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I would like to add a few comments on the hearings both in California and Washington DC. I have listened to all the Online testimonies and was in Washington DC in May at the time of the hearing there. I also reviewed the Congressional Records of the discussion that lead to the passage of the DMCA. It's been quite an education, and I was very saddened by much of what I heard in the hearings. I believe that many issues had been misrepresented by various interests at these hearings. I also believe that some had actually perjured themselves in their testimonies.

For one thing, it is very clear from the record that Digital Millennium Copyright Act would not have been passable by Congress if assurances of protection of Fair Use was not guaranteed. Specifically, the Congressional Record clearly states:

Congressman Ashcoft:

"First, with respect to 'fair use,' the conferees adopted an alternative to section 1201(a)(1) that would authorize the Librarian of Congress to selectively waive the prohibition against the act of circumvention to prevent a diminution in the availability to individual users (including institutions) of a particular category of copyrighted materials. As originally proposed by the Administration and Adopted by the Senate, this section would have established a flat prohibition on the circumvention of technological protection measures to gain access to works for any purpose, and thus raised the specter of moving our Nation towards a 'pay-per-use' society. Under the compromise embodied in the conference report, the Library of Congress would have the authority to address the concerns of the libraries, educational institutions, and other information consumers potentially threatened with the denial of access to categories of works in circumstances that otherwise would be legal today."

Obviously, we see that Congress specifically wants to preserve Fair Use as it was legally binding before the advent of the DMCA. Therefore, everywhere it was questioned what the intent of Congress was in issuing an authority to the Library of Congress, the Library of Congress's scope of rule, and it's power to allow circumvention of Access Controls, especially those pointing to the Congression record, if they are described as being restrictive, clearly the record as quoted shows us that Congress, while it wanted to give Copyright holders more protection, it was not to be at the expense of Public and that the Library of Congress is fully empowered to take action to preserve Fair Use. Congress could not create a formula to do both and simply punted the issue to the Library of Congress. The Library of Congress has been given broad powers in this case, interpretation of the word "Classes" in the law notwithstanding.

Another example where facts have been twisted to fit peoples agenda's is the repeated thought that copyrighted material is property. This is

completely Constitutionally, and morally wrong. People can not own thoughts or cultural works, even works they create. What they own is a limited license of copyright. This comes to the core of what Copyright is. I do not need to point out the Constitutional premise for Copyright, but for completion I'll quote the appropriate passage:

"To promote the Progress of Science and useful Arts, by securing for Limited Times to authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The key word of this paragraph is the word "Limited". When the Founding Fathers wrote the Constitution, they already had examples of Copyright Laws from Europe which gave unlimited Copyright to authors and inventors. Our founding Fathers rejected this format, because they perceived, correctly in my opinion, that Human society requires sharing of information. Congress can tomorrow repeal all copyright law, and then the owners of Copyright would have no license to control material they created. Congress can not by law prevent property rights or the right of free speech. This is the foundation of Fair Use.

On the other hand, when an individual purchases or legally aquires a copy of a work, they own that copy, lock stock and barrel. Their right of ownership is protected Constitutionally by Article 4 of the Bill of Rights. Therefore, Congress can not pass any Law which diminishes the rights of a property owner of their property, even if that property is a a copy of a work which is protected under the limited license which the Government issues to Copyright holders. Essentially, the Courts have ruled repeatedly, most recently with the Sony Betamax case, but in other cases as well for over 200 years, that individuals have an inherent right to make a fair use of copyrighted materials. Congress only echo's in section 107 the Constitutional guarantees the public enjoys as a Constitutional right. Section 107 was not repealed by the DMCA. It states explicitly:

"Sec. 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work,
including such use by reproduction in copies or phonorecords or by any other means specified
by that section, for purposes such as criticism, comment, news reporting, teaching (including
multiple copies for classroom use), scholarship, or research, is not an infringement of
copyright. In determining whether the use made of a work in any particular case is a fair use
the factors to be considered shall include -

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

But this is not the complete list of protections afford by the Constitution to people of their property and freedom of speech. It's at best a guild line. Clearly people had always been allowed to make copies of their property for noncommercial purposes, and never did the copyright holder have exclusive right to determine how copyrighted works are to be used or distributed. This legal fact was confirmed by a dozen Copyright specialist in NYC in a panel discussion of the Internet and Copyright given by the NY Law SIG, in NYC last year, most of which came from the recording industry in NYC.

