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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

+ + + + +

DOCKET NO. RM 9907

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Thursday, May 18, 2000

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The hearing in the above-entitled matter
was held in Room 290, Stanford Law School, Crown
Quadrangle, Stanford, California, at 2:00 p.m.

BEFORE:

MARYBETH PETERS, Register of Copyrights

DAVID CARSON, ESQ., General Counsel

RACHEL GOSLINS, ESQ., Attorney Advisor

CHARLOTTE DOUGLASS, ESQ., Principle Legal
Advisor

ROBERT KASUNIC, ESQ., Senior Attorney Advisor

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I-N-D-E-X

Panel I:

Siva Vaidhyanathan	9
New York University	
 Karen Coyle	 21
California Digital Library	
University of California	
 Linda Crowe	 30
American Library Association	
 Laura Gasaway	 34
American Association of Universities,	
American Council on Education, and the	
National Association of State Universities	
and Land-Grant Colleges	

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

1 (2:15 p.m.)

2 MS. PETERS: Good afternoon, and welcome
3 to Stanford University Law School. We'll be hearing
4 from one panel this afternoon, and we'll begin again
5 tomorrow at 9:30 in the morning to hear two panels
6 throughout the course of the day. The schedule for
7 the Stanford hearings is available today outside,
8 and it's also posted on our website.

9 First of all, I'd like to thank Stanford
10 University Law School for agreeing to host these
11 hearings, and in particular we thank Professors Hank
12 Greely and Paul Goldstein and Julie Viner, the Law
13 School's Director for Special Events for all their
14 assistance. We're very pleased to be here and we're
15 grateful to the university and law school for making
16 these facilities available to us.

17 As you probably know, these hearings are
18 part of the ongoing rulemaking process mandated by
19 the Congress under Section 1201(a)(1) of Title 17 of
20 the United States Code. Section 1201 was enacted in
21 1998 as part of the Digital Millennium Copyright

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1 Act. And I look out and see there are some people
2 who are not too thrilled about this Act.

3 Nevertheless, it is in force, and
4 Section 1201(a) provides that no person shall
5 circumvent a technological measure that effectively
6 controls access to a copyrighted work. However, this
7 prohibition does not go into effect until October
8 28th of this year, which is two years after the DMCA
9 went into effect.

10 Section 1201(a) provides for this
11 rulemaking in which it's the Librarian of Congress
12 who may exempt certain classes of works from the
13 prohibition against circumvention of technological
14 measures that control access to copyrighted works.

15 The purpose of the rulemaking proceeding
16 is to determine whether there are particular classes
17 of works as to which users are, or are likely to be,
18 adversely affected in their ability to make non-
19 infringing uses if they are prohibited from
20 circumventing technological access control measures.

21 Pursuant to the Copyright Office's
22 Notice of Inquiry, which was published in the

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1 Federal Register on November 24, 1999, we received
2 235 Initial Comments and 129 Reply Comments, all of
3 which are available for viewing and downloading on
4 our website.

5 Two weeks ago, we conducted a first
6 round of hearings at the Library of Congress in
7 Washington. After the hearings here at Stanford, we
8 will accept a final round of post-hearing comments.

9 These post-hearing comments are due on Friday, June
10 23rd. In order to allow interested parties adequate
11 time to respond to the hearing testimony, we intend
12 to post the transcript of all hearings on our
13 website as soon as the transcripts are available.

14 We are also recording the testimony for streaming
15 and possible downloading from the Office's website.

16 The audio files from the hearings at the Library of
17 Congress are currently available on our website.

18 The transcripts will also be posted on
19 the website as originally transcribed, but obviously
20 everybody who testifies will have an opportunity to
21 correct any errors in these transcripts. When those
22 corrections are received, we will put the corrected

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1 transcripts on the website.

2 Those of you who are here to testify
3 have already been advised that we intend to put the
4 recording and transcripts on the website, and by
5 your appearance here we understand that you have
6 consented for us to do this. We are also putting
7 written statements of testimony submitted on the
8 Office's website until the transcripts are posted.

9 The Comments, Reply Comments, Hearing
10 Testimony and Post-Hearing Comments will form the
11 basis of evidence for my recommendation to the
12 Librarian of Congress. Before making that
13 recommendation, I am to consult with the Assistant
14 Secretary of Communications and Information of the
15 Department of Commerce. We have already begun these
16 consultations and expect to have more discussions
17 with the agency that the Assistant Secretary heads -
18 - which is NTIA, the National Telecommunications and
19 Information Administration.

20 After receiving my recommendation the
21 Librarian will determine by October 28, which is the
22 deadline, whether or not there are any classes of

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1 works that shall be exempted from the prohibition
2 against circumvention of access control measures
3 during the three years that will begin on October
4 28th in the year 2000 forward.

5 It is clear from the legislative history
6 that this rulemaking proceeding is to focus on
7 "distinct, verifiable and measurable impacts."
8 Isolated or de minimis effects, speculation or
9 conjecture, and mere inconvenience do not rise to
10 the requisite level of proof. Any recommendations
11 for exemptions must be based on specific impacts on
12 particular classes of works.

13 The panel will be asking some tough
14 questions of the participants in an effort to define
15 the issues. We stress that both sides will receive
16 difficult questions, and none of the questions
17 should be seen as expressing a particular view by
18 the panel. This is an ongoing proceeding, and no
19 decisions have been made yet.

20 The purpose of these hearings is to
21 further refine the issues and get the evidence that
22 we need from both sides. In an effort to obtain all

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1 relevant evidence, the Office reserves the right to
2 ask questions in writing of any participant in these
3 proceedings after the close of the hearings. Any
4 such written questions asked and answers received
5 will be posted on our website.

6 What I'd like to do now is introduce our
7 panel. To my immediate left is David Carson, who's
8 the General Counsel of the Copyright Office. To my
9 immediate right is Charlotte Douglass, who is
10 Principal Legal Advisor to the General Counsel. To
11 David's left is Rachel Goslins, who's an Attorney
12 Advisor in our Office of Policy and International
13 Affairs. And to Charlotte's is Rob Kasunic, who is
14 a Senior Attorney in the Office of the General
15 Counsel.

16 We're about to begin. And we have been
17 asked by our Reporter if any of the witnesses have
18 written statements that they will be reading from,
19 it would help them tremendously if you could give
20 them a copy of your written statement.

21 I see the panel is actually already in
22 place, and I have received your order of preference.

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1 So we will start with you, Dr. Siva Vaidhyanathan -
2 - I can't say it.

3 DR. VAIDHYANATHAN: Vaidhyanathan.

4 MS. PETERS: Vaidhyanathan.

5 DR. VAIDHYANATHAN: You were getting
6 there. You would have been fine.

7 MS. PETERS: And then we'll go to Karen
8 Coyle, who will represent the California Digital
9 Library. And then we'll go to the American Library
10 Association, with Linda Crowe. And finally, we'll
11 have Laura Gasaway, who will be representing the
12 American Association of Universities, and the
13 American Council on Education, and the National
14 Association of State Universities and Land Grant
15 Colleges.

16 Okay, it's yours.

17 DR. VAIDHYANATHAN: Good afternoon. My
18 name is Siva Vaidhyanathan. I'm a media studies
19 scholar and cultural historian at New York
20 University. Thank you for allowing me to testify
21 today. I am not a lawyer or a law professor. I am
22 not a librarian. I am a user, a reader, a teacher,

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1 a researcher and a citizen. Worse than that, I'm an
2 unauthorized user. I am a fair user.

3 I'm deeply concerned about the potential
4 harm the anticircumvention power of the Digital
5 Millennium Copyright Act will have on media studies
6 and scholarship in general. I am just as concerned
7 about the effects that this emerging leak-proof,
8 highly regulated electronic regime could have on
9 American culture and deliberative democracy.

10 Today, most of the subjects of media
11 studies research are widely accessible. A handful
12 of works of film and early radio are even in the
13 public domain. So scholars and teachers benefit
14 from ample and easy sources. But that might change
15 over the next few decades as more works -- even
16 those already in the public domain -- become
17 enclosed behind electronic locks and gates, and
18 delivered in streams of digital signals. The
19 potential for abuse of this technology and the legal
20 power behind it is immense.

21 You will notice that most of the tenses
22 I am employing in this testimony are subjunctive and

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1 conditional. As you may have gathered from all the
2 previous testimony on this issue, this law has
3 caused little harm yet, save the immeasurable and
4 undocumentable chilling effect it might have had on
5 those frightened by the combined cultural power of
6 media companies and the state.

7 Yes, my fears are speculative and
8 alarmist. But they are not outlandish nor
9 inconceivable. Not every media company is as
10 harmless as a mouse. Not every government is
11 invested in the free flow of ideas and information.

12 Call me Cassandra if you must, but
13 please imagine my classroom 35 years from now. As I
14 do every semester, I plan to show my class a film
15 that explores conflicting values and loyalties
16 during wartime: Casablanca. But sometime during
17 the 2020s, all the VEHICLES players at New York
18 University fell into disrepair.

19 The library has the tape, but nothing to
20 play it on. Kim's Video Store on Bleecker Street is
21 now just a Starbucks. Blockbuster is now a hand-
22 held device instead of a large store. The only

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1 means for showing this film to my class is to have
2 it streamlined in via satellite feed into a video
3 projector.

4 Casablanca would have entered the public
5 domain the previous year, assuming Congress does not
6 extend the term once again. But it remains well
7 protected, "double-wrapped" by both "click-wrap"
8 contract and technological access controls.

9 So my class settles down. On my palm
10 computer I call up the interface page for either
11 via-Disney-AOL-Warner-Mount or it's competitor
12 MicroFox. I enter my "educator's code." I hit
13 "play." Nothing happens. Once again, I must do my
14 poor Bogart impression for the class in lieu of this
15 film.

16 So what happened? Well, perhaps this
17 was my second class of the day and the service
18 blocks fair users from watching a film twice.
19 Perhaps the NYU Library could not negotiate a
20 contract renewal with the company and stay within
21 its tight budget. Perhaps my "educator's code"
22 revealed me to be the one who wrote that scathing

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1 review of the major summer blockbuster of 2034,
2 Battlefield Earth IX: The Psychlo's Revenge.

3 Perhaps the company identified me as someone who
4 testified against the industry at a Copyright Office
5 hearing way back in May of 2000.

6 The Digital Millennium Copyright Act
7 grants complete power to allow or deny access to a
8 work with the producer or publisher of that work.

9 The producer may prohibit access for those users who
10 might have hostile intentions toward the work. This
11 power could exclude critics and scholars. Most
12 likely it would exclude parodists and satirists as
13 well.

14 The anticircumvention provision shifts
15 the burden of negotiating fair use from the user,
16 and the courts in the case of likely infringement,
17 to the producer. The producer has no incentive to
18 grant access to any user who might exploit the work
19 for fair use -- including scholarship, teaching,
20 commentary or parody. Under this regime, a user
21 must agree to terms of contract with a monopolistic
22 provider before gaining access. One must apply to

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1 read, listen or watch.

2 But why would a company restrict access
3 to its product? In his testimony at these hearings
4 in Washington, D.C., Bernard Sorkin, senior counsel
5 for AOL-Time-Warner asserted that the content
6 industries "cannot exist and prosper by barring
7 their works from public availability," and any such
8 fear "flies in the face of economic logic."

9 Sorkin would be correct if his industry
10 were perfectly competitive. But the very economic
11 basis of copyright is that we need a state-granted
12 limited monopoly to create artificial scarcity where
13 natural scarcity could not exist. Once the content
14 industry has a perfect, technological monopoly on
15 high-demand back-catalog films such as "Casablanca,"
16 the industry has an incentive to limit the number of
17 times it could be shown for free. Restricting free
18 and "fair" use bolsters monopolistic pricing power.

19 And companies have great incentive to restrict
20 harsh critics and parodists from viewing their
21 films.

22 I am very concerned that the Librarian

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1 of Congress is entrusted with composing a list of
2 "classes of works" that might be exempted from the
3 anticircumvention provision. As someone whose work
4 spans from Twain to 2 Live Crew, and includes such
5 sources as legal documents, private letters,
6 diaries, movie soundtracks, and television and film,
7 I have serious misgivings about a government agency
8 allowing greater access to some works over others.

9 All elements of expressive culture are
10 fair game for scholarship -- at least they are today
11 and for a little while. If any categories of works
12 should be exempted from the provision, then all of
13 them should. The Librarian of Congress should not
14 have the power to favor one type or subject of
15 scholarship over another.

