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

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

BEFORE:

MARYBETH PETERS, Register of Copyrights

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RACHEL GOSLINS, ESQ., Attorney Advisor

CHARLOTTE DOUGLASS, ESQ., Principal Legal Advisor

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(10:05 a.m.)

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

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

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

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

This morning we have two witnesses. The first one will be Cary Sherman representing the Recording Industry Association of America. The second one is Robert Hildeman representing
My name is Cary Sherman. I'm Senior Executive Vice President and General Counsel of the Recording Industry Association of America. I would like to thank the Copyright Office for giving me the chance to speak today and for your hard work in both helping to enact the Digital Millennium Copyright Act and in conducting this proceeding.

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

My prepared remarks today will be brief and will address two key points. First, I will explain RIAA's support for the Joint Reply Comments filed by the 17 copyright owner groups. Second, I will give a short description of the application of technological protection measures to the electronic distribution of recorded music, in particular focusing on the work of the Secure Digital Music Initiative, or SDMI, which was referenced in some of
the comments filed in this proceeding. I would also
be happy to answer any questions the Office might
have about these issues.

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

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

As explained in the Joint Comments, much
of the commentary in this proceeding strays from the
confines of this proceeding and asks the Librarian
to do things well beyond his authority, such as repeal provisions of the DMCA or overturn court rulings applying provisions of the DMCA other than those at issue here. Even the comments that address the general question before the Librarian have taken liberty with and confused the scope of this proceeding. For example, rather than propose particular classes of works that might be subject to an exemption, they instead offer general categories of users who could rely on an exemption for all types of works.

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

This result should not be a surprise. The House Judiciary Committee specifically contemplated just that outcome and explained, and I quote, "such an outcome would reflect that the digital information market place is developing in the manner which is most likely to occur, with the availability of copyrighted materials for lawful
uses being enhanced, not diminished, by the
implementation of technological measures and the
establishment of carefully targeted legal
prohibitions against acts of circumvention."

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

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

The Internet and digital technologies
are making significant changes in the music business
but, unfortunately, not always in a good way.

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

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

SDMI is not an effort by record companies to lock up their music so that it will unavailable to consumers. Such a broad array of
companies would not be participating if that were the case. The reason there has been such widespread participation in SDMI is because they all see in SDMI the promise of increased availability of music in digital form.

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

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

I should note that although some commenters mentioned SDMI along with the DVD copy protection scheme known as CSS, the two are fundamentally different. CSS is a specific security
technology, while SDMI is an organization to develop certain voluntary minimum security standards that may be implemented in any number of specific technologies or products.

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

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

One good example of such a completely new experience is a "try before you buy" program. This would give a consumer access to music for free for a limited time while the consumer decides
whether to purchase a permanent copy. This new consumer experience is made possible by delivering a protected digital version of a recording. What is important for this proceeding is that this business model would be impossible if the Librarian were to authorize consumers to hack SDMI-compliant security systems to keep promotional copies without paying for permanent retention.

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

It must be stressed, however, that access only can be achieved if technological protections that respect the copyright in these works are available and effective. Thus, Section 1201(a) promotes new forms of access to digital music, and delaying its effectiveness would hamper
such access. Indeed, press reports are issued almost daily announcing record company plans to begin electronic music distribution services. Nothing would have a greater chilling effect on those plans than a decision by the Librarian excluding sound recordings from the protection of Section 1201(a)(1). No evidence for such an exemption has been produced, and no such exemption should be adopted.

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

Ms. Peters: Thank you.

Mr. Hildeman.

Mr. Hildeman: Thank you. I want to thank the Copyright Office for this invitation. My name is Bob Hildeman. I'm the CEO of Streambox, Inc. The purpose I'm here today is to discuss with this body several components. One is Streambox fully supports adequate and effective copyright protection. The second is that we want to see a balanced approach for fair use and also our ability as technology companies for reverse engineering. Streambox is an Internet and broadband technology company focused on developing the building blocks for Internet and broadband markets.
We are a technology enabler and an infrastructure builder. Our technologies are open and flexible, and we work with real networks, Microsoft, Apple, MP3 and others, and Streambox.com is the leading media search technology for searching, indexing and categorizing streaming media content on the Internet.

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

And again, I want to thank this office for hearing some of the comments that I have to provide. As far as my testimony on rulemaking process for Section 201(a)(1) of the Digital Millennium Copyright Act, let me say at the outset that Streambox fully supports the desires of content owners to effectively protect their copyrighted material in the digital realm. At the same time, we believe that it is very important that the
traditional copyright principles of first sale and fair use also survive in the digital realm.

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

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

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

This brings me to the most important issue that I wish to stress to the Copyright Office. In its quest to satisfy the legitimate concerns of both content owners and users in its deliberations on Section 1201(a)(1), the Copyright Office must also protect the legitimate fair use rights of technological innovators and solutions providers.
In its commentary on fair use in the digital environment, the House Commerce Committee Report accompanying the DMCA astutely notes that:

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

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

System interoperability is the driving force behind the continuing evolution and growth of the Internet industry, and the ability to innovate
is directly tied to the ability to reverse engineer. Companies must have access to other systems, and the law can not favor one system over another.

Thank you.

MS. PETERS: Thank you.

Now we get to start the questions.

Robert, you get to start.

MR. KASUNIC: Thank you. Good morning.

