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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Thursday, May 4, 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

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RACHEL GOSLINS, ESQ, Attorney Advisor

CHARLOTTE DOUGLASS, ESQ., Principal Legal Advisor

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PRESENT:

ARNOLD P. LUTZKER, American Library Association,
Association of Research Libraries, American Association of Law Libraries, Medical Library Association, and Special Libraries Association

JAMES G. NEAL, American Library Association

JULIE E. COHEN, Georgetown University

BERNARD SORKIN, Motion Picture Association of America, Time Warner, Inc.

RICHARD WEISGRAU, American Society of Media photographers, Inc.

VICTOR S. PERLMAN, American Society of Media Photographers, Inc.

STEVEN J. METALITZ, ESQ., Smith & Metalitz, L.L.P.

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

(10:00 a.m.)

MS. PETERS: Good morning and welcome to the third and last day of the hearings in D.C. on the issue of exemptions to the anti-circumvention measure contained in Section 1201(a).

This morning we have three witnesses. They're already seated at the witness table. We have Arnie Lutzker, representing five library associations. We have Jim Neal, who is also representing library associations, and Professor Julie Cohen from Georgetown University Law Center.

So why don't we start with the order that it appears with you? And you know that we will be posting the, if we can technologically, the comments on the Web or the testimony on the Web site if we can stream it, and we will as soon as we get the transcript be posting the transcript, and then later, when it's edited, we will replace it with the edited transcripts.

So, Arnie, thank you.

MR. LUTZKER: Thank you.

My name is Arnold Lutzker, and I served as Special Counsel to a consortium of five national library associations during negotiations of the Digital Millennium Copyright Act.

The purpose of my testimony today will be to offer my perspective on the development of the exemption in Section 1201(a)(1) and its meaning. First, let me give some background to my comments.

I was one of the principal negotiators for the library and educational communications during consideration of Section 1201(a). If we can return to those hectic days of yesteryear, and many of you on the panel were eyewitnesses to all of that, bills working through Congress to implement the WIPO treaties had several clear themes.

Among them was the notion that copyright law was to be modified to fit the digital millennium, and that created certain things that needed to be preserved. Foremost among the things that needed to be preserved in the view of libraries and educators were the various exemptions and limitations spelled out in current copyright law.

For purposes of our discussions today, all of these limitations came simply to be known as “fair use”, but in the more intense discussions and negotiations, fair use was the code phrase not just for Section 107, but for Sections 108, 109, 110, 121 as well.

Second, the bill as it was devised applied only to copyrighted works. Public domain

works, government works, and unprotected databases were outside the scope of coverage.

Indeed, regarding databases, as you know, a separate title of the DMCA dealt with databases, and it was deleted before final passage as part of the overall compromise to pass the legislation.

Section 1201 was never intended as a back door to database protection. As to public domain works, copyright term was also the subject of separate legislation and was adopted with a specific library and educational exception. No change in the status of government works was achieved through the DMCA.

Returning to fair use, you will recall that fair use was an issue in the OSP and database discussions as well as the 1201 anti-circumvention discussions. If the libraries and educators -- speaking on behalf of their institutions and also for the under represented “user community”-- could have had their way, a fair use exception would have been absolute and clear in Section 1201 and elsewhere in the DMCA.

However, they did not have their way. While the House Judiciary Committee managed to provide a very limited exception which appears in

Sections 1201(d) and 1204(b), these provisions were a far cry from what was desired. Even Section 1201(c)(1), which mentions fair use specifically, was not deemed an adequate safeguard for the concerns of libraries and educators with regard to access.

Into this breach stepped the House Commerce Committee. It was the Commerce Committee that took jurisdiction and addressed some of the issues left unresolved after an early version of the bill was passed by the Judiciary Committee.

The fair use concerns of the libraries and educators in their broadest terms were considered by this legislative body. In general, the members of the committee were more receptive than the Judiciary Committee colleagues to providing specific relief for libraries and educational concerns.

Like any legislative process that results in final passage, the bill as drafted, revised, and passed by the Commerce Committee, and later amended in the Senate to place the Section 1201 solution in your laps, is loaded with compromises and tensions. That is, in part, why anyone dealing with this rulemaking task takes it on quite gingerly while scratching one’s head.

Let me try to help clarify a few things and make a few declarative statements. First and foremost, I believe the legislation as drafted, amended, and passed was intended to create a real solution to a real problem. The Commerce Committee, which championed the rulemaking process, was convinced that the new statutory provisions in Section 1201, bolstered by strong civil remedies and criminal penalties, have the real potential to diminish fair use, the first sale doctrine, and other limitations greatly treasured in copyright law as creating balance in copyright policy.

Even though in today's hot intellectual property marketplace individuals and companies are often both users and owners, these rights limitations help level the playing field between owners and users, facilitating just results in enforcement and in licensing negotiations.

As you know, the rights limitations come into play without the consent of the copyright owner. In recognition of the tension between rights and rights limitations, the rulemaking process you are undertaking was intended by Congress to be a real solution, not an illusory or unattainable dream to the difficulty of obtaining access to works solely for noninfringing purposes, where no access

permission has been given.

And I would like to depart from my text and say not necessarily that no access permission has been given, but none is currently available. There may have been access permission given in the past and then it's expired, but now what do you do when you don't have a current access permission?

Second, it flows from this precept that this is a real proceeding, that the burdens imposed on the public seeking an exception now and in the future are not insurmountable. The section's drafters principally asked users to establish whether actual or likely adverse effects would occur if technical measures deny them access to works that are subject to fair use or other limitations.

Third, I take exception with the view of those who see this burden as so substantial as to make it hard, if not impossible, to satisfy. When an agency is instructed to deal with likelihood, as you are in this proceeding, it may not have verifiable facts before it. Rather the agency is being asked to make a judgment based on collected information and experience.

That does not mean, and I would not suggest in the alternative, that the burden is a sham. The House Commerce committee report explained

the rulemaking proceeding should focus on distinct, verifiable, measurable impacts, should not be based on de minimis impacts, and will solicit input to consider a broad range of evidence of past or likely adverse impacts.

By contrast, the House manager's report suggests the evidence must show substantial diminution of availability of works actually occurring, and that future impact should be assessed only in extraordinary circumstances. The later standard would elevate the burden so high as to make this initial proceeding utterly unproductive. There is no experience yet to indicate what the real effects on individuals actions will be when it becomes a crime under copyright law to bypass technology.

Fourth, regarding the House manager's report, the Copyright Office should be wary of placing primary reliance on its interpretation of Section 1201. That report goes well beyond the House Commerce Committee and the conference reports, which are the authoritative legislative sources for this provision.

As the Supreme Court in National Association of Greeting Card Publishers v. United States Postal Service noted, citing another case,

Vaughn v. Rosen, the House manager's statements do not have the status of a conference report or even a report of a single House available to both houses.

In Vaughn, the court noted that the House sponsors had been unable to achieve their objectives in legislation, and thus used floor statements to achieve their aims indirectly. The opinion goes on to say that interpreting legislative history, a court should be “wary” of relying upon a House report or even statements of House sponsors where their views differ from those expressed in the Senate. “The content of the law must depend upon the intent of both Houses, not just one.”

Here, of course, we also emphasize the House Commerce Committee, not the House Judiciary Committee, introduced this rulemaking.

Fifth, what is this thing called "class of works" or "particular classes of works," and how are you to define it? Section 1201 does not provide much guidance, nor does the limited legislative history. Given the confusion which many commentators in this proceeding have stated about those phrases, as well as the meaning of other essential terms in this section, including circumvention and technological measures, there exists an unsettling ambiguity and vagueness in the

provision with criminal sanctions.

This ambiguity raises grave concerns about the constitutional viability of this section. Since your charge is not to rewrite the statute but rather to oversee the rulemaking, I will only note this as a meaningful concern.

The phrase "class of works" came out of negotiations in the Commerce Committee and, in my view, should stand in distinction from the phrase "category of works," which appears in the Copyright Act, Section 102.

The notion behind class of works is that it cuts across categories. After all, fair use and other limitations are not restricted to categories. As you know, however, the burden of establishing fair use and other limitations can vary according to the nature of the work and the uses made of it.

Had the phrase "category of works" been used, there might have been some confusion that the exception should apply to literary works, for example, but not to sound recordings or audiovisual works.

The notion that a particular class of works needed to be identified is rooted in the intention to narrow as appropriate the number of affected works. If works protected by technological

measures are available as viable alternatives for fair use purposes, then measures protecting the digital version should not be circumvented.

Thus, the Commerce Committee drafters understood that a particular class of works would, in all likelihood, be a narrow subset of one of the broad categories of works. In other words, not all literary works, only some.

It sounds simple, but things have gotten more complicated. Why? Well, for one thing, the nature of technological measures controlling access evolved in the short period since consideration of the DMCA. The paradigms referred to in the legislative history were devices that opened works or kept them blocked, literally on-off switches. You either had access or you didn't.

Technological measures like pass codes or keys to encrypted or scrambled works are cited in the committee report. If you had the code or key, you're in. If you don't, you're out.

Other technological measures were recognized to control what is done with the work, such as copy protection measures. The legal implications for fair use of these latter controls are what is addressed in Section 1201(c)(1). Nevertheless, one does not reach the issue of

copying if you are denied access.

Thus, in the legislative negotiating process, technological measures controlling access were viewed as something that assure the copyright owner control over who got into the work and who didn't, something you negotiate for and get - or not.

It turns out as technological models have been refined over time, as the Library Association comments explain, persistent access usage controls, such as timed use controls which turn access on and off repeatedly during access sessions, are a developing model. Those with technical savvy can speak in more depth about these.

The simple truth is that the section drafters did not have persistent access usage controls before them when crafting the current relief in Section 1201(a)(1) or Section 1201(c). However, they knew technology would be changing. To keep the legislation current, they granted you rulemaking authority to use judgment in applying the exception and set new rulemaking proceedings to occur in three year intervals after the initial two year study so that changing conditions could be the basis for periodic reassessment.

Nevertheless, the failure to account for

technological measures that merge access and usage controls and the fast evolution of technology complicates your immediate task. While the Copyright Office may revisit the issue when more data is available, it does not provide an immediate answer as to how best to frame the exemption initially and make it work effectively for the next three years.

I doubt I need to emphasize that because this is the first of these proceedings, even though you will return to these deliberations in three years, what you do by this October will set the standard for years to come.

As to core recommendations, here are a number of things I think that should be stated in the final rule.

First, Section 1201(a) applies only to works protected under the Copyright Act. This means that public domain works, government works, and unprotected databases are not covered by Section 1201.

This much is apparent from the plain text of the statute. If a work is not protected under this title, Section 17, USC, then Section 1201 should not make bypassing technological measures that control access to the work a crime.

Second, a particular class of works is not limited to any category of works. Fair use and all of the limitations apply to every conceivable kind of work, all categories enumerated in Section 102, and others that may be conceived. This does not mean that every copyrighted work will be fair game under the exception. Only that any work could be based on circumstances.

Third, particular class of work should be defined in terms of criteria, not by specific titles. Among the crucial elements of the definition are these: whether the content of the digital version is identical to or the functional equivalent of a version readily available in the marketplace that is not subject to access control measures; whether access to the digital version of the work was initially lawfully acquired by the user; whether controls employed restrict uses in the guise of access; and whether the proposed use is lawful and noninfringing under current copyright law.

Fourth, the need for preservation and archiving of digital work should be specifically addressed. In the case of libraries and archives, if it is established that a particular class of works is not being preserved or archived by the

copyright owners, then upon petition to the Librarian one or more repositories should be chosen for purposes of establishing an archive of such works.

In leaving the definitions and terms of Section 1201 open to expert interpretation, Congress gave the Copyright Office and the Librarian substantial authority to make the principles of Section 1201 and fashion a remedy that insures continued viability of fair use in other rights limitations.

By defining particular classes of works in the manner suggested, the rulemaking would provide a narrow, yet focused opportunity for persons who have legitimate fair use reasons for using a work to enjoy rights limitations without fear of civil or criminal liability if they bypass a technological measure to access a work.

Moreover, such an approach, which mirrors the way fair use itself has evolved over time, would sustain the balance between owners and users that has persisted for decades in current law and keep the playing field of negotiations level at a time when licensing access to works, rather than buying copies, is becoming the prevalent mode of obtaining copies of many works.

Thank you.

MS. PETERS: Thank you.

Jim.

MR. NEAL: Good morning.

MS. PETERS: Morning.

MR. NEAL: My name is Jim Neal. I am Dean of University Libraries at Johns Hopkins University.

I'm here today as a spokesperson for the American library community and as a Director of a large academic library system.

I have also participated extensively over the last decade in the national and international debates on changes in our copyright laws and the advancement of electronic publishing, electronic education, and digital libraries.

Most recently I worked closely with the legislature in Maryland, perhaps not closely enough --

(Laughter.)

MR. NEAL: -- as we considered the UCITA legislation. My basic message today is that we need a meaningful exemption for libraries and their users to the anti-circumvention provisions of DMCA 1201. We must avoid the unfair and unnecessary barriers to the legitimate accessing and use of copyrighted

works protected by certain technological measures.

Therefore, I support with enthusiasm the findings and recommendations submitted to the U.S. Copyright Office on this matter by the American Library Association and other national library organizations.

I note what the Episcopal bishop said to the Anglican bishop. "Brother, we both serve the Lord, you in your way and I in His."

In that spirit, I would like to make several additional points here this morning. First, we must enable libraries to continue their historic functions, the activities that sustain and advance a healthy society and that break down unfair barriers to information, access and use, and these include the ability to archive works, to make materials available for classroom use, to distribute or purchase copy, and to serve the visually impaired, for example.

The exceptions and limitations to copyright must be preserved and advanced in spite of technological controls.

Second, libraries are responsible users of copyrighted materials, and we strive to educate our users and our communities in the appropriate and legal employment of these materials in their

education, their research, and their work.

We are prepared and we do act responsibly in addressing in effective ways abusive behavior. We have policies. We have procedures. We have sanctions. We inform and orient our users to their responsibilities as users of copyrighted materials.

Three, we currently are working with technological controls, such as domain managed and password and proxy systems, but we are very concerned about prospective technological controls, both what I call passive controls and active controls, controls that will manage access and use at a level that will, in fact, prevent legitimate uses of copyright information.

We need the ability to circumvent such controls when permitted by the provisions of our copyright laws. The ability to print, to make ephemeral copies, to archive, for example, must be sustained.

I am concerned about things like self-help, take down, persistent tools, and other destructive practices which can undermine a teacher's class or a researcher's project.

Four, we are similarly concerned in the library community about the additional risks that

such technological controls present in their threats to personal privacy. Federal legislative initiatives are beginning to address these issues, but libraries are fundamentally committed to the privacy of our users, and we will not tolerate erosion of this principle to serve vendor fears or marketing interests.

I must also step back to Item 3 and say that multiple formats do not solve our problem. We must remember that in the electronic environment quality of information equals content plus functionality. Quality of information equals content plus functionality, and users of information in our libraries must be able to make legitimate uses of the entire information package.

Five, we are very concerned that technological measures are not designed to prevent alleged piracy, but actually seek to advance a pay per use business model for accessing electronic information. Pay per look, pay per print, pay per download, pay per page, per chart, per map, per sentence, per character, the possibilities are endless, and we need to be concerned about this economic model.

Six, we must acknowledge the important relationship between public policy and the ability

of libraries and information users to negotiate licenses effectively, especially in a market dominated by sole source providers.

When an activity is recognized and supported in law, it is possible to argue more successfully for its inclusion in contract. This is a digital divide issue. Will only those with the ability to pay, those with the expertise to negotiate effectively, will they secure fair use and barrier free access to legitimate actions, to legitimate use of information?

In conclusion, with the anti-circumvention provisions of the DMCA, the proposed database legislation and the hegemony of contract law over copyright law threatened by the UCITA legislation now under consideration in our state legislatures, these things in my view present us with a situation where we are facing in libraries a frontal assault by owners of intellectual property who seek to set aside the balance that we have, in fact, achieved in our copyright laws.

We must not reinforce and extend a licensing basis and a transactional model for the electronic information market, and we must not undermine the fundamental and socially beneficial role that libraries have played in enabling access

to information.

I'm reminded of a president on a western campus in the United States who, faced with some very different budget problems on her campus, climbed the mountain near campus to consult with God about her problems. This is the question that she posed.

Will the cost of libraries on my campus ever come under control?

God went off, and She thought and thought for many days about this question, and upon returning, She said to Ms. President, "Yes, the cost of libraries will come under control at your university, but not in my lifetime."

We can be sure of one thing. If we do not create a meaningful exemption for libraries to the anti-circumvention provisions of DMCA, our cost under the impact of multiple and diverse technological controls for acquiring, licensing, and managing information to support education, research, and life long learning, these costs will expand. But it is the cost of societal advancement and the forms of reduced intervention and stunted personal growth that I think will have the greatest expense in the United States.

I thank you for this opportunity to

share my ideas, and I will welcome your questions.

MS. PETERS: Thank you.

Professor Cohen.

PROF. COHEN: Good morning. My name is Julie Cohen, and I'm Associate Professor of Law at the Georgetown University Law Center.

I offer this testimony on behalf of myself as an academic who makes research use of copyrighted materials, as a teacher who makes educational use of copyrighted materials, and as a specialist in copyright law who has published a number of articles about the implications of copyright management technologies and anti-circumvention regulations. The articles are cited in the written testimony.

It is my personal opinion that the anti-circumvention provision in Section 1201(a)(1), as well as the related provisions in Section 1201(a)(2) and (b), are in their entirety unconstitutional. That question, though, plainly is not before the Librarian today.

Instead, we are here to determine whether the Librarian should declare a specific exemption or exemptions to the anti-circumvention provision in Section 1201(a)(1), pursuant to statutory authorization.

To do that, however, this proceeding first must determine exactly what sort of exemption Section 1201(a)(1) authorizes. In particular, if the statutory delegation to the Librarian is susceptible of different constructions, one constitutional and one not -- that is to say, if the statute is ambiguous -- it is equally plain that the Librarian must choose the construction that comports with constitutional limitations.

Chevron teaches that an agency's reasonable construction of ambiguous statutory language is entitled to deference. An unconstitutional interpretation is by definition an unreasonable one. That question is properly raised in this proceeding.

There is a constitutional interpretation of Section 1201(a)(1) and an unconstitutional one, and the Librarian is obligated to choose the former and not the latter.

Section 1201(a)(1) authorizes the Librarian to declare an exemption to the prohibition on circumvention of access control measures for, “a particular class of copyrighted works,” upon a showing that the ability to make noninfringing uses is likely to be, “adversely affected.” Constitutionality hinges upon the interpretation of

these two phrases.

With regard to a “particular class,” the question is how a class should be defined and, in particular, whether a class may be defined by reference to the type of use sought to be made. The copyright industries, in their joint reply comments, argue that defining permitted uses is not the issue in this proceeding.

Nothing could be farther from the truth. The statute and the legislative history suggest that classes of works are not coextensive with categories of original works of authorship, as that term is used in Section 102(a), but beyond that, they simply do not say what Congress intended "class" to mean.

The dictionary defines "class" as a group, set or kind sharing common attributes. The nature of the attributes that will define the scope of the exemption is precisely the question that this proceeding must address.

Moreover, the language of the statute authorizes the Librarian to declare an exemption for any class of works that raises the concerns articulated by Congress, and thus, necessarily, for all classes of works that do so.

Based on my experience as a researcher, writer, and educator, I believe that the question of

what class or classes of works raises the problem that Congress identified cannot be answered ex ante except by reference to the use that is sought to be made. The nature of the research and educational processes makes it impossible to say in advance which specific works must be consulted.

Research is, by its very nature, a process of open ended and wide ranging inquiry. Good research and good writing require a significant degree of random, fortuitous access to source materials and the ability to pursue tenuous, but possibly fruitful links and connections.

Good creativity, that is to say, requires something less than perfect control for copyright owners, and promoting good creativity is what copyright is all about. It is for precisely this sort of reason that Section 107's fair use analysis is an open ended balancing inquiry, and that the Supreme Court has cautioned against the application of rigid presumptions and bright line rules.

In contrast, the implementation of persistent access control technologies without exemption would require, in effect, ongoing preauthorization of research uses. This would chill the freedom of inquiry that is central to the

academic process and that is, moreover, privileged by the First Amendment as I have explained in my article, "A Right to Read Anonymously."