16 But as Arnold Lutzker testified at your
17 hearings in Washington, D.C., "classes of works" are
18 not "categories of works." Privileging one
19 "category of work" might let you exempt literary or
20 scientific work but not music or film. And I assume
21 that the Librarian of Congress recognizes this
22 distinction and plans to execute his power based on

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1 it.

2 Any proposal that libraries and
3 librarians enjoy some sort of special exemption from
4 the legal threat inherent in the DMCA would not
5 satisfy my concerns. First, libraries are not users
6 per se, and much scholarship occurs outside of
7 libraries. Second, such a move would turn
8 librarians into "copyright cops," who would be
9 entrusted to determine which uses would be fair and
10 which would not.

11 Fair use is something I as a user must
12 be willing to employ without having to apply for it.

13 All fair use is unauthorized. If a content company
14 has a problem with my use, bring it on, let's go to
15 court. But let's not involve a third party in the
16 dispute, either by requiring her to preempt my use
17 or by threatening her with liability for any
18 infringing use I might make.

19 Copyright was invented in the British
20 Isles as an instrument of censorship, a way of
21 regulating the traffic of ideas through the
22 selective granting of licenses. Fortunately,

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1 copyright has grown in the American context as
2 something very different. Up until a few years ago,
3 when it still embodied a balance among creators,
4 publishers and users, copyright served as an
5 essential foundation of democratic culture. Its
6 very imperfections helped American culture and
7 commerce thrive in the past 200 years.

8 American users have benefitted from the
9 proliferation of American cultural products, but
10 they have also enjoyed four important safety-valves
11 against the censorious power of copyright: the
12 first sale doctrine; fair use; allowances for
13 private non-commercial copying; and the
14 idea/expression dichotomy which allows facts and
15 ideas to flow freely while protecting specific
16 displays of those ideas.

17 Now, all four of these notions are under
18 attack by the content industries through the World
19 Intellectual Property Organization treaties. The
20 DMCA is only the first step of this process.

21 If the film and music industries
22 continue to tighten their reins on use and access,

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1 they will strangle the public domain and the
2 information commons. This trend presents a much
3 greater threat to American culture than just a
4 chilling effect on scholarship. Shrinking the
5 information and cultural commons starves the public
6 sphere of elements of discourse, the raw material
7 for decision making, creativity and humor.

8 So what should we do about this
9 pernicious trend? How can we revive the beauty and
10 genius of the American copyright system and maintain
11 its positive externalities on our culture and
12 democracy?

13 Well, for a start: the Librarian of
14 Congress should exercise his power to exempt from
15 the anticircumvention prohibition any works that are
16 not easily and widely available for teaching,
17 research and unauthorized reading in an unsecured
18 format. Unsecured formats might include VHS
19 videotapes, printed paper volumes or standard
20 compact discs. That means these products must be
21 archived in a public or university library
22 somewhere.

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1 Second, the Librarian of Congress should
2 ensure that the anticircumvention prohibition does
3 not apply in any case to material not covered by
4 Title 107, the Copyright Act. Therefore, a
5 publisher could not stifle access to works in the
6 public domain, to government documents, or facts, or
7 ideas or data.

8 Third, the Librarian should exempt any
9 works that enjoy technological controls that deny
10 access based on editorial concerns. There are no
11 bad readers, authorized or not.

12 But ultimately, the Librarian's actions
13 -- even if he provides as broad an exemption as
14 possible -- will do little or nothing to restore the
15 sense of public interest to copyright law. It would
16 only be an endorsement of that value. Congress has
17 granted the Librarian the power to exempt the use of
18 certain classes of works from prosecution, but not
19 to exempt the sale and distribution of the very
20 anticircumvention technologies and devices that we
21 users would require to exercise our rights in such
22 an environment.

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1 That's like granting us the right to
2 record television shows for later viewing, but
3 prohibiting the sale of video recorders. It's like
4 having freedom of the press, but not the freedom to
5 own a press. Congress should revisit this issue. I
6 trust Congress would recognize the value of an
7 imperfectly regulated yet balanced copyright system.

8 The Digital Millennium Copyright Act is
9 an absurd, Orwellian law, and it should be
10 abandoned. If Congress does not fix it, I hope the
11 U.S. Supreme Court -- which several times in the
12 1990s stood up for users' rights -- would once again
13 rescue our copyright system from those who would
14 corrupt it.

15 On one final note, I offer an anecdote
16 that should illustrate the value of unauthorized
17 use. In December of 1906, Mark Twain donned his
18 white suit to testify before a congressional
19 committee on the new copyright bill. Twain
20 expressed his desire for copyright to be expanded
21 from mere expressions to ideas as well, and to be
22 extended in perpetuity.

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1 While Twain described the very copyright
2 regime we seem to have built in his absence, a young
3 actor in New York was busy reading a short story by
4 Twain called, "The Death Disk," a fable set in the
5 time of Cromwell's rule of England. The young actor
6 made unauthorized use of Twain's story -- which
7 Twain himself had lifted from Thomas Carlyle -- to
8 make a short silent film in 1909 for the American
9 Mutoscope and Biograph Company. In his short films,
10 this enterprising young man worked out the technical
11 challenges of narrative filmmaking. That man's name
12 was David Wark Griffin, the father of American film.

13 Thank you.

14 MS. PETERS: Thank you. Next Karen.

15 MS. COYLE: Good afternoon. My name is
16 Karen Coyle and I hold the position of Information
17 Technology Specialist with the California Digital
18 Library at the University of California. And I'm
19 here to speak to you as a practitioner of library
20 technology, not in any way as an expert in law. And
21 I must say that what I say here are my own words.
22 This is not policy of the University of California.

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1 I should give you a little bit of an
2 idea of my expertise and what I have been working
3 on. The California Digital Library serves all nine
4 University of California campuses. We have an
5 online union catalog of about 10 million titles, and
6 about 18 million holdings. We have available online
7 66 abstracting and indexing databases for our users,
8 and we have eight of those we've actually mounted on
9 our own computers. We provide our users with access
10 to over 4,500 electronic journals and other digital
11 works.

12 My own expertise is primarily in the
13 development of databases, and I estimated the other
14 day that I have probably overseen the development of
15 databases and the loading of about 50 million
16 bibliographic records.

17 Because there isn't a great deal of
18 time, I chose three of the questions that were in
19 your original call for comments here. And I will
20 just answer those. All three of them have to do
21 with technology.

22 The first one is No. 2, "Do Different

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1 Technological Measures Have Different Effects on the
2 Ability of Users to Make Non-Infringing Uses?" And
3 I had a very interesting experience just this week.

4 You may know that Xerox and Microsoft
5 recently announced that they were going to become
6 content providers. And along with this, they have
7 their own access control standard called XrML. And
8 since this is part of my job, I tend to follow these
9 standards, so I went out to the site to download it.

10 In order to read it, I had to also download a
11 special version of Adobe Acrobat, and I had to give
12 my e-mail address so that I could be sent the key so
13 that I could open up the document.

14 I did this. Opened the document, it was
15 117 pages. I closed it and decided I'd look at it
16 another day. It so happens that in my office I have
17 two computers, and they're connected together and I
18 store everything on basically a shared volume. And
19 as far as I'm concerned, they're just two windows
20 into my work space.

21 So, earlier this week I got a chance to
22 open up that document again, and I went to one of my

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1 computers and went to open it up. And I got an
2 error message. I realized it was the other computer
3 and I hadn't downloaded the right version of Adobe
4 Acrobat. I downloaded the right version of Adobe
5 Acrobat, I'm still getting a rather cryptic error
6 message.

7 And it took me a few tries, but after a
8 while I basically deduced that this document can
9 only be opened on the computer where it was
10 downloaded. Well, I decided to go back and read the
11 legal "I agree" agreement, which of course I hadn't
12 read the first time. None of us ever do. And there
13 was no mention in there of access controls at all.

14 So I went back to the web page where I
15 downloaded it, and there was no mention of access
16 controls. On Tuesday I went to the XrML site and
17 said, "It looks to me like this is limited to just
18 one CPU. Is this the case?" And as of this morning
19 I still haven't gotten an answer from the
20 developers.

21 There are two sort of interesting
22 technological aspects to this. One is that access

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1 controls may be invisible to the user. And these
2 were definitely invisible to me. I knew that the
3 access control had to do with Adobe Acrobat, that I
4 had to have a key. But there was nothing telling me
5 that this was only readable on a single computer.

6 The other interesting aspect is that the
7 access control and the license may not be the same.

8 Now, I can't find, really anywhere, a license that
9 says what my license is in relation to this
10 document. The license really has to do with
11 relation to what I would develop using the XrML
12 standard.

13 But interestingly enough, the document
14 seems to be licensed to me. They asked for my name,
15 my address -- that had to be filled in -- my e-mail
16 address. And yet the access is limited to an
17 inanimate object on my desk, which is of a very
18 temporary nature. Because as we know, computers get
19 upgraded every three to five years. This one's four
20 years old, it won't be around very long. I assume
21 that when I upgrade my computer equipment, I'm not
22 going to be able to read this file.

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1 Now, when you make this question about
2 "Do Different Technological Measures Have Different
3 Effects?" the answer is yes. But when I sat down to
4 try to think of all the different technological
5 measures and all the possible effects, I realized
6 that this is going to take a really serious study.
7 I don't think we really know what all the effects
8 are, and some of them are hidden, some of them
9 aren't obvious. I really think that what we
10 need for this technology is something that I like to
11 call a social impact study. That when new
12 technology comes up, that someone needs to look at
13 it in terms of not just what does the technology do,
14 but what's the impact it's going to have on society?

15 And I turn to you, because at the moment
16 I don't know of any other agency that might be in a
17 position to bring together a group of technologists,
18 or somehow charter an investigation of this nature.

19 Of really learning what the controls are and what
20 the impact they have on access. Because I don't
21 think that we have an answer for that today.

22 The next question that I wanted to look

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1 at was the one that says if there are works that are
2 available, both in basically digital copy and hard
3 copy, is the availability of the hard copy
4 essentially make it so that access to the digital
5 copy isn't as important.

6 And here I speak from experience that
7 we've had in developing computer systems over about
8 20 years. Because I started in 1980 with the
9 University of California on these systems. I
10 mentioned that we have sort of eight core databases
11 that are on our system. One of them is National
12 Library of Medicine's Medline, which we made
13 available 12 or more years ago, obviously to serve
14 our medical and biology research staff and students.

15 There is a paper equivalent Index Medicus.

16 When we made it available we were very
17 surprised by the amount of use, and we continue to
18 be surprised by the amount of use. This database
19 accounts for about 30 percent of the use on our
20 system amongst these core databases. This is quite
21 a surprise. There have been times when it actually
22 rivaled the use of the online catalog.

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1 I can't explain it, no one else I know
2 can explain it. But what we do know is that by
3 making information available digitally, we aren't
4 giving the same access that we gave in the paper
5 copy. And that our users are finding new ways to
6 make use of the information, and are discovering new
7 information.

8 And I think we all know that when you
9 search in a database you have the ability to
10 discover information that you might not have
11 discovered in the hard copy work. Because the
12 ability to search is so much better.

13 The exciting thing about working in
14 digital libraries is that we're really developing a
15 new kind of scholarship, and it is different to the
16 scholarship that took place in the paper world. And
17 I don't think we'd want to go backwards to that
18 paper scholarship, and pretty soon we really won't
19 be able to.

20 And then the last question that I wanted
21 to address--down here, it's No. 18: "In What Ways
22 Can Technological Measures That Effectively Control

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1 Access To Copyright Works Be Circumvented, and How
2 Widespread Is Such Circumvention?" Well, I do not
3 know of any library that has a job title,
4 Librarian/Cryptographer. We really -- we don't have
5 cryptographers on our staffs. I don't expect us to
6 have them in the near future.

7 I was thinking about the other day that
8 -- I believe it was last year or the year before,
9 the Electronic Frontier Foundation did a crypto-
10 experiment in which they spent about a year --
11 actually, a little over a year -- building a special
12 computer to the tune of about \$250,000 so that they
13 could experiment with breaking through 56-bit DES
14 encryption.

15 And apparently -- John Gilmore just told
16 me that it actually took 56 hours. And then once
17 they had that computer built to do it, and it's just
18 coincidence that it's the same number as the number
19 of bits.

20 Clearly, it is not really economical in
21 most cases for a library to use this type of
22 technology in order to gain access to works.