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

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

MR. SHERMAN: Given what has happened with CSS, I would feel confident in saying no. In fact, it was the very hack of CSS that caused a delay in introduction of DVD audio into the marketplace. The music companies and the technology companies all came to the conclusion that they
needed to beef up the security system for this new
format before it was released and, as a result, they
have an example of a situation in which
circumvention of a technological protection measure
has actually impeded access to a wonderful new
format that consumers are going to love.

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

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

MR. SHERMAN: They will not be
compatible, but that has nothing to do with the
protection technology. That has to do with the
format of the DVD technology itself. DVD video is
one standard. DVD audio is a completely different
standard. We expect that the devices that will be
sold in the marketplace will be universal players
that will play both DVD video and DVD audio, but the
new DVD audio format will not play on existing DVD
video players.
MR. KASUNIC: So new devices will need to be purchased.

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

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

MR. SHERMAN: One really has to distinguish between SDMI standards and ordinary protection technologies that are available in the marketplace. At this point, there is no SDMI standard for protected content. There is no specific standard with regard to what makes content SDMI-compliant. Therefore, the only thing that
would be relevant in terms of SDMI to the content being provided by Sony is that at some point in the future a Watermark would be incorporated in that content. That is not something that is to happen now. That is something that is to happen only later when certain Phase 2 technology becomes available and is ready for implementation and, at that point, Watermarks will be incorporated in the content.

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

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

MR. SHERMAN: Well, this is not SDMI now, but most of the delivery systems that are being contemplated involve some form of encryption and
some form of digital rights management system.
There are also decisions to be made about which code
to use. That is, a compression, decompression,
algorithm, that is the mechanism by which a very
high, very large file is reduced to a very small
file so that it can be transmitted quickly over the
Internet and other mechanisms. And then there are
decisions about file formats, as well. So there are
lots of different factors that go into a delivery
system. But the protection elements are largely
encryption and digital rights management.

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

With digital rights management, you
would be able to sell a single listen or a week of
listens or a month of listens or a rental thing
where, after a certain point, you can buy it for a
small additional price. You could do "try before you buy" where you'd be able to listen to something for a day or so and then it would time out, and then you could decide whether you want to buy it. You have the possibility of super distribution where you can email things to a friend and a friend can decide whether he's interested in it and wants to buy it as well.

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

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

MR. SHERMAN: Okay. As part of the effort to arrive at a system that would enable the variety of new portable devices coming to market to
be able to obtain SDMI-compliant music, that is music that is going to be compatible with SDMI-compliant systems, the idea was to come up with a mechanism by which pirated versions of music could be filtered out. The underlying concept here was that personal use of music would be okay. If you want to rip your CD to a hard drive and then load it from the hard drive to a portable device or to multiple portable devices for your own use, that would all be fine. But to rip it to your hard drive and then distribute it on the Internet to your million best friends for free and become a worldwide publisher, that was not okay.

And the idea was to find a way to distinguish between the legitimate personal uses versus the illicit Internet distribution. The mechanism that is being used for that is a screen technology that will filter out pirated content. And I won't bother going into how that might be done, but there are mechanisms for identifying that which was distributed on the Internet without authorization. That technology is now being developed. There's a call for proposals out. Preliminary responses have been received and further evaluation will be done through the next several months and a technology will be selected.
Once that screen technology is available for implementation, that is the Phase 2 technology and, in order to be SDMI-compliant, a portable device will have to incorporate that technology so as to filter out pirated music that is distributed illicitly.

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

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

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

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

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

MS. PETERS: Thank you. Before I turn to Charlotte, I wanted to follow up with a question to you, Cary. When you were talking about the delivery mechanisms and you were talking about that there would be some encryption and some rights management schemes, I wanted to go to libraries. We heard yesterday that libraries are kind of like
where people go when they can't afford to buy. It's the alternate method of getting material, so it's critical to access information. In your delivery mechanisms that have some encryption and some rights management, what's going to be the model for sale or delivery to libraries for the use of library patrons?

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

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

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change that makes in consumer response.

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

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

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

MR. SHERMAN: At the very least, the next year. I would say for the next decade minimum, maybe two decades. I think CDs are going to be with
us for a very long time to come, and the gradual introduction of digital delivery mechanisms is really very, very slow upward.

MS. PETERS: Okay. Thank you.

Charlotte.

MS. DOUGLASS: Thank you.

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

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

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

MS. DOUGLASS: Thank you.

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

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

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

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

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

How you do it with respect to other classes of works I think would depend upon the particular category of work. When you think about scientific journals, for example, the fact that they
are available now -- I mean I have a basement filled with scientific journals because my wife is a scientist and we have years of these bound volumes of things that she never goes down to look for because there would only be one article every three issues or so that she had any interest in, but she had to subscribe to a year's worth of journals. Well, she doesn't subscribe any more because she has database access to get just the article that she needs.

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

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

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

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

MS. DOUGLASS: Thank you.

MS. PETERS: Anything else?

MS. DOUGLASS: No.

MS. PETERS: Rachel.

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

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

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

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

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

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

MR. HILDEMAN: The question that comes
about is if I were to take a product or if I was to
develop a product that was compatible with another
existing product and that compatibility came about
Because my innovation or our innovation. According to 1201(f), what is the standard that would be measured whether my product is legitimate or illegitimate. I think that's the issue. If I haven't gone through the steps of gaining a proper license for that, does that make my product illegitimate?

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

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

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

MR. HILDEMAN: Sure.

MS. GOSLINS: Is your concern that if you did not have a license to reverse engineer that your product, the product you ultimately arrived at, would be illegitimate or that if you did not have a
license to actually just open the computer program?

MR. HILDEMAN: I think it's the first.