Good education requires a similarly open ended approach to questions of access to and use of copyrighted materials. The basic course in copyright law is illustrative. Students must read federal cases and statutes, of course, and since no copyright subsists in those materials, they should be entitled to circumvent access controls when no feasible alternative exists.

However, a good copyright course also will expose students to scholarly theories and source materials, and further to examples of the various works that are or might be the subject of copyright disputes. Persistent access control technologies threaten this practice, and as an educator, I consider this a grave threat.

Education is about free ranging inquiry, full stop. We do not require that our students apply for permission to read, view, and evaluate original source material lawfully acquired by the university any more than we require them to apply for permission to think.

I do not consider it an exaggeration to say that the loss of the ability to use lawfully

acquired copies or phonorecords representing the full range of copyrightable subject matter in any of the ways permitted by Sections 107 and 110 would cripple the educational process.

Regarding what is necessary to show likelihood of, "adverse effects," the copyright industries in their joint reply comments make much of the House manager's statements purporting to require a standard of proof far higher than that which obtains in administrative proceedings generally.

But as Arnie Lutzker has explained, that clearly is not the law. If Congress, the full Congress, had wanted to subject this proceeding to such an anomalous standard of proof, it would have said so in the statute. There remains the substantive question whether access controls implicate the ability to make noninfringing uses. The copyright industries argue that they do not, and for some access control technologies this may well be true.

The stated intent of the copyright industries, however, again as Arnie has explained, is to implement persistent controls that require continual reauthorization of access and so technologically conflate access and use.

With respect to these technologies -- which are already beginning to be implemented in, for example, DVD movies, video games and some software -- the issue of leeway to make noninfringing uses is squarely joined. The problem exists, however, for any work to which persistent access controls are or are threatened to be applied.

As I have just discussed, this type of access control technology poses very real and concrete threats to uses that are both traditionally privileged and vital to research and education. The risk to noninfringing uses exists for all digitized works because all such works reside in computer memory simply as an agglomeration of bytes, and access control technologies are portable without limitation to all such works. That is sufficient to show likelihood of adverse effects, and that is all that the statute requires.

It is simply no answer to say, as the copyright industries do in their joint reply comments, that the Librarian also must consider the extent to which access controls facilitate uses that are noninfringing because they are licensed. Section 1201(a)(1)(C)'s enumeration of factors that track the traditional fair use factors indicates that these authorized uses are not the uses Congress

had in mind. Only infringing uses require permission in the first place. Proof of a noninfringing use is a defense to charges of infringement. It follows that a noninfringing use must be an unauthorized one.

It is worth noting, too, that individuals seeking privileged access to copyrighted works may not be able to avail themselves of the exemption to circumvention provided in Section 1201(f) for reverse engineering to achieve interoperability with computer programs that control access to digitized works.

The reason that they may not be able to do so is the recent Universal Studios v. Reimerdes case from the Southern District of New York. It is true, as the copyright industries note, that Reimerdes was decided under Section 1201(a)(2), which prohibits trafficking in technologies to circumvent access controls.

Nonetheless, Reimerdes is squarely relevant in this proceeding. If Reimerdes is right, another question that is not raised here, then the scope of the reverse engineering exemption in Section 1201(f) is quite narrow, so narrow that it does not extend to the production of devices designed to allow individuals' computers to

interoperate with digital works to which they have purchased lawful access.

If the reverse engineering exemption does not authorize this type of interoperability, then the only way of authorizing such interoperability is through an exemption promulgated under Section 1201(a)(1).

In sum, there is a strong likelihood that the increasing use of persistent access control technologies will sharply curtail the access privileges that individuals have enjoyed under the fair use doctrine and other limitations on copyright scope.

Certainly there is sufficient likelihood to satisfy the civil preponderance of the evidence standard that obtains in administrative proceedings generally. For this reason alone, the Librarian should conclude that the need for circumvention privileges extends broadly across any class of works that may lend value to the research and educational process and which is not otherwise available without technological gateways in the form of persistent access controls.

Section 1201(c) clearly indicates congressional intent to preserve fair use and the other statutory limitations on the exclusive rights

of copyright owners. That intent must inform the Librarian's interpretation of the exemption.

It bears repeating here that the interpretation of the statute adopted in this proceeding must be a reasonable one. As the Supreme Court has recently explained in the case of FDA v. Brown and Williamson Tobacco Company, what is reasonable is a function of overall statutory context.

But there is more. As I have indicated, an interpretation that preserves fair use and other limitations is constitutionally required. In its Harper and Row decision, the Supreme Court indicated that fair use serves as a First Amendment safety valve within copyright law.

Other decisions, including Feist and the venerable case of Baker v. Selden, suggest that preserving access to uncopyrightable elements of copyrighted works is required by the policies animating the patent and copyright clause.

Simply put, Congress cannot eliminate fair use or extend copyright-like exclusive rights to uncopyrightable components of protected works. For the same reasons, where another interpretation is available, the Librarian cannot adopt an interpretation that would give an act of Congress

this effect.

These constitutional considerations, moreover, should inform the assessment of the burden of proof that Section 1201(a)(1) places on proponents of exemptions.

I note in passing my belief that the lack of a parallel exemption to the ban on trafficking and circumvention technologies is in any event fatal to the statute's constitutionality. Without such an exemption, any exemptions arising from this proceeding will be available in theory only.

In light of the joint reply comments submitted by the copyright industries, it is worth specifying here what my argument is not.

First, this is not an argument that circumvention should, “be shielded from liability in virtually all circumstances.” So far as I am aware, no member of the library and educational communities has urged this result. What is argued instead is simply that the exemption must be extended to those users and uses that have traditionally enjoyed the privileges of the fair use doctrine and other limitations on copyright owners' exclusive rights. Nor is this an argument that the fair use doctrine or other limitations should, “provide a defense to

liability for circumvention of access controls."

Quite clearly, Section 107 does not itself afford a defense to the separate cause of action that Congress created in Section 1201(a)(1). However, the record shows that Congress recognized that the new anti-circumvention provision would threaten fair use and other copyright limitations with respect to works protected by access control technologies.

Accordingly, Congress authorized the Librarian to craft exemptions to the circumvention ban that are analogous to fair use and rest on the same considerations.

I would like to close by mentioning two other constitutional considerations that are relevant in this proceeding. First, the interpretation of Section 1201(a)(1) also must be informed by due process considerations. Although nonprofit libraries and educational institutions are not subject to criminal penalties under Section 1204(b), this exemption does not extent to the individuals who constitute their clientele.

Enormous vagueness and overbreadth problems would flow from the threat of criminal liability for circumvention in cases where the underlying use is and has traditionally been fair

and privileged under copyright law. This rulemaking should interpret Section 1201(a)(1) to avoid these problems.

Second, the persistent access control technologies that are now beginning to emerge generate records of the details of individual access to the technologically-protected work. This raises enormous privacy problems.

As I have argued in my published writings, because the records reflect intellectual activity and often associational activity as well, their creation also raises First Amendment concerns. Specifically, the enforcement of criminal penalties against individuals who circumvent access controls to protect their intellectual privacy represents a constitutionally impermissible threat to freedom of intellectual inquiry.

Section 1201(i) does not address this problem because it focuses solely on “on-line activities” and solely on measures that are not disclosed to the user. But the chill exists whether monitoring is disclosed or not and whether or not the technological measure tracks “on-line activities” generally or simply access to a particular work.

Specifically, if the institution has

lawful access, that should be enough for record keeping purposes. A well crafted exemption to the anti-circumvention provision should foreclose this privacy threat.

As others have noted, this rulemaking is about determining what is necessary to preserve the balance of rights and limitations that copyright law establishes. The totality of the statutory evidence suggests that Congress intended to preserve that balance and the Constitution requires it.

Thank you.

MS. PETERS: Thank you.

Can I, before I turn this over to the rest of the panel, ask a question about the persistent access controls? What I thought I heard you say is that they're starting to come be available. Are libraries dealing with controls at this point? And if so, how are they dealing with them?

MR. NEAL: We have not experienced as yet in the electronic resources that we are acquiring specific technological controls that enforce that persistence requirement, but we are beginning to see in the licensing relationships with publishers a time limitation or a period of available use set in place.

My position is that the things that we're seeing on the horizon in terms of licensing issues are harbingers of the types of technological issues that we're going to have to deal with down the road. What is now a negotiation process will, in fact, I believe become a technologically controlled reality.

So the time frames that are defined for access to information could translate into takedowns of information, takedowns of capabilities through self-help interventions.

And it was very clear to me as I worked through the UCITA negotiations in Maryland, although we neutralize that particular aspect of it, offered at least some technological capabilities to the copyright owner side that could create some limitations in terms of the ongoing use of information by faculty, students, and library users.

MR. LUTZKER: And what I would add is we have some discussion of this in the initial library comments at page 13 and 14, and I'm not the technical wizard to explain all of these things, but part of what I see -- and I think we may all experience this -- is we do our own computer work.

There's both software and hardware that can require, you know, payments at various points.

So you're doing something, and then if you want to advance forward you may have to enter your credit card to continue to either receive something; the billing may be quite clear, or there may be issues that are raised.

The question is you've had access. You now have to pass another hurdle in terms of a payment arrangement that then maintains the access. You don't make the payment; access is then broken off.

Now, the question is: having had initial access, which may have required payment of some sort, but not for the additional payments that are in play, what happens to that initial payment? How do you take advantage of having had access lawfully in some way where your use then becomes monitored and then re-access based upon additional either payments or other criteria that are in play?

Again, my recollection is in discussing these provisions in Congress, the sophistication of this stuff was anticipated without going into an enormous amount of details, and as we get closer to and as things advance, I mean, I'm sure there's going to be more technically advanced in the next years, but this seems to be a developing trend where access gets turned on and off based upon certain

activities.

PROF. COHEN: I would add that I think we actually do see a version of this already, and a good example is: think about using Westlaw or Lexis to do research. If you are surfing around on Westlaw or Lexis looking for things relevant to a research project and you come across something that might have some relevance and you're not quite sure what to make of it, you have basically two choices. One is to print it out or download it or otherwise create a fair use archival copy, or in the alternative, flag it and live with the possibility that you may at some future time need to go back and look at that source, whatever it is, again -- which would mean, according to the access interpretation that's advanced, that you're requiring a separate act of access.

Now, imagine a world in which that separate act of access creates a new fee either for you or your institution. That's a dramatic shift in the way that research has historically been done. And imagine a world in which you can't create an archival fair use copy for yourself. That is also a dramatic shift in the way that research has historically been done.

MS. PETERS: Can I just follow up a

little bit with some of the things that you said? Can I start with you, Arnie?

In the example that you used that you were familiar with, is the service that you were using the type of service that you would normally expect to find in a library or is it a different type of service that mostly goes to people who are in their home?

MR. LUTZKER: I experience it personally, but I can see it existing both in a library environment. A library, you know, is a terminal, I don't know the statistics. They're probably out there about how many people who don't have computers at home go and use libraries as a principal basis, and they then -- they function in that context as if they were home, if you will, when they're in the library.

But I think it applies both to individuals in their private work capacity, whatever, as well as in the libraries.

MR. NEAL: I think location of access might not be the appropriate question because a lot of library users are accessing library provided capabilities in their homes. So the location of use, I think, is not the relevant, may not be the relevant question. I think more important is the

sustained and legitimate use of that information without the fear that it's going to be taken down, without the fear that there are going to be unnecessary interventions into your computer, and without the fear that you're going to have an escalating series of costs that you're going to have to pay in order to progress through the information.

MS. PETERS: And you were the one who talked about the time access. Were you talking about the fact that like certain CD-ROMs, you get them for a year; you get them for a month. Based in the software after that period, there no longer is access, or alternatively, in a contract you basically have paid for this service for a year, and at the end of the year -- okay.

With regard to the CD-ROMs and at the end of the year that's the end of it, what, if any, are the alternatives? Can you buy the equivalent of the book material and not have limitations on it or on-line access in which you have more control over when it would expire?

MR. NEAL: I think this is obviously a very complex set of issues that is being redefined in many ways by the technological capabilities, but the whole issue in contract arrangements between the actual purchase and ownership and, therefore, the

ability to do certain things with information as compared with sort of the rental licensing environment in which a lot of the electronic information that we're using is now managed, I think, presents a very different time and ownership expectation within a library setting.

And because of the hundreds of thousands, legitimately hundreds of thousands of different information transactions, information resource transactions that exist within a library setting, some of which are time dependent, some of which are perpetual and, therefore, under an ownership model, creates an extraordinarily difficult environment not only for the library managers to deal with because of the diversity of access rules that they're going to have to work through, but users shouldn't be expected to have an understanding of that diversity, or confronted with a situation where they don't have uniform, uniform approaches, but very, very different approaches that could maximize into the hundreds of thousands of different situations that they're faced with in using information.

So I think that's one principle, rental versus ownership. But I'm concerned about situations where we get technologies that are

chronologically sensitive, and we have that information either loaded locally or we have accessed it through the Web, and there are time frames defined for the use of that information within our environment.

Now we do it through some type of proxy or domain controlled environment where things could be taken down and without negotiation, without interaction, maybe legitimately, perhaps illegitimately, and so how do we make sure that our students and our faculty and our users have persistent access to that information when it's appropriate and necessary?

MR. LUTZKER: If I could add, the dialogue suggests to me another reason why it's -- as you think of a rulemaking, you have to at some point focus on the uses that are made of the work because, that's what fair use is about, but if you take an example where with that CD-ROM, that is, you know, at the end of a year. You can't react.

If I wanted to do research into that and pull some things which would be definable as fair use, there ought to be a way to do it in my mind. Exactly how you write the regulatory approach to it, but there ought to be a way to reaccess that work without having to go through perhaps the clearance

process because when you're dealing with fair use, you're not dealing with clearances. You're dealing with individuals acting on their own initiative without prior permissions. There ought to be a way.

At the same time, if I wanted to access it so that I could make copies and send it around to friends, that oughtn't be allowed. That's not what the purpose ought to be, and so you have to then look at the intent and the use of users.

And another reason why this -- in terms of the impossibility of defining particular classes of work as specific things is just for the very purpose. How do I know? I mean, you can't make a showing in this proceeding about whether somebody with respect to some yet unmade CD-ROM that's going to have a timed use to expire in 2002 which comes into being in 2001; how do you define what the fair use rights are with respect to that particular work now? How do you even establish it?

I think you have to deal, again, as I suggested in conceptual terms, that you have to develop standards so that these can then be applied in the marketplace and leave people knowing what the penalties are if they have great exposure. They may exercise these somewhat more gingerly, but you still need to make that available for them if fair use is

going to have meaning.

PROF. COHEN: Another thing to consider in evaluating the time limited CD-ROMs, for example, versus the availability of alternative paper resources is that having enough paper resources to serve your entire student body and faculty often requires multiple copies, and many libraries right now are being confronted with a choice whether to down-size their print collections and replace them with electronic collections, and they're being encouraged to do so by publishers. Many libraries, I think, quite wisely are not completely getting rid of their print collections, but it might be the case, for example, that you used to have five reporter series to serve all your law students and now you just keep one or two, and if then access to the electronic version disappears, one or two copies at a school like Georgetown with 2,000 students is just facially inadequate.

And so there's a question, as Jim said, about content plus functionality that is still very relevant.

MS. PETERS: Can I ask you? What are you doing today with regard to CD-ROMs that are time limited?

MR. NEAL: We take them down.

MS. PETERS: Okay. So you take them down. Okay.

MR. NEAL: Right. We send them back.

MS. PETERS: Okay. All right. Can I just ask a question that you brought up? You talked about the functional equivalent and Professor Cohen talked about Westlaw, where much of the material is available in print form as well as electronic form.

When you talk about functional equivalent, if there is an electronic version that has search and retrieval capability but the exact same material is available in print format, you just have to do a lot more work to get at the same information; where does functional equivalency enter in that equation? Are you saying you've got to have access to the electronic?

MR. LUTZKER: Okay. I know that if I'm wearing an advocate hat, I know some in the library community would view that as a critical component of the work itself. I think from a copyright point of view, conceptually I think there ought to be a way to separate the work from these other software advantages that come with the work.

I don't know if that's -- I mean, you know, we're heading into an area where the functionality of the software which adds to search

and retrieval information. That's value added by the publisher, let's say, and is distinct from the work, and so technically I would say I want to have access to the work, and several possibilities. One is there may be the ability to bypass and substitute your own, off-the-shelf functionality searching thing that can enable you to achieve whatever search functions you might want to have, but you're not going to use Westlaw's search system. You get the ABC search system to preload on your system.

I don't know technically if that's feasible or not. I think it becomes -- I would say that I don't think the functionality of the search system should be the ultimate block to access to the work. I think there's a higher motive in being able to access the work, and if it's inseparable with the searching functions of this DVD or the devices, I think that may be, again, part of the fair use of that particular work.

MS. PETERS: This is where you were in, i think your quality of information is content plus.

MR. NEAL: Absolutely. I think the environment in which we're operating, there are a number of points I would make here.

First, I think work and its quality is increasingly defined not just by the information it

provides, but what you can do with that information, the functionality of that information, and I think we over time will not be able to divorce those elements because we're able to provide students, faculty, and library users with a level of access and a level of usability that is critical, becomes increasingly critical to their work.

Secondly, analog equivalents do not allow me -- and I'm not a lawyer, but we're driving over here into some interesting other areas that we've talked about, and that is my ability to serve a global student and faculty. An analog equivalent does not enable me to deliver that content and functionality in appropriate ways, in legitimate ways to a user community which is defined globally rather than within the walls of my building. And so I need to be concerned about that issue as well.

MS. PETERS: So you're talking about delivering content beyond the walls of your library?

MR. NEAL: That's correct.

MS. PETERS: And let me just --

MR. NEAL: In noninfringing ways.

MS. PETERS: Noninfringe. I'm trying to figure out "in noninfringing ways" how you're going to deliver pieces of information?

MR. NEAL: Yeah, sure.

MS. PETERS: As opposed to entire works?

MR. NEAL: That's correct.

MS. PETERS: Throughout the globe.

MR. NEAL: If I have students who are working in our campus at Nanjing, China, I have to be able to provide them with legitimate and noninfringing access to information that I am purchasing and licensing at Johns Hopkins University.

MS. PETERS: When you use "information," it's, I take it -- I shouldn't take anything. Excuse me. What kind of information would that be?

MR. NEAL: Published information. Information captured in books, journals, other forms of expressions of information.

MS. PETERS: Okay. One last question. Arnie, you talked about being intricately involved in the crafting of this provision, and there's so much focus on you should focus on the use that's being made of the copyrighted work. Could you just give me an example of what you think a particular class of work would be under what the Commerce Committee and maybe the Congress intended?

MR. LUTZKER: Well, I think there were really two threads that were going on, and the way the language was drafted, a lot of back and forth

between different messengers moving back and forth.

Conceptually I think that a particular class of work would be, as I said, it would be something distinguished from categories of work. So it would cut across. It could be any type of work or group of works.

I suppose the paradigms would be sort of a couple of examples. One is that there are digital works, DVDs, and I don't know whether DVDs or CD-ROMs at that point. If there were print analogs to CD-ROM text, that could be viewed as works that you have access to in alternative, assuming they're readily available, in alternative form.

If they are not, if a work only exists in a digital format and does not exist in a readily available call it print format, but it might be other analog format, that then would begin to constitute classes of works that would be available for these purposes.

Beyond that, and this goes to the fact that we were, again, focusing on the merger of the uses that were being made of the works, I think, certainly as I was thinking through the language that we were trying to achieve; the goal was to try to preserve in an environment where both either civil or criminal penalties would attach, to

bypassing certain technology, that you could preserve works in a way that maintains copyright principles.

Therefore, broad concepts of digitally available work sold to libraries, as an example, could constitute a particular class of works. Personally I think that may be too broad a concept, but it was one that was discussed.

The particularity of the class, again, I think becomes, as one understands the necessity of interpreting the statute in a responsible way, and I think Julie's statement really hits home because we were incredibly troubled with the resolution that was achieved because we did not feel that it clearly understood what the purposes of what they were trying to achieve.

In other words, preserving the fair use and rights limitations in copyright law which are use oriented, and that if works are available in the marketplace -- this is the simple concept -- if they're available in the marketplace, you can go in a bookstore and pick them up, then you don't have to break through to access them.