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1 Encryption really is a question of economics, and
2 the cryptographers will always tell you there is no
3 unbreakable encryption. There's just encryption
4 that it's too expensive to break for what you're
5 going to get out of it.

6 I can't imagine libraries having the
7 ability to break through strong copy controls. And
8 I think that this is, in a way, unfortunate because
9 I am quite convinced that we will lose some works.
10 If a library does find that it needs to invest its
11 time and resources in trying to free a work in order
12 to make it available to the public, I feel they are
13 doing a great public service and we should support
14 them in that. It is not something that I can see
15 that any library is going to undertake idly.

16 I don't have a recommendation for you as
17 to what the wording should be, in terms of what
18 exemptions there should be for libraries, because I
19 couldn't begin to speak that language. And I will
20 let the lawyers do that for me. But thank you very
21 much. MS. CROWE: Good afternoon. I
22 guess I'm going to start with the disclaimer, since

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1 I'm far from a copyright expert. This testimony is
2 short and, I hope, to the point.

3 My name is Linda Crowe, and I'm the
4 Director of the Bay Area Library and Information
5 System, the Peninsula Library System and the Silicon
6 Valley Library System. Each is a consortium of
7 public libraries covering the core of the Bay Area,
8 including all the public libraries in the counties
9 in alphabetical order: Alameda, Contra Costa, San
10 Francisco, San Mateo and Santa Clara.

11 The service area consists of 25
12 individual jurisdictions, and over 175 outlets or
13 main libraries and branches. All of these outlets
14 have public access to electronic resources. Some
15 with only a single terminal and some with more than
16 100 terminals open for public use. And they are in
17 use from the time the library opens until it closes.

18 Public libraries see themselves playing
19 a critical role in providing accurate access to
20 information. And it's particularly important that
21 new technologies support and enhance, not impede,
22 the ability of public libraries to provide these

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1 services. Many consider the public
2 library as the public transportation to the Internet
3 or the superhighway. And I suppose that is somewhat
4 descriptive of their role. Much has been made of
5 the digital divide in this state and throughout the
6 country. The area that the libraries we serve
7 represent, one, if not the most wired area in the
8 country. Yet, there are information haves and have-
9 nots, and the digital divide is as real here as
10 anywhere else.

11 Where else can many teenagers who live
12 in East Palo Alto, just down the road, parts of West
13 Oakland or Bayview/Hunter's Point go to access the
14 resources he or she needs to complete a homework
15 assignment, or do research on a subject of personal
16 interest?

17 As three consortias, we are spending
18 more and more scarce dollars on resources in
19 electronic formats. For example, this fiscal year
20 we will spend close to \$1.5 million on electronic
21 databases. Next year we will probably spend more,
22 and we are constantly trying to meet requests for

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1 people who want more and need more.

2 We need to be able to assure our users
3 that within the limits of fair use, that the people
4 who need them will have them available. I mentioned
5 the digital divide, and that public libraries may be
6 the only place some people may be able to use these
7 resources.

8 We also find that more and more people
9 who have access to the Internet elsewhere, come to
10 the public libraries because librarians have
11 organized the information and can help access what
12 the user really needs more quickly and more
13 effectively.

14 These users need research done in
15 whatever format is available. And public libraries
16 need to be able to supply these formats without
17 undue technological constraints, costs or charges.
18 At this point, most public libraries are not talking
19 at meetings much about the DMCA, copyright and fair
20 use because they have lived and accepted the
21 principles that they've had for years.

22 Now, we have this broad new law that

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1 confuses and concerns us, because of the ambiguity
2 and apparent contradiction. On one hand we have the
3 anticircumvention section 1201, and on the other
4 hand -- as I understand it -- we have the provision
5 to 21201 that says, "nothing in this section shall
6 affect rights, remedies, limitations or defenses to
7 copyright infringement, including fair use under
8 this title."

9 We need a precise, a clear precise sense
10 of what is and is not proper, so we can exercise
11 those rights. Without this preciseness we are
12 likely to err on the side of caution, possibly
13 restricting access to information to those who need
14 it, and denying them the rights to use it in ways
15 that are legal under current copyright law.

16 I would urge the Librarian to issue
17 exemptions that protect the rights of content
18 owners, but allow us to serve our public. That is,
19 the people who use and depend on public libraries.

20 Thank you.

21 MS. GASAWAY: Good afternoon. My name
22 is Laura Gasaway. I'm here today on behalf of the

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1 Association of American Universities, the National
2 Association of State Universities and Land-Grant
3 Colleges, and the American Council on Education.

4 Thank you so much for the opportunity to appear
5 before you.

6 I will make four points today. First,
7 an examination of the purpose of today's hearings.

8 Second, our experience to date with access controls
9 and their first cousins, license restrictions.

10 Third, how the proposed business models presented by
11 copyright holders will interfere with the use of
12 copyrighted works in teaching, learning, scholarship
13 and research. And lastly, what this means for your
14 task in the rulemaking proceeding.

15 The bottom line for us is exempting from
16 the realm of prohibition on circumventing conduct
17 any uses for which the user had lawful initial
18 access. Further, we believe two types of works that
19 were identified in our opening statement -- fair use
20 works and thin copyrights -- are particularly
21 vulnerable. And equities are stronger toward
22 exempting them.

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1 Congress was concerned that the
2 possibility of technological protection measures,
3 TPMS, would be applied by copyright owners in ways
4 that interfered with lawful uses of copyrighted
5 works. Ways that upset the copyright balance that
6 has long served owners and users of protected works.

7 You've heard copyright holders in these
8 hearings state that their future economic health
9 will be completely compromised if there is an
10 exemption for their works. Nothing could be further
11 from the truth. The risk to copyright holders is
12 negligible.

13 Nothing in this rulemaking affects the
14 availability of the prohibitions contained in
15 Sections 1201(a)(2) and 1201(b). For example, the
16 manufacture and distribution of circumventing
17 devices and the performance of circumventing
18 services. Nor will any copyright remedies for
19 infringement be exempted. In any case of
20 infringement Section 1201(a)(1) is redundant.

21 Moreover, nothing in this rulemaking
22 will stop copyright holders from applying TPMS. The

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1 question is whether we invoke federal courts to
2 reinforce anticircumvention. Additionally,
3 contractual rights will continue to apply.

4 Our experience with access controls to
5 date, whether technological protection measures or
6 licensing, have been varied. We, of course, have
7 had much more experience with licensing than TPMS to
8 date. Most of our experience has
9 been with passwords, which are the kind of basic or
10 primary access control technology that does not
11 cause us concern. In fact, our own Institutions are
12 using passwords on web pages, course materials, and
13 the like that we develop.

14 We have also dealt with location
15 restrictions, especially in license agreements where
16 the university pays a license fee but access is
17 restricted to on-campus use. This has been a
18 problem for us when we're dealing with distance
19 learning students, medical interns and the other
20 students who are enrolled but who are physically
21 located elsewhere than the campus for that
22 particular semester. And we've had to deal with

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1 authentication of those users to create access for
2 them.

3 Sometimes publishers have not allowed us
4 to do that. They have restricted access to the
5 domain name, regardless of the fact that these were
6 enrolled students. So they have restricted it to
7 the place, regardless of the fact that these were
8 enrolled students.

9 We've also seen restrictions on who may
10 access the material. Usually it is students,
11 faculty and staff -- pointed out to you by earlier
12 witnesses in these hearings. The problems for
13 state-supported Institutions which also have
14 responsibility to serve citizens of their area and
15 their state. Increasingly, this is causing
16 difficulty when we have sole source government
17 information that's embodied in these electronic
18 databases, et cetera.

19 Another problem that we've had with
20 licensing has been the removal from databases of
21 materials during the license period, with no advance
22 warning. And I'm specifically referring to the

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1 removal of the French legal materials from the Lexis
2 database very recently.

3 Now, one could certainly argue that
4 Lexis has violated the license agreement with law
5 schools in doing that, but that's really not our
6 purpose here today. Just to point out that these
7 are the difficulties we've had.

8 There have also been licensing
9 restrictions on use, where a particular product
10 could be used for teaching and demonstration but not
11 for research. Sometimes licenses to use have been
12 denied because the copyright holder sees its market
13 as a non-educational model. It just doesn't fit the
14 use that we asking, so they have refused to license
15 entirely, or even to respond to our request for a
16 license.

17 Today's contractual restrictions are
18 tomorrow's technological protection measures. With
19 a license agreement, however, institutions have had
20 some ability to negotiate the terms. With TPMs, the
21 ability to negotiate is lost.

22 We have had one relevant experience in

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1 my own library with TPMs and the problems with them.

2 I call these "disappearing CD-Roms." Actually, we
3 still have the CD-ROM, it's the content that's
4 disappeared. Apparently they were date-

5 sensitive, although this was not included in the
6 license agreement, and there was no advance warning.

7 The library was left with nothing. This happened
8 to us with Westlaw CD-ROMs. The publisher admitted
9 that it was a mistake and agreed to replace them.
10 But we were several weeks without the material.

11 So far, publishers have not implemented
12 many such controls. But according to their
13 testimony during these hearings, this is about to
14 change. The institutions represented by our
15 organizations are seriously concerned about what
16 we've heard from copyright holders at these
17 hearings. Clearly, they intend to merge access and
18 use controls. The business models they discuss make
19 it clear.

20 At what point do access controls and use
21 controls merge? One could argue that when a
22 university acquires access to materials through a

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1 license agreement for its enrolled students, and yet
2 off-campus but enrolled students are not permitted
3 access, this is a type of use control. We paid for
4 access for these students, but they still cannot use
5 the material.

6 The copyright holder is differentiating
7 between users, all of whom are enrolled students.
8 Is this access or is this use? We don't know, and
9 we can't tell when we are liable for such conduct
10 should we circumvent.

11 Copyright holders clearly want to merge
12 access and use, as their testimony indicates. They
13 say they want to keep anyone from breaking into the
14 bookstore and stealing a book. What it seems to me,
15 and to us that they are saying is that they want to
16 stop anyone from breaking into the book, even after
17 they have lawfully acquired access to the book.

18 The pay-for-use world that publishers
19 and producers have discussed at these hearings are
20 use controls for higher education. Such merger is
21 completely inconsistent with the congressional
22 scheme. Congress treated access and

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1 use controls very differently in the statute, and
2 the Copyright Office should take into account what
3 copyright holders have said during these hearings
4 because the risk to users of copyrighted works is
5 considerable.

6 The proposed business models presented,
7 we believe, will interfere with the use of
8 copyrighted works for teaching, learning,
9 scholarship and research. Fair use is fundamental
10 to educating America's students, producing
11 scholarship, research and the like.

12 College and university libraries acquire
13 copyrighted works by purchase, gift or license;
14 faculty, students and staff then have the right to
15 use these works for education. How will an
16 educational institution be able to function with
17 pay-for-use?

18 For example, the single listen. A
19 faculty member plays the song in class once. The
20 students then ask to have it repeated because they
21 didn't quite understand or get enough of the
22 material for the educational purposes. The

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1 individual students then need to listen additional
2 times for reinforcement, or to study for exams. How
3 is this going to work for higher education?

4 We also strongly support the statements
5 of library associations concerning the preservation
6 of digital works. The cultural and scholarly record
7 is critical for researchers and teachers, and
8 indeed, we believe for society. The makers of
9 silent films saw them only as works for
10 entertainment.

11 Fortunately, there were libraries that
12 preserved these works as important cultural records.

13 How much poorer would be our understanding of
14 society, and of early movie-making, had these works
15 been lost to the world. The same is true for things
16 like greeting cards, postcards, old photographs,
17 advertising posters, things that clearly were not
18 originally intended for education.

19 Fifty years from now scholars will want
20 to look at the early digital materials to determine
21 how the industry developed, and what it said about
22 people's tastes and interests. What scientific

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1 information was deemed worthy of distribution in
2 digital format.

3 One witness dismissed archiving of
4 digital works as irrelevant to society. The
5 Copyright Office and the Library of Congress needs
6 to think hard about turning these decisions on
7 preservation over to owners with this attitude.

8 With this information, how should the
9 Copyright Office exercise this rulemaking power?
10 Congress intended primary controls on access when it
11 established the distinction between access and use
12 controls. For that reason, we believe the classes
13 exempted from the act of anticircumvention should be
14 those for which the user had lawful initial access.

15 In the Academy, we do not differentiate
16 between works for entertainment and works for
17 teaching, learning and scholarship. The discipline
18 in which they are used makes a great deal of
19 difference. My colleague from NYU pointed out a
20 good bit of that.