The DMCA does not permit Fair Use and Section 107 to be altered. Neither the Congressional Record or the text of the law itself allows for Fair Use to be exterminated. In fact, Congress hasn't been given the authority to reduce the Property Rights of owners to their copyrighted materials. Copyright licensure can not eliminate Fair use. It's not permitted to prevent copying.

In the testimony by Richard Weisgrau of the American Society of Media Photographers, he said that breaking the access control mechanism for fair use purposes is the same as breaking into his Photo business to to make Fair Use of a Photo on the wall. Common Sense, and I consider myself a person of common sense, would say that this analogy is warped. He owns a physical photo that is hanging on his wall. If I break into his store, I'm committing breaking and entering, and I have no fair use of HIS photo, because he has legal procession of it. If I own it and it's in my legal procession, then I would have Fair Use rights to it.

The case is just the opposite of the situation of what he describes. I purchase a DVD and break the access control to see it and copy it to my hard drive for archival purposes. A control or legal remedy which prevents this is as if Richard Weisgrau breaks into my home and steals my disk because I want to make fair use of it. If I want to play the thing on my blender, that's completely MY BUSINESS. It is not Richard's Business. Richard seems to fail to see where my home begins and where his business ends. If I want to play it on Linux, that's my business. If I want to make multiple copies of excerpts of it for educational instruction in a Classroom, Section 107 says specifically that this is my right. The DMCA is not to destroy that right. Essentially, the statement made that Fair Use is a privilege, is completely wrong. It's a constitutional right. Copyright is the privilege.

Repeatedly in the questions and answers, the Library of Congress's panel asks for examples of where Fair Use was prevented. I've been prevented repeatedly from Fair Use of DVD's because I can't copy them in any reasonable fashion. DVD's also obstruct my Fair Use of playing them on Linux, or on my blender if I want to. I use nothing for a computer platform other than Linux. Linux has a different Business model than Operating systems like Windows. Part of it's business plan is making sure source code is available for debugging and interopertability. This is a new business model forged out of the Internet. The MPAA does not

that the right to obstruct this model or prevent my Fair Use. I can not see my DVD's. I can see my VHS Tape and view The New York Times, but I can not see a DVD at all.

Furthermore, the basic information for a Computer is contained in a copyrighted Read Only Memory chip called a BIOS. If they made an access control device to the Bios, I would not be able to run Linux at all on the computer without cracking the access control. Such an event would destroy the 100 million dollar Open Source industry in it's cradle. In would not exist in 3 years if the Library of Congress doesn't act today to protect it on this front from abuse of copyright that prevents fair use. If I purchase the computer, I own it and it's mine. No one can tell me I HAVE to use it with Windows, or any other operating system. That would be a violation of my property rights ie: my Fair Use Rights.

Congress itself recognized the falsehood of the DMCA as a piece of copyright law. They considered there legal premise for it under the Commerce Clause. Under the copyright provision, it has a difficult Constitutional test. I don't think that a Commerce power can be used to destroy property protection and copyright protections afforded to owners of Copyrighted material under the Constitution. And thus the Library of Congress has been assigned the duty of protecting the Constitutional Rights of the Public when they legally aquire Copyrighted Material.

In the Testimony by Bernard Sorkin of Time Warner and Motion Picture Association of America, he states that Linux has a legal DVD. I testify before you that this is not true, and I believe that Bernard Sorkin is completely aware of that. Creative Labs had worked with the Open Sourced community to develop one for an old player no longer available on the market. After the arrest of Jon Johansen in Norway after the release of DeCss, Creative Labs was force to freeze their co-operation with the Open Sourced community. Creative Labs told me this at the Linux Expo in NYC this summer. They told me they were pressured to end the relationship with the Open Source community on the software needed for the new DVD drive that they currently have on the market. As a result, there is no current legal DVD player for Linux. If the MPAA isn't aware of the pressure put on Creative Labs, then who did it?