If works are not available in that format or the functional equivalent, then you should have the ability to access them.

MS. PETERS: Okay. I'm going to stop.

David.

MR. CARSON: Let me start with you, Arnie. I want to make sure I understand what you just said. Are you saying that you were troubled by the ultimate language in the statute because it wasn't clear that it was, in fact, focusing on the types of uses that ought to be permissible, or was I misunderstanding what you said?

MR. LUTZKER: No. I think the trouble that I had, and as I said, I think Julie's statement gives clear summary to many of the concerns that we had at the time. I think there remains ambiguity and vagueness throughout the language as to what is this particular class of works. I think that where you have a criminal statute, and I can say that, you know, in terms of my interpretation it's not a binding interpretation obviously, but where it can apply to uses, it can apply to particular categories of works that are not otherwise available, you know, the format.

The clarity of the language just isn't there. What constitutes circumvention, what constitutes a technological measure, it's been suggested as we noted in our comments; it has been suggested that a library card constitutes a

technological measure that protects works, and that certainly wasn't broached during the course of the discussions, but I can understand how people could reach that conclusion.

And I think the ambiguity of the terms throughout was a persistent problem.

MR. CARSON: Professor Cohen, can you tell us specifically what exemptions you would like us to recommend to the Librarian that he find ought to be or will be created pursuant to Section 1201(a)(1)?

PROF. COHEN: What I would recommend, and excuse me because I'm fishing around in my stack of papers, is quite closely in line with what has already been put forward by Peter Jaszi and by Arnie today.

In Peter's testimony, he talked, I believe, about “works embodied in copies which have been lawfully acquired by users who subsequently seek to make noninfringing uses thereof.” To that I would add works access to which has lawfully been acquired by the user or the user's institution because institutional access followed by subsequent unmetered use by users who are affiliated with that institution -- educational and research users -- is a historic and, I've argued, constitutional part of

what fair use requires.

The list of factors elaborated by Arnie similarly goes to the question of whether initial access was lawfully acquired by the user, and to that again I would add "or the user's institution."

Sometimes the status of the user as an authorized affiliate of an institution will be quite relevant, and I believe that is underscored by Jim's point about his students in China who are nonetheless affiliated with Johns Hopkins and, therefore, by paying tuition are entitled to the right to access resources held in the university's main library. And then the further factors elaborated by Arnie, I believe, are also valid and should be part of the definition of the exemption that is authorized:

"Whether the content is identical to or the functional equivalent of a version readily available in the marketplace." I would just underscore that as to that factor we should not be talking simply about whether there's some substitute, some other work available in the marketplace from some different publisher. Sometimes there isn't substitutability for informational works. Imagine if you couldn't get, for example, a Nimmer on Copyright. What would you do?

I suppose some competitors to Nimmer on Copyright might wish for such a world, but in my opinion, if I couldn't have access to that work, it would be fatal to what I do every single day.

"Whether the controls employed restrict uses in the guise of access." I suppose if I take off my advocate's hat for one second and put my academic's hat back on, the distinction between access and use is metaphysical, right? And that's the problem that we're all sitting here scratching our heads about.

But nonetheless, Section 106 does not give the right to control all uses and, therefore, it's a distinction that has to be made in some way whether or not we think it's a strange thing to have to do.

This gets back to the question: is there a right to access the value added, for example, after there's been takedown, and does that mean there should be some right to access the CD-ROM version as opposed to the print version of the work?

If we say that there is not, in my view that leads inexorably to a pay-per-look regime, and we need to consider when we're talking about the value added that the institution, the user's institution, has already paid an enormous sum of

money for access to the electronic resource -- in many cases an enormous sum of money over and above what it would have to pay for access to the print resource.

Now, as a matter of policy and tradition, within the sectors of our society that do public education, that do research, that do library services, we have not had metering and pay-per-look below the institutional level. If the institution purchases lawful access, that has been good enough, and that has fostered an incredibly rich and vibrant educational and research culture, and I've argued that constitutional values underlie that system.

I would argue that absent very, very clear indication that Congress intended to change that entire sector of our society and to eradicate that entire culture, there should be a strong presumption to retain it.

MR. LUTZKER: And I would just add that the solution of the fair use debate that devolved was one that to some significant degree was a punt by Congress. Congress was looking at this issue. They wanted to maintain -- at one level there were these two competing balances, and they felt that the capability of putting resolution of these types of issues in an expert agency that has familiarity and

sensitivity to the broad range of copyright concerns does provide at least a forum for a more full and complete analysis, which was from my perspective not given certainly in development of this particular language.

There was a feeling that by establishing these general standards and then giving the agency the opportunity with its expertise in copyright, to maintain assurance that the fair use aspects of this, which is really the paramount question why we're here.

How do you maintain fair use and the related protections in light of the new prohibitions which will come into play? And I think that there was a sense of discretion that would be afforded the agency.

And some of the vagueness of the terms which aside from whether you can do your job effectively in that context at least reflects the fact that by putting in an expert agency, the sensitivity to fair use and how it actually plays out in the marketplace is a thing that they felt they would get by giving you this authority.

MR. CARSON: You've made the case, Arnie, and I think it's probably fair to say you all agree with this, that class of works, well, first of

all, you say it cuts across categories.

Second, I think I heard that in defining a class of works, one of the ingredients of that definition would be the nature of the particular use that is being made of the work, and that that ought to be folded into our definition of a class of works.

Are you all with me so far? Is that a fair statement of how you look at the situation?

MR. NEAL: Yeah.

MR. CARSON: All right. It's fair to say that we recognize the issue; we share the concern; we ask the question. One of the many questions we ask at our notice of inquiry was can you define a class of works by reference to the nature of the use, and if you can't, we recognize the problems that that might create. Certainly from your point of view it does create problems.

But I guess I still need to be persuaded that that really is what is encompassed within the term "class of work." So when I read those words on the page, "class of works," intuitively I don't think, "Well, that must refer not only to the type of work, but to the type of use."

When I look even at the Commerce Committee report language, which is the language you

are certainly pressing upon us, I see it saying that the particular class of copyrighted work should be a narrow and focused subset of the broad categories of works of authorship that is identified in Section 102 of the Copyright Act.

All the guidance I see in black and white in front of me, whether in the statute or in the legislative history, seems to be talking about either, well, not necessarily the categories of works that we find in Section 17, but subsets of those categories which seems to be telling me, all right, you start with those categories and then you subdivide them, not that you cut across them.

I still need to hear more, I think, to be persuaded that we can do that. I understand why you want us to do that, and I may be sympathetic to that, but I'm not sure I've heard the case for why we have that much discretion.

MR. LUTZKER: Well, I think fundamentally if you also look at the criteria that was laid out, and I think again I will refer back and forth to some of Julie's comments as well; I think it's inherent in the understanding of fair use and the limitations that are set in copyright law to say a particular class of works constitutes DVD disks that contain original films that are not

available in any other format. Okay?

I mean, to say that fair use cannot apply to -- let me back up. So you could say in one context that those then constitute a class of works. Okay? You can go through, but the predictability of what those classes are in a rulemaking context is virtually impossible in my view.

As I suggest, there are millions and millions of works. If the burden of Congress to say to maintain fair use with respect to works that have access controls associated with them, as more and more works have access controls, to say the burden of proof is to establish with respect to each particular work that you've got to make a proof now, looking prospectively for three years, you're basically going to be in a situation unless you take this approach that you will, in effect, deny the fair use concepts that apply to these works.

I think there is a policy inconsistency with taking that narrow approach that you are stuck in a rut to say a particular class must only be specific categories, works.

MR. CARSON: Well, why did Congress choose the language "particular class of works"? Couldn't it have done a much better job making clear what it wanted to do if what it wanted to do is what

you're saying it wanted to do?

MR. LUTZKER: It could have, and I think we were dealing with a committee that had less longstanding responsibility and expertise in the area of copyright, as this was working out, and I think there was a simplicity applied to many of the principles as we were working through achieving a resolution, and I think the simplest concept would be I've got a DVD, and I've got a VHS tape. They're the same film. You don't have to break through any DVD content controls if you can get the videotape. That would be a simple paradigm.

But if the DVD constitutes a materially different version than a VHS tape, it has new material or however one defines the edit element. Then in that context, that could constitute a particular class. I think that was in one level what was going on.

At a deeper level, at a deeper level, there was a fundamental desire to preserve fair use and other rights principles in the context of this sort of interim period, and there was a fundamental desire to preserve this going forward for research and library and fair use purposes.

And as you understand what fair use is about, fair use is use oriented as opposed to work

oriented, and there is an inherent inconsistency, and as Julie suggested, unless you interpret it in a way that recognizes fair use is use based, not work based, then you're left with a dilemma.

But I think the resolution that you can apply is that it is a use based functionality, and that particular classes can come forward based upon standards that you can lay out and that the people can then apply during the course of the next three years.

PROF. COHEN: Let me just build on what Arnie has said. Absolutely, it seems clear from the language of the statute that there was an intent on the part of Congress to preserve fair use and other limitations.

Something else that seems relatively clear to me, and when I teach this statute to my class, I have been known to say this, is that Congress didn't really want to get that much more specific about class and left you with that thankless task, and that's why we're here.

So we are talking then, at bottom, about canons of statutory interpretation and about rules that govern agency interpretation of statutes. At bottom, the question of what “class” means within the framework of the statute or whether there are

constraints on your interpretation of what “class” means within the statute is going to be a question of law to be decided by an Article III court, and it would be nice if that you had that in front of you.

But, of course, you don't, and so then the question becomes: within the overall statutory context what is a reasonable interpretation of what "class" means, and it is clear that, for example, Congress did not say it has to be a specific class within a specific category, singular, of 102(a) works. It said specific classes within the categories as a whole, "categories," plural.

MR. CARSON: But why refer to the categories? Are the categories irrelevant? And if so, why refer to them?

PROF. COHEN: Well, why not refer to them? The categories don't seem to have been the primary criterion for defining what's a class. Class is not defined, and Congress could easily have defined class with reference to a particular category. It didn't choose to do so.

So you're left with the question: what clues does the statute and what clues does the legislative history provide about the meaning of this word "class," and you're obligated to do or, rather, not to do what would be unconstitutional and

your obligated to consider not just the specific words of particular class of works, but to consider the overall statutory context which includes Section 1201(c) and includes Section 107 and the other limitations on Section 106 exclusive rights.

MR. LUTZKER: David, if I could --

MR. CARSON: You can, but I think Neal had wanted to say something.

MR. NEAL: I just want to say I'm always very anxious about commenting in these environments for fear of being naive or uninformed about some of these legal questions.

MR. CARSON: You can join the rest of us.

MR. NEAL: But I think there's a related point here that I need to make from the world in which I live, and that is "works," at least as I understand them, are losing their relevance. Works are defined increasingly by not just what they are, but what they connect to, and therefore, we have a body of information that might be a grouping of works, but that is a dynamic phenomenon that brings lots of different media, categories, classes of materials into an interplay which I think defines increasingly the current and future information environment in which users work.

So what is a work may be related to the definition of class and category.

The second phenomenon is one in which I think information intermingles in collections of information. So whereas we may have had a journal and a book and a film and a map, those now become part of a whole which may be a new work, and the media, the media of expression, the media of distribution becomes the collection and not the individual works that at least in our historical view make up that collection.

So I don't know if that relates to what we're talking about here, but those are real phenomena that we experience in our world.

That is, works may only have effectively been defined in terms of what they have links to, which is a dynamic phenomena.

MR. CARSON: I know that and I follow that, and I understand that that's the point of view that you would be looking at or the way you'd be looking at it, but I guess I'm not sure where that leads us.

Are you --

MR. NEAL: Well, I'm trying to understand your debate over issues of class of materials and categories of materials, and I hear

responses that talk about a work, and what I'm saying is that increasingly in the world in which my students and faculty operate, they're not working with works. They're working with information that's linked to other information. Does that become the new definition of work, a work?

And where does a work exist within a body of material which we define as a collection published on line?

MS. PETERS: What I'm hearing is that the world is changing, that the model that we used before where you had books and you sold books was an old model, and we're really moving into an entirely different environment where information is dynamic and constantly changing.

And what we're responding to in some of this is that different business models are growing up to handle that different dynamic nature of the way we make information and entertainment products available, and yet what I sometimes hear from you is but we shouldn't be changing the model. We should be modeling it much more on we used to sell books. It was an outright sale.

MR. NEAL: You hear me saying that?

MS. PETERS: No.

MR. NEAL: Oh.

MS. PETERS: I thought I heard this panel saying that we're moving to a licensing regime, and that's really not necessarily a good thing.

PROF. COHEN: Well, I could point you to what the Supreme Court said in Twentieth Century Music v. Aiken.

MS. PETERS: Aiken, yes.

PROF. COHEN: Which I'm sure you know better than I do, which is that when technological change makes it a new world, the Copyright Act should be construed in light of its fundamental purpose. I think what you're hearing us say is that the shift to a pure pay-per licensing regime is absolutely fundamentally inconsistent with that fundamental purpose.

MS. PETERS: I hear that, but I meant I also thought I heard a shift to licensing in general. There's a difference between licensing and licensing pay per view.

MR. NEAL: I agree with that.

PROF. COHEN: Absolutely.

MS. PETERS: Okay.

MR. NEAL: And I guess what I would argue is that the constant -- regardless of what the business model is, regardless of what the format of

the information is, given the nuances in the law about that, and regardless of the way a work is defined or packaged or linked, the fair use element must be, in my view a constant.

MS. PETERS: Okay.

MR. LUTZKER: And, David, let me return because I think your concern is obviously a key concern that I want to persuade you about. Okay?

If you look at 1201(a)(1)(B) which is where this all stems from, it speaks about the prohibition is not going to apply to persons who are users of a copyrighted work. Okay. So we start out with the statute looking at use of a copyrighted work.

It then speaks of "which is in a particular class of work." So in other words, there is a narrowness that they perceive in some fashion. How do we narrow?

Now, class is not a word that is defined in the Copyright Act, and Congress didn't do a good job of defining it, but they gave you the responsibility of defining it, and what I would suggest is that if you continue in this concept, we're looking at the user of a copyrighted work. This work is in some grouping of works. It's in a particular classification of works where the user

has been adversely affected in making fair use or other uses of that work that are otherwise permitted under the statute.

Use permeates the concept of the particular class of work. I mean, the particular class is the generic. You're really focusing on what the specific copyrighted work that the user wants to make use of, and to be assured that this work is within a grouping of works that will facilitate fair use because otherwise the statutory functions are being defeated.

And I would submit that use is inherent in the concept, and that's really -- you know, in those days trying to sort of work through this concept in both the political and other context, I mean the language is -- the best guide for what the language is is first you go to the statute, and then you figure out legislative comments, and people, you know, will make their own statements.

Committee reports are obviously important, and I would take Julie's course on understanding all of the legislative history, but use is absolutely dead center of what this is about, and if you try to say, "I want to define a particular class as National Geographics that are no longer available in some fashion," you know, you're

going to have millions of different things that you've got to look at and nobody, I would submit, ought to be forced to come forward now and say how I'm going to be adversely affected in the next three years in being able to access certain types of works.

It can't be done. It is an impossible task, and I don't think that this was created -- I think this was created in good faith to create a solution to a real problem, to a real dilemma that both the Commerce Committee took the bull by the horns and they wanted to move forward with this. They wanted to create a meaningful opportunity for fair use to remain available where certain works are protected by technology.

And unless you take a use orientated approach then you're going to have a list. You'll publish it in the Federal Register. "The following are 25 particular classes of works that are okay," and then you're saying everything else that's protected by these measures are not, and I think that destroys with respect to everything that is not in this listing of 25 titles or categories, whatever; it destroys the ability of researchers like the kids in their classes to study and use the works as the copyright law intends.

MR. CARSON: So what exemptions do you propose be published in the Federal Register? Supply me with the language if you can.

MR. LUTZKER: Well, I tried to. In other words, I think that the particular class, and again, I think, and I'll make a comment on Marybeth's. Licensing is not only not going to go away. It's here to stay.

The issue, in part, is a leveling of the playing field. This statute, as it was being proposed and propounded and worked through, it was understood to create a seismic change in the way copyright law was going to be perceived because if you could establish an access barrier before anything else, it became a crime in putting aside the exception for libraries and educational institutions; looking at it from the individual perspective, it's a crime to access works without this permission. Then that's a seismic change because as has been discussed, I mean, you've got licensing models popping up all over the place.

But what Congress is saying is we want to preserve fair use. These have important constitutional copyright practical purposes, creativity and the like. We want to preserve it. How do we do that?

We're going to allow some periodic review, and it's not going to be a one time review. It's going to be periodic. We're going to allow some periodic review, and that will assure the maintenance of fair use and these other exceptions.

And I would submit that if you take a use based approach -- this has been suggested whether it's Peter Jaszi's language or things that I have or that Julie has suggested -- if you do that, it allows the negotiation process to proceed in a fair manner because it does create a degree of ambiguity as to whether this particular work can or cannot -- the technological measures on a specific work can or cannot be bypassed.

It puts the burden on the user to establish justifications if they are ever challenged in court, and I would submit also that the criminal provisions here elevate this to a high degree, and I don't think that particularly with education that will be going is, that is going on right now and will continue to go on, people will have a better understanding of what this all means, and they will enter upon that warily. They'll know if they're bypassing something and put aside the question of how you can figure out.

You could tell me I could bypass

anything, and I wouldn't know how to do it. We've talked about that. How the marketplace will accomplish this is a question you don't have to resolve, I guess, but people will exercise this with some wariness now, but by giving it a use orientation, you at least allow the possibility that a particular work can be subject to fair use.

I mean you have works that are not yet in being. You have works that are going to be created in 2001 and two and three, and no one can show adverse effects with respect to things that aren't even in existence. How do you deal with that over the next three years?

You can't suspend fair use. You can't suspend educational uses that are in the statute now for three years with respect to those specific works. The dilemma, and I don't necessarily see it as this great big dilemma because I think because the term is not clearly defined in legislative history and the statute, they're giving you, the agency, the ability to define it the way you deem appropriate.

You may be second guessed in the court, and you may be stuck with a statute that has such constitutional infirmities that there's no hope anyway, but all you can do is give credibility to

the existing limitations which have been hard fought, judge imposed or whatever over the past 50, 100 years, and I think use becomes the pivot around which you can make sense of this because, let's face it, it's hard to make sense of some of this.

MR. CARSON: Let's go to a concrete situation that we've had some discussion of and one that's a very simple one that we can all get our hands around, I think, which is the CD-ROM that has an expiration date. It worked up until yesterday, and then all of a sudden yesterday it stopped working.

In the context of this rulemaking, what, if anything, do you propose that we do to solve the problem if there is a problem created by that situation?

MR. LUTZKER: I don't think you ought to deal specifically with that in the sense that if an individual CD-ROM has now expired, okay, it's expired. You know, you can figure out how to break through or bypass the measures that block access to it. If you want to make a fair use of that, you should be able to, in my view. Okay? It's a copyrighted work. The statute says copyrighted works are subject to these provisions. You should be able to now.

Are you committing a crime by accessing that work? The answer has to be based upon how are you going to use it. As I said before, if you want to access it so that you can copy it and send it to all of your friends, that could be copyright infringement today, but it could also be a violation of the access requirements, and it could be a criminal violation under this statute.

However, if you want to pull out a paragraph from that CD-ROM for purposes of a research paper, is that a crime?

MR. CARSON: Well, let me make sure I understand. What you're saying is that you should be able to access it subsequently for your own legitimate uses, I think.

MR. LUTZKER: Non-infringing uses.

MR. CARSON: Okay, but you shouldn't be able to access it so that you can send it to your friends, and you said then that that latter case might be a violation. Circumvention to access it for that purpose might be a violation of Section 1201(a)?

MR. LUTZKER: Yes.

MR. CARSON: Simply because you're just looking at the purpose. I gather that --

MR. LUTZKER: Yes.

MR. CARSON: -- is why it made that difference.

MR. LUTZKER: Yes.

MR. CARSON: Okay, okay. Now, in talking about an access control that simply is an expiration date, for example, or some of the more sophisticated ones we've heard about, to what degree are we seeing that kind of control out in the marketplace that is not consistent with licensing terms that accompany the work, whether those were freely negotiated or whether you really had no choice?