My concern would be that I should not have to
license a product to reverse engineer a product for
the fact I think innovation many times that you
understand the compatible systems so, therefore, you
tend to or you do come about with solutions that
would be compatible.

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

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

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

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

But there's no question but that the piracy will have a devastating long-term impact on this industry if it's not reigned in at some point. We think that we've done a great job in terms of beginning to do that, but new technologies keep
arising that make the problem greater once again. This will be a continuing challenge. It's not going to be responded to by laws. It's not going to be responded to just by technical protection measures. It's going to be responded to in the marketplace with legitimate businesses that are somehow going to attract consumers towards the convenience and greater value of participating in the legitimate marketplace rather than in the illegal one. But I hardly regard CDs as a model for the fact that we continue to sell CDs indicating that there shouldn't be criminal liability for circumvention.

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

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

MS. GOSLINS: And I just have one final question about the kind of technologies concerned or involved in the SDMI. Yesterday, we heard from some commentators who distinguished between first level
access control protections, which just controlled
access to the content but wasn't actually embedded
in the content itself and so, once you had access to
the content, then you had to have a copy control or
use restriction in place if you wanted to control
that, and what they called second level access
protections, which is an initial level of access
control and then a second level that actually
remained with the content and so, even if you
downloaded it or made a fair use copy of it, the
embedded commands would still require
reauthorization every time you tried to open that
up.

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

MR. SHERMAN: For the most part, yes.

They are designed essentially to protect rights
against copying that isn't authorized or rights
against copying in numbers that aren't authorized.
I mean one of the beauties of these things is you
can sell a copy that has unlimited copying
capability or you're allowed to make 10 copies or
you're allowed to make five copies, you're allowed
to make two copies or no copies. That could then be
reflected in the price that you pay for the product.

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

MS. GOSLINS: Thank you.

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

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

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

MR. HILDEMAN: Provisions should be
expanded.

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

MR. HILDEMAN: I think we should look at
ways to expand on that. I think it should include
additional language for reverse engineering. I
think the reverse engineering portion is too
limiting. It's too general right now.

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

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

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

   MR. HILDEMAN: I think I'm here to share
with you market information from technology's point
of view. I'm not sure what needs done to correct
the language of the law. I think that's for the
body to figure out. I think I'm here to share with
you from technology point of view that there needs
to be a balanced approach, right now that the laws
are not balanced.

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

MR. HILDEMAN: That's right.

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

MR. SHERMAN: If you could repeat it
once.

MR. CARSON: Sure. Exempt works
embodied in copies which have been lawfully acquired
by users who subsequently seek to make non-
infringing uses thereof. If you want Rachel to put
it in front of you, she's got a copy of his
testimony. If you want to take a moment to reflect on it, I'd just like to get your reaction to that.

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

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

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

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

MR. CARSON: To be fair, of course, you've just read an excerpt and you might want to take a look at the rest of his testimony and, if appropriate, you can comment later. But I gather your first impression is not necessarily favorable.
We received comments from the Public Broadcasting System I'd like to get your reaction to. They point out that under Section 114(b) of Title 17 the reproduction, distribution and derivative work rights in Section 106 do not apply to sound recordings included in educational television and radio programs, and they express a concern, and I think that's probably as far as it goes, but a concern at the very least that their ability to make non-infringing uses of published non-dramatic musical works, which they say depends in part on access to sound recordings, that might be endangered by technological protection devices.

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

MR. SHERMAN: CDs in unprotected form are going to be available for a very long time to come and, therefore, the traditional mechanism by which they've gained that kind of access is going to continue. Furthermore, record companies are in the business of promoting their works in every work possible. That includes on public broadcasting as well as commercial radio. Record companies have been accused of being too generous in terms of
providing their music to radio stations and the
like, and there doesn't seem to be any cause for
anybody to be alarmed that this commercial
imperative is going to change just because
technology enables protection measures to exist.

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

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

MR. SHERMAN: I'm sort of mystified by
the proposition. It seems to start from the
proposition that the Salinger case was all wrong,
that if you write a letter, that it's got to be
available to the world because you wrote it and, therefore, there's an obligation to libraries and anybody else to have access to it and to be able to use it for all the beneficent purposes that are somehow embodied in fair use doctrine and the like. I don't see it that way. I mean it seems to me that there's a balancing between the right of the copyright owner to create something that's never published or that's published with restrictions versus the right of the public to use that which the public acquires. And just because additional content is made available because the medium allows for it doesn't mean that there should be a concomitant obligation to never impose restrictions on that. So I just don't buy into the fundamental underpinning of the position.

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

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

MR. CARSON: So that would be
copyrighted material of any kind --

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

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

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

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

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

MR. SHERMAN: I guess I would just comment broadly that I thought that this was a debate that had already occurred. It occurred in Congress where a great deal of time was spent by a great many people trying to figure out the right balance and what this 1201(a)(1) proceeding should be all about, and the statute speaks pretty clearly
to the fact that one is looking at particular classes of works and, instead, we're hearing that particular classes of users should be given certain rights and, when it comes down to works, we're being told that it's basically all works that somehow fall into some broad category, whether it's the category of copies which have been lawfully acquired by users or whether it's copies that can be reverse engineered.

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

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

MR. HILDEMAN: I guess I'm just pointing out conditions we would like to see. I guess I
don't have any clear answer for you how --

MS. PETERS: It is his wish.

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

MR. HILDEMAN: Sure.

MS. PETERS: Rob has one question.