21 We have faculty who study the history of
22 rock and roll, so how can sound recordings -- works

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1 originally intended for entertainment -- not be
2 subject to defeating TPMs in cultural studies,
3 history, et cetera? The works were intended for
4 entertainment originally, the use that it's made of
5 them in education is quite different. It is for
6 instruction and research.

7 Use of these works in the Academy has
8 been fair use for 200 years. There are two classes
9 of works that probably have greater universal use in
10 higher education than others. In other words, all
11 disciplines make use of these works.

12 Therefore, these works are those for
13 which the balance leans most heavily for a broad
14 exemption. And the failure to do so will
15 significantly hurt teaching, learning, scholarship,
16 et cetera.

17 First of all, fair use works. Works
18 that due to their nature are likely to be lawfully
19 used under the fair use doctrine. This would
20 include, at a minimum, scientific and social
21 databases, textbooks, scholarly journals, academic
22 monographs and treatises, law reports and

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1 educational audio/visual works.

2 You should probably also think about
3 writing a regulation that would exempt a work not on
4 this list, but because of its use in a particular
5 context, it is highly likely the use might be a fair
6 use. And an example might be motion pictures in a
7 film school.

8 The second type of works that we believe
9 especially needs a broad exemption are factual
10 works, those with thin copyrights. Those that
11 contain limited copyrightable subject matter, and
12 are fact-intensive, or that contain significant
13 public domain materials.

14 Examples of these works would be maps,
15 some databases, histories, statistical reports and
16 abstracts, encyclopedias, dictionaries, newspapers
17 and the like. We believe that the exemption you
18 are considering should be broad for scholarship,
19 education and libraries.

20 The United States has the finest
21 academic system in the world. Likewise, we have the
22 strongest copyright industries. Both have thrived

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1 under copyright and with fair use. Responsibility
2 falls on your office and this rulemaking to see that
3 the balance is preserved.

4 Thank you.

5 MS. PETERS: Okay, thank you. We want
6 to go to the panel questioning. And the questioner
7 can ask a person specifically, or can throw it out
8 to the panel. If they throw it to the panel, anyone
9 who feels like jumping in and contributing, please
10 do. And even if a question is directed to an
11 individual, if another person feels that they have
12 something to add, please feel free to add and say "I
13 want to add to that."

14 We're going to start the questioning
15 with Rachel Goslins of the Policy and International
16 Staff.

17 MS. GOSLINS: Good afternoon. This
18 panel is especially valuable and helpful to us
19 because of all the types of people that we have
20 technologies before us. Librarians, academicians
21 and users have the most kind of hands-on experience
22 of both the works and the technologies that we're

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1 talking about.

2 So my questions are going to be largely
3 focused on actual problems or conditions that you
4 experience in the course of administering your
5 libraries or teaching your classes.

6 First, in a way we're relatively lucky
7 in this study, because we're asked to look at access
8 control technologies, which are probably the oldest
9 technologies we have around in the relatively young
10 world of the digital environment. Password
11 protection and encryption, IP domain names,
12 protections have been around for a while, and so
13 there should be some backlog of experience with
14 them.

15 And my first question is directed to the
16 whole panel. Considering that these testifying have
17 been around for a while, and considering that up
18 until -- and at the moment the act of circumventing
19 them is not illegal, so I'm not asking anybody to
20 confess to anything. Are there times or situations
21 in your day-to-day businesses where you have to
22 circumvent these kind of protections or forego the

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1 use of work?

2 DR. VAIDHYANATHAN: There are examples
3 where I would like to circumvent, but it doesn't
4 mean I either have or have been able to. For
5 instance, I use Lexis/Nexis rampantly in my
6 research. And I'm licensed through New York
7 University Library to read Lexis/Nexis database
8 information from my IP address on my university-
9 issued computer. But when I travel, I can't.

10 I wish I could. I wish I could have
11 access to that, but once again the license is sort
12 of computer-specific, or machine-specific as opposed
13 to licensing the access to me as a scholar.

14 MS. GOSLINS: And what is it, exactly,
15 that prohibits you from circumventing these
16 controls?

17 DR. VAIDHYANATHAN: Well, because the IP
18 address allows the server to let me into that
19 particular page. It's what checks whether I'm okay.

20 MS. GOSLINS: So in this case, it's the
21 technology? It's not the lack or existence of a
22 legal prohibition in doing so, it's just that the

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1 technology is effective?

2 DR. VAIDHYANATHAN: Right.

3 MS. GOSLINS: Are there other
4 experiences that people have had?

5 MS. COYLE: I think that describes most
6 of our experience, which is that in things like IP
7 address checking we have vendors who limit -- most
8 our vendors, actually, limit to certain IP
9 addresses. And it's not that our users or our
10 librarians wouldn't sometimes like to get around
11 that. But most people don't know how.

12 So the technology is actually effective.

13 And I think that's why we don't have a lot of
14 experience in trying to circumvent controls. Some
15 of them virtually cannot be circumvented. I mean,
16 it can be very difficult. The economy of
17 circumventing these controls is really prohibitive.

18 MS. GOSLINS: That's actually a point I
19 wanted to pick up on.

20 MS. PETERS: May I comment on this?
21 Which is, you said that the control came about with
22 regard to your contract, your license. So,

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1 actually, I guess your university signed a license
2 that binds its employees. So is your complaint
3 against the license, or is it the license plus the
4 technology?

5 DR. VAIDHYANATHAN: It's the license plus
6 the technology. I mean, one requires the other.

7 MS. GOSLINS: I'd like to pick up on Ms.
8 Coyle's point. But before doing that, I'd just like
9 to make sure nobody else on the panel has examples
10 of times that they have to circumvent.

11 MS. GASAWAY: There have been times that
12 we've had to circumvent, specifically with license
13 to --

14 MS. GOSLINS: Arrest her.

15 (Laughter.)

16 MS. GASAWAY: Specifically with license
17 to Westlaw, and Lexis because we're under the law
18 school contract for each individual's personal
19 password. You know, if someone comes in off the
20 street with a reference question, but not for law
21 practice. It's for a general question.

22 If we then use our own passwords for

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1 that, in a way we are circumventing. Not letting
2 them do it, but to answer a reference question for
3 them. And we have done that on occasion, simply
4 because that's the only access that we have to some
5 of the material. Now we can't answer that French
6 legal question that they were going to ask, period.

7 MS. GOSLINS: If I could just follow-up
8 on that for a second. Is it really, then, that
9 you're -- when, in effect, you're doing there would
10 be circumventing the license terms, right? Not
11 necessarily the -- I mean, the access -- you're not
12 actually breaking the access control protections.
13 You're just circumventing the terms of the license?

14 MS. GASAWAY: Yes. I mean, I guess it
15 depends on which way you look at it. Because of the
16 personal password situation, it's a little bit
17 different. Because ours apply to any machine, no IP
18 address. It's personal.

19 MS. PETERS: For certain use, right?

20 MS. GASAWAY: Right. For educational
21 use.

22 MS. PETERS: Right, yes.

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1 MS. GASAWAY: Not only educational use,
2 law school use.

3 MS. GOSLINS: And are there other --
4 okay, picking up on Ms. Coyle's point, which is
5 something we've heard in several of these hearings,
6 that circumventing access controls is expensive and
7 time-consuming and difficult. And generally you
8 need some design or some product or service that is
9 illegal to manufacture, design or produce them.

10 At the risk of being argumentative, why
11 is this exemption important, then? If these
12 technological protections are effective, if
13 realistically libraries wouldn't be able to
14 circumvent even if we were to exempt all classes of
15 works, what will a possible exemption give you?

16 MS. COYLE: Right. And the reason why I
17 see that as being an argument for the exemption is
18 the fact that should a library get in the position
19 where it does have to dedicate the \$250,000 and a
20 year's worth of development in order to circumvent,
21 it's because it was an extremely important piece of
22 knowledge that that library felt it was worth

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1 investing the money to preserve.

2 It's not that you can't do it, it's that
3 it has to be -- you have to match the value of what
4 you are preserving with what it's going to cost you
5 to get to it to preserve it.

6 DR. VAIDHYANATHAN: And I would like the
7 Library of Congress to stand up for the principle.

8 MS. PETERS: For the --

9 DR. VAIDHYANATHAN: The principle of
10 preservation, the principle of first sale, the
11 principle of fair use.

12 MS. GOSLINS: Okay. This is another
13 sort of broad question. Obviously, one of the
14 things we're looking at is to what extent materials
15 are available in alternative formats, and to what
16 extent they're available only in digital formats.

17 So I'm just curious. I don't mean
18 specific numbers, but off the cuff, how much of the
19 material that you deal with in the operations of
20 your libraries is available only in digital form,
21 and how much of it is available elsewhere?

22 MS. CROWE: In the public libraries,

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1 often the databases that we buy are databases of
2 periodicals and that sort of thing that are --
3 they're also available in print. But we have to
4 make choices about which format we're going to buy,
5 because we can't afford to buy both formats.

6 So, it has become more and more popular
7 to buy them in electronic format because people can
8 access them from home, or from the office, or from
9 wherever is convenient. Therefore, although they
10 may be available in two formats, we have to choose.

11 And we're choosing the one that we think is more
12 convenient for people.

13 MS. GOSLINS: But, in general, the
14 formats -- you're choosing between two formats, and
15 in the day-to-day world it's also available in an
16 analog format?

17 MS. CROWE: Yes. Often. Not all the
18 time, but often.

19 MS. COYLE: Now, many of the e-journals
20 that we carry never were published in print, so we
21 do have many thousands of electronic journals that
22 are available only in this format. And, as you

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1 know, there's things like Highwire Press that in the
2 academic world, in academic production of knowledge,
3 that there is a consciousness of the need to both
4 provide these things electronically, and to preserve
5 them.

6 And what we're finding is that consortia
7 and library agreements are being developed so that
8 these things are being maintained for perpetual
9 access by some institution. Research Libraries
10 Group has taken on that for some materials.

11 This is definitely true for the archival
12 materials, because as people digitize archival
13 materials, even though the archival material is
14 still there, it has a very low possibility of use.

15 So when you have an archive of very rare
16 photographs, you cannot let people have access to
17 them. Therefore, the digital product really becomes
18 a functioning surrogate. And there is a great
19 consciousness of providing perpetual use to those
20 materials. However, oftentimes those materials are
21 materials that are owned by the library, and
22 therefore there isn't a copyright issue.

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1 MS. GASAWAY: And we certainly have some
2 things in the big legal databases that are available
3 in print. But we're also getting many more
4 databases that do not exist in print, like EDGAR,
5 with all the SEC material. Some of that does not
6 exist in print. If you're in Washington and can go
7 by the Securities and Exchange Commission, you can
8 get hold of some of it. But some of it is just
9 simply not available to us.

10 The ERIC database is another one in
11 which there's a good bit of material that's
12 available only electronically.

13 MS. GOSLINS: What is the name? ERIC?

14 MS. GASAWAY: The education database.
15 And until Ms. Peter's colleague at the Patent and
16 Trademark Office got right about publishing patents,
17 the only access to them was through an electronic
18 database. But now they are available on the web.

19 The Bureau of National Affairs is
20 creating all kinds of libraries, as they're calling
21 them, of their materials. Like in Healthlaw, which
22 will have a combination of materials that are

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1 available in print, but a big chunk of their stuff
2 is not. And it is the bringing it together that is
3 making it valuable.

4 So I think we are on the upswing of
5 seeing things that are available only
6 electronically.

7 MS. GOSLINS: Okay. Can I ask you a
8 very specific question? Do you remember what
9 witness it was that said that archiving is
10 irrelevant to society?

11 MS. GASAWAY: Yes. Richard Weisgrau of
12 ASMP.

13 MS. GOSLINS: All right. And I have
14 another specific question for you, Lolly. One of
15 your suggestions is that what you call fair use
16 works should be exempted from the anticircumvention
17 prohibition for, I believe, libraries and
18 universities, right? And in that group you include
19 textbooks and audio/visual and other educational
20 materials.

21 Does this create a similar problem that
22 we saw in distance education, which is a proposal to

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1 exempt works precisely in the markets for which
2 they're designed.

3 MS. GASAWAY: Well, remember that that
4 applies only to works for which we already lawful
5 access. So if these are licensed work, we paid the
6 license fee. It's just they exempt them from the
7 anticircumvention provision.

