going to have central
5 access to everything, that we're going to have
6 individuals buying their e-books or their textbooks
7 or their computer software, and so those
8 technological measures are going to be on the
9 computer, on the work station.

10 And so I think there's a very fine line
11 and I anticipate there'll be a relationship of how
12 technological measures are used, A) to enforce the
13 contract and, B) to possibly eliminate the access
14 altogether. And that's an issue I think that can --
15 and by the way, in Maryland, the self help
16 provisions, that was one of the significant
17 amendments wherefore those mass market purchases,
18 which would be the individual faculty, staff member,
19 student, self help was not an option, and so we're
20 happy to know that hopefully won't affect us. It
21 may affect other people. So it's a fuzzy
22 relationship and I think we will begin to see that
23 as a management control, not necessarily just at the
24 digital library level, but at the individual work
25 station information access level.

26 MS. GOSLINS: I just have another brief

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1 question for Ms. Soules. I just wanted to clarify.
2 You mentioned in your testimony that vendors require
3 your library to maintain print in addition to
4 electronic formats, and I'm just curious as to why.
5 Do you know why that is?

6 MS. SOULES: Well, I can speculate,
7 although I suspect you should ask publishers about
8 that. But I suppose my speculation would be along
9 the following order. First of all, I think some of
10 it is fear. They're afraid that they will lose
11 their revenue stream. I think that's one reason.

12 MS. GOSLINS: Wouldn't it just be
13 substituted? You're paying for the electronic
14 version instead of the print version? The reason
15 that I'm focusing on this is we've heard the
16 opposite. We've heard there's strong fear that all
17 media formats are going to move to electronic and
18 then people will not have any print backups from
19 which they can make fair uses or which they can
20 archive and preserve. So it was just interesting to
21 me to see the opposite, to see a publisher-initiated
22 opposite result occurring in your library. So I
23 just wanted to know a little more about that.

24 MS. SOULES: Well, first of all, I think
25 there is a fear that eventually there will be
26 electronic -- first of all, I should say there

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1 really are three categories of journals now. There
2 are print ones, there are electronic ones, and then
3 there are ones where it's available in both formats.
4 But in cases where the campus at large has
5 negotiated licenses with -- I can think of three
6 publishers now, they have required us not only to
7 maintain print, they have also required us to
8 guarantee that over a certain length of time of the
9 contract -- two years, three years -- we will not,
10 we will agree not to cancel journals if we find that
11 they are not -- let's say I decide I don't need
12 journal X any more. It's not being used or whatever
13 reason. I'm not going to be able to cancel it.
14 Usually, what happens is you find that the way they
15 price it, and pricing models, as the gentleman
16 mentioned this morning, there are going to be
17 experimentations of the pricing models all over the
18 place. But the reality is that when you get a
19 pricing model, generally what they do is they'll
20 charge you so much for one format and then you get a
21 discount on the other format. But the reality is if
22 you just want the electronic format and not the
23 print format, the price is out of reach. So you end
24 up signing a contract where you guarantee you will
25 keep the print.

26 I have always thought that some of it

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1 was based on fear of loss of revenue stream. Also,
2 I think some of it has to do with the fact that
3 there are some environments where print is really
4 what the customer wants and they can only make that
5 print fiscally viable if there are sufficient copies
6 sold, and I think that's perhaps another driver.
7 But I'm saying that with the caveat that it's a
8 question the publisher preferably should be
9 answering for you.

10 MS. GOSLINS: And does that not allay
11 any of your fair use fears?

12 MS. SOULES: Not in the slightest
13 because I can't --

14 MS. GOSLINS: Even though you will
15 always have the physical version.

16 MS. SOULES: Well, first of all, I don't
17 think I always will have the physical volume. And
18 secondly, don't forget in one sense, strange as this
19 may seem, part of these package deals force me to
20 aggregate my selection rights. Let's say I have a
21 publisher and the publisher has 50 journals and he
22 makes available an electronic version in a package
23 deal. The truth is I may only carry certain ones of
24 those in print form, but I'm required to keep those
25 on. I have to take on the rest of the other 50, but
26 I have to keep the others on. I may not need all 50

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1 of them in my particular library setting. So I
2 usually have to take them all though, and then I
3 have to guarantee that I won't cancel the print.

