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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Tuesday, May 2, 2000

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

BEFORE:

MARYBETH PETERS, Register of Copyrights

DAVID CARSON, ESQ., General Counsel

RACHEL GOSLINS, ESQ, Attorney Advisor

CHARLOTTE DOUGLASS, ESQ., Principal Legal Advisor

ROBERT KASUNIC, ESQ., Senior Attorney Advisor

I-N-D-E-X

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

10:10 a.m.

MS. PETERS: Good morning. My name is Marybeth Peters. I am the Register of Copyrights, which means Director of the United States Copyright Office. I welcome you to the first of three days of hearings here at the Library of Congress. Today, tomorrow and Thursday we will hear testimony which generally we'll begin at 10:00 in the morning and generally will begin at 2:00 in the afternoon, although I have a crisis this afternoon, so this afternoon we're actually going to begin at 2:30.

Two weeks from Thursday we will hold another day and a half of hearings at Stanford University in Palo Alto. Those dates are May 18th and 19th. A schedule for all five days of the hearings is available today and is also available on the Copyright Office web site.

As I think all of you who are here know, these hearings are part of an ongoing rule making process mandated by Congress under Section 1201(a)(1) of Title 17 of the United States Code. Section 1201 was enacted in 1998 as part of a Digital Millennium Copyright Act. It provides that no person shall circumvent a technological measure that effectively controls access to a copyrighted

work. However, this provision does not go into effect until October 28, 2000, two years after the date of enactment of the DMCA.

Section 1201(a)(1) provides that the Librarian of Congress may exempt certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works through this rule making procedures. The purpose of our proceeding is to determine whether there are particular classes of works as to which users are or likely to be adversely effected in their ability to make non-infringing uses. They are prohibited from circumventing technological access control measures.

Pursuant to the Copyright Offices' notice of inquiry published in the *Federal Register* on November 24, 1999 the Office has receive 235 initial comments and 129 reply comments. All of these are available on our web site for viewing and for downloading.

After the hearings here and at Stanford we will accept a final round of post-hearing comments. These post-hearing comments are due Friday, June 23rd. In order to allow interested parties adequate time to respond the hearing testimony the Copyright Office intends to post the

transcripts of all of the hearings on our web site as soon as they are available. We also intend to record the testimony for streaming and/or downloading from our web site and we expect that those recordings will be available before the transcript. The transcripts will be posted on the web site as they are originally transcribed, but the office will give persons testifying an opportunity to correct any errors in the transcripts and when those corrections are received we will put the corrected transcripts on the web site.

Those of you who are here to testify have already been advised what we intend to do. And, by you appearance we understand that we have your consent to do this. The comments, reply comments, hearing testimony and post-hearing comments will form the basis of evidence for my recommendation to the Librarian of Congress.

Before making that recommendation I am to consult with the Assistant Secretary for Communications and Information of the Department of Commerce's National Telecommunications and Information Administration. We have already begun those consultations and expect to have more discussions with NTIA after the hearings.

After receiving my recommendation the

Librarian will determine by the October 28th deadline whether or not there are any classes of works that shall be exempted from the prohibition against circumvention of the access control measures during the three years, beginning October 28, 2000 to October 28, 2003.

It is clear from the legislative history that this proceeding is to focus on distinct, verifiable and measurable impacts. Isolated or *de minimus* effects, speculation or conjecture, and mere inconvenience do not rise to the requisite level of proof. Any recommendations for exemptions must be based on specific impacts of particular classes of works.

The panel will be asking some tough questions of the participants in an effort to define the issues. I stress that both sides will receive difficult questions and none of the questions should be seen as expressing a particular view by the panel. It's merely a way to elicit more information. This is an ongoing proceeding and no decisions have been made yet as to any critical issues in this rule making. The purpose of these hearings is to further refine the issues and to get as much evidence as possible from both sides.

In an effort to obtain all the relevant

evidence the Copyright Office reserves the right to ask questions in writing of any participant in these proceedings after the close of the hearings. Any such written questions that we ask and the answers that we receive will be posted on our web site.