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

MR. SHERMAN: You're certainly right, and I was over-stating the proposition when comparing unpublished with published works. But the principle really ought to be the same. A copyright owner might want his or her copyrighted work to only be available in certain forms. When the Director's Guild came in and said they hate the reformatting for TV because it is a disgrace to their work which
was designed for a different kind of screen and that it reflected on their capabilities as directors and cinematographers and so on, people respected their right to have some ability to at least let it be known that this was not their original work or whatever.

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

Artists feel very strongly when they create an album that it is a form of their expression, and they don't like it when a particular piece is plucked out of context and the album isn't viewed as a work in its entirety. They regard the graphics as an integral part of the music and so on and so forth, and I think that we have an obligation to try and respect those kinds of creator's wishes and, if that means that not every piece of everything can be taken separate and apart, I think that's part of the calculus that would go into a fair use analysis. But the mere fact that it's out
there doesn't mean that there are obligations with respect it forever being made available in any form to anybody.

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

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

MS. PETERS: Thank you very much.

The hearings will resume this afternoon at 2:00.

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

MS. PETERS: Good afternoon. Welcome to the afternoon session of our second day of hearings. This afternoon, we have actually I guess five
separate speakers, although a number of you represent CCMC. I'm going to go in the order that it shows on our witness list, which is to start with the University of Maryland and then go to the University of Michigan and then move over CCUMC. So why don't we start.

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

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

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

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

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

While I'm here today principally to
support the concerns that have been raised by the
library community, I'm also here to share some of my
views of how the outcome of the rulemaking process
will impact on higher education information
technology community as well as the faculty and staff and students that we serve at our institution.

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

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

On the other hand, I think the IT community, in general, as I see it, also disapproves of certain uses of the technology including uses that engage in illegal activities, technology to invade personal privacy, technology to interfere with open access to information, and technology to
unduly regulate the free exchange of ideas.

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

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

At the University of Maryland, for example, we expect that our primary mission will
continue to be fulfilled as a residential campus. Nonetheless, we are aggressively seeking ways to use technology to enhance the learning experience for our residential community, although I must note that a majority of our students are still commuter students who don't actually live on campus. As well as we're looking at ways we can do outreach to the citizens of the state that helps us fulfill our land grant mission.

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

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

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

So, for example, the purchaser is to free to lend, rent, or resell the purchased copy. In that sense, copyright law follow IP products into the marketplace and promotes the continued dissemination of information." And I'm still quoting from this report where it goes on to say, "Licensing, however, constitutes a limited transfer of rights to use an item on stated terms and conditions. Licenses are governed by contract law and, as such, are essentially a private agreement between two parties. That agreement can involve a wide range of terms and conditions and need not incorporate any public policy considerations beyond some basic limits on what constitutes an enforceable contract." And that ends the quote from that
While the higher education community has become accustomed to the use of sight licenses for computer software programs, an area that in the Office of Information Technology we deal with quite regularly, the concept of licensing books, journals and databases is a proposition that we have not fully embraced. And at the core of our resistance is that in the fear of the process of shifting from a paradigm of buying a work to one where we license its use may also lead to the forfeiture of the exemptions we presently enjoy under the federal copyright law.

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

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

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

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

Another troubling aspect is the
placement of public domain materials, including
facts and government information into digital
formats that proclaim a form of legal protection not
heretofore acknowledged under federal copyright law.
The exploitation and commercialization of
information accessible by means of a computer
network and information technology is precisely what
the Uniform Computer Information Transactions Act,
or UCITA, that is being proposed to the 50 states as
a uniform state law anticipates.
The State of Maryland General Assembly recently voted to be among the first in the country to adopt UCITA, with significant amendments, I might add, and UCITA will establish a new legal framework centered around state contract law for transaction in computer information, which would include classes of works already covered under federal copyright law and then some.

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

First, a majority of the questions seek information pertaining to the present effects of technological measures, and the University of Maryland has employed technological measures to limit access to its online resources in an effort to
comply with its license agreements. We have also
devised simple and secure methods to restrict access
to course websites that make fair use of copyrighted
works as well as that contain private information in
the form of student education records.

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

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

Additionally, the rapid adoption in the
states of the Uniform Electronic Transfers Act, UETA
as opposed to UCITA, is likely to further facilitate
commercial Internet transactions, including access
to digital information. So, in other words, we are
on the verge of seeing an explosion of the uses of
technological measures not realized today.
Second, questions 11 and 16 specifically ask, quote, "Should any classes of works be defined, in part, based on whether the works are being used for nonprofit archival, preservation, and/or educational purposes or purposes of criticism, comment, news reporting, teaching, scholarship or research?" And my obvious reply is, yes. And the purpose for my response is that these very types of uses that are already contemplated and given special protections under existing sections of the Copyright Act, including the provisions for fair use. Digital materials should be treated the same as their analog counterparts for purposes of copyright protections and determining acceptable uses.

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

And finally, question 17 asks, quote, "should any classes of works be defined, in part, based on whether the works are being produced in ways that do not constitute copyright infringement? For example, is fair use in a manner permitted by exemptions prescribed by law?" Unquote.
Again, my answer is yes. The Association for Computing Machinery, in their comments dated February 17, said it best when they urged you to prohibit the circumvention of technological measures only when it is done with the intent to infringe. Criminal intent has always been an important foundation for our criminal justice system and seems to be an essential limiting factor as you further define the exemption.

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

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

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

MS. PETERS: Thank you very much.

Aline.