4 Well, let's say I have 20 of them in
5 print form. So I get 30 that would only be in
6 electronic form because I never carried them in
7 print before, and I have the remaining 20 in both
8 electronic and print form. But the truth is I need
9 maybe three or four of them, those core ones, in
10 both print and electronic form but I really don't
11 need the other ones in both print and electronic
12 form and, in my ideal world, I would choose which
13 format I wanted. But I aggregate that in order to
14 get the contract for the electronic. It sounds a
15 little confusing.

16 MS. GOSLINS: I think I understand.

17 MS. SOULES: Thank goodness I've made
18 something clear to you.

19 MS. GOSLINS: I'm done with my
20 questions.

21 MS. PETERS: Okay. Charlotte.

22 MS. DOUGLASS: I just have a couple of
23 general questions. Yesterday we heard about -- on
24 applicability of fair use to 1201(a)(1) in terms of
25 there being a distinction between non-infringing
26 uses and fair uses, and on a certain level you can

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1 see that because there are specific non-infringing
2 uses in 108, 109, specific narrow fair uses --
3 narrow non-infringing uses rather -- and then fair
4 use is a different kind of quantity because the
5 determination might be made after the fact that
6 something is or is not infringing.

7 So my question is, how do you respond to
8 the statement that fair use does not apply to the
9 anti-circumvention part of our deliberations, that
10 we're really talking about non-infringing uses and
11 perhaps licensed use?

12 MS. SOULES: Can I ask a question and
13 ask how are those distinctions made between fair use
14 and non-infringing use?

15 MS. DOUGLASS: Fair use, some people
16 say, is something that a court has to decide. First
17 of all, you have to decide it's infringing and then
18 the court has to decide, based on applying the
19 factors. So I'm just asking whether you agree that
20 fair use is not at issue but we're really talking
21 about non-infringing uses and we're talking about
22 perhaps licensed use.

23 MR. PETERSON: The reaction I have to
24 that statement is that perhaps the way it's -- and I
25 think it's referred to in the notice as non-
26 infringing uses comma including fair use, because --

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1 and I see this in my education and discussion of
2 what fair use is. I used the word exemptions
3 because in education we have many exemptions above
4 and beyond fair use. So I guess that would be the
5 distinction I would make is that fair use is
6 probably the preeminent issue, but there are many
7 more non-infringing uses like the face-to-face
8 teaching, etcetera, that we would want to equally
9 preserve.

10 MS. VOGELSONG: I would also say that,
11 although fair use is technically a defense, that
12 very few educators understand it as such and, in
13 fact, that the way it is taught at our institutions
14 is that we teach people - or try to teach people -
15 to make that analysis before they make the use, so
16 it seems appropriate.

17 MS. DOUGLASS: I guess another question
18 that I have is I know you have given some specific
19 examples of where you feel there has been an adverse
20 effect. Do you feel that those adverse effects are
21 because of the anti-circumvention provisions or
22 could those adverse effects be for some other
23 reason? The adverse effects that you mentioned.

24 MR. CLARK: I think we feel that most of
25 them are. I've been thinking about this since we
26 were talking about access and use and trying to

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1 think of the problem a little differently, and this
2 may have a bearing on the examples, too. There were
3 a couple of key sentences when we got to that point
4 related to sometimes access and use provisions or
5 security measures being inextricably bound together
6 sometimes.

7 There's a question, and I think a real
8 concern, among educators here. I know I have a
9 concern that there may be semantic differences which
10 will reach the stage of legal actions when some
11 things are done in the name of fair use. When we're
12 talking about access, for example. My institution
13 buys an image database, to go back to that one. We
14 have access to it in the form it's in. Now, if we
15 want to do some of the manipulations that we
16 mentioned in the example of taking the images out
17 for using them as source material and designs or
18 comparative side-by-side, that sort of thing, yes,
19 that's copying if they're removed from the database.
20 That could also be considered another level of
21 access. Oh, your license didn't provide that sort
22 of access. Your access is the database. Why are
23 you removing them from the database? That involves
24 at least semantically what could be called access
25 before you get to copy it. And it's sort of, I
26 guess, along the lines of the problem that we've had

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1 to sort out with computer software and making a
2 transient copy to be able to read it, whether it's
3 off the Internet or somewhere else on the network,
4 whether that qualifies as an actual copy or not.
5 Even though that may not be completely an access
6 issue, there's a semantic issue in there that had to
7 be cleared up.