What I would now like to do is introduce our panel. To my immediate left is Davis Carson, the general counsel of the Copyright Office. To my immediate right is Charlotte Douglass who is a principal legal advisor to the general counsel. To her right is Rob Kasunic, senior attorney in the office of the general counsel. And, to my extreme left is Rachel Goslins, attorney advisor in our Office of Policy and International Affairs.

Having begun the hearing with my introductory statement and our introduction of the panel, let me now turn to our first panel of witnesses and I'm very pleased that you are all in place and we have Peter Jaszi, who is representing the Digital Future Coalition. We have Sarah Wiant, who is representing the American Association of Law Libraries and from the D.C. Library Association we have Betty Landesman.

I assume that you have worked out an order amongst yourselves or if not, do you want to go in the order that I --

MR. JASZI: We'll go with the order --

MS. PETERS: With the order I announced. Okay. Peter, it's yours. Thank you.

MR. JASZI: Thank you very much.

The Digital Future Coalition consists of 42 national organizations, including a wide range of for profit and non-profit entities. Our members, a list of whom is attached to my written testimony, represent educators, computer and telecommunication industry companies, librarians, artists, software and hardware producers, and scientists, among others.

Organized in the fall of 1995, the DFC took an active part in the discussions that led up to the conclusion of World Intellectual Property Organization Treaties in December 1996, and to the final passage of the Digital Millennium Copyright Act implementing those treaties in October 1998.

I speak for the membership of DFC when I say that throughout the process our paramount concern was to assure that however the United States Copyright Law might be modified to suit the conditions of the new technological environment it would maintain its traditional balance between proprietors' control rights and consumers' use privileges, including, but not limited to, so-called

fair use. Thus, we were gratified when the WIPO treaties, in language unprecedented in the annals of international intellectual property law, specifically recognized the need to maintain a balance between the rights of authors and the larger public interest, in addition to calling for party states to provide protection for and, remedies against the circumvention of, technological protection measures.

At the same time we were concerned that so-called anti-circumvention legislation had the potential to disturb that balance significantly, as least at where the law of the United States was concerned. Section 1201(a)(1) of the DMCA, if enforced as enacted, would do just that. As it stands, Section 1201(a)(1), bolstered by the provisions of succeeding sections provides content owners with the legal infrastructure required to implement a ubiquitous system of pay-per-use electronic information commerce.

The basis for this statement is simple and self-evident. Technologies now exist that permit information proprietors to continue to regulate access to digitized copies of content after those copies have been lawfully acquired by others, whether on pre-recorded media or via an Internet

download. In today's technological environment the fact that Section 1201(a)(1) prohibits circumvention of technological measures controlling access to information, rather than those protecting against its unauthorized use is of little real significance to consumers.

Indeed, in this proceeding the joint reply comments of the American Film Marketing Association and 16 other content industry associations make it clear (at page 21) that their business plans go beyond implementation of access controls for initial binary permissions or denials of access. In addition, they describe “second level” access controls that allow, and I quote, "management of who can have access, when, how much and from where."

At the heart of this rule making is the inquiry into whether users of copyrighted works are likely to be adversely effected by the full implementation of Section 1201(a)(1). Necessarily, such an inquiry must be speculative since it entails a prediction about the future. However, the stated commitment of the content industries to the technological implementation and legal defense of second level access controls is the best available evidence of the potential for adverse affectation.

This is because if circumvention of second level technological access controls were prohibited, the use of such controls would enable content owners to deny consumers the practical and legal ability to make the various kinds of uses now permitted under copyright law, including those authorized under the fair use doctrine of Section 107 and the various exemptions provided in Section 110.

Indeed, the implications of full enforcement of Section 1201(a)(1) are potentially even more far reaching. Access controls could be employed to prevent consumers from passively reading or viewing the content of digital information products they had purchased, unless, of course, they were willing to pay again and again for the privilege.