In other words, are we seeing technological controls in works that you pay for, you get them even though there's no contractual terms saying that these restrictions are going to be imposed on you? Is that a problem today?

MR. NEAL: No, that's not a prevalent situation.

MR. CARSON: So generally when you're seeing these controls, they are controls that are essentially enforcing terms that whether you like it or not you've agreed to. Is that a fair statement?

MR. NEAL: But there are two provisions, two very practical issues here that I think are legitimate. One is when a work may have been

programmed to be available for a period of time, and what's been programmed into the work does not agree with the license agreement that you've signed. So you have a period of time in which access is not permitted even though you have agreed to that access.

And so that is a possibility where you have technology which is not in alignment with the agreement.

The second is where there's a payment process, where you agree to pay on a periodic basis, and the work is available for a period of time. The payment gets lost. The payment transaction does not occur in the way that everyone expects it to, and the work comes down even though the payment has been made.

Is there still legitimate and appropriate use of that information? Those are practical issue that I think libraries have and will increasingly have to deal with.

MR. CARSON: Let's say you just decide to stop paying for it. You have a subscription that says you pay this much every month, but you decide, you know, I've been paying for it for six months, and I just don't feel like paying for it anymore. I've got it here. I should be able to circumvent

now whenever I want to get the information because I'm using the information for research.

Is that a situation where you should be permitted to circumvent because you have the physical copy in your possession? You're doing it for a legitimate research purposes. You just don't feel like paying for it anymore.

MR. NEAL: I would say that the practice that we would use in my library setting and in most library settings that I'm familiar with is that we would not make that material available any longer.

MR. CARSON: All right, but I'm trying to figure out how if we follow what is being suggested here in terms of the exemption that we gave, maybe I'm missing something, but it seems to me that the person who decides I don't want to pay anymore could probably take advantage of the exemption that is being proposed, and if not, why not?

PROF. COHEN: Two things about that point. I think the problem that we're having here stems, first of all, from the fact that what we're saying is fundamentally there's a need for questions like that to be decided on a case-by-case basis consistent with the equitable factors that have traditionally informed fair use analysis.

So you might say, okay, on the one hand, suppose somebody whose library discontinued its subscription to this thing ten years ago decides to circumvent the access controls, and it would seem that it would be hard to make a good case for that.

Let's say, on the other hand, my library discontinued its access a month ago, and I was citing it for a research project I have in progress, and I really need to continue to check my citations. It would seem easy to make a good case for that.

And then there's the vast terrain in between, and it's difficult to say with any precision exactly where in between you're going to draw the line and say where it falls and which acts of circumvention are going to be fair and are not.

But I think the point that we're making is that line does not coincide exactly perfectly in a bright line way with the end of the timed subscription.

Now, that's not necessarily so comforting, but that brings me to my second point. It's not in anybody's interest for this to happen. Publishers want their works to be disseminated. They want people to have access to and use them, and libraries want their users to have access to and use a broad range of works.

And here what Arnie said before becomes critical. The copyright industries have hammered on the point that the threat of infringement is what keeps libraries honest. I differ with them on the baseline question as to how honest libraries are.

In the first place, I think they're quite honest, but as Arnie pointed out, there's a flip side to that: the threat of fair use is what keeps publishers honest and keeps the negotiations on a level playing field.

And I would argue that it's critically important and, in fact, vital to the working of the system in a fair and equitable way that Congress intended that that bright line does not perfectly coincide with the end of the subscription, and that bright line is -- excuse me -- that not bright-line is subject to articulation on a case-by-case basis.

MR. CARSON: Well, you said something there, and I think it's the underlying theme of your whole response there that's been lurking in the back of my mind as I've been listening to this, and it sounds as though what you're proposing is that whatever exemption we end up with is one that is akin to fair use, and that it relates a number of factors which ultimately a judge will have to determine whether you're within it or without it.

Is that a fair --

PROF. COHEN: I think so, and there's nothing unusual in that. Courts interpret regulations all the time.

MR. CARSON: Isn't that unusual when you're talking about an exemption though?

PROF. COHEN: I'm not aware that it is.

MR. LUTZKER: And I would say that it's not. I mean, particularly if you look at the way the statute was formulated, there is a parallel with the fair use provisions when you look at the things that you're supposed to be examining, you know, the availability of the use of the works, the availability of use of works for nonprofit, archival preservation, educational purposes. There's a parallel there.

So I think that there was an understanding that this becomes part of the copyright mosaic, and since it is copyrighted works that are protected under the title that are being subject to this access thing that you do want to have the flexibility that's already inherent in copyright law.

Let me focus because I know the licensing issue is a real nub of one of the problems that we have to work through with this, and I think

you can say a couple of things.

First of all, a contract is a contract, and it's enforceable on its terms, and if somebody has a contract to have access for something for a period of time, that may supersede things that they have under copyright principles and they've agreed to the bargain.

Now, there are two types of contracts obviously. There are negotiated ones, and there are the things that you don't negotiate, clip license and the like.

And I think that the etiquette as we evolve this area, what you do here will have impact on the etiquette of negotiations during the next several years. You may find that to be a good or a bad responsibility, but I think it will have impact.

I don't think the issue is that licenses would be ignored. I think licenses will be enforced. The question is: if someone wants to exercise -- if a license has expired and on the time use concept, I'm assuming the license now has expired. Okay. So I'm not under a license. I'm in this post license period. The question is, what's to be done.

And I think if you also view this in the context of a statute dealing with criminality for

certain activities, which is not -- I mean, you know, it could have been just a civil thing, but it's civil and criminal penalties that are associated with this, fundamentally the criminal thing comes up repeatedly because of the concern, legitimate, about piracy and multiple exploitations of works.

But at base, if you're looking at an individual behavior, whether you need to impose the criminal sanctions on top of something which would otherwise be arguably fair use, and I think the ambiguity that comes from just creating standards as opposed to saying this specific group of works is now exempt is inherent in, as I said before, in the nature of the beast of what we're dealing with coming down from Congress.

But the licensing negotiations that will go forward, and I hear this, too, in terms of there is an undercurrent of concern in what you call the user, library, educational community about license prices going up and the pay for whatever, but I think that you can exercise an impact on those negotiations by what you do now, and if part of what you view is maintenance of a level playing field, that will then play out in terms of license negotiation. It won't dictate specific terms, but

it will have an ability of users to have something to fall back on in the event they can come up with a license.

MR. CARSON: I'm not sure you're suggesting this, but are you suggesting that a technological measure that deprives people of access and that is designed to impose licensing terms is not the type of measure that Section 1201(a) should be enforcing?

In other words, leave them to the contractual remedy, but they shouldn't be able to ultimately sue you for breaching the technological measure.

MR. LUTZKER: Well, they certainly have a contract right. In other words, if you're in a license, you're in a different environment because, by its definition the noninfringing uses we're looking at are non-permissioned uses. If you have permission -- the question is if it's beyond the scope of the license, okay, but the mere existence of the license is a fact which will, in a sense, muddy the use marketplace, if you will -- the absence of a license is the purest condition. If you have a license, it then becomes a set of commitments on both sides, and if the technological devices are designed to assure that the license is

being enforced, I can understand that. I wouldn't suggest that those are going to be what you ought to wipe away.

But those are the very same things that impact. If they impact on a licensed user, they also impact on an unlicensed user who may be wanting to make fair use or a post license users who wants to make fair use.

MR. CARSON: One final question and then I'll give someone else a chance. I guess I've heard that the kind of exemption you'd like to see is sort of akin to fair use in that it's a number of factors and ultimately maybe a court will have to figure out which side of the line you're on. Isn't that inconsistent with what I'm hearing about the criminal penalties here and the problem that you need to have clear guidance so that people know whether they are crossing the line and engaging in criminal conduct?

I think it's a pretty well established doctrine that when you have a criminal penalty, you've got to have a pretty clear definition of what the criminal act is, and what I'm hearing is, well, the exemption should be something that ultimately is determined on a case-by-case basis like fair use is. The judge will decide whether it is or it isn't, and

that to me sounds like something very unusual in the criminal context.

MR. LUTZKER: There are criminal penalties under copyright law. I mean, in other words, and people defend: hey, it's fair use. You know, I sold 40,000 copies of Star Wars, and I have fair use.

I don't think the mere fact that you're developing -- I think you can do it even though there is criminal penalties.

MR. CARSON: Rachel?

MS. GOSLINS: I just have a couple of quick questions. We've heard a lot in the past three days about fears of the user community about where these technologies are going and the type of uses that in the future they may be prohibited from making.

I'd like for a moment just to focus on the state of the world today, and anybody can answer, but specifically I'm interested in the people who have had experience dealing with both these resources and the protections that are in place today and making clear first that circumventing an access control protection is not today illegal.

I'm curious if you find yourself today

in situations where you were forced to circumvent access controls in order to make what you consider fair uses of the work or forego the use. Are there things that you do today that, if they do not create an exemption, will be illegal as of October, the year 2000?

PROF. COHEN: I would say this depends substantially on the terms of my institution's site licenses of works that I use in digital form, and this goes back to the example that I gave about Westlaw earlier.

It's perfectly possible that I would come across something not a U.S. government work -- say, an article -- and want to make a personal copy of it or go back and look at it again. As I understand it right now, my institution's site license doesn't impose a separate fee for me to do either of those things, a metered fee for me to do either of those things.

So as it stands today, the answer is no, and if that term changed, then the answer would be yes, and I do not see any significant legal obstacles to that term changing if it were clear that it was all just considered a big access control, and the change could be made with impunity.

MR. NEAL: I think that we're working

with an array of technological control systems currently as we access and use electronic information. Those are what I would describe as passive systems. That is, they are domain driven, proxy server driven, password driven that enable an authorized user to get into an electronic file of information and to make appropriate uses of that information.

And so that's one arena in which use has been defined, and it's more of the issue of the geography of use than the nature of the use in terms of the application of the technological control.

And as I said earlier, and this will harken back to something that Arnie just said, as I look at the types of provisions that we're being asked to accept and which we're increasingly learning how to negotiate in our license proposals, I can see suggestions of where active technological controls will go in terms of the ability to not just embrace users as they enter, but to actually monitor and to act upon inappropriate uses even though in some cases those uses may be defined under fair use as appropriate and legitimate uses.

We also find, going back to -- just two more quick points. I believe as Arnie suggested that what is contained in law is very influential in

terms of the ability of libraries and universities and users to negotiate effectively with copyright owners. What is respected and understood in law gives us a leg up in terms of advancing the interests of our users.

A related concern, I think, is the cost of managing this environment as we face an array of technological controls, an array of license agreements, particularly in situations where we have collections of works and not individual works, and in those collections we have public domain material or links to public domain material that may be controlled technologically. Then I think we've created a very different working environment for our users that might be not inappropriate, might be inappropriate for their exercising their fair use rights.

MS. GOSLINS: Okay. I think I understand your response. I just want to clarify that taking into account all of your concerns, you're not aware at the moment of circumstances where your librarians or professors are being forced to circumvent access control protections in order to make use of works.

MR. NEAL: No.

MS. GOSLINS: Okay. This question may

have already been answered in a couple of different ways in this in the course of our discussion this morning, but as we listen to the range of concerns that the educational, library, and user community have, they seem to range from what I'm thinking of as sole source concerns in which material which is not available any other way is locked up and concerns about difficulty of access, restrictions on the amount of people that can use things at one time or, as you put it, just a quality concern of quality equals content plus functionality, and I'm wondering whether you think we should think differently or along a continuum about access control technologies that prohibit any use whatsoever or those that make uses more inconvenient or more difficult.

MR. NEAL: Could you state your question again?

MS. GOSLINS: Sorry. There seems to be a range of concerns, and at one end there is the concern that there will just be no other way to get certain materials if this prohibition is enforced without an exemption, and at the other end it's that it will be a lot more inconvenient and difficult to make use of materials if there is not an exemption to the prohibition, and I would just like a little information as we try and balance the concerns that

we hear expressed what you think our attitude should be to this continuum, whether we should pay more attention and give more weight to this sort of sole source type of concerns and what our perspective should be on concerns about increased inconvenience and difficulty in making use of works.

MR. LUTZKER: In some respects I think that that's an issue that can so complicate the type of consideration. I mean, it's like I'm doing research and I'm in Washington, D.C., and I've got something that's on the CD-ROM, and I determine I can't access it, and I wouldn't know how to access it anyway, but I can't access, but it's available. Where is it available? It's available in New Jersey somewhere. Nowhere in the Washington area is that document available. It's available in New Jersey.

It's inconvenient for me to go to New Jersey. So, you know, that's one thing, but let's say it's available in Baltimore or in, Suitland. The notion of convenience or inconvenience is really a side issue and not the nub of what we're at. The question is in exercising fair use rights, do I have certain rights with respect to this particular work as you will define this category.

And I think the notion of convenience or inconvenience can tend to be a matter of distance.

It can be a function of cost in some respects, and I think that's traditionally -- I mean if it becomes part of the overall analysis and it becomes a factor, but I don't think it should be a defining factor.

MS. GOSLINS: I understand you. It seemed to me that your proposal did make it a somewhat defining factor, that one of the criteria that should be included in defining a class of works is whether the content was available, was --

MR. LUTZKER: Ready availability, right.

MS. GOSLINS: Whether it was readily available, and it seemed that that would require whoever it was that was going to make use of the work to make judgments about what readily available meant, and that, you know, the difference between Baltimore or New Jersey would then become relevant.

MR. LUTZKER: As I said, I don't think it is a completely irrelevant issue, but I don't think it is the defining issue. I think it can be part of the overall mosaic.

MR. NEAL: I guess I don't see sole source provider and inconvenience being on the same continuum. I think they are distinctive issues that you need to think about as you deliberate this situation.

The sole source provider condition in terms of what we acquire and provide access to in libraries is overwhelming. The overwhelming majority of the resources that we provide access to and acquire are available from a single source, and that lack of a competitive marketplace does influence the type of access that is enabled and the price that we pay, and I would argue eventually the types of technology controls that we might encounter.

I also think that you also have to consider, but not in competition with the issue of sole source provider, the convenience question. Convenience might be issues of cost. They might be issues of time. They might be issues of quality, and I think one always is looking at those three factors in making choices in one's life.

I'd like to reactivate my concern about the difficulties faced by poor communities in terms of their ability to pay, and by poor communities in terms of their ability to rally the necessary expertise both in terms of legal issues and technological issues to deal with these types of situations that I think we'll be confronted with.

As I argued with UCITA and as I will argue here, the digital divide issues are more than

issues of connectivity. They have legal and economic components to them that we need to deal with, and I believe this is front and center a digital divide question that we're dealing with here.

PROF. COHEN: A couple of things. On the question of what is inconvenient, it seems to me that a very important, though not necessarily the only consideration, has to be whether the work is available in your market without technological gateways, and sometimes available will have to include content plus functionality.

As to technologies that prevent any use, I'm not sure I see those on a continuum with technologies that make use more inconvenient or maybe I see them all in a giant circle because you could have kinds and kinds of technology that protects against any use. You could have a technology that simply is a password key, and once you have it, you can make any use of the work for all time, and that seems to me a kind of pure access control. That's what Congress was considering in the first place, and the kind that in my opinion raises far fewer ongoing fair use problems because it doesn't seek after you've purchased the key and gotten lawful access to regulate ongoing use in any

way. Or you could have technology that prevents any use on an ongoing basis, and that in my opinion raises enormous fair use problems.

MS. GOSLINS: Okay. Just one final question. Actually mostly for Arnie.

You stated in your testimony that from your experience in negotiating 1201 you are certain that 1201 was not intended to be a back door to database protection, and I'm sure you noticed in a lot of the comments there have been recommendations for using databases as a class of works that might be considered for exemption from the 1201 provision.

So I'm just curious to hear you think through this a little bit more. How should we think about works or access control technologies which protect indiscriminately copyrightable content and non-copyrightable content? I mean, the easy example here is databases.

MR. LUTZKER: Yeah. I think it's clear, and there's some language difference between, you know, the A and the B sections, but it's clear that 1201(a) with respect to the prohibition we're focusing on covered works protected under the title and I can't say abstractly whether a database is or is not protected under the title.

MS. GOSLINS: Well, let's just assume

for a second that we're talking about a database that has copyrightable elements of at least selection arrangement and cooperation and also material that is not protected by copyright, like court cases or --

MR. LUTZKER: Well, it goes to the question of what is the work. Is the entire database the work or are the elements of it the work or works, if you will, an accumulation of works?

And there's where I think, again fundamentally this provision should not prevent people from getting access to data that is not protected by copyright law. Now, where you merge unprotected and protectable elements, it is a practical difficulty of saying, in terms of writing a regulation that would apply to a situation like that -- that's why I think use becomes an acceptable approach on your end.

You can say that, there are certain accesses that can be made and certain accesses that can't be made, and if you are accessing works that are not protected by this title, that ought to be allowed.

MS. GOSLINS: But if I circumvent Lexis nexus access controls, how is anybody supposed to know or how are we supposed to write a rule that

distinguishes between whether I'm circumventing it to use their search engine and read the head notes or to read the text of Feist? How do we draw that distinction? How does anybody draw that distinction?

MR. LUTZKER: Well, I think it becomes incumbent upon -- I mean, if you don't exempt that, let's say there's nothing, and people are going to go out and they're really going to circumvent or they're not. Okay? Most institutions will comply by whatever the law is.

If people go ahead and circumvent, so that in other words they've now entered this no man's land, how are the proprietors going to determine who they are? What are the mechanisms in place for them to determine whether or not a circumvention has occurred which is a violation of the statute?

I think the problems exist there concurrently, and I'm not connecting in that sense, I see, but --

MS. GOSLINS: That just seems to me as a practical problem of the copyright owner as opposed to when we're thinking about a product that is both protected by copyright and under this title and not.

MR. LUTZKER: I think fundamentally

there needs to be an acknowledgement through the Office, through the Library in these regulations that if a work is not protected under the title, it is outside the scope of this criminal-civil provision. Okay?

If it is a use oriented exception, uses that are outside dealing with non-copyrightable material are not a violation of the section. If the use that is made is of protected material and there's not otherwise an acceptable basis for using it, then it would be a violation.

PROF. COHEN: I'd add that technologies aren't static here, and that's really an important thing to remember. It's causing us an enormous amount of grief even today, and to pick up on something Arnie started out with, if there is no exemption because of the fear that someone might really want those excellent copyrightable headnotes, then there is no exemption, period.

If the library has one print copy of the reporter down somewhere in the basement in a several thousand student school, then there's effectively no exemption, and that particularly where the underlying content is U.S. government public domain works is simply unacceptable.

A rule that says you have to look at the

circumstances of the use might well encourage the content provider to develop better technologies that make it easier to make the sorts of uses that have to be permitted, and that in my view is a good thing.

MS. PETERS: Charlotte.

MS. DOUGLASS: Yeah, I have a couple of quick questions. You've been talking about potential adverse effects on public uses of copyrighted works, and I just would like to know if there is any other reason.

Could there be any other reasons except circumvention that might mean that there really isn't an -- let me start again.

When you try to prove some things, you might want to prove -- what we have to do is decide whether the prohibition on circumvention causes adverse effects. So what I'm trying to get at is whether there are any other reasons besides the prohibition on circumvention that might account for the adverse effects.

MR. NEAL: I'm not understanding the question.

PROF. COHEN: Well, do you possibly mean the person is poor and couldn't pay for access to the work anyway? Because that could very well be a

reason, but our society has historically had an answer to that, which is the public library. So the copyright system is bound up with those other factors at every level.

MS. DOUGLASS: I'm just trying to hone in on things caused by the prohibition on access controls, prohibition on circumvention of access controls, and when in the final analysis Congress is going to say, "Have you answered the question that these things were caused by the prohibition on access controls, or there might have been some other causes?"

And if there might have been some other causes, then that's not going to meet what Congress has asked us to do as I see it.

PROF. COHEN: It is not my reading of this statute that Congress has asked you to determine whether the implementation of access controls is a but-for cause of the adverse effects. It is my reading of the statute that Congress has asked you to determine whether after the implementation of access controls users are suffering adverse effect that they were not suffering previously, and the implementation of access control can be one cause of that, but it's not my reading of the statute that it needs to be

the only cause.

