

LIBRARY OF CONGRESS

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UNITED STATES COPYRIGHT OFFICE

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

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DOCKET NO. RM 9907

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Wednesday, May 3, 2000

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

BEFORE:

MARYBETH PETERS, Register of Copyrights

DAVID CARSON, ESQ., General Counsel

RACHEL GOSLINS, ESQ, Attorney Advisor

CHARLOTTE DOUGLASS, ESQ., Principal Legal  
Advisor

ROBERT KASUNIC, ESQ., Senior Attorney Advisor

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1  
2  
3 MS. PETERS: Good morning. We come to  
4 our second day of hearings on the potential  
5 exception to the protection of access control  
6 technology.

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

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

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

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

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

2 MR. SHERMAN: Thank you very much.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. PETERS: Thank you.

14 Mr. Hildeman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Thank you.

5 MS. PETERS: Thank you.

6 Now we get to start the questions.

7 Robert, you get to start.

8 MR. KASUNIC: Thank you. Good morning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 development right now.

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

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

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

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

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

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

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

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1 change that makes in consumer response.

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

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

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

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

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

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

6 MS. DOUGLASS: Thank you.

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

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

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1 how best to respond to the need.

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

8 MS. DOUGLASS: Thank you.

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

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

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

26 MR. HILDEMAN: Yes.

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

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

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

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

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

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

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

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

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

7 MS. DOUGLASS: Thank you.

8 MS. PETERS: Anything else?

9 MS. DOUGLASS: No.

10 MS. PETERS: Rachel.

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

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

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

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

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

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

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

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

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

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

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

22                   MR. HILDEMAN:  Sure.

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

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1 license to actually just open the computer program?

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

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

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

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1 CDs are the source.

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

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

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

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

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

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

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

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

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

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

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

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

9 MS. GOSLINS: Thank you.

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

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

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

18 MR. HILDEMAN: Provisions should be  
19 expanded.

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

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

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1 limiting. It's too general right now.

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

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

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

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

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

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

11 MR. HILDEMAN: That's right.

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

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

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

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

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

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

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1 would be any inhibition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 MR. CARSON: So that would be

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1 copyrighted material of any kind --

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

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

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

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

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

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

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

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

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

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

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

2 MS. PETERS: It is his wish.

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

6 MR. HILDEMAN: Sure.

7 MS. PETERS: Rob has one question.

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

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

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

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

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

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

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

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

19 MS. PETERS: Thank you very much.

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

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

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

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

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

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

26 Similarly, my responsibilities entail an

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

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

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

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

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

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

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

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

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1 unduly regulate the free exchange of ideas.

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

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

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

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

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

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

26 Secondly, the difference between buying

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

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

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1 report.

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

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

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

26 Yet, the exclusive rights under the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26                   On some days I feel like a technology

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

17 MS. PETERS: Thank you very much.

18 Aline.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 Thank you again for this opportunity to  
6 speak.

7 MS. PETERS: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 under the anti-circumvention rule of the DCMA.

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

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

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

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

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

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

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

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

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

26 In their submitted remarks, libraries

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

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

23 MS. PETERS: Thank you.

24 MR. CLARK: Thank you.

25 MS. PETERS: Okay.

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

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1 answers.

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

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

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

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

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

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

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

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

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

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

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

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

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

26 MR. CLARK: Well, what they would be

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

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

26 MR. CLARK: It was an unidentified

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

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

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

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

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

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

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

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

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

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

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1 not your ability to access it. Right?

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

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

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

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

21 MR. CLARK: Right.

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

26 MR. CLARK: That would be accurate, but

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MS. SOULES: That's right.

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

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

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

7 MS. PETERS: Oh, sure.

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

25 MS. PETERS: Okay. Take your example.

26 MS. SOULES: Okay.

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

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

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

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

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

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

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

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

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

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

26 MS. GOSLINS: I just have another brief

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

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

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

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

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

26 I have always thought that some of it

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

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

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

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

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

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

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

16 MS. GOSLINS: I think I understand.

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

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

21 MS. PETERS: Okay. Charlotte.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MS. DOUGLASS: -- re-access.

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

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

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

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

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

26 MS. SOULES: Probably.

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

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

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

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

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

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

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

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

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

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

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

26 I certainly agreed with the gentleman

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

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

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

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

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

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

20 MS. SOULES: Understood.

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

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

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

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

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

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

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

19 Is this helpful or problematic?

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

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

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

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

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

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

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1 is just one more means.

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

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

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

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

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

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

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1 classes of works.

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

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

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

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

26 The second issue, however, though that

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

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

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

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

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

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

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

14 MS. VOGELSONG: Yes.

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

20 MS. PETERS: His is lawfully acquired.

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

26 MS. VOGELSONG: I guess I was assuming

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

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

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

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

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

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

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

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

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

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

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1 at this point. Is that right?

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

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

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

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

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

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