Lest these concerns seem farfetched, I would point out that under current fair use precedents a purchaser of digitized entertainment context that has been packaged with technological access controls are permitted to copy, read and analyze the security software in order to achieve inter-operability by means of their circumvention. Notwithstanding this, in Universal Studios v. Reimerdes the member companies of the Motion Picture

Association currently are employing provisions of Section 1201 not involved in this rule making to frustrate what is asserted by the defendants to be just such a privileged practice.

Whatever the merits of this particular case, it raises a number of issues concerning the interaction between Chapter 12 and traditional copyright doctrine. Thus, for example, it has been the plaintiffs' argument that because Section 1201 defines rights, wrongs and penalties that are independent from those provided for in the copyright law itself fair use is inapposite to the analysis of their claims.

To date the judge has concurred. Of course, because Section 1201(a)(1) is not in effect, individual limits users who have employed the DeCSS patch to play back DVDs on their computers have not been sued in the Reimerdes case had the provision been operative, there is no reason to believe that they would have been omitted from the complaint. Cases such as this one highlight the importance of Section 1201(a)(1)(B) through (E), pursuant to which this rule making is taking place.

While there are other provisions of Chapter 12 intended to preserve aspects of the traditional balance between owners and users of

protected works, most are so drafted that they can be read not to reach many real world situations that are covered by the more flexible exceptions and exemptions of copyright law. Thus, for example, in the Reimerdes case Judge Lewis Kaplan has ruled that the defendants' activities did not qualify under the Section 1201(f)(2) exception related to reverse engineering, because, among other things, the entertainment software products contained in DVDs are not "computer programs."

More generally, with respect to the DMCA's specific exemptions as a whole, a recent NRC study concluded that more legitimate reasons to circumvent access control systems exist than are currently recognized in the Digital Millennium Copyright Act.

For example, a copyright owner might need to circumvent an access control system to investigate whether someone else is hiding infringement by encrypting a copy of that owner's works, or a firm might need to circumvent an access control system to determine whether a software virus was about to infect its computer system.

Now, by contrast with these specific exemptions, Section 1201(c)(1) is generously formulated: "Nothing in this section shall effect

rights, remedies, limitations or defenses to copyright infringement, including fair use under this title." Given its plain meaning, this provision would require judges to interpret and apply Section 1201(a)(1) so as to preserve fair use and other traditional limits on copyright. In the event of such an interpretation many of the concerns just expressed about the specific exemptions would become at least somewhat less urgent.

However, this does not appear to be the interpretation of Section 1201(c)(1) preferred by the content industries. Although courts ultimately may recognize the importance and appropriateness of preserving fair use and other traditional copyright defenses pursuant to Section 1201(c)(1), this is not a foregone conclusion, as David Nimmer has recently pointed out.

At least until such time as this point is clarified, the Librarian of Congress' rule making function under the DMCA remains critical. Its importance is reinforced by a consideration of the legislative history of the relevant provisions. Here, the House Commerce Committee's July 22nd report is of particular significance, since it accompanied the first version of the legislation to contain in substance the provisions which ultimately

became Section 1201(a)(1)(B) through (E).

In my written testimony I quote at length from that report. I will do so only briefly here. The report states, for example, that the principle of fair use involves a balancing process "whereby the exclusive interests of copyright owners are balanced against the competing needs of users...." It dwells on the importance of fair use to scholarship, education, the interests of consumers and those of American business, and it concludes for the passage in question that the committee felt "compelled to address" risks that new legislation posed to fair use, including the "risk that the enactment of the bill could establish the legal framework that would inexorably create a 'pay-for-use' society." The report continued by stating that "the committee has struck a balance that is now embodied in Section 1201(a)(1) of the bill." As the passage makes clear, it falls to this rule making to consider how fair use in particular and the principle of balance in the United States' copyright law in general, can best be preserved in the near term.

If it is likely that implementation of technological measures backed by legal sanctions against circumvention will fundamentally alter and

thus adversely effect the information consumer's experience, and I believe it is, the remaining challenge is how to craft meaningful exceptions that are cast, as the statute specifies, in terms of classes of works.