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

In my summary of intended testimony, I
advocated that we focus on the original intent of
copyright law, namely the promotion of learning and
the creation of new knowledge. We should also
strive to achieve a balance among the needs of
authors, creators, publishers, vendors, educators,
librarians, learners, and others engaged in these
endeavors. In the digital environment, this balance
should be preserved as well.

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

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

The digital environment holds great
promise for libraries. The benefits to our users
are great. Digital technology allows users greater
ability to seek and to find information. Obviously,
searching the Web or a CD-Rom using a sophisticated
search engine is preferable to the traditional
methods of searching in print indexes. However,
enhanced digital capabilities should not come at the
cost of a user's legal right to access nor should
fair use protections be dependent on format.

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

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

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

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

For example, we have faced situations where we pay for the use of a database but, through the course of the year's contract, information in the database disappears. Sometimes we are told, sometimes we are not. The vendor will ascribe this
to a publisher decision. Regardless of the reason, we do not get a refund and we have lost the information.

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

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

My next example comes from my private life. My brother-in-law is co-principal at an inner city Detroit school. The budget for the little library in his school is $500 for the year, money that comes from Title VI. His librarian buys a few magazines, a couple of other items, and relies on donations of material from other sources. According to him, it seems to work. If he weren't going to
retire this year, I would suggest that he's probably
in for a surprise. I could donate some books or old
journals to his library through the right of first
sale, but what do I do with electronic information?
What do these students do as they fall further
behind the digital divide? If technological
measures are applied so tightly that libraries can
not exercise first sale rights, smaller libraries
with restricted budgets will suffer
disproportionately.

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

We are not finished with this
technological revolution. Until we are farther
along, we can not afford to introduce restrictions
that will damage the abilities of each of us to
access information for the legitimate purposes of
learning and creating new knowledge. We need to
work together to create the technological means that
will maintain the balance inherent in the original
concept of copyright. To tip the balance too much
in any one direction will deter our efforts to learn
and create new knowledge and will not provide the
incentive for us to work together, nor to continue
developing technology for the best interests of all.

Thank you again for this opportunity to
speak.

MS. PETERS: Thank you.

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

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

Representing our organization today are
three members of CCUMC's Government Regulations and
Public Policy Committee: Jeff Clark to my right and
your left from James Madison University, Dan Hamby
representing the Public Broadcasting Service, and
myself, Diana Vogelsong from American University. I'm actually substituting here for Lisa Livingston from the University of Wisconsin.

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

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

CCUMC's educational members acquire and manage collections of material in a broad range of formats. They also provide curriculum support for faculty and others who wish to make effective use of these materials in teaching and learning. Members play an active role in educating users about respect for intellectual property.
Issues related to use of and access to materials for educational purpose are at the core of CCUMC's mission. Our organization led the development of the Fair Use Guidelines for Educational Multimedia in conjunction with a Conference on Fair Use of the National Information Infrastructure's Working Group on Intellectual Property Rights. These guidelines were published as part of a non-legislative report of the Subcommittee on Courts and Intellectual Property of the Committee of the Judiciary, U.S. House of Representatives on September 27, 1996.

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

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

The purposes for which faculty and students can apply these guidelines cover
I'd like to now turn this over to my colleague, Jeff Clark, to talk about our particular concerns.

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

First, this rulemaking procedure has been established in part to determine whether classes of works are likely to be adversely affected by the prohibition against circumvention of
technological controls on access to copyrighted works. The CCUMC questions the requirement to restrict exemptions to only certain classes of work.

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

Other classes of works represent cultural expressions which have other primary purposes in the market but are useful as instructional resources in two broad ways. They provide rich content for teachers to draw upon to achieve instructional objectives similar to those achieved by so-called instructional resources and, again, some of the general audience programs that are produced by organizations like PBS fall into that category for educators, as well. And secondly, they can be analyzed and studied as cultural, social, and political artifacts which reveal important meaning about their human sources and uses.
As front line educators and producers of educational materials, CCUMC recognizes the valuable role that anti-circumvention technologies plays in assuring protection of the rights of creators and producers. However, we also recognize the value of all types of media as educational resources. When selecting teaching resources, educators must first identify their teaching objectives and understand the varied learning styles of their students. Only then is the medium or delivery format effectively selected.

Indeed, recent theories of multiple intelligences stress that educators recognize the importance of using a variety of teaching approaches to meet student needs. With this in mind, it is evident that any attempt to identify classes of works to be exempted under the anti-circumvention ruling imposes a burden on the educational process. Two: the difficulty of distinguishing access and use in the digital environment places educators at a disadvantage. A distinction is made in the new Section 1201(a)(1) of the copyright title between access to works, circumvention of whose security measures is prohibited, and the non-infringing uses or effectively fair uses that may be made of them which is not. This makes sense in
terms of controlling circumvention of protective measures for purposes of illegal access to copyrighted materials that have not been properly licensed. Publishers and producers have argued that fair uses would be permitted, therefore, for those who have acquired materials lawfully. In this scenario, where a broad-based license encompasses or even goes beyond the fair use criteria to meet educational needs, few would have concerns about protection for copyright holders.

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

Both of these issues are important because the rulemaking proceeding will determine whether classes of work are likely to be adversely
affected by encryption, secure envelopes, or other means of control from the digital realm.

Increasingly, materials are available only in electronic formats and traditional media can not be relied upon as back-up resources when educators seek to exercise fair use options. Because decisions made on this matter would hold for three years until the next review process, educators will be at risk if projections regarding access measures, marketplace changes, or even teaching needs and methodologies do not track as anticipated and pay per use technologies become the norm.

