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STATEMENT OF RODNEY J. PETERSEN, J.D.
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IN THE MATTER OF RULEMAKING
EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES

BEFORE THE U.S. COPYRIGHT OFFICE,
LIBRARY OF CONGRESS

May 3, 2000

My name is Rodney Petersen. I am 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 at the University is one of an administrator and educator. In my administrative role, I am responsible for our policies and practices as they relate to 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 direct a team (known as *Project NEThics*) that responds to allegations of information technology misuse, including copyright infringement. Similarly, my responsibilities entail an educational or outreach function that includes conducting workshops, lecturing in classes, consulting, and writing for publications on topics that concern Internet law and policy. Issues of intellectual property, especially the application of copyright law and institutional policies in the digital environment, are an ever-increasing part of my portfolio.

The University of Maryland, College Park, is the flagship institution of the University System of Maryland (USM). The University is a land-grant, Research I institution and a member of the Association of American Universities, Association of Research Libraries, and 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 the information technology infrastructure and support services necessary for the educational enterprise.

While I am here today principally to support the concerns that have been raised by the library community, I am also here to share my views of how the outcome of the rulemaking process will impact upon the higher education information technology (IT) community as well as the faculty and students we serve.

It should be exceedingly obvious by now that each of us who testifies at these hearings and the authors of written comments bring a set of biases or values that are shaped by our professional training, daily experiences, or institutional cultures. 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, in general, is enthusiastic about the use of technology:

- to enable intellectual discovery,
- to support scholarship and the creation of new content,
- to facilitate the distribution of copyrighted works, and
- to manage access and control to information and services (i.e., authentication and authorization)

On the other hand, the higher education IT community, in general, disapproves of the use of technology:

- to engage in illegal activities,
- to invade personal privacy,
- to interfere with open access to information, and
- to unduly regulate the free exchange of ideas.

These principles constitute the values system that serves to guide our daily practices and inform our positions on matters of public policy such as the one before you today.

In my conversations with colleagues about the impact of section 1201(a)(1) upon the IT and higher education community, the discussion centers around three themes that seem to be shaping information policy in the knowledge economy in which we currently live, learn, and work.

First, **any time, any place learning necessitates access to digital information.** 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, we expect that our primary mission will be fulfilled as a residential campus. Nonetheless, we are aggressively seeking ways to use technology to enhance the learning experience for our "residential" community (albeit a majority of our students are commuters) as well as reach out to citizens in the State in fulfillment of our land-grant mission. Other institutions, such as our neighboring USM institution, University College, already conduct a majority of their courses online and plan to continue to move in that direction. The system of distributed learning being anticipated at the University of Maryland and several other research universities will increasingly depend upon information accessible on the Internet and through digital libraries. Consequently, the legal and public policy framework that governs access, preservation, and use of digital information is of paramount interest to the higher education and IT communities.

Second, **the difference between buying a work and licensing it are significant.** A recent report of the National Research Council summarizes the development as follows:

> The sale of a physical copy of a work has been the dominant model for transferring IP 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. For example, the purchaser is free to lend, rent, or resell the purchased copy. In that sense, copyright law follows IP products into the marketplace and promotes the continued dissemination of information.
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> 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. (*The Digital Dilemma: Intellectual Property in the Information Age.* Washington, D.C.: National Academy Press, 2000, pp. 34-35)

While the higher education community has become accustomed to the use of "site licenses" for computer software programs, the concept of licensing books, journals, and databases is a proposition that we have not fully embraced. At the core of our resistance is the fear that in 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.

Finally, **the move to commercialize information must work for the public good.** The oft-cited phrase from the U.S. Constitution in support of copyright protections claim that its intended purpose is "to promote the progress of science and the useful arts." (Article I, Section 8). Yet, the exclusive rights under the Copyright Act or the limited monopoly envisioned by the framers of the Constitution often resides not with the original author or creator but commercial publishers or information distributors. The present affect has been to misappropriate the protections of copyright law "to promote corporate profits and protect commercial interests." 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) 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 law. The exploitation and commercialization of information accessible by means of computer networks and information technology is precisely what the Uniform Computer Information Transactions Act (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) that will establish a new legal framework centered around state contract law for transactions in computer information, which would include classes of works already covered under federal copyright law (and more.)

I recognize that these broader themes are part of other debates in the states as well as recent studies under the purview of the Copyright Office. 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 community seek to secure an exemption to prohibition on circumvention of copyright protection systems for access control technologies. I will now comment briefly on some of the specific questions identified in the Notice Of Inquiry.

First, a majority of the questions seek information pertaining to the present effects of technological measures. The University of Maryland has employed technological measures to limit access to its online resources in an effort to comply with license agreements. We have also devised simple and secure methods to restrict access to course Web sites that make "fair use" of copyrighted works as well as 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 development and ongoing introduction of such measures as the technology matures. For example, public key infrastructure (PKI) is still a clumsy and not well-understood technology, but there are experimentations under way that could make it more widely used in the near future. The rapid adoption in the states of the Uniform Electronic Transfers Act (UETA) is likely to further facilitate commercial Internet transactions, including access to digital information. In other words, we are on the verge of seeing an explosion of uses of technological measures not realized to date.

Second, questions 11 and 16 specifically ask, "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?" My obvious reply is "yes." The purpose for my response is that it is 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 analogue counterparts for purposes of copyright protections and determining acceptable uses. It would seem that "the promotion of science and useful arts" 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.

Finally, question 17 ask, "should any classes of works be defined, in part, based on whether the works are being used in ways that do not constitute copyright infringement, e.g., as fair use or in a manner permitted by exemptions prescribed by law?" Again, my answer is "yes." The Association for Computing Machinery in their comments dated February 17th said it best when they urged you to prohibit the circumvention of technological protection mechanisms *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 educational 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, "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." On some days I feel like a technology evangelist in my role at the University – and believe me, encouraging some of our faculty to embrace information technology in their teaching and research is likely to require a higher power. The faculty and students at our nation's research universities are both creators and consumers of copyrighted works; therefore, there is no questioning the interests of research universities in maintaining the careful balances under federal copyright law that have developed over time. 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.