Lastly, I would like to address some of the issues brought up by Adobe and others. They say that allowing Fair Use rights to citizens would undermined their business and be harmful to the American Economy. How can they make these conclusions? Wide distribution of Musical works over radio, through Disk Jockeys at parties, and the simple sharing of records and tapes has created fortunes for the Music industry. In fact, the Industry itself has abused it's creative artists repeatedly to the point where the Beatles created their own Distribution Company, Apple Records, Prince has refused to live up to his contract because the record company was censuring his work as a creator, and the NY Times reports on Sunday June 11th that several major artists are choosing to distribute their work through Napstar, a program involved in a court battle because it permits the distribution of Music without the permission of Record Companies. They have accused the record companies of abusing them.

Abode admits to make nearly huge in profits in it's opening testimony. So obviously they are making tremendous profits. And yet Adobe has been

one of the worse abusers of the copyrights of any software company. They were so abusive of their Post Script format that HP, Apple and Microsoft all had to create alternate fonting formats to by pass Adobe's abuses. They charge rates for their software, Pagemaker, Photoshop and Illustrator, so high that they suppress the economic development of impoverished groups around the country from entering into the market place with usable skills. Each cost over $500 a copy and there is no personal use versions with more reasonable costs. Each is an essential tools in New York media and advertising sectors. And these sectors are now closed out to the poor.

Most importantly, it's not the purpose of Copyright to protect individual companies or sectors of the economy. It's designed to serve the public good. It can't be in the publics good eliminate Fair Use under the guise of Access control. We have no idea where the next trillion dollar industry is to turn up. It loks like it might be Open Source and hand held devices. Preventing Fair Use to protect Adobe is suppressing the next great innovation.

The internet has reduced the cost of information to the public. This has been the largest revolution in information and communications since the Guttenburg Bible. What Adobe and Time-Warner want the copyright office to do is stand silently while they take extra legal measures keep the status quo in the cost of information. They are asking the Copyright Office to ignore the current abuses of fair use so that they can continue to control the flow of information that every American sees and hears, while making a large profit on it in the process. The authors and inventors tend to see little of the profits derived by the creation of the Arts and Discoveries they make.

At a minimum, in order to protect the public and the right of Fair Use, the Copyright Office needs to give an exemption to the following Classes of Works.

a: Any work which is distributed and where the access control measure is separately distributed, such as in the case of DVD's there the disk is purchased, but the control mechanism is in DVD player.

b: Any work where personal copying is not available for Fair Use.

C: Any work not currently supported or available through the Copyright Holders which had previously been made available to the public. For example the copyrighted works of old video games or old software programs need to be made available are reasonable cost or one should be allowed to break through access controls to copy it for continued usage on new platforms.

D: Any work where an interface is not available for universal interopertatability so that anyone can create a device for it's access and Fair Use.

Universities are currently engaging in relationships with publishers which threatens the existence of paper books on materials in various areas of Human Knowledge, such as Medicine, Electronics or Dentistry. Students, Professionals and the public are loosing their fair use access to important areas of knowledge today. They are loosing their second

sales rights and rights to annotate their books, or copy parts of it for study or instruction. This is the condition today and it is occurring through DVD technology. In some ways, these smaller publishers are a greater threat to the public interest then even Time-Warner. And I implore the Copyright Office to act now to insure that information is democratically distributed today. As it is, nearly the entire human accomplishment of the 20th Century is still controlled by copyrights. These copyrights are under the control of a small number of conglomerates. Without Fair Use, we can not be assured of retaining the history of our people, except by a small band of elites. Without protecting the Fair Use rights of people as it is being unquestionable assaulted now in the Linux/DVD and University/Textbook issues, civilization is at risk. One thing Sorkin was correct about was that Time-Warner is a threat to an Open Society. I can not trust the same industry which has been convicted of anti-trust activity in the Movie business in the 1950's, which tried to put subliminal advertising into movies in the 1960's and has abused their artists and business partners for 50 years with the sole key to access and copy permissions to the great bulk of cultural artifacts of the 20th Century and what will be created in the coming years.