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

Third, to illustrate the above issues, CCUMC offers the following examples of educational situations involving protected copyrighted materials where fair use is or might be compromised if educational activity is unreasonably constrained
under the anti-circumvention rule of the DCMA.

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

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

Another CCUMC colleague experienced one of the unexpected effects that technological security measures can have on occasion. The CD-Rom version of the Oxford English Dictionary, though
usable on an individual PC workstation, would not
output to a data projector for group instructional
purposes. While perhaps unusual, this speaks to the
unpredictability factor that can sometimes be
introduced when software security measures are
implemented.

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

For example, a sophisticated form of
such need for manipulation is offered by another
CCUMC member. In a pilot project involving an art
image database, images were loaded by students into
Adobe Photoshop software and manipulated to create
new designs for museum posters. Similarly, students
could combine the images with other materials in
other software to create virtual exhibitions. The
instructional aim met by this form of working with
the images was to allow students to study their
formal meaning and content in ways that could not be
pursued had they been limited to viewing the images in the original format and database only.

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

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

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

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

MS. PETERS: Thank you.

MR. CLARK: Thank you.

MS. PETERS: Okay.

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

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

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

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

MR. CLARK: Well, until the advent of the decryption, because of a key that was left open in the DVD encryption and the cases that have resulted from that, you could not copy DVD either in an analog format or a digital format into another piece of software like Quicktime to perform this kind of teaching purpose. I guess the access issue involved in this, was that that broken code is what's under litigation along with the people who have disseminated it.
MS. GOSLINS: All right. Just so I can clarify, so you needed -- the instructor in this case needed to use the DeCSS in order to copy the --

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

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

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

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

MR. CLARK: Well, it has to be accessed before it can be copied. In this case, clips for comparative purposes into a different piece of software. But do to that, you have to get into the DVD which, until this DeCSS came along, was not possible.
MR. CARSON: Okay. We're going to be talking about that issue with some other people who'll be testifying specifically on that later, but let me see if I can get some clarification so I can understand the nature of the problem here. Had this instructor been using Windows 98 operating system rather than Linux, would that instructor have been able to accomplish what he or she wanted to do or would he or she still have had to circumvent something somehow?

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

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

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

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

MR. CLARK: It was an unidentified

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

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

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

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

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

MS. VOGELSONG: In that particular case,
yes.

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

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

MS. GOSLINS: But that would be a
copying issue. Right? I mean controls that
precluded you from taking an image out of one
database and putting it somewhere else would be a
control that affected your ability to copy it and
not your ability to access it. Right?

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

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

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

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

MR. CLARK: Right.

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

MR. CLARK: That would be accurate, but
the example we were trying to point up is that the
in-class instruction on how to use the database is
more comparable to a fair use of it. It is not
using its intellectual property for the content but
showing the students how to use it -- now, when you
go to the reference area, this is how you do it.
But if they can't access it while they're in class,
they're losing real time because there are already
too many users in the reference area on the
database.

MS. GOSLINS: And then my last point is
actually a different question but it's based on the
last bullet point. The suggestion was interesting
to me of using circumvention measures such as proxy
servers to gain access for remote students who would
not otherwise have access, and it's great to hear
that because I asked the question to another panel
about in what instances now under the state of the
laws that exist now in which it's not criminal to
circumvent access control protections are libraries
being forced to either circumvent these access
controls or forego what they consider a fair use.
And I think I phrased the question wrong because
nobody wanted to admit to circumventing anything
because I was going to make a citizen's arrest or
something.
But putting it on the table that you're not confessing to anything, it would be very helpful for me to know from the functioning librarians in the group what situations you currently find, given that access controls are around and have been around already for a little while, you find it necessary to circumvent these kind of controls in order to make what you consider fair uses of the work.

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

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

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

I mean life is synergistic, seems to me, and I'm sure that all of us do that. I mean I learn things from reading the New Yorker, for example, that I bring to work as a librarian in a business library, which you wouldn't necessarily think would happen. I mean there are synergies taking place and, in deed, your life is seamless. You don't compartmentalize it to the extent that you make decisions that this is for a class, this is for a
project, this is for research, this is for teaching. And some of it comes from the fact that vendors, some of the vendors I deal with have not perhaps dealt with the academic market before and don't understand how it works and, of course, it becomes part of my job, at any rate, to try to educate them about that. But there have been occasions where vendors have been quite recalcitrant about these things and have been extremely insistent that it's only to be used for this narrow purpose. How am I going to help anybody, my students, my faculty, to understand when they can use it, when they can not, and how are they going to continue to do their work and really learn from this synergistic environment when those kind of restrictions are put on?

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

MS. SOULES: It's always been an ad hoc case-by-case basis. Okay. I'm thinking of one example in the past where we had a vendor who was quite insistent on a database being used only for
certain purpose and, as a result, a library in California actually put up a posted sign. I'm talking about posterboard right next to the computer. I'm not talking about anything electronic. It explained this in their choice of words to their patrons walking in the door. We didn't have remote access in those days. And the vendor representative happened to be visiting the library, saw the sign, didn't like it. Next thing you knew, the contract was canceled and they were not allowed to use the database at all. It was taken away. And the end result was they had to get their own institutional lawyers to go to bat for them in order to have it restored.

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

MS. SOULES: That's right.

MS. PETERS: But I guess my question has to do with in many ways, isn't it really the terms of the contract that you're having great difficulty with as opposed to an access control? I mean there
isn't access control #1 for teaching, access control #2 for research, and when I go into the database, I hit teaching and then when I go to do research, I hit a different one. Isn't it really the contract itself that has the restrictions?