8 MS. VOGELSONG: Just to elaborate on a
9 different example, I was concerned this morning to
10 hear the gentleman from the recording industry talk
11 about a Phase 2 technology which would require
12 different equipment to operate. Well, if you are an
13 educational media center and you invest in Phase 1
14 technology and the accompanying software, what do
15 you do when Phase 2 comes in the door and you're
16 expected to deliver it to a class and you have a
17 lawfully acquired copy of that content?

18 MS. DOUGLASS: So you consider access or
19 do you consider access to be more than initial
20 access, maybe access --

21 MS. VOGELSONG: Subsequent access, as
22 well.

23 MS. DOUGLASS: -- re-access.

24 MR. PETERSON: And one of the topics
25 that's come up a lot here that troubles me, and I'm
26 trying to think it through, is this notion that,

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1 again, it's hard to separate when it's an access
2 control issue versus a licensing issue. But in the
3 absence of a contract term dealing with this, what
4 happens when you don't renew a subscription and what
5 about the access to past issues?

6 I mean I can think of many examples. In
7 fact, when I came to the University of Maryland in
8 1992, we were going through severe state budget
9 crises and so our library discontinued subscriptions
10 to certain journals and one that some of us might
11 have interest in is the *Journal of College and*
12 *University Law*. I guess I was probably one of six
13 people on the campus that looked at it, and they
14 said let's stop the subscription. Well, that 1992
15 and in my research over the past 10 years, I've many
16 times had to go back to that area of the stacks and
17 access those old editions of the *Journal of College*
18 *and University Law* because they're there and I can
19 do that.

20 What concerns me is that if those were
21 licensed or available only online and in 1992 we
22 couldn't afford to pay the subscription, the adverse
23 impact is I don't have access to those prior issues.

24 MS. PETERS: Isn't that an issue for
25 every library, I mean, in the world?

26 MS. SOULES: Probably.

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1 MS. PETERS: And the question s, how do
2 you make sure that at least someone preserves it or
3 someone is going to be able to provide access, and
4 that would be true whether or not there ever was a
5 1201 or an issue with regard to access.

6 MR. PETERSON: Well, the other
7 observation I have, and this is probably where I'm
8 an outsider as a non-librarian, but this whole
9 preservation access issue, which I know there was a
10 lot of discussion about yesterday and may not be
11 directly relevant to the rulemaking, is a
12 fundamental issue. And I think it goes to my
13 concern about what I called the commercialization of
14 information or maybe even the privatization. The
15 one thing I do value about the libraries is that
16 preservation and access role, that I know I can go
17 to our library on campus and find that prior
18 edition.

19 But when that process is taken over and
20 controlled through technological means by some third
21 party who may or may not be around or may or may not
22 have the incentive to preserve every single edition,
23 only the ones that have some economic value, that
24 concerns me a lot.

25 MR. KASUNIC: I have a couple of
26 questions, and I guess mostly just in general to

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1 anybody or everybody. But we have some fairly
2 specific requirements in terms of what evidence that
3 we have to find here and there are some specific
4 statements in the legislative history that evidence
5 that is speculation or conjecture is just not
6 sufficient for findings in this area. I noticed as
7 I was going through some of the examples that were
8 cited in the statements as we went along and the
9 words being used in many instances are "could" and
10 "may" and I'm just trying to find out: are there
11 some specific instances of some of these different
12 areas -- I guess there's a couple -- where there are
13 specific classes. I know there's some carryover and
14 it's sometimes difficult to, that this could affect
15 and may affect a lot of different works -- but are
16 there specific classes of works? And, if you'd help
17 define what that term is, that would be helpful as
18 well. One thing that was mentioned was where access
19 measures blend and bind inseparably access and use
20 controls. Let's, I guess, start with that. Are
21 there any specific works or specific classes of
22 works where these access and use controls are being
23 bound inseparably where it's having an adverse
24 effect?