8 MS. GOSLINS: And the initial access
9 point would be -- for instance, if you -- as an
10 example of that, if you purchased access to an
11 online database for six months, and then that six
12 months ended. You would then, from that point on,
13 be exempted from the prohibition of
14 anticircumvention because you had initial use?

15 MS. GASAWAY: No. I think when you're
16 talking about a termed license period, it is only
17 for that period. I think it's only for that period.

18 I do not personally see how we could ever advocate
19 that -- you know, with a journal subscription now,
20 an analog subscription, when you stop the
21 subscription you don't continue getting the volumes.

22 So, I mean, I think that the move to the

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1 digital world is the same thing with those. If you
2 paid for 12 months of access, that's what you get.

3 MS. GOSLINS: So how would it work, that
4 if you had initial lawful access and it's an
5 audio/visual work produced for education purposes.
6 You would then need to circumvent the access control
7 protections?

8 MS. GASAWAY: It's not that whether we
9 would need to, it's whether we would be liable if we
10 did do it. That's really the issue. We don't know
11 whether we would need to. Suppose that it's one of
12 these timed ones that disappears? You know,
13 something like that. And yet it's still within our
14 contract period of having paid for. Why should we
15 be liable for circumventing if we've already had
16 lawful initial access and the contract period has
17 not expired?

18 MS. GOSLINS: I'm sorry that I'm
19 following up on this. I think I'm just still
20 slightly confused. I understand that example. That
21 seems like that example would, however, apply only
22 in situations where somebody made a mistake and you

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1 weren't having access to something that you were
2 entitled to. That seems like a pretty narrow
3 exemption.

4 MS. GASAWAY: Well, all I can tell you
5 is from my own experience as a law librarian, and
6 that's the only one I personally dealt with so far.
7 So I don't know how rare it is, because there were
8 a bunch of us who had to deal with that.

9 MS. GOSLINS: Okay. And then I just
10 have one more question for Mr. Vaidhyanathan,
11 something like that. One of the things you
12 mentioned, or you suggested as a criterion for
13 exemption is technologies that didn't deny access
14 based on editorial concerns. I'm just curious. Are
15 there technologies now that do that, and are capable
16 of doing that?

17 DR. VAIDHYANATHAN: So far -- I'm sure
18 they're all capable of doing that. When I get into
19 NYTimes.com, I have to enter my e-mail address and a
20 password. So far I have done nothing to justify
21 NYTimes.com from keeping me out, but there's nothing
22 to prevent them from keeping me out.

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1 Now, it's a --

2 MS. GOSLINS: Okay, it's sort of an FBI
3 Top Ten Wanted list?

4 DR. VAIDHYANATHAN: Or, yes. Whatever.
5 It's not inconceivable to think that certain sites
6 or databases would be willing and able to exercise
7 editorial control over access. You know, it would
8 be a very simple way of regulating readership.

9 MS. GOSLINS: But you're not aware of
10 anybody that does that now?

11 DR. VAIDHYANATHAN: No, I'm not.

12 MS. GOSLINS: Okay. All right. I think
13 I'm done.

14 MS. PETERS: Charlotte?

15 MS. DOUGLASS: You said in pursuing a
16 little bit of that adverse effects, and the
17 difference between an adverse effect and a mere
18 inconvenience -- well, if you can't get material at
19 all but for circumvention, that's one thing. But
20 suppose you have the ability instead of
21 circumventing of digitally-encrypted work, to go to
22 12 other sources and get access.

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1 Would you think then that the
2 availability of the work in 12 other areas would
3 mean that that was an adverse effect, when you could
4 not get the digitally-encrypted version? Or would
5 the availability that took you 12 times as long mean
6 that that was a mere inconvenience?

7 I'm just trying to hone in on what's an
8 adverse effect and what's a mere inconvenience.

9 MS. COYLE: Yes, and I'm trying to
10 understand it. I'm not quite sure what it is. But
11 it sounds to me like what you're talking about is
12 something that comes up in the area of preservation
13 of hard copy works, which is that if your work is
14 deteriorating you don't immediately copy it. The
15 idea is that you're supposed to go out and try to
16 find out if you can reasonably get another copy.

17 And you seem to be saying that if for
18 some reason your digital access is broken, should
19 you be required to go out and try to find other
20 digital access before circumventing. Is that --

21 MS. DOUGLASS: No, I'm sorry I wasn't
22 clear. I'm trying to distinguish between, on the

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1 one hand, what is a real adverse effect and what is
2 a mere inconvenience. For the reason that Congress
3 tells us that we are to consider things that are
4 adverse effects in trying to establish these
5 particular classes of works that are to be exempted
6 for non-infringing use.

7 But Congress also tells us that we
8 should not pay as much attention to mere
9 inconveniences. And so I'm trying to decide whether
10 -- what are they talking about?

11 MS. COYLE: You're still trying to
12 define inconvenience, yes.

13 MS. DOUGLASS: What is an example of
14 that? And so I came up with an example that,
15 suppose you had a digitally-encrypted work but you
16 can actually get the same material by going to 12
17 other places, taking 12 times as long. Does that
18 mean that it's -- that the fact that you can go and
19 take 12 times as long, that's a mere inconvenience
20 or is it an adverse effect?

21 MS. COYLE: I think it's very hard to
22 sort of answer that question in the abstract,

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1 because it depends on whether or not that user is
2 actually going to continue to follow-up 12 times as
3 long. Or if that 12 times as long is 12 days rather
4 than 12 seconds, which there's a big difference in
5 time.

6 And so there has to be some kind of
7 concept of what it's reasonable to expect users to
8 go through, or for libraries to go through.

9 DR. VAIDHYANATHAN: And Ms. Douglass, I
10 have actually three observations about that subject.

11 First of all, if there were a condition, for
12 instance, that the researcher were on a heavy
13 deadline, then -- and an article is not going to get
14 published if he or she can't get that information
15 within 28 or 48 hours, that's a real effect.

16 Secondly, another real effect might be
17 if the user is for instance, visually disabled and
18 has software available to create an audio
19 presentation of a digital work and is basically
20 unable to read or understand printed text, then
21 that's a case of real harm.

22 Third, I think it's very important to

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1 recognize that in the realm of First Amendment law a
2 chilling effect is a real effect. And it wouldn't
3 be very hard to be able to come up with examples of
4 a chilling effect.

5 And then, for instance, just off the top
6 of my head before I read this, when the anti-DSS
7 cases hit the press, sites that had DeCSS software
8 on them shut themselves down before it was ever
9 litigated. In other words, they were protecting
10 themselves. That is a real chilling effect.

11 MS. DOUGLASS: Thank you.

12 MS. GASAWAY: I think also that there
13 are works that are available only electronically.
14 So, clearly the adverse impact or adverse effect is
15 there for those works. Your example of there are 12
16 other sources available says that going through the
17 decryption or whatever, would not be very time or
18 cost-effective, except in the instances that Siva
19 just mentioned to you, or something like that.

20 But we do have to focus on the fact that
21 increasingly there are works that are going to be
22 available only digitally. And on those the adverse

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1 effect is clear.

2 MS. DOUGLASS: One of the questions that
3 we asked in our Initial Notice was, speaking still
4 of adverse effect, with respect to any adverse
5 effect is there an explanation for the adverse
6 effect other than the presence of technological
7 measures that effectively control access to works.

8 That means that but for the presence of
9 circumvention, is there -- was that adverse effect
10 caused, or could it be something else? Could it be
11 because of the licensing restrictions, could it be
12 for -- I know this is highly abstract and I'm sorry
13 I can't give you a hard example of it. But we have
14 to somehow try to link cause and effect here because
15 that's what Congress said to do.

16 So I want to know if there is, or if
17 there could be other reasons for the adverse effect
18 except for the prohibition on circumvention? Does
19 that make sense?

20 MS. GASAWAY: I think it does make
21 sense. I think, at least from my standpoint, the
22 concern that we're going to see some of the license

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1 restrictions on use converted to TPMs is really
2 where we focus. And where we really have to think
3 about, sure, some of the concerns today are just
4 pure licensing concerns.

5 But if you can turn that contract into a
6 technological protection that also protects not only
7 access, but use, you know, then it's too late.
8 We've already lost the access to the work unless we
9 have the broad exemption from circumvention.

10 MS. DOUGLASS: And your broad exemption
11 goes to fair use works and thin copyright works?

12 MS. GASAWAY: Well, first we would
13 prefer that it be any work for which we have initial
14 --

15 MS. DOUGLASS: Lawful.

16 MS. GASAWAY: Lawful use, right. And
17 then in the alternative, if that is broader than
18 rulemaking can encompass, we'd say that there are
19 these classes of works that are specifically unique
20 to higher ed. But we would also hope that there was
21 a rule that said for particular circumstances there
22 would be the ability to bring other categories into

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1 that. And I use as the example films in a
2 filmmaking school, or something like that, which are
3 not in those two categories necessarily.

4 MS. DOUGLASS: Now, I'm trying to
5 recollect. You said that classes of works is not
6 necessarily categories of works.

7 MS. GASAWAY: I didn't say that.

8 MS. DOUGLASS: Oh, you said that. Okay,
9 I'm sorry. So this may be an unfair question, but
10 can you figure out how to get to classes of works
11 that are not categories of works according to the
12 legislative history?

13 DR. VAIDHYANATHAN: Well, let's see. I
14 think you're empowered to read the word "categories"
15 as distinct from "classes." And I think that you're
16 empowered to do that because they are two distinct
17 words and two distinct areas of the code. If they
18 had meant -- if the Commerce Committee had meant
19 categories, it could and probably would have said
20 categories.

21 What is a class of work? Well, you can
22 define a class of work functionally, and I think

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1 that may be the only reasonable way to do it. A
2 class of work is a work that is available in certain
3 ways and used in certain ways. And then it's up to
4 you to fill in the blanks what those ways are.

5 MS. DOUGLASS: Do you have any comment
6 on this, Dr. Gasaway?

7 MS. GASAWAY: I'm pretty sure it's not
8 categories of works, because that's how I first read
9 it when the legislation was being drafted and trying
10 to figure it out. I think we've done the best job
11 we can with looking at those fair use works and
12 factual works. Suppose it could also be defined by
13 length of term?

14 You know, we could say that after the
15 first so many years the work is no longer something
16 that we need to worry about that for. I don't think
17 that will be very popular with copyright holders,
18 but you know, you're looking at different ways we
19 could cut across what's a class of work.

20 Old stuff. That's a class. Bad stuff.

21 MS. DOUGLASS: Old stuff is a class
22 particularly if the copyright term has already

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1 expired.

2 MS. GASAWAY: Oh, then it's public
3 domain. I'm talking about old stuff that's still
4 under copyright.

5 DR. VAIDHYANATHAN: But to articulate
6 clearly that items in the public domain should not
7 be covered by the anticircumvention prohibition
8 because they're not covered under Section 107.

9 MS. GOSLINS: I think that's pretty
10 clear from the legislation.

11 DR. VAIDHYANATHAN: Well, okay. We'll
12 see if it's clear in practice.

13 MS. DOUGLASS: What's not so clear,
14 maybe, is public domain material that is covered by
15 what some consider to be a thin veneer of
16 copyrightable works. For example, an introduction,
17 an index, a table, with all of these public domain
18 facts from the SEC. And you happen to be in Denver,
19 Colorado.

20 So, are you advocating any particular
21 exemption with respect, possibly, to that kind of
22 material?

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1 DR. VAIDHYANATHAN: The only way I could
2 envision that working -- I would love to see an
3 exemption for the public domain material. In other
4 words, no one should be able to prosecute me for
5 circumventing access to the complete works of Mark
6 Twain on a protected CD-ROM, for instance.

7 I would like that. However, I recognize
8 that the complete works of Mark Twain are available
9 in several other forms, not enclosed, not protected.

10 So you may find too broad a definition on work
11 along -- or work against the principle of the
12 legislation in front of you.

13 MS. GASAWAY: Also talking about works
14 abandoned in the commercial market, which are fixed
15 and obsolete technology. It's another class of
16 works that we could look at.

17 MS. DOUGLASS: Thank you.

18 Ms. Coyle, the summary of your statement
19 refers to reformatting material, and the need for
20 circumvention in connection with preserving material
21 for archival purposes. Have you ever needed to
22 reformat audio/visual works or the like for storage

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1 reasons?

2 For example, DAT or DVD format, to avoid
3 maintaining items on more space-consuming media? Am
4 I making myself clear?