MS. SOULES: May I ask a question back?

MS. PETERS: Oh, sure.

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

MS. PETERS: Okay. Take your example.

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

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

MR. CARSON: Here's the problem I think we're having though. I could agree with everything you've said up until now, and I agree with a good deal of what I've heard, but I don't think technological protection measures are so sophisticated that they can detect the nature of the use you're engaging in and shut you out when it's for teaching and not when it's for research or vice versa. You may have a very valid point about the contractual restrictions that are being imposed upon
you. It doesn't sound to me like it has anything to
do with technological measures that restrict access.
You either have access or you don't in terms of the
technology. You've got contractual restrictions
that say you don't. What am I missing?

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

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

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

MR. PETERSEN: I was waiting for that
question, IT guy, because that's the danger of being
with the Office of Information Technology, even
though I'm really a lawyer by training and the like.
One of the things that occurs to me -- and again, I
hate to keep harping on this relationship with the
UCITA experience and the contract issue, but we had
grave concerns during those debates about the issue
of self help and the ability, and I think a lot of
the focus here is on these negotiated licenses that
are going to kind of be centrally controlled and turning them on or off is going to be kind of centrally managed whereas I think the reality is in the very near future we're not going to have central access to everything, that we're going to have individuals buying their e-books or their textbooks or their computer software, and so those technological measures are going to be on the computer, on the work station.

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

Ms. Goslins: I just have another brief
question for Ms. Soules. I just wanted to clarify. You mentioned in your testimony that vendors require your library to maintain print in addition to electronic formats, and I'm just curious as to why. Do you know why that is?

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

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

MS. SOULES: Well, first of all, I think there is a fear that eventually there will be electronic -- first of all, I should say there
really are three categories of journals now. There are print ones, there are electronic ones, and then there are ones where it's available in both formats. But in cases where the campus at large has negotiated licenses with -- I can think of three publishers now, they have required us not only to maintain print, they have also required us to guarantee that over a certain length of time of the contract -- two years, three years -- we will not, we will agree not to cancel journals if we find that they are not -- let's say I decide I don't need journal X any more. It's not being used or whatever reason. I'm not going to be able to cancel it. Usually, what happens is you find that the way they price it, and pricing models, as the gentleman mentioned this morning, there are going to be experimentations of the pricing models all over the place. But the reality is that when you get a pricing model, generally what they do is they'll charge you so much for one format and then you get a discount on the other format. But the reality is if you just want the electronic format and not the print format, the price is out of reach. So you end up signing a contract where you guarantee you will keep the print.

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

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

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

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

MS. SOULES: Well, first of all, I don't think I always will have the physical volume. And secondly, don't forget in one sense, strange as this may seem, part of these package deals force me to aggregate my selection rights. Let's say I have a publisher and the publisher has 50 journals and he makes available an electronic version in a package deal. The truth is I may only carry certain ones of those in print form, but I'm required to keep those on. I have to take on the rest of the other 50, but I have to keep the others on. I may not need all 50
of them in my particular library setting. So I usually have to take them all though, and then I have to guarantee that I won't cancel the print.

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

    MS. GOSLINS: I think I understand.

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

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


    MS. DOUGLASS: I just have a couple of general questions. Yesterday we heard about -- on applicability of fair use to 1201(a)(1) in terms of there being a distinction between non-infringing uses and fair uses, and on a certain level you can
see that because there are specific non-infringing
uses in 108, 109, specific narrow fair uses --
narrow non-infringing uses rather -- and then fair
use is a different kind of quantity because the
determination might be made after the fact that
something is or is not infringing.

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

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

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

MR. PETERSON: The reaction I have to
that statement is that perhaps the way it's -- and I
think it's referred to in the notice as non-
infringing uses comma including fair use, because --
and I see this in my education and discussion of what fair use is. I used the word exemptions because in education we have many exemptions above and beyond fair use. So I guess that would be the distinction I would make is that fair use is probably the preeminent issue, but there are many more non-infringing uses like the face-to-face teaching, etcetera, that we would want to equally preserve.

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

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

MR. CLARK: I think we feel that most of them are. I've been thinking about this since we were talking about access and use and trying to
think of the problem a little differently, and this may have a bearing on the examples, too. There were a couple of key sentences when we got to that point related to sometimes access and use provisions or security measures being inextricably bound together sometimes.

There's a question, and I think a real concern, among educators here. I know I have a concern that there may be semantic differences which will reach the stage of legal actions when some things are done in the name of fair use. When we're talking about access, for example. My institution buys an image database, to go back to that one. We have access to it in the form it's in. Now, if we want to do some of the manipulations that we mentioned in the example of taking the images out for using them as source material and designs or comparative side-by-side, that sort of thing, yes, that's copying if they're removed from the database. That could also be considered another level of access. Oh, your license didn't provide that sort of access. Your access is the database. Why are you removing them from the database? That involves at least semantically what could be called access before you get to copy it. And it's sort of, I guess, along the lines of the problem that we've had.
to sort out with computer software and making a
transient copy to be able to read it, whether it's
off the Internet or somewhere else on the network,
whether that qualifies as an actual copy or not.
Even though that may not be completely an access
issue, there's a semantic issue in there that had to
be cleared up.

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

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

MS. VOGELSONG: Subsequent access, as
well.

MS. DOUGLASS: -- re-access.