Some of the suggestions made by other participants in the comment phase of the rule making, for example, the American Association of Universities' proposals to exempt "thin copyright" works have considerable merit. Standing alone, however, these suggestions do not fully respond to the most likely adverse effect on consumers' welfare: Their loss of the ability to make free choices about how, when and to what extent to use copyrighted works embodied in lawfully acquired copies (subject, of course, to the constraints imposed by traditional copyright law itself).

And, that leads to the proposal with which I would like to close my statement: a proposal, which I should make clear, represents my personal view and not necessarily that of all the DFC's member organizations, although I think that ultimately they will support it. It is that the Librarian should exempt from the operation of Section 1201(a)(1) works embodied in copies which have been lawfully acquired by users who

subsequently seek to make non-infringing uses thereof.

The proposed language focuses on a class of works that cuts across the various categories defined in Section 102(a). Significantly, it would exclude from its operation works the proprietors had chosen to make available by means other than the distribution of copies (as, for example, by providing limited electronic access only). Indeed, as electronic information commerce evolves the proposed exemption might become less and less significant in practice, just as new business models might require other or additional exemptions in future triennial rule makings.

For the moment, however, limited though the proposed class is, its exemption would provide a safeguard against the most imminent and easily foreseeable harms to otherwise law abiding information consumers that full implementation of Section 1201(a)(1) otherwise is likely to generate. At the same time, by emphasizing the purpose of the intended use, the proposal would provide no safe harbor to those who seek to override access controls for illegitimate purposes, even if they are the owners of the copies subject to such controls.

The proposal has one further advantage.

Its adoption would bring the reach of Section 1201(a)(1) into conformity with what the legislative history of the DMCA suggests was the original understanding of its Congressional sponsors as to the section's proper scope. The record reflects that as conceived of by its proponents, the section was intended to apply to the activities of individuals who engaged in circumvention in order to acquire unauthorized initial access to copyrighted works, and not to fair and other non-infringing uses made by those already in possession of copies.

Thus, for example, the House Manager's report, at page 5, explains Section 1201(a)(1) by stating that, and I quote, "the act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a lock room to steal a book." And, in a letter dated June 16, 1998 the Judiciary Sub-Committee Chairman, Representative Howard Coble, stated that the anti-circumvention measures of H.R. 2281, as the legislation then was denominated, were intended to leave users, and I quote, "free to circumvent technological protection measures to make fair use copies."

This sensible vision of the Section

1201(a)(1) prohibition now deserves attention and respect. The future of fair use and other traditional copyright defenses will be determined in significant part by the outcome of the current rule making. By adopting the proposed exemption, the Librarian could take an important step towards stabilizing the balance of copyright law in the new electronic information environment. Thank you.

MS. PETERS: Thank you very much. Sarah.

MS. WIANT: Good morning. My name is Sarah Wiant. I'm the director of the Law Library and a professor of law at Washington and Lee University School of Law. Among the subjects that I teach there include intellectual property and copyrights.

I appreciate the opportunity to testify this morning on Section 1201(a)(1), anti-circumvention provisions of the DMCA. This is an issue critical to the future of copyright law because it determines whether public policy, such as fair use and other exemptions, will survive in fact in the digital world.

I am here today as a representative of the American Association of Law Libraries and while I'm primarily here on behalf of AALL, I also speak

for libraries in general and in some sense, a very real sense for the American public.

Law libraries serve their constituencies, law students and faculty, researchers, the general public, the legal community, bench and bar, in our Nation's more than 1,900 law libraries. Our members are committed to the principles of public access to government information that are a fundamental requirement of our democratic society. For most American citizens their local law library is the only source of access to comprehensive federal, state and local law and law related materials. Many of these important publications are becoming increasingly available only in electronic formats.

My statement this morning is going to focus on three areas. First, I will describe the adverse effect of the new anti-circumvention prohibitions on faculties, students and legal researchers in their ability to make non-infringing uses of works legitimately acquired by our institutions.

Second, I will highlight the legal community's concerns regarding limitations of access or on access to federal government publications for which no copyright protection is available.

And, third, I would like to discuss our concerns that as more and more information becomes available only on-line, the ability of libraries to provide permanent access to some publications and to preserve and achieve them has been and will continue to be adversely effected.