25 MR. CLARK: I don't know, apart from
26 getting to at least the substantially arguable case

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1 of the DVDs again. I haven't got wide enough
2 experience to know if there are. I think part of
3 our concern though is that because if these things
4 develop in the intervening period between reviews,
5 that sort of puts educators at a disadvantage until
6 they're next brought up because the market is
7 changing, the technology is changing so rapidly that
8 these things can come up.

9 MS. VOGELSONG: When we first started
10 using digital image databases like Corbis we had
11 very restrictive access to them and then it changed.
12 We started out talking about AMICO and we were going
13 to use a particular example from that database and
14 we realized that they had readjusted their format
15 since we had started writing this testimony, and so
16 it's just a constantly changing picture for
17 educators, and I think that's some of our concern.
18 To name a class of works when the structure, the
19 composition, the range of these databases and
20 conglomerate formats is changing month to month.
21 And so it's hard to pin something on a particular
22 class, and I think that is part of our concern here.
23 Given what we've seen in recent history, we have
24 great concern that the access can change
25 substantially over a short period of time.

26 MS. SOULES: It can also change -- it

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1 was interesting listening to the gentleman this
2 morning talking about CDs, and I realize he was
3 talking about music, but I have banks of CDs in my
4 library. He said, well, they were a few years old.
5 But the reality is I had some CDs that were close to
6 25 years old and he was quite right in saying that
7 they weren't all that reliable. The truth is, you
8 want to talk about technological measures, they're
9 totally unreadable today. There isn't a piece of
10 equipment that will allow them to be read. You just
11 take them out to the trash dump. That's it.

12 And I think that's one of the issues
13 that takes us back to archiving. You're talking
14 about classes of works, and I realize I'm talking
15 about formats, so I know that. But the reality is a
16 technological measure is actually a format in
17 itself. If you issue it in a book, a printed book,
18 that is a form of technology and I'm sure in days of
19 -- scrolls they looked at books and thought, oh,
20 what is this new thing? A CD is a technological
21 measure. A 16 BPI tape is a technological measure
22 in itself, and maybe we not only have a linking of
23 access and use and content, we also have embedded in
24 there format in itself because they turn over so
25 rapidly.

26 I certainly agreed with the gentleman

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1 this morning when he said CDs would be around in
2 three years. I don't know how readable they'll be,
3 but they'll be around in three years. But also
4 there will be new formats and we'll need to be able
5 to read them. And I think that's why we haven't
6 really relied on CDs and various other types of
7 electronic formats at this point as an archiving
8 medium. We still use the microform and so on and so
9 forth because we know it's going to last. So in a
10 sense, I look at format as a form of technological
11 measure in itself.

12 So when you're talking about classes of
13 works, you asked about how to define it, but that
14 adds a new spin to me. I realize that isn't the
15 traditional sense of a class of work, nonfiction or
16 fiction or whatever it is, but I think unfortunately
17 we've also got this blending of format that's rather
18 determining a class of work. So I'm sitting around
19 saying, well, are CD-Roms a form of class of work
20 and how am I going to have access to the information
21 on it having, of course, already had to throw out
22 some because they're unreadable. I don't know if
23 that helps any or makes it just worse.

24 MR. KASUNIC: I do understand the
25 argument, although the specific example is of a past
26 specific case and where, at the time, there wasn't

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1 any access control measure. And that work could have
2 been archived because he did have access to that
3 work. He could have made at tape at that time. So
4 we're concerned with right now -- and we certainly
5 understand the concerns of not knowing what's going
6 to come up, but Congress did anticipate that and
7 that's why we'll be back in three years.