MR. PETERSON: And one of the topics
that's come up a lot here that troubles me, and I'm
trying to think it through, is this notion that,
again, it's hard to separate when it's an access
control issue versus a licensing issue. But in the
absence of a contract term dealing with this, what
crises and so our library discontinued subscriptions
to certain journals and one that some of us might
have interest in is the Journal of College and
University Law. I guess I was probably one of six
people on the campus that looked at it, and they
said let's stop the subscription. Well, that 1992
in my research over the past 10 years, I've many
times had to go back to that area of the stacks and
access those old editions of the Journal of College
and University Law because they're there and I can
do that.

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

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

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

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

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

MR. KASUNIC: I have a couple of questions, and I guess mostly just in general to
anybody or everybody. But we have some fairly
specific requirements in terms of what evidence that
we have to find here and there are some specific
statements in the legislative history that evidence
that is speculation or conjecture is just not
sufficient for findings in this area. I noticed as
I was going through some of the examples that were
cited in the statements as we went along and the
words being used in many instances are "could" and
"may" and I'm just trying to find out: are there
some specific instances of some of these different
areas -- I guess there's a couple -- where there are
specific classes. I know there's some carryover and
it's sometimes difficult to, that this could affect
and may affect a lot of different works -- but are
there specific classes of works? And, if you'd help
define what that term is, that would be helpful as
well. One thing that was mentioned was where access
measures blend and bind inseparably access and use
controls. Let's, I guess, start with that. Are
there any specific works or specific classes of
works where these access and use controls are being
bound inseparably where it's having an adverse
effect?

MR. CLARK: I don't know, apart from
getting to at least the substantially arguable case
of the DVDs again. I haven't got wide enough experience to know if there are. I think part of our concern though is that because if these things develop in the intervening period between reviews, that sort of puts educators at a disadvantage until they're next brought up because the market is changing, the technology is changing so rapidly that these things can come up.

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

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

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

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

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

MR. KASUNIC: I do understand the argument, although the specific example is of a past specific case and where, at the time, there wasn't
any access control measure. And that work could have been archived because he did have access to that work. He could have made a tape at that time. So we're concerned with right now -- and we certainly understand the concerns of not knowing what's going to come up, but Congress did anticipate that and that's why we'll be back in three years.

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

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

MS. SOULES: Understood.

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

MS. SOULES: Well, the kind of electronic information I buy for a business library comes, as I tried to say in my testimony, vendors do different things. They put
information together and I have, for example, financial databases where they get raw data from various places all over the world and it comes in and it's fed in and they're the only ones who get that.

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

I have databases where, as we've talked earlier, they're essentially a compilation of journals that are in electronic format, some only, some also in print. So again, I'm not sure if I'm helping here or making things worse, but I have a lot of sole source vendors and they can dictate whatever terms they like. So from that point of view, I do get concerned about balance. What you've
come back and told me earlier is that you don't see contractual issues as inextricably linked with these anti-circumvention regulations as I do is essentially where we're at, I think.

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

Is this helpful or problematic?

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

MS. SOULES: Well, you see, I don't see
them as separate. That's the difference between us, because in my day to day world, if my customers cannot get the information and I am no longer able to provide it in such a way that they can have fair use rights, as far as I'm concerned, some right has been abrogated somewhere.

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

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

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

MR. KASUNIC: Are there any other instances?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. VOGELSONG: Yes.

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

MS. PETERS: His is lawfully acquired.

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

MS. VOGELSONG: I guess I was assuming
that if you were licensing, it was lawfully acquired.

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

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

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

MR. CLARK: Well, inherently unfair because if the entire copyright law still applies, there are uses which are fair for which you don't have to ask permission and payment is a form of permission in the process. I think there are some -- you know, I can only speak for myself and probably some of my colleagues and there are probably some larger issues, too, that I've been thinking about recently. But it relates to restrictions that can be put within that framework of how things can be used once they're at -- that affect how, for example, these things which we refer to as cultural expressions that might be
used in teaching can be used in context and whether they can be put in contexts that are analytically unfavorable to them or whether they're going to be restricted in certain ways if there isn't this latitude for fair uses for teaching, research, and so on that are outside of the control of any individual vendor who holds copyright. And we think that's important, too, at least I do and I know a lot of my colleagues do.

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

We might even go over -- I was following for a while, I think it was in the early stages, the Microsoft case. One of the arguments talked about,
you can look at this philosophically, Internet Explorer, is it or is it not a part of the operating system? The way it’s been constructed recently, yes, it is. It’s inextricably bound and it’s part of it and you separate the two and there may be functional problems. Of course, on the other side of the brain, another part of you says that, yes, but there are two different functions there. I get the operating system and get the one I choose so that I can exchange as many applications with colleagues as possible and get as many as I want, but the application is what I really want. And I recognize there’s an application bound in that base which is technically part of it and you can look at one way philosophically, but I know also that they don’t have to be part of each other. They’re two different things. And there’s some fear that this same thing will occur with the interpretation of access versus use.

MS. PETERS: One last question. I’m going to follow up on something that Rachel asked to make sure I’ve got it right. Today the prohibition on breaking access controls by individuals is not in effect, yet there are access controls on many different products. What I think I heard you say is you’re not aware of anyone breaking access controls
at this point. Is that right?

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

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

MS. VOGELSONG: I think generally what we found is in the case of image databases that they were causing problems. We've been able to negotiate or the market has sort of driven some of the producers to alter their formats or people just aren't attempting to do it. They're just not making those uses of those materials.
MS. PETERS: Anyone else? If not, thank you very much. And for those who are in the audience, we'll be back tomorrow at 10:00.

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