And the reason that that's not my reading of the statute is because the implementation of access controls is part of -- it sounds grandiose -- but a new economic order or an attempt to impose a new economic or new licensing order within this copyright world, and a lot of causes are linked.

Now, one could say, "Well, you library and educational people, you are dinosaurs, and you are resisting this new economic order." I think that Congress clearly provided for that resistance, but more importantly, I think that this is not about whether someone's a dinosaur or not, but whether libraries as such are going to be able to continue to exist, and the implementation of access control technologies is one cause of a chain of developments that might prove troubling in that regard, but need not be the sole cause.

MS. DOUGLASS: Another question I have is to Mr. Neal, I believe, or anybody can comment, and this may be the least of your concerns, but before the implementation of the DMCA, there were some comments made during and around the negotiation of the two WIPO treaties, which said that one of the objectives was continuing availability of works, and that another objectives was to permit easy access to

authorized uses.

And I wonder if you would care to comment on the international effect of what happen if these measures, anti-circumvention measures came into being without exemption. Do you have any just general comment?

MR. NEAL: I feel like I'm at my Ph.D. orals

(Laughter.)

MR. NEAL: I was a participant at the WIPO treaty discussions in Geneva lo those many years ago, and among the many issues that we wrestled through there were issues of harmonizing the world's approach, the national approaches to changes in the electronic or in the information environment with changes in copyright law and recognizing that the movement of information across borders was a pressing reality that we needed to deal with. And so that inspires us to think about the very question that you're raising here.

The second thing we recognized is that the concept of fair use with its broad exceptions and limitations to copyright ownership rights is a concept which is perhaps most aggressively embraced in law in the United States. There may be comparable concepts or words in other legal national

copyright language, but not at the same level and not with the same perhaps consistent application over time, and therefore, we worked -- at least the fair use community as I would define it -- worked very hard in Geneva to educate and work with other representatives from around the world to look at fair use as an important global concept to be adopted.

And although we were not successful in integrating the concept or the terminology of fair use into the body of the treaty, it was, in fact, embraced in the preamble to the treaty and, therefore, I think a very important step forward.

So I think an important aspect of what you say is that there is at least an increasing international recognition of the importance of limitations and exceptions, and that fair use did enter I presume for the first time -- and I look to Marybeth to confirm that -- at least for the first time in my experience entered in international treaty the terminology "fair use."

And so I thought that was an important breakthrough, and I hope that the rest of the world begins to catch up with us before we lose it, so to speak.

MR. LUTZKER: Charlotte, if I could

return to your first thing, I was thinking about that, and at least from my perspective I want to make clear that one could say it is not the technological measures that create the adverse effects. It's the contract. It's the license that creates the adverse effects, and I think I would want to separate that and say, in effect, that the contract terms are the contract terms. If libraries negotiate and they have certain limitations which are agreed to in respect of a license, that's the deal, and that's the way they use it, and that's what they say that's how they use it.

But the adverse effects that the technology imposes are, in a sense -- even if they enforce contractual terms between licensed parties, I reiterate we're dealing with non-licensed, unrelated parties, in effect. I mean there might have been prior agreements between them in the past, but it is in an environment where there is no license.

And so if you think of the adverse effect being really caused by the license and not the technology, the technology is really in license terms. I think you're not looking to the ultimate concern that we're pressing.

MR. NEAL: I want to draw an important

distinction at least in my mind between negotiated licenses where parties have an opportunity to go back and forth to reach terms of agreement on how information will be used and non-negotiated licenses, which are increasingly part of the electronic Internet world in which we live and where click on and shrink wrap approaches, I think -- represent increasing array of agreements for which there's not an opportunity to negotiate, and I think we need to draw that distinction.

I'm amazed at the number of on-line licenses that I'm presented with where, rather than having to browse down through the text to which I am supposedly agreeing to the buttons that I'm expected to click at the bottom of all this information, they're now presented at the top with the assumption, well, you don't want to read it anyway. So let's get you to agree right up front, or they're buried. The agreements are on a screen, and you have to go to a second or third screen to actually read the text.

So there's a built in assumption here, I think, increasingly in the on-line world that the nonnegotiated license arrangement will not work a lot more, and we need to be concerned about that.

MS. DOUGLASS: Thank you.

MS. PETERS: Okay. Rob.

MR. KASUNIC: Well, I'll try and keep my questions brief. I know you've been up there for a long time.

MS. PETERS: Hopefully they didn't drink as much water as I did.

(Laughter.)

MR. KASUNIC: I did want to start off with follow up on the discussion on the thin copyrights and the protection of information that is only thinly protected under Title 17.

And there was a statement that that might be even more important since if all information is becoming, as you mentioned Mr. Neal, intermingled into collections to a certain extent, or compilations, then this distinction, how we deal with this area is important.

If the technology used by the copyright owner is applied at this point in time, with the current state of the technology to both copyrightable and non-copyrightable elements of works, who should bear the burden of the indiscriminate use of that technology? --On not protecting, exclusively, the copyrightable elements, but placing access controls on the broad compilations or databases that encompass both

copyrightable and non-copyrightable elements?

PROF. COHEN: Who should bear the burden in a court proceeding?

MR. KASUNIC: Who should bear the burden under Section 1201(a)(1) in terms of the use of that technology?

If the technology, as we have it right now, is not able to discriminate between particulars (conceivably there could be a time when the technology could be applied only to copyrightable elements as opposed to the overall work). Who should, under the current state of technology as we have it under 1201(a)(1) --

MR. LUTZKER: I think as Julie helped me out on the database discussion, I think it makes logical sense that as we look at these as being more sophisticated technological measures imposed by the owners, creators, sellers or licensors of the material, that it behooves them to work through the structure that gives them maximum protection for the things that need protecting and in recognition of the fact that there may be, in a sense, use rights with respect to portions of that material; that those be made at least accessible in a way that doesn't open up the whole shop.

I mean, right now if all you have to do

is enter your initials and that becomes your pass code to get into the whole universe of stuff, and half that stuff is public domain and government works and half of that stuff is proprietary, then obviously the dilemma is, well, if you let them in they can go to the public domain, but they also go to the other stuff.

But I would think that the parties that are licensing the stuff need to determine and use technological measures if they want to enforce this provision. They have other ways of protecting their interests because, the provision is not in force right now, and they have ways of protecting the provision.

The other day or yesterday, Monday afternoon there was a very entertaining presentation by a guy from Silver Platter. They've been doing this stuff for 20 years, and they presumably have been thriving, and this is a new additional benefit for them, a new right, if you will, to control and create, of burden the responsibilities, and if they want to take advantage of it without sort of diminishing what the public has a right to, then they ought to figure out the measures and allow it.

I don't know whether I'm creating an impossible task. I don't know the technology to

say -- I don't know whether any of us can. I mean, get the engineers in to explain how you could do that, but I have enormous faith that it can be done or if it's economically desirable it will be done.

PROF. COHEN: I think the burden of proof is met by a showing that the technologies apply to copyrightable and uncopyrightable elements alike. That's precisely the problem.

MR. KASUNIC: I'm sorry. I didn't hear the last part.

PROF. COHEN: I said I think the burden of proof is met by a showing that the technology is applied to both copyrightable and uncopyrightable elements alike. That is precisely the problem.

MR. KASUNIC: What if protections go beyond just the technological control measures, go beyond protecting simply access, and merge the protection into access and use?

MR. LUTZKER: Well, in theory, Section 1201(c)(1) addresses the notion that there's nothing with respect to use. This is one of the difficult things to absorb in the statute. On the one hand you have the provision that nothing in here will affect the rights that are already existing, and they specifically mention fair use. So aren't you protected?

And it becomes a question of what is access, what is use. If you're in and you have access, and there may be separate questions of contract, but the fair use provisions and other provisions are in play when you're using the work.

And, it's the difference, too, in the models of whether we use licensed material as opposed to purchased material, and one thing that struck me, and it came up in actually discussions during term extension, and the Register's office was deeply involved in many of those discussions. I don't remember if it was actually in the negotiations or whatever, but it was a concept that if this licensing affords an opportunity to really assure real control over works, it's a way of eliminating many of the fair use issues that have cropped up over the course of years.

Then, what's to stop publishers from instead of selling books with Borders Books -- it's a license. You open the book, and you're licensing to obtain a copy of a work.

It sort of was a creative thought process that that engendered, but we're basically in a situation where in theory fair use is supposed to apply once you're using the work, subject to whatever license requirements there may be.

MR. KASUNIC: That brings me to a broader question, following up on some of the discussion of how we define access and what that relationship is with use. For instance, in the example that David raised about the expired CD, that after expiration, which is a license restriction on the CD, is one allowed to re-access it without violating 1201(a)(1)?

Is secondary access within the scope of consideration of what Congress intended in 1201(a)(1) or is it not? We see a lot of discussion in the legislative history about black boxes and about breaking into a locked room. How does secondary access fit into that? In 1201(a)(1) are we concerned with secondary access or was the intent different – the meaning being initial access of a work?

MR. LUTZKER: Well, we had a lot of discussion as a way, and I think it was an effort at compromise on the library side to suggest some initial lawful access, and we have it in many of the current proposals. It adds a Patina of fairness I would say to the analysis, and that's why it is part of it.

The question, and I think Charlotte had asked this, and I don't know precisely the

formulation about whether a work is published or unpublished, but a work is a work under copyright law. I mean you've got to look at this as what does the copyright law say.

The copyright law grants certain rights to owners of works, and they're spelled out in 106, and if they're not in 106, they don't exist, and then you go to the limitations in 107 to 121 or whatever the last number is now, and that's how you define what the rights of ownership are.

And under those circumstances you can then see that the fact that there was a prior license or arrangement may or may not have relevance to whether or not you can make a fair use of it. Particularly in an electronic world and the worrying about theft and piracy and the like, again, it adds credibility to those who have had a license, but I don't know whether you should necessarily be penalized or not penalized having had that access.

I think in part the concept of the access helps so that you know what's inside the work to know whether or not you need to get to it. Julie can tell me never having had access to something that this is a good work that I might use in some research, but there's more credibility if you've already had that understanding.

Separately a question came up. Well, if you have access, just make a copy of it, you know, while you have the access, and that may or may not have license implications, but then it becomes an enormous burden in an electronic environment. The whole purpose is you don't have to have a copy. You can access it visually.

MR. KASUNIC: But then am I understanding correctly that we're in some ways defining access in terms of the use then of the work?

MR. LUTZKER: I think that is one of the great dilemmas that I'm glad you have, but access and use merge. That's why when in the original library comments we talk about access and use that there's an intertwining, and people can have access either for a day and somebody can have access for a longer period, but access really converts to the ability to use the material, to view it, to see it, and the technology now to the extent it enforces access, it does merge in enforcing usage.

MR. KASUNIC: Well, that is our trouble here, and that's why I'm trying to focus in on it to try to see how we break those apart. Since Congress didn't prohibit the conduct of circumventing for the use of the Section 106 rights, but only prohibited

the conduct of circumventing for access. So how do we pull these apart in this situation and in some way limit that definition of access so that it doesn't involve the 106 rights and the use rights?

MR. LUTZKER: That's what we've tried to provide.

MR. NEAL: Moving down a tough path, I know, here again. CD-ROMs. CD-ROMS. There's no such thing as a CD-ROM. CD-ROMs come with books. So we stick them in the back, and we put them on the shelf. CD-ROMs come as works in themselves. So a person picks it up off the shelf or requests it over a desk, and they take it to a reader and they put it in and they use it.

CD-ROMs increasingly are a set of information which is linked to a dynamic Web site. So some of the information that's on the CD-ROM, and a lot of the information is related information as proposed and presented in a Web environment.

And historically and perhaps to a lesser extent CD-ROMs were networked. That is, we put them up on a piece of equipment that enabled us to integrate and present them to users in a broad geographic way. So you didn't have to be physically at a work station. You could be anywhere within the domain and access that information.

So CD-ROM already has all kinds of technological complexities and diversities built into it and how it relates to other formats of information.

When we use CD-ROMs, they very often involve a negotiated license, and in some cases they involve a nonnegotiated license because we go into a store, we buy it, we open it up, and say, "Dah, dah, we have agreed to these terms. We didn't have a chance to tell you what we thought we were going to do with this and reach some agreement on it, but I opened the package and, therefore, I agreed to these terms."

Now you can say, "Okay. You don't like those terms. Bring it back. Bring it back to the store and don't use it." That's an interesting UCITA discussion.

But when we negotiate access to a CD-ROM and there is an issue related to its time frame, we don't permit persistent -- how long that is. I mean we stop using it. We don't allow systematic how much. We don't allow widespread, where. So we take down the where, the how much, and the how long capabilities.

Now, we may have if we were smart, we may have negotiated that so that we can hold onto

that CD-ROM and keep it somewhere in our collection so that we may not enable systematic widespread use. We may be able to enable the checking of that for certain educational and research purposes. Most of us have not thought about that in our negotiations for these types of things.

So I don't know if that helps, but that puts it in a much more complex framework than it just being a CD-ROM.

MR. KASUNIC: Well, the license then is creating terms on how you can access it, for how long, how many times, how many users, but is that that's a contractual provision. That's not protected under 1201(a)(1) -- that you have a licensing provision in there.

We're looking at the technological controls that are protecting the access to it. So if that license were breached and we were to ignore that license, how would you define whether you can circumvent just the technological control? That the number of times or re-accessing it is something that's within the terms of the license not now being considered, but, rather, just in terms of considering what is prohibited under 1201(a).

MR. LUTZKER: Well, all of the licenses are going to say, "By accepting this contract you

agree not to exercise your anti-circumvention rights as provided under 1201(a)(1) as recommended to the Librarian by the Copyright Office." You can predict that, but I can tell you by having that exception and limitation built into law, it gives us an enormous leg up in those contract negotiations.

PROF. COHEN: I would add that it is not the function of federal copyright law to prevent people technologically from breaching their licenses, and if the law decides that everything's access, that's in fact what you're doing, and that's backwards.

MR. KASUNIC: Okay. One final thing. In terms of the definition that was being discussed, if I can just find this, that “a work that was lawfully acquired by a user or users and an institution”, being a potential exemption, how do we deal with that definition? Or, what is the scope of that definition of “lawfully acquired”? Is that something that is just purchased or are we also talking about where something is licensed, where someone has a license and has initial access to that work? Is that then a lawful acquisition that's, at that point, the initial access of it?

PROF. COHEN: It seems that initial access has to be a factor in differentiating between

what is access and what is use, whether the transaction is styled as a purchase of a copy or as a license.

MR. KASUNIC: So whether something is "lawfully acquired" encompasses both a licensee of the work or someone who purchases.

MR. LUTZKER: Yeah, I think the concept, and, again, this was designed to sort of understand the urgencies of the marketplace and to try to create a fair modeling of what is going on. If a purchase or license has been made or if other definitions of what constitutes lawful access, I wouldn't say that those two would necessarily be the full parameters.

I mean if I go into a library, I haven't necessarily purchased -- the library may -- but I haven't necessarily purchased or licensed the materials, but I still may have a lawful access at that point in time.

And so I think it's intended to be distinguished from theft and piracy, and again, it gives a sense that we are in a regime that is bounded by laws and bounded by some degree of fairness. I think I want to clarify because I don't know whether I've been -- it's clear because you've got negotiated licenses, that's the nonnegotiated

type. I think Jim's comments are particularly pertinent in how to evaluate, and I haven't yet thought through sort of exactly how I would suggest even modifying the things that I've outlined because as you get to hearing, I can see different things.

But I can see distinctions between the negotiated license, the nonnegotiated license as you make certain assessments into the particular classes of works that users should be able to make use of, but I think there are clear distinctions between the nonnegotiated license situation and the license situation.

MR. KASUNIC: Thank you.

MS. PETERS: Thank you.

I want to thank the panel. This sets a record. We have not kept a panel anywhere near as long. So obviously you presented testimony that was very relevant that helped us a lot.

MR. NEAL: Where do we submit our per diems? No.

(Laughter.)

MS. PETERS: For those of you who are appearing at two o'clock, you have one hour and 20 minutes to find restrooms and lunch.

Thank you very much.

(Whereupon, at 12:40 p.m., the above-

entitled hearing was recessed for lunch, to reconvene at 2:00 p.m., the same day.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(2:00 p.m.)

MS. PETERS: Welcome to the last session of the D.C. hearings on our Section 1201(a)(1)(A) rulemaking.

And I notice that our audience has wandered off, but everybody will hear your words by going to the Internet and see them.

This afternoon our witnesses are Bernard Sorkin, who represents Time Warner and the Motion Picture Association of America, and Richard Weisgrau, accompanied by Victor Perlman who represents the American Society of Media Photographers, and why don't we start with you, Bernie?

MR. SORKIN: Thank you.

I appreciate the opportunity of being here to testify before you in the hope of convincing you that we are not on the brink of the end of Western civilization as we know it.

I appear here for Time Warner, Inc., and the Motion Picture Association of America, Inc.

Both Time Warner and the members of the Motion Picture Association depend for their existence on adequate and effective copyright protection. They are also vitally interested in the

healthy maintenance of the fair use doctrine. That doctrine makes it possible for them to create and disseminate factual and nonfactual, textual, audio, visual, and audiovisual works.

I shall state the conclusion of my submission here, at the risk of reducing the tension in the room. There has been no evidentiary showing of any realistic likelihood of any adverse effect on anyone's ability to make noninfringing uses of any particular, quote, class of works, unquote, when Section 1201(a)(1)(A) becomes effective.

Accordingly, there should be no delay in the effective date of that section. Interested parties may, of course, put together such evidence as they believe relevant and persuasive for submission in rulemaking proceedings during the successive three-year periods following the effective date of Section 1201(a)(1)(A), as provided in Section 1201(a)(1)(C).

Such submissions would at least have the benefit of being made in the context of an existing anti-circumvention prohibition instead of dealing with, as the comments seeking exemptions now do, the chimera of alleged consequences of a statute not yet in effect.

It has become almost trite to say that

digitization presents extremely serious problems for copyright protection. There are, of course, many benefits to copyright owners, as well as to the rest of society.

Nevertheless, the fact that copyrighted works may be speedily and cheaply duplicated in unlimited quantities and without any degradation of quality even when copies are made from copies, the fact that digitized works may be easily and cheaply transmitted throughout the world by the push of a computer button, and the fact that digitized works may be easily and cheaply modified have created a qualitative rather than merely a quantitative difference in the dangers faced by copyright.

And accordingly in the defenses required for copyright protection. In this regard it is important to recognize that adequate defense of copyright is needed not only to protect the works themselves and the interests of copyright owners, but also to protect those interested in creating and operating the physical infrastructure which depends on copyright works for its prosperity.

These increased dangers were recognized by the approximately 160 member nations of the world intellectual property organization that agreed in Geneva in December 1996 to two treaties intended to

provide protection in digital and on-line environments. These treaties were thought necessary to achieve adequate protection despite the recent passage of the Trips Agreement (phonetic) and its protections for intellectual property.

So clear are the increased dangers to copyright resulting from digitization. One of those treaties, the WIPO copyright treaty, includes in its Article XI the following: "Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty or the Burn Convention, and that restrict acts in respect of their works which are not authorized by the authors concerned or permitted by law."

That article is at the basis of the statutory provision, Section 1201(a)(1) of the Digital Millennium Copyright Act which was enacted to implement the U.S. requirements under the WIPO treaties. It is pursuant to that statutory provision that this rulemaking proceeding was instituted, quote, to determine whether there are classes of works as to which users are or are likely to be adversely affected in their ability to make

noninfringing uses if they are prohibited from circumventing, end quote, technological measures that control access to copyrighted works.

This being a rulemaking proceeding, its outcome must be based on evidence presented in the course of the proceeding. Mere speculation is of no moment. In that connection, the notice of inquiry itself points out that, quote, it is clear from the legislative history that a determination to exempt the class of works from the prohibition on circumvention must be based on a determination that the prohibition has a substantial adverse effect on noninfringing use of that particular class of works.

The Commerce Committee ordered that the rulemaking proceeding is to focus on distinct, verifiable and measurable impacts, and should not be based upon de minimis impacts.

Similarly, the manager's report stated that the focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures, such as encryption or scrambling, has caused any substantial adverse impact on the ability to make noninfringing uses, and suggested that mere inconveniences or individual cases do not rise to the level of a substantial adverse impact.

The assertions about purported adverse effects flowing from the future effectiveness of Section 1201(a)(1)(A) are based on nothing more than speculation, and moreover, on speculation based on ill founded premises.