8 MS. SOULES: I can't wait to see you
9 again.

10 MR. KASUNIC: But different things can
11 occur in that the market will change. But aside
12 from this inseparable binding, what specific works
13 have been adversely affected? There was also some
14 mention that there were specific works that were
15 sole sources and only available in electronic format
16 and with these access control measures. So if you
17 could cite some specific examples of these sole
18 source works in which there's no other source and,
19 again, inconvenience is not --

20 MS. SOULES: Understood.

21 MR. KASUNIC: -- an issue, but whether
22 it's just available in some other source.

23 MS. SOULES: Well, the kind of
24 electronic information I buy for a business library
25 comes, as I tried to say in my testimony, vendors do
26 different things. Some are aggregators. They put

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1 information together and I have, for example,
2 financial databases where they get raw data from
3 various places all over the world and it comes in
4 and it's fed in and they're the only ones who get
5 that.

6 I have a database, for example, that
7 presents information country-to-country-to-country,
8 and they have people out there and they're not just
9 an aggregator. They are a creator of information.
10 They have people in those countries gathering data
11 and they have people in those countries actually
12 translating some of it into the English language so
13 that when you get the database, on that database you
14 have aggregated information, original research
15 information, you have translated information. I'm
16 not going to be able to get that information for my
17 customer from anyone other than that particular
18 source.

19 I have databases where, as we've talked
20 earlier, they're essentially a compilation of
21 journals that are in electronic format, some only,
22 some also in print. So again, I'm not sure if I'm
23 helping here or making things worse, but I have a
24 lot of sole source vendors and they can dictate
25 whatever terms they like. So from that point of
26 view, I do get concerned about balance. What you've

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1 come back and told me earlier is that you don't see
2 contractual issues as inextricably linked with these
3 anti-circumvention regulations as I do is
4 essentially where we're at, I think.

5 But from my day to day experience, I can
6 only tell you that I find myself functioning in a
7 world where I have fewer and fewer controls, fewer
8 and fewer abilities for fair use rights and things
9 of that sort. But if that is not your purview, then
10 that is not your purview but in terms of classes of
11 works, I mean databases are not all the same. And
12 I'm guilty of this, too. I come and I talk to you.
13 I say database this and database that and database,
14 database. But they're not all the same and, in
15 terms of a class of work, there's original work,
16 there's aggregated work, there's translation work,
17 and it's all muddled together which is, of course,
18 the heart of our problem, I think, generally.

19 Is this helpful or problematic?

20 MR. KASUNIC: Yes. And the access
21 controls there are limiting your ability to make the
22 non-infringing use? Because you mentioned that
23 licenses are dictating the terms. Is it the
24 technology that's dictating the terms or the
25 licensing agreement?

26 MS. SOULES: Well, you see, I don't see

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1 them as separate. That's the difference between us,
2 because in my day to day world, if my customers can
3 not get the information and I am no longer able to
4 provide it in such a way that they can have fair use
5 rights, as far as I'm concerned, some right has been
6 abrogated somewhere.

7 MR. KASUNIC: Maybe if I put it this
8 way. If you were to breach the licensing agreement,
9 is there then some measure that, technologically, is
10 stopping you from accessing the work? I'm just
11 trying to understand --

12 MS. SOULES: If you're talking
13 technologically today, probably not. I don't expect
14 that to be true for much longer, as I said earlier.
15 Then I went and deferred to Rodney, like the coward
16 I am.

17 MR. PETERSON: The only thing to add,
18 and I understand this problem of dealing with a
19 specific notice of rulemaking issue versus the
20 broader issues, but I see it, I think, similarly.
21 It's part of an arsenal, and I hate to put it in war
22 type terms, but access control measures, just like
23 self-help provisions and negotiated agreements,
24 limiting fair use, all of those things build up in
25 ways that can limit access and really make it
26 difficult in the process of negotiations. So this

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1 is just one more means.

2 MR. KASUNIC: Are there any other
3 instances?

4 MR. CARSON: I think just about everyone
5 who's testifying right now, either in your prepared
6 statements or your responses to questions, has
7 expressed some frustration with and perhaps even
8 objections to the requirement that we restrict
9 exemptions only to certain classes of works. Let me
10 suggest that at least the frustration is shared by
11 some people on this side of the table.