5 MS. COYLE: Yes. We do make copies of
6 everything that we receive, and this is part of our
7 licensing. And we do copy -- I mean, we have data
8 going back to 1978, so I've had the privilege of
9 going through system upgrades and having to recopy
10 hundreds of thousands of files. So, yes, this is
11 something that occurs actually quite regularly.

12 MS. DOUGLASS: And you do it now as a
13 matter of a license?

14 MS. COYLE: Right, right.

15 MS. PETERS: Is that something that you
16 require in all of your licenses, or manage to get in
17 all of your licenses?

18 MS. COYLE: You don't manage to get it
19 from all of them, no.

20 MS. PETERS: Okay. What do you do when
21 you don't get it?

22 MS. COYLE: I talk to the people who do

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1 licensing, because I don't do that directly. You
2 know, I do the bits and bytes, other people do
3 licensing. But I figured this question would be
4 asked.

5 What happens at that point is it seems
6 that we go into prolonged negotiations with the
7 vendor. And we have had contract negotiations last
8 18 to 24 months until we reach an agreement.

9 MS. PETERS: But you keep going for an
10 agreement. Maybe I should ask, what do you do with
11 your archived material? Does that become the base
12 from which you serve, or is it more like a doomsday
13 kind of --

14 MS. COYLE: Yes. Actually, most of the
15 material that we've archived is bibliographic
16 records. And those at least were -- now they're
17 stored in Oakland and San Francisco. There was a
18 time when some of them were stored in Nevada as
19 well, so that when California slid into the ocean
20 our data would still be there. Fortunately, that
21 hasn't happened. But yes, things are stored with
22 the idea that we think we have to keep it forever.

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1 Now, I should mention about digital
2 preservation, because I think there's some
3 misunderstanding about that. Which is that digital
4 preservation -- with book preservation you wait 50
5 to 200 years, and as the book starts to deteriorate
6 then you preserve it.

7 With digital preservation you have --
8 preservation really begins on Day One. That
9 preservation is really a kind of preventive kind of
10 thing.

11 MS. DOUGLASS: So you would not
12 necessarily advocate having an anticircumvention
13 exemption, because you would take care of it up
14 front?

 MS. COYLE: Well, no. You
15 don't take care of it up front. The problem is that
16 -- I mean, if I get a CD-ROM and data is on CD-ROM,
17 that data is protected. I can make a copy of that
18 CD-ROM, the data is just as protected as it ever
19 was.

20 And, you know, I have no more access to that new CD-
21 ROM than I did into the old one.

22 If I feel that that is data that I have

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1 to -- and that I have a right to keep in perpetuity,
2 I am going to want it kept in a format that I know I
3 can get to in 10 years. And a copy of that CD-ROM
4 is not going to do that for me.

5 MS. PETERS: So, you put it what? What
6 kind of format would you put it on?

7 MS. COYLE: It isn't just -- I mean,
8 you're talking about the physical format?

9 MS. PETERS: I mean, obviously --

10 MS. COYLE: The physical format isn't
11 the question. The question is the data format.

12 MS. PETERS: Right. But what does that
13 become?

14 MS. COYLE: Depends on what kind of data
15 you have.

16 MS. PETERS: So what do you do for a CD-
17 ROM to preserve it?

18 MS. COYLE: Well, it's a -- see, it
19 isn't a question whether it's CD-ROM, it's what's on
20 it. So, for example, our standard for preserving
21 images is a certain level of TIF format. And if we
22 have images that we've received -- and again, most

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1 of the images that we receive are from our own
2 archives. So it isn't a question of having to
3 circumvent anything.

4 But we have images that we receive. We
5 put them into that format, because that's the format
6 we expect to be able to read in 20 to 30 years.

7 MS. DOUGLASS: I'm going out on a limb
8 here. Dr. Vaidhyathan?

9 DR. VAIDHYANATHAN: That's good.

10 MS. DOUGLASS: All right. Your summary,
11 the first to a broader picture of information
12 comment, and a shrinking of the public domain. And
13 you say that it's going to affect decision-making
14 and creativity and humor. And from the lack of
15 humor here, that's a serious charge. So I'd like to
16 know if you can connect that really broad charge to
17 anything regarding circumvention.

18 DR. VAIDHYANATHAN: The connection would
19 be really clear under cases where copyright holders
20 exercised editorial control over access. The minute
21 that starts happening, then certain classes of
22 people get access to certain works or information,

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1 even data, if we're not careful how we write these
2 rules.

3 In which case, certain classes of people
4 would have much higher ability to manipulate public
5 discussion and debate. And perhaps people,
6 economically marginalized or socially marginalized,
7 would not have access to central texts, ideas and
8 tenets of our society that might be worthy of
9 satire.

10 And as a result -- I mean, in connection
11 to that, and I'm going to add this -- might as well
12 add it now, as long as there are no follow-up
13 questions about it, because I just learned about it.

14 Cyber Patrol, the filtering software, the filtering
15 service, apparently had been suppressing speech. It
16 prevents you from viewing certain places on the Web,
17 for instance.

18 Apparently the encryption of the block
19 list was broken. And as soon as activists
20 discovered that Cyber Patrol was blocking sites not
21 particularly defined by its policy, Cyber Patrol
22 blocked those websites that carried the criticism of

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1 the policy. Does that make sense?

2 MS. DOUGLASS: Yes, it does. I've heard
3 it before.

4 DR. VAIDHYANATHAN: Glad you did.

5 MS. DOUGLASS: And I suppose there's not
6 been any similar -- I guess we could call it adverse
7 effect. Or has there been any action taken? Have
8 you heard, for example, that there's some sort of a
9 parody of The Matrix on the Web?

10 DR. VAIDHYANATHAN: Of The Matrix I
11 haven't heard. But I have heard about a parody of
12 an Elian Gonzalez photo, for instance, that also
13 simultaneously parodied a major beer ad. And both -
14 - I guess people received cease and desist letters
15 as a result of this parodic manipulation.

16 That's not a control over -- it's not a
17 technological control over access to this stuff.
18 Nobody really has a problem with access to Budweiser
19 ads. If only we did. But it was a case where the
20 cultural power of the copyright system is used to
21 try to stifle parody and free expression.

22 MS. DOUGLASS: Thank you for adding

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1 humor to this testimony.

2 MS. PETERS: Thank you very much.

3 Rob?

4 MR. KASUNIC: Good afternoon. Going
5 back, there was a lot of broad concerns with the
6 things that are probably outside the scope of the
7 technological controls. And I think in some of the
8 comments, we've seen that there is a -- Ms. Coyle's
9 testimony that it's too early for any of us to make
10 any definite statements about some of this. And
11 also Dr. Vaidhyathan, that the potential for abuse
12 is there.

13 And also admitting that the fears are
14 speculative and alarmist. That these are maybe
15 significant concerns, but it's not clear that we've
16 reached a certain point yet in the number of works.

17 In addition to -- Congress set up, in
18 addition to this triennial review that the Copyright
19 Office is empowered to do every three years, that
20 Congress also in the legislative history anticipated
21 that the market would be a factor in controlling
22 this. That if controls got too tight, then the

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1 market would compensate, and that there would be
2 effects on that side.

3 And in addition, the Copyright Office is
4 there to review this at another point in time, if
5 some of these situations do get worse. Is there any
6 evidence, in any of your views, that this is not
7 likely to be the case? That Congress was wrong,
8 that the market or that the pressure of knowing that
9 the Copyright Office would be reviewing this again
10 would not be enough to alleviate some of these
11 potential fears?

12 DR. VAIDHYANATHAN: The second concern
13 first. Yes, your triennial review is not likely to
14 have a direct effect on mitigating any of these
15 harms. For the simple fact that technologies and
16 devices will still be illegal. So once again, it's
17 the right without the ability.

18 Addressing your first concern, once
19 again a chilling effect is a real and tangible
20 factor in the way that the public and creators
21 interact with media companies and the copyright law
22 system. And any gap in understanding of the nuances

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1 of the Digital Millennium Copyright Act in general,
2 or the anticircumvention prohibitions specifically,
3 are not only likely to have a chilling effect, I'm
4 sure that's already happened.

5 If you don't realize what your specific
6 rights are, chances are you're not going to exercise
7 any of your given rights.

8 MR. KASUNIC: Did anybody else have --
9 yes?

10 MS. GASAWAY: I should mention that we
11 have a little bit of concern about how the market
12 for education is being viewed, generally. And I'm
13 not talking about just for materials that are
14 designed specifically for that market.

15 But as copyright holders talk to you
16 all, everything they talked about market seemed to
17 be aimed at an individual. You know, how are we
18 going to deal with getting access to these works in
19 the educational context, if everything is set up so
20 it's an individual who gets access? As opposed to a
21 license that we're dealing with now.

22 And the market simply has not worked

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1 that well, when it comes even to licensing.
2 Especially some of these works for entertainment. I
3 mean, look at the evidence we saw when we were
4 talking about distance learning, even after the
5 school had purchased the work, being denied the
6 right to use it for distance learning.

7 I know we shouldn't talk about that it's
8 too expensive, but I'm not talking about that. But
9 quoted fees that mean you really don't use it. And
10 so I'm talking about exorbitant, not just a little
11 on the expensive side. But which is clearly a way
12 of controlling what's going on in education. And I
13 think that's one of the concerns I have.

14 It's really the whole First Amendment.
15 I mean, what are we going to be able to use for
16 teaching? Especially with things like cultural
17 studies. It's really a control on what is going to
18 be taught to your kids.

19 MR. KASUNIC: Well, then, I guess that
20 gets back to a comment that was raised before about
21 what is the purpose of the exemption in this, and
22 how will this really help. Because if the market

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1 has not been doing its job in maybe restrictive
2 licensing, that's -- this exemption isn't going to
3 change that. And it's also not going to
4 have an effect on the technology itself. The
5 technology can be as restrictive as anyone wants to
6 make it. All we can deal with in any potential
7 exemption is the prohibition on circumventing that
8 technology. So what will the effect of an exemption
9 be here?

10 MS. COYLE: I actually think that the
11 exemption will have an effect on the licensing and
12 contracting. Because I think that it gives a
13 message, and it gives a message that we expect
14 libraries to be providing information to the public,
15 and to be archiving the information. And I think
16 that it helps support what libraries are trying to
17 get into their licenses, which is the ability to do
18 just that.

19 MR. KASUNIC: Well, then, in terms of
20 the message that is to be sent -- and there does
21 seem to be an interest in the Copyright Office in
22 sending some kind of message here. But under

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1 certain restrictions on what kind of message we can
2 send. And we do have to identify classes of work.

3 In terms of how -- it was raised, going
4 back to the classes of works and the determination
5 of categories. Were given in the legislative
6 history something that did, to a certain extent, tie
7 this to the categories, where it was talked about
8 that, given examples, that this could something
9 narrower or should be something narrower than an
10 overall category of works, and not something like
11 audio/visual in general. But more narrow as in
12 motion pictures, but maybe not so narrow as in some
13 particular genre within there.

14 So how do we take this out of that area
15 of limiting it to one particular category, to a
16 broad -- to having a class of works which spans a
17 number of different categories? One where we do
18 have this legislative history that does seem to
19 narrow the scope a bit.

20 MS. GASAWAY: We gave you a bunch of
21 examples in the testimony that I delivered, talking
22 about factual works and fair use works. And named

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1 within those specific types that appear in different
2 categories in Section 102(a).

3 MR. KASUNIC: Okay. With the thin
4 copyrights, and that was one of the areas you talked
5 about in the types of work, with factual works. And
6 this is something that was raised with a number of
7 the database owners and interests. That there is a
8 claim that this is something that's covered under
9 Title 17. That while there is a scope of
10 protection is arguable, that it may not be as
11 completely as broad, that this is under Title 17.
12 And that the technology is controlling a work that's
13 protected by Title 17. How can we work with that
14 restriction, that it is something that's covered.
15 If the technology is covering both copyrightable
16 elements and factual material, how -- and is not
17 differentiating between the two, is that something
18 that should be able to be protected under Section
19 1201?

20 MS. GASAWAY: I think it's relatively
21 easy to do it. You simply would say that for
22 educational, scholarly research purposes, even

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1 though those works are protected under the Copyright
2 Act, and because we've had lawful initial use, then
3 they are exempted from anticircumvention for these
4 library, education, scholarly and research uses.

5 DR. VAIDHYANATHAN: And are you actually
6 talking about, for instance, databases with some
7 original arrangement and -- is that what your
8 question is about? So there's partial copyrighted
9 material on a particular database, but the data
10 itself -- which is not covered under the Copyright
11 Act -- but you're saying how can you help draw that
12 distinction, or what should you privilege?