One example is in the statement by Copyright's Commons that it shares, quote, the Library Association's concerns that access controls may, italicized "may," too easily become persistent use controls in the hands of publishers.

Another example is the statement in that same paper that, quote, we fear that the anti-circumvention rules will be wrongfully used for improper commercial purposes and to block speech, closed quote.

There they stand, completely free of any factual support. Moreover, those seeking exemptions from application of Section 1201(a)(1) failed to consider a number of fundamental premises that should lay to rest these and the other speculations on which their papers are based.

For one thing, at least for some time works will continue to be made available in analog formats and paper formats, that is, in ways not subject to the provisions of Section 1201, and accordingly, free from the concerns expressed in

those papers.

I should say parenthetically that even motion pictures released on DVD about which so much vituperation was spilled in this proceeding have been and re continuing to be released on VHS and even, mirabile dictu, in 35 millimeter prints so that members of Copyright's Commons and of the library and educational communities can enjoy them in theaters.

Secondly, and very fundamentally, copyright owners, distributors, and publishers are interested in the widest possible distribution of their works. The Salinger case, which involved an author's seeking seclusion for himself and his works, is not an exemplar of the content owning community.

Copyright owners, distributors, and publishers cannot exist and prosper by borrowing their works from public availability. The assertion by Copyright's Commons that, quote, corporate copyright holders now seek to use the Digital Millennium Copyright Act's power of copyright to expand the monopoly on expression and restrict the public's use of their works is not only unsupported, but flies in the face of economic logic.

There is a dramatic contrast between the

speculations of those seeking exemptions and the reality of a tax on copyright protection of the kind against which Section 1201 is intended to protect. One example of the latter is the hacking of the CSS technology intended to protect DVDs from unauthorized copying and access.

Another example is the circumvention by stream box of the access control and copy protection measures that real networks affords to copyright owners.

In short, while the expressed concerns about adverse effects are speculative and illogical, the threats to technological protections and to copyright are real and have already manifested themselves.

Equally problematical is what the notice of inquiry calls a major consideration, quote, to determine how to define the scope of boundaries of a particular class of copyrighted works, unquote.

The notice of inquiry quotes the Commerce Committee report to the effect that, quote, the particular class of copyrighted works should be a narrow and focused subset of the broad categories of works of authorship should be, that is, identified in Section 102 of the Copyright Act.

Whether or not such a definition can be

articulated, none of the papers has succeeded in doing so. Indeed, it seems clear that no matter how "class of works" is defined any exemption from the operation of Section 1201(a)(1)(A) for such a class will have the effect of removing the protection of that section from other works not intended to fall within the definition.

In conclusion, it is with some puzzlement and even dismay that I regard the positions taken by the educational and library communities. They, as much as Time Warner, the members of the Motion Picture Association and other content owners depend on and should encourage greater protection and greater availability of copyrighted works.

Greater protection because in a digital environment it makes possible increased production of copyrighted works, as well as increased and speedier distribution; greater availability because it makes possible education and library services to a broader public by newly developed media.

In helping to diminish piracy and other dangers to copyrighted works, access controls have and will increase the availability of a wide range of copyrighted works to grant exemptions from or otherwise weaken Section 1201(a)(1)(A), would have

the effect of discouraging production and distribution of copyrighted works, and particularly from making such works available in digital format.

It seems clear, particularly in view of the complete lack of any factual support for delaying the effective date for Section 1201(a)(1)(A) or granting exemptions from that provision, and particularly in view of the huge and irreparable damage that would be done to copyright by virtue of any such delay or exemptions, that law and logic require that there be no such delay or exemption at least at this time.

After the statute has gone into effect five months from now, the interests that are opposed to the statute can make a real world assessment of its impact instead of the speculation proffered in this inquiry and as provided by the statute makes such submissions as they deem appropriate.

Thank you.

MS. PETERS: Thank you.

Mr. Weisgrau.

MR. WEISGRAU: Thank you.

First, let me thank you for the opportunity to testify, and additionally I'd like to thank the Copyright Office for its recent efforts in making the registration system available to

photographers finally.

MS. PETERS: Finally.

MR. WEISGRAU: We do thank you for that.

When I had small children, I used to read them a book, and it was called Simple Pictures Are Best, and it was a story about how a photographer started out to take a photograph of his two kids and then added the dog and then added the cat and then added the wife and then added the nieces and nephews and then added the plants and then added the broom, and the picture became so complicated that you couldn't tell what the subject was anymore.

And as I sat here this morning, I began to say, "Gee, I wish everyone would subscribe to my own self-imposed rule, keep it simple, stupid, because I've just heard so much gibberish this morning that is not on point that it's almost not worth rebutting. So I'm not going to take a lot of your time with that."

I think the Register in her opening remarks said, quote, the purpose of this rulemaking proceeding is to determine whether there are particular classes of works as to which users are or are likely to be adversely affected in their ability to make non-infringing uses if they are prohibited

from circumventing technological access control measures. I seem to think while that's a mouthful, it is quite clear. I didn't hear anybody say anything today really that was relevant to this that made a persuasive argument. In fact, the most persuasive argument I heard is by the gentleman who sat in the seat this morning. Arnie and I -- sorry.

MS. PETERS: That's okay.

MR. WEISGRAU: Yeah. -- when he said, "We cannot demonstrate adverse effect," and then five minutes later, and he's on the record saying that; five minutes later he says, "And this adverse effect to the extent that it does exist is caused by licensing, not access problems."

So what are we sitting here for?

However, we all have to earn our money. So we're going to make some comments here which are really legally based, and I do understand that Mr. Perlman is the ASMP's General Counsel. He is a lawyer and an amateur photographer.

I am a photographer and an amateur lawyer. Therefore, it has fallen into my hands to make the legal argument because I can get away with more than he can, see.

When we looked at the charge given to the Library of Congress, we noticed the adverse

effects rule. We noticed the class of works, and we also noticed a thing called a term "other such factors," that you can comment on other such factors.

So I want to talk a little bit about factors about adverse risks to rights owners because I think that's adverse risk. It doesn't all just go one way, and I'll elaborate on that.

Victor pointed out to me this morning that on page 181 of the current Copyright Act in 1201(c)(4), it says, quote, "Nothing in this section shall enlarge or diminish any right of free speech."

I don't think you can read 1201(a) and ignore 1201(c), and I think that clearly there's a free speech issue here. It seems to me that freedom of speech gives me the right to say what I want, where I want, when I want, and to whom I want, and I can also get paid for it if I want and someone is willing to pay. Freedom of speech and free speech are obviously different.

I frequently exercise my freedom of speech, but it is not for free. Now, if you allow this circumvention of access controls, you can effectively force me to speak to parties to whom I do not wish to speak because I have said I will not speak this to anyone who doesn't pay me, and that's

my right, I believe, constitutionally.

So I think that if you allow circumvention of access control, you effectively damage my freedom of speech rights.

Additionally, I think that the Constitution and Fourth Amendment say that I have a right to be secure in my premises, person, papers, and effects, and not even the government of this country except in the rarest of circumstances can access my property without a warrant and due process. Are we going to write a law now that says some people can break and enter and access my papers without due process? Because that's effectively what you say.

You have taken the lock off my door.

If you take the lock off my door, then I think that you have really damaged me in another way because the Constitution and the 14th Amendment say I have the right to equal protection under these laws, and the moment anyone defines classes of works to which access controls can be circumvented, the moment you define the class of works, and I don't care how narrow they are or how broad they are, you have defined a class of rights owner and/or author.

At that moment, you have effectively said this class of author/rights owner has rights

under the law, and this class does not have the same rights under the law. I think that I'm entitled to equal protection under the law, and you can't define me as a class, which says you can circumvent my works, but you can't circumvent his. So I think that there are some serious constitutional issues here which are our other concerns, and they go to the rights of people to be secure in their papers, have equal protection of the law, and speak to whom they want, and when they want and for a fee if they choose.

Now, from our perspective here, what became very evident this morning is that the cat is out of the bag. This is not an issue of access. What we heard today is that it is an issue of fair use, and I was amazed to sit in the back of this room and hear fair use described as a right. I've always thought it was a criteria for evaluation to determine whether you could defend against a use for which you had no license and not a right.

If it was a right, it would be clearly definable and everybody would have it automatically. So I don't see fair use as a right. I see it more as a defense.

What appears to me is that what we have seen here from our opposing parties is that they are

really upset because the world order is changing. Well, I ask this question. Who said that libraries will exist forever? I mean, it could be that the Internet is the library of the future. I have a kid in graduate school and one in college, and they don't go to libraries anymore. They just use the Internet.

I kept hearing this morning that we have to facilitate fair use, and then I heard that the rights of copyright owners are defined in 106 and multiple sections thereafter, including 107, fair use. I think that the rights of copyright owners are defined in 106, and what 107 does is say in certain instances you can ignore those rights if you fit these criteria, and it's a fact by fact basis.

I just don't understand how fair use creates any argument or can be the basis of any argument for unauthorized access.

If I have a brick and mortar photo gallery and on that gallery's walls I put photographs, I lock the door and I charge admission. I'm perfectly entitled to do that. Would the Congress of the United States pass a law that said someone walking by the store, by the gallery can break the lock in order to come in just to see if there's something they want to buy? I doubt it.

Then how can we even contemplate setting up any class of works to which individuals have a right to break the lock, walk in, and take a look around. We cannot distinguish between the brick and mortar store and the Internet store. It's not reasonable to do that, not in the changing technological environment. Property is property and rights are rights, and the existence of cyberspace does not mean we have to have law that is founded on some type of ether that we don't need to breathe.

I heard that we have to worry about students in China who have to be able to access information in the United States in the libraries. I mean last year it was distance learning. Now it's distance lending. I don't see where that has anything to do with what we're talking about. We're talking about the rights, owners' simple, fundamental right to control the speech which he or she creates and/or owns. And I don't see how anyone came make any law or any regulation which says that I don't have a right to control access in the digital cyber world if I have a corresponding right in the tangible brick and mortar world.

I think I've made my point. So I'm going to stop just stop right there and not consume any more of your time because I'm sure you'll want

to go home, but you've got it.

As far as we're concerned, this comes down to the simple basics. Authors and copyright owners have rights under the Constitution, and we think that the most compelling argument here is you should not make a recommendation to Congress which would even lead them to consider for one instant creating a class of individuals which would have less rights than others under the same body of law.

Thank you.

MS. PETERS: Thank you.

Now, we begin the questioning. Turning to my extreme left, let's begin with Rachel.

MS. GOSLINS: Great.

MS. PETERS: You mean you're not thrilled?

MS. GOSLINS: Right. Both of you argue -- actually I just have one sort of basic question at the moment -- both of you argue to some extent that proponents of an exemption have not satisfied the burden that they have by statute to show adverse effects or an adverse impact. They argue to some extent that the way you frame the burden of proof would make it impossible for anybody to satisfy that burden and render the congressional mandate to us pretty much meaningless.

We're heard the professors have needed to circumvent DVD protection in order to access and play movies for their class. We've heard that they sometimes use proxy servers to get remote access for students that are licensed to use databases, but are not within the Internet when they access this.

So my question is, I guess, what kind of evidence would satisfy you under your vision of how this burden of proof works. How would a proponent satisfy the burden of proof that they have?

MR. SORKIN: Okay. To start at least, I think in the absence of an effective 1201(a)(1)(A), 1201(1)(a)(i), it's very, very tough to meet that burden of proof. However, that may be -- the question was asked this morning have you had any adverse effect, anything as if the statute were in effect today, and at least Professor Cohen and Professor Neal said no.

It took them a long time to say no, and they kind of worked their way around it, but the conclusion was, no, there's been no effect. Now, whether or not there will be such an effect come October when the statute goes into effect is something else again. In order to do that, you have to have a much better crystal ball than I do about what companies' content owners are going to do by

way of protecting their works.

From all indications of which I'm aware currently, and I haven't read a newspaper since this morning, and for my company, particularly, that's critical.

(Laughter.)

MR. SORKIN: But from all indications of which I'm aware, while there are intentions to take advantage of the protections offered by 1201, none of it will have the kind of adverse effect about which complaint has been made.

So I suppose I could dream up some kind of mythical hypothetical, if you will, example of what the proof would be. I would have a tough time doing it today. Perhaps it would be something like a company making DVD if you will or any kind of work, a musical work available, and encasing it, protecting it as the DVDs were protected by CSS and not allowing access to it for any purpose whatsoever, including, of course, what would be legitimate purposes for faire use.

That would be on that company's part a piece of unmitigated silliness. That's one of the points I tried to do. We are not in business to keep our stuff locked up and keep it away from the public. Quite the contrary.

MS. GOSLINS: Okay.

MR. PERLMAN: May I submit that based on what I heard this morning, the burden of proof was irrelevant because under any standard the question was asked: how would you define the particular classes of work to which an exemption should be granted, and I did not hear a single tangible answer to that question.

MS. GOSLINS: That's a whole other line of questioning.

Just so that we're clear, what I hear a lot of both of you saying, and as you've seen my questions to the user community, to what extent can you show adverse effects today, and in many instances the answer has been we're not able to do so today, but the statute does, in effect, ask us to look into the crystal ball at least three years ahead.

So taking that into account, what could a proponent say to you that would make you believe that at least from now until the next three years there was a danger of this adverse effect?

MR. SORKIN: Perhaps the example that I just made up. Perhaps I found a memo in your company's files that says we are going to overturn this world. We would be much better off if people

did not play our CDs, if they did not see our movies or read our books. So we're going to protect everything and then sue anybody who even tries to get a hold of them for any purpose whatsoever.

Absent such a thing I'm not imaginative enough to devise some satisfactory thing that would meet that burden. Quite frankly, I remain puzzled by the congressional intention in having you look at this now instead of after the statute comes into effect, and we can all take a look and see what's happening.

MR. WEISGRAU: May I just add to that, too? I don't agree with the notion that you have to do this projection of what might be adverse effect. I forget the document we excerpted this from. Victor has it, but I think it came from the Commerce Committee. Quoting their words, they were looking for, quote, distinct, verifiable, measurable impact. Mere inconvenience is not substantial impact, close quote.

I would add to that nor is fear demonstrable impact.

It seems to me that Congress has asked for verifiable impact, not the project. There is a three year review period. If, in fact, things go awry, there is a process three years down the road

for them to bring in evidence of this adverse impact.

Ms. Douglass I thought asked one of the better questions of this morning, and she said if it's not access that creates this impact, then where might it come from, and one of the panelists said, well, it could come from the fact that libraries are poor. Well, I don't think that Congress said to the Library of Congress, "Find some way to rearrange the socioeconomic structure of this country to resolve the injustices of unbalanced distribution of wealth."

Libraries, their problem is that they want it for free. Our problem is that we wanted to get paid, that we want to be paid. That doesn't seem to me to be the topic of -- the balance between the two parties there of whether it's free or to be paid doesn't seem to be at issue here. You're supposed to be talking about adverse effect. They can't demonstrate any of it. All they can do is say it might be there.

Well, the world might end tomorrow, too. Maybe we should just give up all laws, have a good time.

MS. GOSLINS: I guess my last question is how you would respond to arguments that we've

heard, the specific problem of removal of access, that more and more there are products to which a library subscribes, and they have a fully paid subscription for a year, for instance, which if they had in a print version, they would then have the individual issues, and when they cancel their subscription they no longer have access to lawfully acquired copies which they purchase, and they can't use them what they would consider to be fair uses of them.

It seems to be a relatively new problem with, you know, or new issue that's come up with technologies that now make that possible, which necessarily exist several years back, and so I would just be curious as to how you would respond to that argument.

MR. SORKIN: Well, again, speaking in terms of the people for whom I speak here, I would have a first question as to whether there is any contemplation of removing from the library acquirer, let's say, on the expiration of some term removing the product.

I can well understand that there might be a term which would come to an end so there would be no further supply of the product. Frankly, I just don't know. Again, to my knowledge, although

I've heard rumblings from other companies of doing that kind of thing, it never struck me as logical. If anybody at my company asked whether that should be done at the end of the year, you take it back or cause it to self-destruct or something like that. If anybody should ask me, my recommendation would be to the contrary.

Do I guarantee that my recommendation would be followed? I'm afraid not, but that's the only answer I have.

Now, it is, on the other hand, true. I suppose one can make the argument that in the good old analogue and paper world, if I rented you a film, a book, a phonograph record, rented it to you, at the end of the rental period I'm entitled to get it back. Access implies a right to have or to get, and depending on the terms on which access is arranged, one can get it back.

So that may be a theoretical underpinning, to answer your question, but quite frankly, from my perspective I don't see it as logical, economical, or appropriate.

MR. PERLMAN: If I may, the rabbit goes into the hat when you refer to the thing as being lawfully acquired because that begs the question of what it is that has been lawfully acquired.

This group must have phenomenal powers, just awesome powers because what I heard this morning was that you were being asked to grant an exemption, and not an exemption from the anti-circumvention provisions of the DMCA, but from the universal economic laws that are evolving with technology.

We, over the course of history, have evolved from an economic basis that started out grounded literally and figuratively in real property to a point where it became grounded in tangible personal property, and we are now moving into an era when it is grounded in intangible personal property.

Because of that the basic economic model is changing from sales of tangibles to the rental and license of temporary and specified uses of intangibles. What you've been asked to do is to change that, and I'm afraid it's not within your powers.

MS. GOSLINS: But how would you respond to the argument that in the previous world the balances that copyright is supposed to embody was settled in statutory exemptions and rights that were articulated by the statute? And now that we are moving, as we seem to be hearing more and more, towards a world in which that is regulated more and

more by contract and less and less by statute, that this is precisely the time that the people who have the least bargaining power and who were protected previously by the statute need to have those protections reinforced in a world where contract is now taking over some of the mechanisms that used to be affected by the statutes.

MR. PERLMAN: Since I represent the group that probably has the very least bargaining power of any entity that you could possibly discuss today, I'm content to allow market forces to determine the way the economic world works to the extent that over a period of time, that history reflects a basic and enduring wrong, then we need legislation to change it, but we haven't met that precondition.

MR. WEISGRAU: I think also they haven't put forth any evidence that the new model is really that adverse, this possible new model. The notion of purchasing, I can purchase the whole book and then I keep the whole book forever, and yes, maybe I pay 29.95 for the book.

But under a new model I might be able to just purchase the four pages of the book I actually want to read and only pay 65 cents for it each time I want to read it and end up saving money on it.

I mean there's two sides to the coin in

terms of the licensing argument, and that is that licensing can be specific and very, very clearly defined, very limited pieces of content, and as we have in the publishing industry where at one time if you wanted to buy -- you had to buy a textbook, and now today you don't have to buy a textbook. You get a course back, which is a chapter from this one and a chapter from that one, and you don't pay for the price of the textbook anymore.

Well, technology makes that possible. There's been no adverse effect in the publishing industry in terms of the student's ability to acquire knowledge to learn from, but technology has changed the way that knowledge is assembled and sold and packaged, and I think that's what's happening here.

They can't demonstrate anything that shows that it's going to do any damage to the public good or welfare here, and the fact that to the extent that specific examples were given this morning by Ms. Cohen. She referred a couple of times to Lexis and Westlaw.

Those models argue against her very point because those are digital media that have since their inception been given free access to law students and given extraordinarily inexpensive to

the educational community.

MS. PETERS: Bernard, did you have one?

MR. SORKIN: I thought there might be two points which have been touched on, but that might be raised further in answer to your question.

Number one, insofar as a contract might be oppressive with respect to people who have fewer resources or are disadvantaged, courts deal with that almost routinely, but beyond that, if there isn't the kind of oppression, a contract of adhesion kind of situation, I don't think the copyright law with or without the DMCA or the Copyright Office is geared, and maybe it's unfortunate that they're not geared to solving those kind of what you might call material justice kind of issues.

More fundamentally, I think, to this inquiry, and I tried to make the point in my presentation, but perhaps missed the boat. What we're coming into and have come into to a large degree in the digital world is truly a new kind of world relative to the kind of properties we're talking about.

It's not easy and perhaps impossible to apply the old rules of copyright as we knew it, and I think the changes that are imported now by the DMCA and particularly by 1201 radical as they may

seem are absolutely necessary because if copyright is seriously weakened or in my perception destroyed, then that does tremendous damage, and there's no way of taking advantage of all of the benefits that digitization has to offer content owners, society, the educational community particularly.