12 Nevertheless, I guess my view is that is
13 what the statute says and, starting from that point,
14 is there anyone here who is asking us to ignore that
15 pre-requirement and, if you're not asking us to
16 ignore it, elaborate on how you expect us to deal
17 with it.

18 MS. SOULES: Is it possible for you to
19 suggest an exemption to all classes of works?

20 MR. CARSON: I wouldn't be the first to
21 suggest it, but I would suggest --

22 MS. SOULES: Well, there are political
23 realities that we all face, I guess, but from my
24 point of view, perhaps the question is being -- I
25 understand the question, unfortunately, but I think
26 that's where I am, that it really needs to be all

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1 classes of works.

2 I understand that testimony was given
3 earlier by Peter Jaszi and that testimony will be
4 given tomorrow by Arnie Lutzker, and I think they're
5 the people who may well be able to address this
6 question more effectively for you than those of us
7 sitting here because they're the ones who framed
8 some of this in the first place, as I understand it.
9 So I'm suggesting you go to the sole source.

10 MR. CARSON: If I can translate, perhaps
11 what I'm hearing is you're the folks who are telling
12 me what the problem is and the solutions you'd like
13 to see and perhaps people like Peter and Arnie are
14 the people who can try to give me the legal
15 framework to do what you're asking.

16 MS. SOULES: I'm certainly hoping so
17 because -- well, he's a lawyer, but I'm not a
18 lawyer.

19 MR. PETERSON: Two arguments I would
20 make. One is echoing what was said yesterday, is
21 that the extent to which the focus can be upon the
22 use of the work is certainly my preference and my
23 comments today tried to emphasize those two
24 questions because those are what are important to us
25 in terms of who we are and how we use them.

26 The second issue, however, though that

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1 goes more to this class of works issue. One of the
2 reasons it frustrates me, too, to have that in the
3 legislation is it's the kind of complexity that's
4 been brought to some of the distance education
5 issues where they've tried to slice up what kinds or
6 classifications of work you can and can not use, and
7 it creates mass confusion, quite frankly. And so
8 the extent to which we could focus less on classes
9 of use and make all of them game and focus on how
10 they're used, that is the framework within which I
11 think it's easier for me to educate my faculty and
12 my students and for me to understand what the rules
13 are.

14 MS. PETERS: Distance education was much
15 easier because they use the statutory
16 classification, and then the question is why? Why
17 are some in and why are some out? This is a much
18 more difficult exercise.

19 MS. SOULES: You know as well as I do,
20 you go back through the law and what happened was
21 you started with something very simple and, as new
22 formats of work were created, they kept being added
23 to the copyright law, and I suppose I'm having
24 difficulty understanding why we now want to separate
25 them all out again.

26 MS. PETERS: Because it's an exemption.

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1 Because you craft an exemption as narrowly as is
2 needed. What you're all saying is where we sit,
3 it's all classes of works and you should be focusing
4 on the use. Unfortunately, that's not the way the
5 task was crafted. But I guess we hear where you
6 are.

7 MS. VOGELSONG: We liked Peter Jaszi's
8 definition, incidentally. I think "lawfully
9 acquired" elements are certainly reasonable. It
10 seems to me, if that can be considered part of a
11 class component, it is a reasonable thing.

12 MS. PETERS: Are you saying that his
13 definition works for you?

14 MS. VOGELSONG: Yes.

15 MR. PETERSON: Well, but one of the
16 concerns I had in reading that -- it's back to this
17 ownership versus licensing issue, and I think his
18 language that was used was something about lawfully
19 acquired.

20 MS. PETERS: His is lawfully acquired.

21 MR. PETERSON: Lawfully acquired copies,
22 I think is the language he uses. And I'm very
23 concerned, having been through the UCITA experience,
24 that that may be meaningless in a world where you
25 don't own a copy. You license the use.

26 MS. VOGELSONG: I guess I was assuming

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1 that if you were licensing, it was lawfully
2 acquired.

3 MS. SOULES: I don't feel I'm acquiring
4 very much these days. I think I'm just in my
5 apartment now instead of in my house.