13 MR. KASUNIC: Right. Well, if we have a
14 technological control measure -- that as long as
15 there is some element that would be copyrightable,
16 that that can be applied to the overall work. While
17 that may contain public domain elements, do we open
18 up the -- certain copyrightable elements? How does
19 an exemption differentiate between the two?

20 DR. VAIDHYANATHAN: You should err on
21 the side of public interest, you should err on the
22 side of factual availability and the free flow of

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1 information. You should, for instance, say that not
2 just teachers and scholars should have access to
3 non-copyrightable elements of a particular work, but
4 all potential users should have access to that
5 information. Especially if it's the only place one
6 can get it.

7 MR. KASUNIC: So that would be a
8 restriction, then, on it. That if you have a
9 database that's a sole source of that, and if this
10 was something that was available in some other form,
11 then that would not be -- that would not fall under
12 that exemption?

13 DR. VAIDHYANATHAN: Well, once again,
14 you have to take into account accessibility for all
15 users. Users in Alaska, users who are visually
16 impaired, all of whom should have an equal ability
17 to manipulate factual information.

18 MR. KASUNIC: Well, I guess, Ms. Coyle,
19 that that was something that -- raising about with
20 the sole source. And it's unclear that this has
21 increased the benefits to society, having some of
22 these in a digital format as opposed to if it's

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1 maybe available only in hard form. That having some
2 of these work available digitally has increased the
3 number of users and types of uses that are --

4 MS. COYLE: That simply changed the kind
5 of use, although this has just begun and we don't
6 really know exactly where that's going. But I think
7 we're seeing a change, actually, in the type of
8 scholarship that takes place because of a new kind
9 of availability of information, which was previously
10 available in a different form.

11 MR. KASUNIC: And are you aware of
12 anybody who has looked into doing some of -- you've
13 mentioned social impact studies. And I know there
14 was some interest in the Copyright Office doing
15 that. But is that something that is going to be
16 looked into by libraries and other areas, to
17 determine what some of these adverse effects are?

18 MS. COYLE: I don't know of anyone who's
19 really planning to do something that I would
20 consider to be a study of that type, no. It's going
21 to take effort, it's going to take people's time,
22 it's going to take gathering together a group of

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1 experts.

2 MS. GASAWAY: I think I would worry a
3 little bit about -- talking about these databases
4 and things that are copyrighted. We're not arguing
5 about the copyright status of those works, but that
6 the veneer of copyright should not be used to
7 bootstrap circumvention prohibition for all non-
8 protected material. I mean, I think it's turned the
9 other way.

10 We're simply saying the whole point is
11 we've had initial lawful access, so perhaps we've
12 had a license, whatever. These are thin copyrighted
13 works and because of the use that we are making of
14 them in education, research. Talking about
15 students, faculty, and libraries. That because of
16 all of that, there should be an exemption in this
17 anticircumvention for that class of works, those
18 that have thin copyrights to begin with.

19 DR. VAIDHYANATHAN: Access to a
20 copyrightable veneer of a database is not
21 infringement of a copyrightable veneer.

22 MS. GASAWAY: That's right.

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1 DR. VAIDHYANATHAN: And it's really
2 important that we not conflate use and infringement.
3 Or somebody has to because Congress didn't.

4 MR. KASUNIC: Well, just to clarify one
5 point, in terms of -- when you said that the initial
6 lawful use, or initial lawful access to a work --
7 and that's something that had been raised in some of
8 the other testimony by Peter Jaszi and Arnie Lutzker
9 as well, about initial lawful access being a
10 criteria.

11 That access would then, I think in
12 Professor Jaszi's statement that that was lawfully
13 acquired work. So you're talking about this being
14 expanded to lawful access in terms of the licensing,
15 but being restricted to the terms of that license so
16 that not -- okay. Just wanted to clarify that.
17 Thank you.

18 MS. PETERS: Can I just follow on what
19 was Rob's question? Is your focus on initial access
20 against a pay-per-use model? So that you have to
21 somehow trigger a payment, or another dime, whatever
22 it is, to get use -- to be able to look at it again?

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1 MS. GASAWAY: Not necessarily. It could
2 be that you took a blanket license of some kind. It
3 could be that you acquired it by gift. You know, I
4 mean, when we look at works, you might have
5 purchased it. If it's an outright purchase. So
6 it's sort of all of those ways one lawfully acquires
7 a work, whether possession or access to it.

8 MS. PETERS: Okay. Let's say that you
9 got it by gift. And it has, what, an access control
10 such as a password. So you don't have that
11 password, but because it came to you lawfully as a
12 gift, then you have the right to circumvent that
13 access control?

14 MS. GASAWAY: Yes. Unless the license
15 to the person who acquired it initially required
16 that they not be able to give it away.

17 MS. PETERS: Right.

18 MS. GASAWAY: If their license did not
19 prevent that, I guess we could look at software
20 under 109(b)(2)(A), whatever those long numbers are.
21 You know, the library and the education exemption
22 to the computer software amendments.

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1 Because we are allowed to give it away to another
2 educational institution.

3 So we give it to them, they don't have
4 the password. Yes, they should be able to
5 circumvent that. Because under the statute we're
6 allowed to give it away to them.

7 MS. PETERS: Take software as an
8 example.

9 MS. GASAWAY: Okay.

10 MS. PETERS: Under software, you --
11 well, I won't say you. People, libraries have the
12 right to lend that software.

13 MS. GASAWAY: Yes.

14 MS. PETERS: Is the software ever, like,
15 password-protected so that when the people get it
16 home, they have a problem using it?

17 MS. GASAWAY: I'm probably not the best
18 one to ask about that, Marybeth. I'll bet some of
19 the people who are in other kinds of libraries -- in
20 law libraries we don't do much of that, loaning
21 software.

22 MS. COYLE: Yes. It's not very -- so, I

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1 don't know. I mean, I assume that if that's the
2 case, then you would, along with lending the
3 software, you would have to give them the access
4 password. Because otherwise they couldn't use it,
5 and why would you have lent it to them if they
6 couldn't use it?

7 MS. PETERS: Okay.

8 MS. GASAWAY: So they could look at the
9 floppy.

10 MS. PETERS: Okay. David?

11 MR. CARSON: Well, following up on your
12 second to last question. Professor Gasaway, and
13 really everyone, are any of you aware of cases --
14 and I think I've heard one or two, but I just wanted
15 to get sort of a checklist in my own mind of cases
16 in which technological measures have restricted
17 access to works, beyond existing contractual
18 restrictions?

19 MS. GASAWAY: The only personal
20 experience that I've had is the one of the
21 disappearing CD-ROM content. That's the only one I
22 have personally seen to date.

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1 MR. CARSON: Okay. That was the Lexis
2 French database?

3 MS. GASAWAY: No, that was the Westlaw
4 CD-ROM.

5 MR. CARSON: And that one, I think you
6 said, was a mistake, right?

7 MS. GASAWAY: It was a mistake, but they
8 said it was a mistake. But we don't know whether it
9 was.

10 MR. CARSON: Did they correct it?

11 MS. GASAWAY: Yes, but it took them
12 seven weeks to correct it. So we were seven weeks -
13 -

14 MS. PETERS: You had no access for seven
15 weeks?

16 MS. GASAWAY: We had no access for seven
17 weeks.

18 MR. CARSON: Okay. Anyone else aware of
19 any cases in which something -- technological
20 measures restricted access beyond terms that were in
21 a license that you had?

22 DR. VAIDHYANATHAN: The Cyber Patrol

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1 case would fall under that.

2 MR. CARSON: Okay. All right.

3 MS. COYLE: Well, I still think it's
4 interesting because you're assuming that the only
5 time that people can't get in is when the technology
6 deliberately is keeping them out. And I think we
7 can't assume perfect technology.

8 And I think that the example that Lolly
9 gave is a very good one of that. Technology fails.

10 It actually fails quite regularly, and so it fails
11 even though you may still be within your contract.

12 DR. VAIDHYANATHAN: A real fresh example
13 of that that just happened a couple of days ago.
14 There's a new subscription-only website for media
15 critics and scholars called "Inside.com." It's
16 planning to charge \$20 per month for an access fee,
17 and therefore it's going to be password-protected.

18 For their start-up they sent out e-mails
19 to specific people on a specific list, saying "We're
20 going to give you a month of free access. Go to
21 this page and register with us, and we'll let you
22 in." So I got the e-mail, I went to the page, I

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1 registered, gave them all the information they
2 needed. And their link, their connect button was
3 not hot.

4 There was a glitch in the system, so I
5 didn't have access to their information, even though
6 I gave them everything they asked for in our
7 contractual deal.

8 MR. CARSON: Do you have any reason to
9 think that was anything other than a mistake on
10 their part?

11 DR. VAIDHYANATHAN: No, no. Whether it
12 was a mistake or not, their effect is the same.

13 MR. CARSON: Okay. Let's take that
14 further, though. Because what we're talking about
15 here is whether there should be classes of works
16 with respect to would you circumvent. And let's
17 assume we were to make a class of works as being
18 those works which, by mistake, access has been
19 denied you, even though you have a contractual right
20 to.

21 DR. VAIDHYANATHAN: Yes. That would be
22 great.

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1 MR. CARSON: I'm not sure that's an
2 appropriate class under the law, but let's just
3 assume that for a minute.

4 DR. VAIDHYANATHAN: Well, it might be an
5 essential class under the law. When I'm teaching
6 that class in 2035, and I plug in my access code and
7 the film doesn't come, it may not have come because
8 of some evil intent.

9 MR. CARSON: Oh, I understand.

10 DR. VAIDHYANATHAN: It may have not come
11 because of a mistake. And if I have a really
12 brilliant student who's willing to hack the system
13 right then and there to get me in, I shouldn't be
14 prosecuted for lawful access to that film.

15 MR. CARSON: Okay, you've actually
16 started to answer my question, anyway. Because the
17 question is -- well, first of all, let's have
18 another -- let's build another assumption in this.
19 Let's assume, because no one thus far has had a
20 contrary experience, that when that access has been
21 denied by mistake, the content provider, once being
22 advised of that mistake, takes corrective action.

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1 It may take him a little while, but they do take
2 corrective action. Let's assume good faith by the
3 content provider.

4 As a realistic matter, is the ability to
5 circumvent something that you could take advantage
6 of? I mean, is it something that, when you have
7 encryption or whatever that is preventing you from
8 getting in there, that you could virtually
9 instantaneously circumvent anyway, quicker than it
10 would take the content provider who's acting in good
11 faith to correct the problem?

12 DR. VAIDHYANATHAN: It's impossible to
13 predict. Because it's impossible to predict the
14 level of technological expertise among those who
15 seek access. And it's impossible to predict the
16 level of technological barrier set up by the content
17 provider. It's also impossible to predict the chain
18 of communication it would require through any
19 complex system, to correct the situation. And my
20 semester might be over before Casablanca plays.

21 MR. CARSON: Let's take the Westlaw
22 example that we did have. Do you have any reason to

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1 believe that you would have had means to circumvent
2 that in a timely way?

3 MS. GASAWAY: No. The only way we could
4 have circumvented it is if another library had the
5 same title, and we just simply copied it. Because
6 there was nothing on the CD. We had just a blank
7 CD.

8 MR. CARSON: Okay. Let's take the Lexis
9 French database. That's something that I assume you
10 had online access to, and at some point it just
11 disappeared?

12 MS. GASAWAY: That's right.

13 MR. CARSON: I'm not sure how relevant
14 it is, but do you know why it disappeared? Was
15 there any explanation?

16 MS. GASAWAY: No, we don't.

17 MR. CARSON: Okay. Can you tell me how
18 a legal right to circumvent technological access
19 control measures would have prevented the problem
20 that you ultimately had?

21 MS. GASAWAY: It wouldn't have, David.
22 I was just, at that point, really talking about --

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1 you asked for examples of what had happened so far.

2 That one was very fresh because of having happened
3 recently. Because there was no announcement, no
4 explanation why, just one day it's gone.

5 MR. CARSON: Okay. I'd like all of you
6 now to assume for a moment what may or may not be
7 the case. Which is that we decide that we are going
8 to exempt only those classes of works with respect
9 to which you can demonstrate that users have already
10 suffered serious adverse impacts on their ability to
11 engage in non-infringing uses. Are you with me so
12 far?