MS. PETERS: Charlotte.

MS. DOUGLASS: I have an interpretation question, and it has to do with the difference between -- I guess maybe if I could just go to MPAA's statement, I guess it was in the comment, and the question is: is there any difference between focusing on the impact of the implementation of technological measures and focusing on the prohibition of circumvention of access control measures.

I'm just trying to get our tasks straight in our mind, and the MPAA seemed to think that the copyright office in its notice of inquiry was focusing on the impact of technological measures as opposed to focusing -- you know, adverse effects from the impact as opposed to adverse effects from the prohibition on circumvention of technological access measures.

So I'm asking. Are they one and the same thing or are they different? And if they're

different, can you just tell me, maybe give me an example of one as opposed to the other?

MR. SORKIN: If I understand your question correctly, Ms. Douglass, I'll try.

I think there are two different things, although they may be different sides of the same coin in a sense. The technological measures, the protections provided by Section 1201 and, more particularly for our purposes, by 1201(a)(1)(A), may have an impact, and that impact is the subject of the complaints we've been hearing from the library and educational community and, I guess, from others.

And in answer to Ms. Goslins' question, I tried to think of a hypothetical result, you know, of what that impact could be.

On the other hand, that's different, and I hope now I understood your question correctly. That's different from the impact of prohibiting operation of those technological measures. Am I reading from the same page as you are?

MS. DOUGLASS: Yes, you are.

MR. SORKIN: That impact, I think, is easy to see in terms of the effect on copyright protection.

MS. DOUGLASS: Could you give me an example, a concrete example that a layperson could

understand?

MR. SORKIN: Yeah. Well, if we can switch to a different part of 1201, yes.

MS. DOUGLASS: Okay.

MR. SORKIN: The DCSS case, where there was actual circumvention of the protective device that was intended to insulate DVDs from unauthorized access. Quite actual, and the potentiality for harm was and still is huge, harm not only to the copyright owners of those motion pictures that were the subject of this thing, but to an industry because if that couldn't be cured, it would mean that the motion picture studios would stop releasing their movies in DVD.

That's not to the benefit of anybody. The public benefits to some degree, to a large degree depending on what kind of movie fan you are, benefits to a large degree, let's say, from having movies available in that format, and that's true for many, many works which can be provided better in many contexts in digital form.

But leaving that kind of thing aside, that may sound a bit parochial. Look at it in terms of distance learning, which everybody here has fought battles on on one side or another, and is accepted as a great, great public and societal good.

If works can't be digitized, if works' owners will not digitize them for fear of losing them completely, that possibility goes down the drain as well.

I hope I answered your question.

MS. DOUGLASS: Yes. I think so. You're saying that an adverse effect from a circumvention -- from being prohibited from circumventing -- I'm no David Carson so I can't say "download" six times in one sentence. So I'm going to stumble maybe a bit.

But at any rate, you're talking about the difference between circumvention, adverse effects from circumvention, and just adverse effect from implementation. So adverse effect from circumvention would be what the Linux users are saying is taking place with respect to their DVDs that they cannot --

MR. SORKIN: Right, right.

MS. DOUGLASS: -- play on their --

MR. SORKIN: Right, except that what the Linux users have not paid attention to is the fact that a license has been all along available to them or to the manufacturers of machines that would use the Linux system, and currently it is licensed. So I assume they are happy and are sending the Copyright Office letters of apology for overwriting

(phonetic) the original report on it.

MS. DOUGLASS: The license free of charge?

MR. SORKIN: No, but they're not outrageously priced.

MS. DOUGLASS: Okay. All right. Thank you very much.

I have another, I guess, general question, and that is it seems to me that both sides are saying -- maybe I won't say both sides, but both the library interests and both the content owners are saying that it doesn't make any sense to focus on just classes of works because you say, Mr. Sorkin, that if you focus on one class of works, then you're disadvantaging that particular class of works.

So does it make sense to have, say, like a fair access provision? Would a fair access provision make any sense similar to fair use, but that focuses on those four or five categories that were enunciated by Mr. Lutzker this morning?

MR. SORKIN: Before I struggle with your question, I'd like to make one small modification. I don't think I suggested that using classes of works results in disadvantaging a class. What I said was assuming that a class of works can be

defined, and in my view that's a very, very tough assumption, but assuming that to be the case, when you define such a class application of the removal of the protection with respect to that class will necessarily result in spilling over to other works that you don't intend to include in that definition.

And I hope you won't ask me for an example because I cannot think of an example of a class of works.

So far as fair access is concerned, I don't think that's practical or appropriate. Access strikes me as a particularly private, if you will, notion, one not subject to the kind of relief, so to speak, that fair use provides as an affirmative defense.

What do I mean by that? If I have -- forgive me for frequently going back to motion picture analogies, but I don't know very much about anything else -- if I have the only good negative of a great motion picture, I don't have to let anybody come near it to make duplicates, to show it or anything else. That's mine, and I could keep it locked up.

That's the kind of thing I meant with respect to the Salinger case. So I don't know what would constitute fair access unless you apply the

same kind of criteria as are applied with respect to fair use, but that would entail a pretty drastic revision of our property laws.

You know, copyright law in my view carries a lot of freight, all of the exceptions that are attached to it. There aren't many ownership kind of laws that are so full of holes and obligations imposed on copyright owners or, maybe better put, denigrations from the ownership.

But ownership of a piece of tangible property, yes, that's mine, and it may be that society wants to change these things. It may be that if I own a lot of milk and bread I should be required to give it to people, but so far that hasn't happened.

MR. PERLMAN: Fair use, fair access is a red herring. It's a very seductive, attractive red herring, but a red herring nonetheless for two reasons.

First, it is beyond the scope of the assignment that's been given to the Library of Congress.

Second, it's been brought up many times this morning by the user side. All of us can vividly remember spending a couple of years of pleasure in the CONFU process, the entirety of

which was based on fair use.

Some that was universally agreed to within the Digital Images Working Group and, I believe, also within the CONFU body at large was that if there were a simple, easy, readily accessible licensing system, fair use would go away because, in effect, the users would be happy to pay a reasonable charge in exchange for the insurance against having stepped outside of the fair use boundaries.

We heard that over and over again. Well, today we're talking about a technology that provides exactly that, and all of a sudden they need fair use. What they need is an exemption from the same kind of economic constraints that I talked about earlier. They are looking for free use as opposed to fair use.

MS. DOUGLASS: I think that does it. Thank you.

MS. PETERS: Rob.

MR. KASUNIC: I'll begin with some questions to Mr. Weisgrau and Mr. Perlman.

Just following up on that last question in terms of fair use and it being outside the scope of what the Copyright Office should be considering within this, fair use was repeatedly emphasized in

the legislative history and also even within Section 1201(a)(1). The factors that the office is to consider within this rulemaking are some of the same factors that we find in the fair use analysis.

How then is fair use not a relevant consideration even while there may be other avenues for licensing availability? How is it not a relevant consideration for adverse impacts?

MR. PERLMAN: It may be the result of inarticulate drafting by Congress. It may be the result of intentionally inarticulate drafting by Congress. Your task is to find particular classes of work to which an exemption should be granted. As soon as you start talking in terms of use and what is fair and what is not, if you grant an exemption based on fair use, you have to grant that exemption across the board, not to any particular class of work. That's why I said it's outside of the scope of what you have been assigned, God bless you, to do.

MR. KASUNIC: Okay. Then if our task is to work exclusively on particular classes of works, there is certainly, as was pointed out earlier today, there's a relationship within 1201(a)(1) of that class of works to uses, users and noninfringing uses with 1201(a)(1).

And there was also the comment that these class of works could be viewed as cutting across broad categories, and that use of the term "broad categories", being plural, wouldn't necessarily restrict the class to any one individual category. But, since this was used as a plural of all the categories, which is really the scope of all copyrightable works, that we could define a class of works as overlapping a number of different categories and basing that “class” on a particular use.

Since we have not really been offered any specific definitions for a class of works by copyright owners, why isn't this view a satisfactory way to go about this?

MR. PERLMAN: When you look at the language as a whole, and when I was an English major I was very much a believer in the new school of discussion of interpretation, which meant that you took a look at the words that you were given, and you started there.

And when we look at phrases like particular classes of works, the concept of particular certainly connotes to me a very specific analysis and a very specific treatment. If you're going to deal with a use that cuts across virtually

every classification of work, that to me is outside of the assignment and outside the intention behind the assignment.

MR. KASUNIC: Well, what if we look at a particular type of noninfringing use as related? The particular aspect of the class, is the particular use, and how that cuts across those categories of works?

MR. PERLMAN: Because you're talking about a particular use as opposed to the use of a particular class. That's why.

MR. KASUNIC: There were also some comments stating that we can only look at the particular adverse effects that are presently verifiable and specifically identifiable, but we do, again, have language in the legislative history that explains that this rulemaking -- and this is in the section-by-section analysis -- that the rulemaking may also, to the extent required, assess whether an adverse impact is likely to occur over the time period relevant to each rulemaking proceeding.

So if there is any ability -- which, in this particular time period is difficult to establish verifiable adverse consequences to the prohibition, since the prohibition hasn't taken effect -- wouldn't it seem only reasonable that we

look to some of these likely to occur adverse impacts?

MR. PERLMAN: Absolutely, but I did not hear any this morning that were likely to occur. What I heard and saw were great and vague fears, again, most of which were based around having to pay money even though the reality is that perhaps they would be paying less money and getting better access in exchange.

MR. WEISGRAU: I think that, yes, certainly you can look at that, but I think something you ought to apply in terms of an evaluation of the information is not what is possible, but what is probable.

So to be examining people's worst nightmares and fears and to have a rulemaking based upon that is simply to base rules upon individuals' paranoia. That doesn't make any sense to me.

There is no evidence that I've seen anyone produce that would substantiate their claims that things could move in this adverse direction. If you look at the Internet, we have a site where there are 70,000 previously protected images on the Internet. You could not gain access to this site without passwords and the like.

Now, what did we do? The trend is to go

the other way. We took all that protection off so that anybody can get in there at any time. There was a time when you bought a Microsoft program that you had to go through some contortions in order to install it, and it would blow up or something if you installed it twice, and they've taken all of that off.

I don't see any evidence in the software community, in the content community anywhere, I don't see anything happening anywhere that would lead one to believe that access controls are going to be put up in such a way that they're going to have this damaging effect. I mean could somebody give us one iota of evidence that would lead us to believe that there is even a small probability that this will happen? I don't see it anywhere.

MR. KASUNIC: Okay. One final questions for the both of you. You were talking about the constitutional aspects of this situation and, from the copyright owners' side, that there is a right to speak and, what goes along with that, is the right not to speak and to withhold certain elements. We've had some Supreme Court comment on that very issue.

But in the context that the Court has discussed that, it's been in regard to unpublished works -- that one has the ability not to publish and

not to put something forward. But once there is a distribution to the public, then certain other limitations and exemptions on copyright owners begin to kick in.

How does that fit in with this -- where works are distributed and where this is being put forward to the public -- and how can that right not to speak then be withheld?

MR. WEISGRAU: I think that, again, I understand exactly what you're saying, and I support it in theory in the direction you're going, but what I want to point out is that from my reading of all the language in the law, there's nothing that defines clearly when something is published.

So suppose I make 20 copies of a disk with access controls on it to be given to this limited group of people, and maybe it has my organization's strategic plan on it or something. Does this mean that a librarian can hack through the access controls if she gets a copy because she wants to know if there's anything the library might be interested in? Is that published or not published?

There's no bright line of what's published anymore, is there? I mean I can bring court cases in here that will show you that one judge rules 50 copies was published and another

judge rules 3,000 copies wasn't published. So I don't know when something is published and when it's not published, and I don't think that's the criteria.

The fundamental criteria is do I have a right to protect the information and to protect my speech when, where, and to whom I give it, and whether it's for a fee. I think that there is a right to free speech, and I believe in that right.

I don't think that there is a right to know. There is a right to pursue knowledge. There is no right to know. We are not interfering with their right to pursue knowledge, but sometimes you have to go through the hoops to get the knowledge.

But I think the more compelling constitutional argument is not just a free speech one, but again, if you set up a class of works, you are establishing a class of authors and/or rights owners who will not have equal protection under the law, and we've been to the Supreme Court before, and I'm going to tell you if photographs end up in that class of works because we don't know what classes of works are, but if they were to end up in there, we'll look for the case to make that point.

MR. SORKIN: May I add a point?

MR. KASUNIC: Yes, please.

MR. SORKIN: I must apologize because I'm going to be repeating something that I said before, but I think consideration has to be given to the thought in your thinking about this issue, given to the proposition that there is something very, very new about digitized works and the need to protect them, and that the notion of publication may not be as important in that context as it has been in the paper and analog world.

The DMCA or Section 1201 particularly in certain respects, I think, does not really fit comfortably into a copyright law as we knew it, and all of the amendments to the copyright law, and you can start with 1909 and you come down through 1976 and so forth; they're of a different nature.

And now we come to something which is startlingly different and startlingly different because the requirements, the obligations, if you will, to protect these kind of works are startling, and I don't think we can necessarily comfortably apply the old rules.

MR. KASUNIC: If I could follow up on that, Mr. Sorkin, and ask you –

MR. SORKIN: I had to open my mouth, I think.

(Laughter.)

MR. KASUNIC: -- that you had stated in your initial comment that anyone wanting to make a fair use of copyrighted work need only follow the same steps as he or she would in absence of technological protections, buy or rent a copy, subscribe to a transmission thereof, or borrow a copy from a library.

Well, is this the case now? You just stated that we're in a very different world and some of these things are very different. How do these two fit together?

MR. SORKIN: They fit together because we have put one foot and several toes of the other foot into this new work, but all you have to do is go to a bookstore, go to a movie theater, turn on your television set, and you'll see that all of these things, perhaps with a rare exception now and then -- the Stephen King book, for example, about which there's been a lot of discussion, was issued only in digital form, but the plan at least as I read about it was to issue it in paper form as well, and that will probably happen very shortly.

And in his musings Stephen King allowed as how paper is not going to disappear. So at least for I don't know whether to say the foreseeable future or for some reasonable period of time or for

a long, but for some time you can do all of these things, go to the library and get the book and so forth.

MR. KASUNIC: Well, following up on that, the bookstore and books, the analogy has been used in your comments as well as in the legislative history that access control is similar to the situation -- that one's free to go in and buy a book, but you're not allowed to break into the bookstore to get it.

How does that fit with the situation you had raised, the DCSS issue, and with the DVD situation, where here we have an owner, that lawful purchasers going into not the book -- we'll say the DVD store -- and buying that. Not breaking into the store, but going in and buying the DVD and then they find that the DVD is locked?

Isn't that slightly different from the analogy that Congress was initially thinking about? The purchasers have paid for something? What did they pay for?

MR. SORKIN: They've paid for the right to own that DVD and to view the content, if they have a licensed player. That's now where we come to the new world aspect of it because if you went into a store and bought just the CD or bought a video of

that same picture, you would be, by virtue of having that, creating the same order of danger to copyright protection as you do when you have a DVD if the DVD is not protected by virtue of the fact that it's in digital form.

So what the purchaser has bought, and it seemingly works for an awful lot of purchasers because DVD has been a very successful enterprise, to play it on a licensed player, and as I said before, that includes these days the Linux machine.

MR. KASUNIC: Well, how does the protection that is on the DVD protect access? I noticed that from your statement that some of the fears expressed by copyright owners in this digital age are cheaply duplicated, cheaply transmitted, and cheaply modified works. But all of those fears concern Section 106 rights. That's something that the conduct of circumvention does not prohibit. All we have is a prohibition against circumvention of access. In what sense does this technology that was applied to DVDs -- whether that's still an issue or not, it serves as an example for something that was an issue -- how did that protect access to the work as opposed to attempting to protect some of these other copy protections?

MR. SORKIN: I have a feeling we're

about to fall off the edge of my technological expertise, but what the access means is not as in the old days, acquiring the copy so that you can pick it up and hold it and take it out of the store. What it means is you can have access to the work included on the copy so that if you overcome that protection, you can play it on an unlicensed player or take it away and duplicate it.

MR. KASUNIC: Thank you.

MR. CARSON: Mr. Weisgrau and Mr. Perlman, can you give us some examples of the types of technological measures that photographers use to control access to their works?

MR. WEISGRAU: None.

MR. CARSON: You mentioned that you had to use passwords at one time.

MR. WEISGRAU: Yes, but that's a trend that's gone away. Now, most photography sites on the Internet and certainly, I think, most, if not all, CD-ROM disks which contain photography are simply accessible.

It's not inconceivable that if, in fact unrestricted access is abused, that photographers might not respond by controlling access again. All we need is a few more decisions like Kelly --

(Laughter.)

MR. WEISGRAU: -- which, you know, define a whole new world of fair use.

Most people that create works, whether they be corporate authors or individual authors, create them to give them wide exposure and have them be seen, sold, and to profit from them, and access controls don't necessarily lend themselves to that goal.

So I don't really know of any meaningful photography site or any photography product which has any access controls on it today.

MR. CARSON: That being the case, why do you care what we do?

MR. WEISGRAU: We care because if, in fact, the fair user community with the aid of decisions like Kelly, if that expands, if fair use, the whole concept, is expanded to a point where we find it intolerable, then in fact we could put restrictions on these devices and on these sites.

I'm not saying it's likely. At this point there's certainly no talk in the industry of doing that, but I'm concerned simply about not just -- we care because it could happen, because of what the government can do, and because still ultimately I think that this whole exercise is really dabbling in an area where you're tampering with people's

constitutional rights for equal protection.

I mean I'm not a lawyer, but I do think I'm a reasonable man, and I like the reasonable man theory of law, and I ask you to go out on that street and stop anyone and ask them this question. Do you think it would be okay for the Congress to pass a law which says it's okay for you to break and enter in order to find out what's inside a building in case you want to buy it?

And I think that most people would look at you and say, "What, are you crazy?" I think that most reasonable men would say, "You're crazy. Why would the Congress ever do something that says you can break and enter so that you can come in to see what I have? Ask me. I'll show it to you if I want to show it to you, and if I don't want to show it to you, it's my right not to show it to you."

So I think that there's a fundamental issue here that brings us to this table. It's not immediate impact on photographers. It's immediate impact on reasonable men and their rights under the United States Constitution that we're here about.

MR. PERLMAN: I live in a town where people still leave their houses and cars unlocked, but I grew up in New York City, and I'm damned if I'm going to do that. I want the ability to lock my

door when I want to lock it.

MR. CARSON: Okay. The next question is primarily directed at Mr. Sorkin if only because I think Mr. Perlman has answered it, but I certainly invite anyone to respond.

You were all here this morning. We had some discussion -- actually the testimony and the proposal of Professor Jaszi of a couple of days ago -- which, to paraphrase it, would ask us to create an exemption which would exempt any copies of works lawfully acquired by the person who feels the need to circumvent access control devices.

Do you have any problems with that kind of exemption? And if so, what are the problems?

MR. SORKIN: Yes.

MR. CARSON: Well, you've answered the first half of my question.

MR. SORKIN: First of all --

MR. CARSON: Mr. Sorkin, just make sure you're speaking into the microphone.

MR. SORKIN: I'm sorry. I'm sorry. Thank you.

I think we have to focus on the distinction between access and exercise of what we've been calling in all the papers and all the releases copying as being shorthand for all of the

rights in 106.

While access may be granted or may be taken, while a work might be acquired as in the case of the CD, that doesn't necessarily carry with it the right to do anything else.

If you're importing fair use into your question, then that as an affirmative defense might result in the acquirer being able to copy or take segments or do whatever it is that fair use would allow under the particular circumstances, but to devise such an exemption from 1201, I think, would be harmful to the structure of the statute in that it would kind of meld copying and access together, whereas they should be kept separate in my view, and also just destroy a substantial amount of protection.

MR. CARSON: All right. But I want to make sure I'm understanding what you're saying and you're understanding my question because --

MR. SORKIN: Maybe not.

MR. CARSON: -- because what we're talking about, I gather, is an exemption which would simply say if you have lawfully acquired a copy of the work, you have the right to circumvent technological measures that control access, not that you have the right to circumvent technological

measures that control copy and so on.

MR. SORKIN: Oh, yeah. If that's it --

MR. CARSON: Right.