6 MR. PETERSON: Sounds like Peter's
7 answer raises as many questions as it answers.

8 MS. PETERS: May be. Almost everybody -
9 - and some of us have jumped in. On the CCUMC side,
10 you expressed concern about paper use and that that
11 would become a model, and I guess my question is do
12 you perceive that as inherently unfair and, if so,
13 why?

14 MR. CLARK: Well, inherently unfair
15 because if the entire copyright law still applies,
16 there are uses which are fair for which you don't
17 have to ask permission and payment is a form of
18 permission in the process. I think there are some -
19 - you know, I can only speak for myself and probably
20 some of my colleagues and there are probably some
21 larger issues, too, that I've been thinking about
22 recently. But it relates to restrictions that can
23 be put within that framework of how things can be
24 used once they're at
25 -- that affect how, for example, these things which
26 we refer to as cultural expressions that might be

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1 used in teaching can be used in context and whether
2 they can be put in contexts that are analytically
3 unfavorable to them or whether they're going to be
4 restricted in certain ways if there isn't this
5 latitude for fair uses for teaching, research, and
6 so on that are outside of the control of any
7 individual vendor who holds copyright. And we think
8 that's important, too, at least I do and I know a
9 lot of my colleagues do.

10 And I think the other concern is not
11 directly related - the one where we've been thinking
12 about access and use and where the two may be
13 confused and where licensing issues may be involved.
14 To sort of reiterate, if I feel confident in the
15 interpretation of this section that access, what
16 access meant and that it didn't mean the things we
17 could do with fair use that involve forms of
18 playback or copying - that it did not involve
19 access in it at all -- I don't think we'd have a
20 beef at all. But there is a concern that it will be
21 defined that way legally, by legal action, and also
22 in terms of the way the software is constructed, as
23 a basis for a legal argument.

24 We might even go over -- I was following
25 for a while, I think it was in the early stages, the
26 Microsoft case. One of the arguments talked about,

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1 you can look at this philosophically, Internet
2 Explorer, is it or is it not a part of the operating
3 system? The way it's been constructed recently,
4 yes, it is. It's inextricably bound and it's part
5 of it and you separate the two and there may be
6 functional problems. Of course, on the other side
7 of the brain, another part of you says that, yes,
8 but there are two different functions there. I get
9 the operating system and get the one I choose so
10 that I can exchange as many applications with
11 colleagues as possible and get as many as I want,
12 but the application is what I really want. And I
13 recognize there's an application bound in that base
14 which is technically part of it and you can look at
15 one way philosophically, but I know also that they
16 don't have to be part of each other. They're two
17 different things. And there's some fear that this
18 same thing will occur with the interpretation of
19 access versus use.

20 MS. PETERS: One last question. I'm
21 going to follow up on something that Rachel asked to
22 make sure I've got it right. Today the prohibition
23 on breaking access controls by individuals is not in
24 effect, yet there are access controls on many
25 different products. What I think I heard you say is
26 you're not aware of anyone breaking access controls

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1 at this point. Is that right?

2 MR. CLARK: Except for DVD, because
3 there wouldn't be a case in court if it weren't
4 considered that, or they wouldn't have a good case
5 if it weren't considered that. And I guess this has
6 to do with the DVD being encrypted and designed to
7 be played on certain players. Playing it on Linux
8 meant that wasn't authorized. That's an access
9 issue.

10 MR. PETERSON: So if there were an
11 exemption, it would basically allow you to do what
12 you are authorized to do today. I mean it's the
13 same kind of thing. So what you're saying is things
14 like the DVD would be the things that you would be
15 interested in. Is that right? Or there's new
16 things coming on the market that are going to cause
17 you to have similar types of problems? Anyone? I
18 see shaking heads.

19 MS. VOGELSONG: I think generally what
20 we found is in the case of image databases that they
21 were causing problems. We've been able to negotiate
22 or the market has sort of driven some of the
23 producers to alter their formats or people just
24 aren't attempting
25 to do it. They're just not making those uses of
26 those materials.

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1 MS. PETERS: Anyone else? If not, thank
2 you very much. And for those who are in the
3 audience, we'll be back tomorrow at 10:00.

4 (Whereupon, the afore-mentioned
5 proceedings were concluded at 3:40 p.m.)

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