13 Okay. In that case, can you tell me
14 what those classes are, and what are the impacts
15 that have already occurred that you can identify,
16 that would justify selecting those classes?

17 I guess I'm asking you to tell me what
18 classes there are with respect to which there have
19 already been those serious adverse impacts.

20 MS. COYLE: What classes? Okay, ask me
21 that again. I'm lost. What classes?

22 MR. CARSON: First of all, the premise

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1 is that we will exempt only those classes of works
2 with respect to which users have already had serious
3 adverse impacts on their ability to make non-
4 infringing uses.

5 MS. COYLE: In other words, we've had an
6 experience with this in the past?

7 MR. CARSON: Absolutely.

8 MS. COYLE: Oh, okay. I had understood
9 your statement differently.

10 MR. CARSON: All right. If that's the
11 case, if the law says we can't exempt a class unless
12 we've already made that finding.

13 MS. COYLE: There's proof that
14 something's already gone wrong somewhere, yes.

15 MR. CARSON: Yes. Then can you tell me
16 what classes there with respect to which that
17 condition has been met?

18 DR. VAIDHYANATHAN: Yes. There are
19 people who can't play digital video disks because
20 they didn't buy, perhaps even couldn't buy a
21 particular brand of digital video disk player.
22 Let's say, for instance, they have a computer with

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1 Linux running on it, and they want to play their
2 lawfully acquired digital video disk. Then, yes,
3 that particular situation would come up.

4 MR. CARSON: We expect to have some long
5 conversations on that subject tomorrow. Anything
6 besides that? Okay. Professor Gasaway, the first
7 class of works that you asked us to examine -- and
8 correct me if I've got this wrong -- is works with
9 respect to the user has initially obtained lawful
10 possession, is that correct?

11 MS. GASAWAY: It's lawful access.

12 MR. CARSON: Lawful access, okay. How
13 do you square that with the requirement that we
14 identify a particular class of works? Is that a
15 class of works within the statutory meaning?

16 MS. GASAWAY: I think you have broad
17 discretionary power here to accomplish that however
18 you want. And if you want to define the class as
19 that to which the user had initial lawful access, I
20 think you can do that.

21 MR. CARSON: Well, you're a law
22 professor. What do you find in the statutory

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1 language or the legislative history that suggests we
2 have that much discretion?

3 MS. GASAWAY: I don't find anything that
4 says you don't.

5 (Laughter.)

6 MR. CARSON: Fine. Let's move on to
7 your class of fair use works. I happen to be a
8 strong believer in fair use. And I guess my
9 question is, aren't all works fair use works? In
10 fact, my experience is that some of the most
11 interesting fair use cases, and the ones that I find
12 myself believing most strongly about are the cases
13 in which the work -- with respect to which fair use
14 is being made, are highly creative works.

15 MS. GASAWAY: Right.

16 MR. CARSON: And if that's the case,
17 then are we exempting everything?

18 MS. GASAWAY: Well, I think we started
19 out by saying, "Look, for all of higher education
20 there are two groups of works that we think all
21 disciplines use, and maybe have -- the equity's just
22 even a little stronger than anything else." And

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1 that was those fair use works and the thin
2 copyright.

3 But we did say, in addition, we thought
4 that you might think about writing a regulation that
5 would exempt a work not in those categories, these
6 creative kinds of works. Because of the surrounding
7 context, like use of motion pictures in a film
8 school. Where we wouldn't say those are works that
9 would automatically fall into that fair use works
10 class, because of the context they well might. And
11 that's what I said, I think in higher ed we do not
12 differentiate between the types of works. You know,
13 we just don't. We consider an audio/visual work the
14 same thing that we consider a literary work. The
15 Copyright Act differentiates them, but teachers do
16 not.

17 DR. VAIDHYANATHAN: I also do think it's
18 important that we not be in a position to, for
19 instance, license teachers and professors to have
20 greater access to works than, for instance, my mom.

21 I mean, all users should have equal access to these
22 works.

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1 And therefore, actually coming up with a
2 notion of an actual -- I'm afraid it's a category
3 rather than a class -- fair use works might disrupt
4 that. That's why I'm not really on board with a
5 specific definition of a class of fair use works.
6 All works are potential fair use works.

7 MS. GASAWAY: I don't agree with that.
8 Doesn't that gut the whole provision of the law?
9 You're going to exempt everything.

10 DR. VAIDHYANATHAN: Yes, that would be
11 great.

12 MS. GASAWAY: And that's why I think we
13 said, you know, given our druthers, we would start
14 with this. But we also have to look at the fact
15 that classes of works did not mean the 102(a)
16 categories. What does it mean?

17 And there are different ways to cut it.

18 And we've mentioned date and some other things.
19 But the ones that really made the most sense might
20 be those fair use and thin copyright works if you
21 cannot go as broad as looking at that initial lawful
22 use-- initial lawful access. I m sorry.

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1 MR. CARSON: Okay. I'd like some help
2 with my legal analysis here, so I'm going to
3 primarily look to you, Professor Gasaway, on this
4 one.

5 MS. GASAWAY: Hot seat.

6 MR. CARSON: This is a question of
7 interpretation of Section 1201.

8 MS. GASAWAY: Oh, great.

9 MR. CARSON: When we -- let's assume
10 that we recommend that the Librarian exempt a
11 particular class of works, and let's assume that he
12 accepts that recommendation and exempts it. Is it
13 your understanding that if a particular class of
14 works is exempted, all users of that class of works
15 are entitled to circumvent technological measures
16 that control access? Or alternatively, only that
17 users who are engaging ultimately in non-infringing
18 uses are entitled to circumvent?

19 MS. GASAWAY: Now, I'm not able to --
20 like I can in 108 and 107 and 110 -- spit out the
21 sections without doing much looking. But I thought
22 that it said any class of works that are subject by

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1 -- non-infringing uses by persons who are users of
2 the work are who are likely to be affected.

3 So I think you can cut it different
4 ways. It could be everyone, it could simply be
5 because of the public good of education and
6 libraries those uses are exempted. I think you have
7 a lot of discretion there. Because I think it does
8 talk about particular persons and users.

9 MR. CARSON: Okay. Well, let's say we
10 decide that the databases are going to be exempt,
11 and that's all we do. Because let's assume for a
12 moment -- because I think this is probably the plain
13 reading of the statute -- that all the Librarian
14 does is say, "The following classes are classes I
15 designate as falling within those categories."

16 So the ultimate regulation just says we
17 find the following category, database. Would that
18 mean, in your view, that anyone can circumvent a
19 technological measure that controls access to that
20 database? Or would it mean, on the other hand, that
21 only people who are engaging in non-infringing use
22 of that database can circumvent?

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1 MS. GASAWAY: I think the words of the
2 statute say that non-infringing uses by persons who
3 are users of a copyrighted work. So I'm reading
4 from the bible, and it says non-infringing uses. So
5 that's certainly my own interpretation, that it is -
6 -

7 MS. PETERS: They're in D.

8 MS. GASAWAY: Pardon?

9 MS. PETERS: You're reading D, right?

10 MS. GASAWAY: I'm reading D. And I
11 really -- now, this may just be my own foggy notion
12 of it, but all along I thought that not only could
13 you define classes, but classes for particular
14 users. That it did not necessarily have to be as
15 against the public, generally. That would be great.
16 But it could also be against particular classes of
17 users, from the way I've read this.

18 But Ms. Peters and I were both at a
19 conference where we heard a copyright law professor
20 say not only would it be nice if the statute could
21 be read and understand by normal human beings, it
22 would be nice if it could be read and understand by

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1 intellectual property professors, so--

2 DR. VAIDHYANATHAN: Getting back to that
3 example, I'm not sure how one could infringe upon a
4 database. I don't think we've come up with a set of
5 situations, unless you're actually talking about
6 infringing the copyrightable portion of that
7 database. MR. CARSON: Well, sure.

8 DR. VAIDHYANATHAN: So, yes. So
9 exempting databases would be an irrelevant exercise.

10 MR. CARSON: Well, I think the database
11 owners might disagree with you on that.

12 MS. GASAWAY: Yes. I disagree with
13 that. I think that there certainly are portions of
14 databases that are copyrightable and therefore
15 subject to infringement. So that certainly could be
16 one.

17 I would be surprised if it would be
18 exempted as against all uses, because that would
19 also include competitors for the database, rather
20 than those users for what are traditionally fair use
21 purposes.

22 MR. CARSON: Professor Gasaway, you also

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1 said that some copyright owners have previously
2 testified in this proceeding that they intend to
3 merge access control measures and use control
4 measures. Did I get that right?

5 MS. GASAWAY: Yes.

6 MR. CARSON: Okay. Just a suggestion.
7 It would be very helpful for us if either when you
8 correct your transcript or in post-hearing comments,
9 if you could identify those particular people and
10 where in their testimony we could find that, you'll
11 save us a little bit of work.

12 MS. GASAWAY: We'll do that.

13 MR. CARSON: Okay.

14 MS. GASAWAY: Naturally, they didn't use
15 exactly those words.

16 MR. CARSON: That's why it would help
17 for you to identify exactly what it was they said,
18 so we can come to our own judgment as well.

19 Ms. Coyle, you said you're not a lawyer
20 and therefore you can't --

21 MS. COYLE: Definitely not.

22 MR. CARSON: Well, congratulations.

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1 (Laughter.)

2 MS. COYLE: Thank you.

3 MR. CARSON: And that you can't describe
4 in legal terms what exemptions we can recommend, and
5 I can certainly understand that. But as someone
6 who's out there in the field, struggling with these
7 issues, can you tell us as a practical matter what
8 kinds of things should be exempted from this
9 anticircumvention provision?

10 Leave it to us to come up with the legal
11 language. You tell us the problem and what kinds of
12 works really are at risk here.

13 MS. COYLE: I think, as you've heard in
14 the other testimony, I can't think of a type of work
15 that isn't at risk. As long as it's digital and
16 it's protected, I believe it's at risk.

17 MR. CARSON: Okay. Professor
18 Vaidhyanathan, you said that one of the types of
19 works you'd like to see exempted would be works that
20 are not easily and widely available in unsecured
21 formats. Can you give us concrete examples of what
22 kind of work you're talking about?

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1 DR. VAIDHYANATHAN: Let's see. Well,
2 this is a skimpy concrete example. There are
3 certain articles that are available only on the New
4 York Times website, not available in the paper
5 product. If the New York Times website were
6 protected completely, which it basically is password
7 protection at this point. Then, yes, that material
8 would have to be exempted under my model. Exempted
9 from the anticircumvention provision.

10 MR. CARSON: Okay. You're giving me
11 what I think is really a hypothetical. Because you
12 started saying "if."

13 DR. VAIDHYANATHAN: Well, it is
14 protected by a technological gate right now. You
15 can't get into --

16 MR. CARSON: Which anyone can get into,
17 having done it myself a number of times.

18 DR. VAIDHYANATHAN: Well, you and I
19 aren't everyone. We don't know if everyone can, and
20 we don't know for how long, and we don't know under
21 what conditions they still say yes or no. They've
22 only said yes, as far as your experience or my

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1 experience indicates. But that doesn't mean they
2 can't or won't say no. And we haven't yet found the
3 person to whom they've said no.

4 However, that is a technological gate.
5 And circumventing it in order to get access to a
6 particular article that's not available in print
7 form should be exempted.

8 MS. PETERS: Okay. I did something
9 brilliant. I went and let my very able staff go
10 first, and I'm looking at all the questions that I
11 have. And actually I think almost all the questions
12 that I had, I've asked throughout or others have
13 basically answered them.

14 So, I think maybe for me I don't have
15 anything at this point. Does anyone else on the
16 panel have anything that they're dying to ask? No?

17 Okay.

18 Let me just make a note. In the
19 proceeding I noticed at least one person raising
20 their hand. And I didn't recognize that person
21 because this is a formal hearing in which people had
22 to give notice, and they had adequate opportunity to

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1 testify.

2 If there's anyone in the audience who
3 feels very strongly that they want to say something,
4 we do have another comment period. And you
5 certainly can file comments by June 23rd.

6 I certainly would like to thank the
7 witnesses. You've been extremely helpful, and we've
8 kept you quite a while. So thank you very much.
9 And for those -- I see some people who will testify
10 tomorrow. We hope to see you here. And anyone else
11 who wants to come. Thank you.

12 (Whereupon, at 4:18 p.m., the hearing
13 was adjourned, to be reconvened Friday, May 19,
14 2000, at 9:30 a.m.)

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