MR. SORKIN: -- if that's it, I think in my view the access and the acquisition are the same thing, but I don't understand how your example would work, Mr. Carson because of the order of things.

You say if you have lawfully acquired. That seems to precede the circumvention of access.

MR. SORKIN: Well, I suppose one could imagine, and it's not my proposal, but I suppose one could imagine you go into the store and you purchase a copy of something. You take it home. You've legitimately purchased it, and yet there is some technological measure on there that you can't overcome without some kind of circumvention.

MR. SORKIN: Well, then I must confess to being lost in the technology here because there must be in your mind and perhaps in everybody's except mine a distinction between the access and the acquisition. If it's available in the store for purchase --

MS. PETERS: Let me add to your question. I think they were getting at persistent identifiers. So that if it was lawfully acquired the first time, but the way that it operates you

have to keep getting authorization for every time you view it --

MR. SORKIN: Oh, okay. That's DVDX, the DVDX kind of thing you're talking about?

MR. CARSON: Well, that might be one case.

MS. PETERS: Yeah.

MR. SORKIN: Or something like that?

MS. PETERS: But I thought that that's what they were after. They were talking about second access as opposed to initial access.

MR. SORKIN: Oh, I see. I'm sorry. I misapprehended what you were saying.

I think I would oppose that on the ground that the second access, so to speak, evidently the copyright owner wanted an additional charge for that, and there's no reason why that shouldn't be effective.

MR. WEISGRAU: Yeah, can I just --

MR. CARSON: Go ahead.

MR. WEISGRAU: It's a little confusing to me, too, but I guess I understand where the professor is coming from. I've listened to him before, and always been amazed.

It seems to me that if you have this lawful copy, you have with it the access, controls,

and things you need to access it. One of a copyright owner's rights is to determine the period of a license, and if this license to use this thing expires at a certain time and you buy it knowing that condition, then that's what you bought, and if you bought it not knowing that condition, shame on you unless it wasn't disclosed.

If it wasn't disclosed, take it back and get your money back. I don't think that that -- you know, again, you shouldn't get the right to break and enter because you don't like the deal you bought into.

Secondly, I mean, let's apply that to cable television. My wife heard that "The Sopranos" was a great program. So she subscribed to HBO on our cable system, proceeded to watch it for the season, and then when it was over she canceled HBO because she doesn't want to see it anymore.

Now, so we had lawful access to HBO. Does that mean I can go climb up the pole now and hook HBO up and use it again because I once had lawful access to it? I don't think so.

MS. PETERS: Or I think it had to do with -- another one was the CD-ROM that has the expiration date, and I don't think, Bernie, it applies to your products of entertainment. It's

much more informational products that are constantly being updated and sometimes --

MR. SORKIN: DVDX may be a DVD that simply had an expiration date on it. You bought it and you could play it for 24 hours, and unless you drop another nickel in somebody's slot --

MS. PETERS: Yeah, that's what.

MR. SORKIN: Yeah. Although my company didn't favor that because it was seen as, while it existed, it was seen as a rival to our DVDs, in principle I have no problem with that.

MR. WEISGRAU: I could see a situation where a time expiration might be not only -- certainly I think it's legitimate under the copyright owner's rights, but I could see a situation where it might be important.

Let's take scientific and trade journals, authoritative publications that are very concerned about the quality of the documents which they publish, and let's take it that science is a changing body of knowledge so that in any given two or three year period basic information that's contained in this authoritative journal on disk may well change. It may well no longer be active. There may be some reason to compel a person to not use old information if your reputation and your

reliability as a source of quality published material is dependent upon it being used in a timely fashion.

MS. PETERS: And if I'm an archive and my purpose is historical archiving, I just don't have it? I want to know what the situation was in 1990, and it's gone because things have changed and it's now 1995.

MR. WEISGRAU: You now don't have it? No, I think you do have it.

MS. PETERS: How do I have it if it has an expiration date?

MR. WEISGRAU: You have to get a license to get past that expiration date.

MR. CARSON: If a license isn't available because that particular product isn't marketed anymore, then what should the situation be?

MR. WEISGRAU: Because that particular product isn't marketed anymore --

MS. PETERS: It's been withdrawn. It's stopped.

MR. WEISGRAU: -- I think that you're in the same quandary that a lot of people are in. You no longer have the information available to you. Not every piece of information that's ever been recorded is continually available to everyone.

MR. CARSON: But sitting on this piece of plastic I have, why shouldn't I be able to do what I need to do to get to it if there's no other way to do it?

MR. WEISGRAU: I don't think that that -- what harm do you demonstrate if you can't get to it? Now there's something you wanted to know that you once new? I mean --

MR. CARSON: I'm writing a treatise on the history of science.

MR. WEISGRAU: Right.

MR. CARSON: I'd like to be able to reconstruct what the state of scientific knowledge was in 1990. I can't do that. That knowledge has been withdrawn from circulation.

MR. WEISGRAU: Well, first of all, I certainly don't see that example ever existing, but if it did, the first question I'd say is are you really sure that there's no other place you can get this information? I mean, this information exists nowhere else?

MR. CARSON: Well, it's my hypothetical.

MR. WEISGRAU: That's to know.

(Laughter.)

MR. SORKIN: Although, if I may, one of the greatest books I've ever read was a treatise

called "Politics and the Constitution of the United States," by W.W. Crossky. Just fantastic, and I read it in about 1948.

I've been trying to find a copy ever since, and they do exist, but they cost about $250, which for me means they don't exist. It's like in your hypothetical.

That happens in the paper world as well, you know. It's nothing new, and it may happen, may well happen less in the digital world unless some of the owners do things that are eminently foolish because there's no reason why that stuff should disappear. It should be kept, and you can use your credit card to get it, and so forth, I would think.

MR. PERLMAN: I think you're also going down a technological blind alley. CD-ROMs were obsolete before they ever hit the shelves of the dealers. They will in the relatively near future not exist anymore. What you will have is on-line access to information.

If you have a right to that access and if you either have a fair use right or a licensed right to archive the information, then you need to archive it as it changes because the database, the Web site as it exists today is not going to be the Web site as it exists tomorrow.

MR. CARSON: Do I have a right to archive it?

DR. BLANK: You tell me. If you have access to it, perhaps you do. If you have --

MS. PETERS: It's an open access situation.

MR. PERLMAN: Open access or a licensed? More likely a licensed access which will tell you whether you have the right to archive it, and if you don't automatically, then it's up to you to negotiate a right to archive it.

MR. WEISGRAU: And the other question with regard to your earlier example, when you bought this disk for your archive, did you know that it would expire, that the time would expire; that some day that disk would no longer be usable?

MR. CARSON: Well, like most people I probably didn't read the fine print. So no.

MR. WEISGRAU: Well, in that case, you know, you're a victim of your own foolishness, but in fact, if you knew that and you made that transaction, then shouldn't you be bound by it? I mean didn't you when you purchased it enter into a contract?

MR. CARSON: I follow the reasoning. We could have an interesting debate on this for all

afternoon.

MR. WEISGRAU: Sure, we could.

MR. CARSON: Let's move on to another subject. You were all, again, here this morning, and one conversation we had with the panel this morning was whether one can define a class of works in part by reference to the particular use of the work or the type of use of the work that is in question.

I think the consensus of the panel this morning was, yes, you should be able to, and in fact, it doesn't make sense to do anything other than that. I'd like to get the reaction of this particular panel to that proposition.

MR. WEISGRAU: Can you define a class of feet by the streets they walk on? I don't think that you can define a class of work by the use to which it's put because any given -- let's take a photograph. A photograph can be promotional. It can be informational. It can be truly documentary. It can be conceptual. It can be historical. It could be of sports. It could be of historical. It could be of news. It could be of products.

How are you going to define -- are you going to define the class of work as photograph? Well, that's too broad, isn't it, to just say that

all photographs can be accessed?

I don't know how you can define a class of work by the use. I mean it just doesn't make any sense to me. I don't understand how you could possibly do that.

What you're doing, what they're saying to you is they're playing what I consider to be a mind game. Let's make them believe that works and uses are the same.

So what they're really asking you to do is to make a judgment based upon a class of use, not a class of work. Do you get where I'm going with this? They're saying, "Look. We can't make an argument here about class of works. There's no way we can make an argument. We don't have anything to stand on. So we're going to do two things. Number one, we're going to attack the bench, and number two, we're going to try to make you believe that something is what it is not."

MR. PERLMAN: If you were supposed to classify tools, you can hammer a nail in with a hammer, and that's its job, but you can also hammer a nail in with a wrench, with a screwdriver, with a pair of pliers. That doesn't turn them into hammers.

MR. WEISGRAU: And in Title 17, I think

the word "work" -- I mean the word "work" exists, and I believe the word "use" exists somewhere in the --

MS. PETERS: Fair use.

MR. WEISGRAU: Fair use. I mean, the word "work" is statutory. You're going to now change it to include or to be influenced by the word "use"? I don't see how you can do that. I really don't see how you can do that with any fairness whatsoever.

I'll think of another constitutional argument about it.

MR. CARSON: What's your reaction, Mr. Sorkin, to the problem?

MR. SORKIN: Well, the same reaction and for almost the same reasons. In addition, use is a function of somebody doing something, and there will be a lot of somebodies who will do different somethings with every kind of work in the copyright lexicon.

So are we suggesting -- let's assume that we come to a very broad definition, unlike what the statute requires, that we use literary works. Well, some people will use literary works for reading for pleasure. Some will use them for instruction. Some will use them as a basis for

doing other works. Some will use them for public performance, and more imaginative people than I can think of other things.

But what then becomes the class with which you're dealing? And let's assume that you decide to apply a definition linked to use and you say, well, through all literary works which are used for public performance.

How do you limit the removal of the 1201 protection to those literary works instead of having it spill over to others?

So I think what we have is kind of a trap door with that kind of thing, and it strikes me that the notion of use in this context may be the way of sneaking some kind of fair use idea into a place where it doesn't belong.

MR. WEISGRAU: I think that fundamentally they're playing with the English language this way. A work is an object or a subject, and use is an action. So you can't define a subject by an action that you take with the subject.

MR. CARSON: What I'm hearing from all three of you, I gather, is that a particular class of works has to be determined with respect to something inherent in the nature of the work itself.

MR. WEISGRAU: I think so.

MR. SORKIN: I think that's right.

MR. CARSON: Then how do you fit that together with what the purpose of this revision is, which is to determine whether there are particular kinds of works with respect to which the prohibition on circumvention of access control measures is making it impractical of impossible for users of work to engage in noninfringing uses.

Isn't ultimately the focus -- doesn't the focus ultimately have to be on the uses, the noninfringing uses?

MR. WEISGRAU: Then they ought to write the statute that way.

MR. CARSON: Are you telling us the statute makes no sense?

MR. WEISGRAU: I'm not going to go so far as to say it makes no sense. It's very confusing.

MR. PERLMAN: Res ipsa loquitur.

MR. SORKIN: You know, the focus has to be on the particular works as to which noninfringing uses can't be made. I don't think the statute is asking you to determine what are the noninfringing uses that can't be made.

MR. CARSON: How can we determine the

type of works if we're not thinking about what uses might be noninfringing that would implicate the --

MR. SORKIN: Well, that's one of the difficulties with the formulation of the statute, one of the many, but again, to put it in terms of an example that doesn't really work because I don't think anything works here, but you might determine that musical works, if protected by the 1201, musical works if protected by 1201 cannot have any noninfringing works -- I'm sorry -- noninfringing uses made of them, and that would fulfill the statutory requirement.

That particular formulation I don't think would make any sense, but I can't think of any that would.

MR. CARSON: It sounds like you're all telling us that we're wasting our time in this endeavor.

MR. WEISGRAU: Well, you said it, but I think you're right.

MR. PERLMAN: You have been given an unenviable task.

MR. CARSON: Well, isn't it incumbent upon us to try to find some meaning in the words that we're being asked to apply to make sense out of it or should we just say, "It makes no sense, and

therefore, we come to the conclusion that there can never be any exemptions"?

MR. PERLMAN: I think that you are doing exactly what you should be doing, which is the very best that you can with the words that you've been given, and based on the information that you've been given this morning and presumably in the other two days of hearings, you've been given no evidence on which to find that there is an exemption that is applicable to any particular class of work.

MR. WEISGRAU: And I think that, you know, leadership is all about taking difficult positions and stating them when it's necessary, and the bottom line here is they didn't tell you to find exemptions. They told you to examine the situation, to evaluate and whether there should be.

And I think that what I'm hearing after looking at all of this testimony and hearing all of the statements is that your report should be there are no class of works that should be exempt. Nobody said you have to recommend exemptions. You can come back and say there are no class of works exempt.

MR. SORKIN: What you have just said sound kind of hopeless and may sound very dead end, but the situation could well change diametrically, 180 degrees when the statute goes into effect, and

you could take a look and see what the world is really like and how different works are or are not available for noninfringing uses.

MR. WEISGRAU: Again, I mean, talking about what you should recommend, I'm going to quote the Register from page 2 of her comments. "It is clear from the legislative history that this rulemaking proceeding is to focus on distinct, verifiable, and measurable impacts."

What I'm saying is having heard it all, I have not seen one iota of evidence that there are any such impacts. Therefore, why do you need to speak to a class of works if there is no demonstration of a distinct, verifiable, measurable impact?

MR. CARSON: Okay. One final subject I'd like to raise, as most everyone in this room is aware, the vast majority of comments we received in this rulemaking related to the DVD situation, and like it or not, Mr. Sorkin, you're the first person to appear here who really, I think, has made that a centerpiece of your testimony, at least a very major part of your testimony and of your written comments.

First of all, you mentioned earlier, and I just wanted to explore this a little more, that there is now a license available, and I gather what

you're saying is that people in the Linux community now, just like anyone else with any computer running Windows '95 or '95 or an Apple computer, whatever, can do exactly the same thing with their DVDs.

MR. SORKIN: Yes.

MR. CARSON: I wish we had someone from the other side here to tell me that that is the case because in that case, we wouldn't have to ask you anymore questions perhaps on this subject.

MR. SORKIN: I suspect you'd be happier if somebody told you it's not the case.

(Laughter.)

MR. CARSON: We'll have an opportunity in a couple of weeks when one of the preeminent spokespersons for that point of view will be here, and if we're told that's not a problem anymore, I'll breathe a sigh of relief.

On the assumption that perhaps it's not that simple --

MR. SORKIN: I'm sorry? On the assumption?

MR. CARSON: On the assumption that it's not that simple, that the availability of this new license and the implication of this new license hasn't resolved the problem, first of all, can you tell us? None of us has great technical expertise,

and we recognize that your technical expertise may not be much greater, if at all.

The whole DECSS controversy, first of all, I gather than the CSS coding, if that's what it is --

MR. SORKIN: Yeah.

MR. CARSON: -- has a purpose of controlling access; is that correct?

MR. SORKIN: Right.

MR. CARSON: Can you elaborate on exactly what it does in a nontechnical sense?

MR. SORKIN: Well, the best I can do is to say that if you took that DVD and played it on, let's say, Linux or any unlicensed player, you'd get nothing or distortion, but nothing that would be worthwhile.

MR. CARSON: What is the purpose of prohibiting access to the content on that DVD when it's placed in a nonlicensed player?

MR. SORKIN: Because if the DVD were not protected, then you could put it in any kind of player, licensed or nonlicensed, and you can not only play it, but you can also duplicate it.

MR. CARSON: All right. Well, aren't we in the realm of a different subsection of Section 1201 when we're expressing those concerns?

MR. SORKIN: Yes.

MR. CARSON: So why should we care about protecting; why should we care about upholding a provision of the law that restricts access to DVDs to people who you'd love to have had the access, just not on that particular machine?

That wasn't a very articulately expressed --

MR. SORKIN: Are you saying why should you care in this proceeding?

MR. CARSON: Yes. I mean, we're here to determine whether we should exempt any classes of works.

MR. SORKIN: Right.

MR. CARSON: And one could argue that motion pictures on DVD are a candidate for that. You may disagree on the merits. Can we say that?

MR. SORKIN: Sure.

MR. CARSON: It's a question of relevance right now.

MR. SORKIN: Yeah. I'm not suggesting, and if I did, I didn't intend to do it in my paper or comments, that it's in any way determinative of what this panel should do, of what your office should do. The reason I brought the Reimerdes case into this is simply as an example of what's

happening in the digital world and an example of how dangerous it is in this case, sad to say, even with protection.

As you know, I'm sure, what happened to the CSS, the content scrambling system, was that a bright young guy in Norway about 18 years old hacked his way through it, and it's that kind of thing that I used as an example and perhaps didn't do it well, but used as an example of the very critical need for the kind of protection that 1201 offers in both areas, both copying and access.

MR. CARSON: Yeah, go ahead.

MS. PETERS: On your CSS, it has both access controls and copy controls, right?

MR. SORKIN: I believe so, yes.

MS. PETERS: Is the copy control "do not copy anything" or is it that --

MR. SORKIN: Yeah.

MS. PETERS: -- the copy control is you can make one copy, but you can't make the second?

MR. SORKIN: I don't know the answer to that, Ms. Peters. I think --

MS. PETERS: What I was trying to get at --

MR. SORKIN: Like SCMS you mean.

MS. PETERS: What I was trying to get

at, we heard this morning, and we've heard it before and it's in the comments that where you have access controls for which there is a prohibition for individuals to break that and copy controls where there is no prohibition, that in many instances these really have merged and, therefore, that's a problem because there is no prohibition on the copy, but there is on the access.

So to the extent that they're put together in the same thing, that is a problem, and I was trying to get at is this one of the situations where the access control and copy controls make it so that you can't --

MR. SORKIN: I understand the question.

MS. PETERS: -- make fair use at all.

MR. SORKIN: If one of my colleagues is still here and I can call on him for assistance.

MS. PETERS: which one are you looking for?

MR. SORKIN: Steve Metalitz.

MR. CARSON: We'll have the pleasure of your formal appearance on a subsequent occasion, but we welcome you for purposes of assisting Mr. Sorkin.

Steve Metalitz.

MR. METALITZ: Thank you.

I think your question gets to another

issue, which is whether there is an exception to 1201(a)(1) based on the motivation or the reason why an access control measure has been adopted, and I don't think there's really any basis in the statute for that.

To the extent that CSS is an access control, I think Mr. Sorkin described the way in which it's an access control. Then presumably its circumvention will be a violation of 1201(a)(1), and the trafficking in the DCSS hack already is a violation of 1201(a)(2) as the court found.

Now, I'm not sure whether the court also got into the 1201(b) issue because for trafficking purposes it doesn't really make a difference --

MS. PETERS: No, I agree.

MR. METALITZ: -- whether it has access control or copy control.

MS. PETERS: I agree. You heard all the comments about that you really can't distinguish between access controls and copy controls and merger. Have you got any comments on that argument?

MR. METALITZ: Well, the only comment I would make is that so far the courts have not experienced this difficulty that some of the witnesses perceive, and I think I can't say that it would never arise, but I think it's a manageable

distinction because the courts seem to have been able to manage it.

MS. PETERS: Okay.

MR. WEISGRAU: May I just give a practical reason --

MS. PETERS: Yeah, sure.

MR. WEISGRAU: -- why you should not make DVDs containing motion pictures an exempt class of work, a practical reason?

And that is that it took more than ten years for the VHS to become a household item, for it to really be adopted as a standard for use in the United States. The hardware base of DVD players in the United States is minuscule. Nobody is going to get rich making DVDs right now because there's not enough people to buy them.

And it's going to be years before there is enough hardware base to make it profitable enough to produce a work on DVD only. So in the interim -- I say "in the interim" because I think you're going to go through this process in three more years, right? -- all of these works, as Mr. Sorkin pointed out earlier are on television, in the theaters, and on VHS. So why take this one class of work?

They can go, but let them get a videotape. DVD is not the only alternative when it

comes to a motion picture. In fact, it's probably the least accessible alternative.

So I would say you have to wait. Why not wait and see what happens before you would say it's a class of work that should be exempt?

MS. PETERS: Does anyone else have any questions?

(No response.)

MS. PETERS: If not, our hearings in the District of Columbia are closed, and I want to thank all the witnesses and even those who sat in the audience and stayed through.

Thank you very much.

(Whereupon, at 3:50 p.m., the hearing in the above-entitled matter was concluded.)