As to my first point, in the formal comments provided by AALL and other major library associations, we explained the unique role of our Nation's libraries in serving the information needs of the American public. Millions of users walk into libraries each day looking for information across a broad span of topics and academic disciplines. Their needs are met through a variety of formats. These may be print, it may be microfiche, it may be video, sound recorders, computer discs, CDs, DDDs and, yes indeed, the Internet.

Federal copyright law has for more than 200 years provided the historic balance between the rights of copyright owners and users. We believe a broad exemption from the 1201(a) restriction against accessing and using copyrighted works protected by technological measures, is essential to insure that the public continues to enjoy uses of information provided by libraries.

The anti-circumvention technologies now

in place and those under development have a purpose beyond that of controlling unlawful access. They are a mechanism for controlling all uses of work. For both libraries and our users, they will limit use of legally acquired digital information by effectively destroying the first sale doctrine. They will prevent libraries from fulfilling their mission to achieve and provide long term access to information resources and they will impeded all other non-infringing activities that advance the fundamental public good purposes of the copyright law.

From our joint library communities' initial comments I would like to summary just a couple of comments. The role of libraries is to insure fair access and use to copyrighted works and part of our responsibility is to bridge the digital divide.

Every community in the nation is served by libraries and these libraries spend billions of dollars annually to provide their users with access to electronic information. Many of the technological measures will erase the distinction between access and use, regulating the exploitation of the work. Any rollback to preserving fair use in the digital information environment will further

increase the digital divide.

Fair use, the library achieves and educational institution exemptions to the Copyright Act are key to the ability of libraries to serve social needs and public policy. Copyright law is the very foundation by which libraries and educational institutions provide the public with products and services necessary to meet their information needs.

The first sale doctrine allows libraries to load information products they have purchased. The fair use provisions allow users to exploit fully their access to information resources for the legitimate purposes of education, research, criticism and other socially beneficial purposes. Section 108 allows libraries to make single copies of works in their collections available to patrons engaged in private study, research and scholarship and to achieve and preserve these works for long term access. Section 110 includes provisions to facilitate classroom and distant learning. And, Section 121 contains limitations that insure the reproduction and distribution of copyrighted material for the use by the blind and disabled.

These principles must be preserved in the digital environment just as they have applied

historically to print resources. Any technological measures limiting these principles will seriously and irreparably harm the ability of libraries to serve the public good.

Another point we made is that Section 1201 expands the boundaries of criminal laws in ways that are vague and poorly defined and that cover acts that are legal and acceptable behavior. Our initial comments describe in greater detail the language of 1201(a). It contains troubling ambiguities in such key terms as technological measures, circumvent, access and class of works.

There are few legal precedents interpreting these terms to guide libraries and their users in the application, nor is the legislative record particularly helpful. Court decisions may help clarify some meanings, but in the meantime library users face criminal and civil penalties for exploitations that have been considered until now to be legal and non-infringing. The threat of litigation will serve as the deterrent from uses, some of which may be lawful, perhaps maybe most which may be lawful.

As a practical matter most libraries could not afford the high cost of litigation to determine the definition of these terms. This

uncertainty will have a chilling effect on users and will inhibit legitimate non-infringing uses for education, research, criticism and other public information uses.

As to the second focus of my comments this morning, I would like to now address the legal community's concerns regarding limitations on access to federal government publications for which no copyright protection is available. As previously noted, the purpose of technological measures is to limit or control access and use of digital information.

In the earlier comments, on March 20, 2000, in comments filed by Kent Smith, Deputy Director of the National Library of Medicine, reply comment 75, he notes circumstances in which works by government scientists receive copyright protection. Technological measures to control the use of copyrighted works have also limited the ability of this library, as well as all other libraries, to achieve, preserve and provide continuing access to some publications. This rule making seeks to determine classes of works that might be adversely effected by such technological protections. Clearly all forms of scientific technical information dissemination would be

adversely effected.

Most blatant would be the limitation on access to publications of government scientists for which no copy right protection is available, but which constantly appear within the copy premature and under technological barriers of published works.

While these comments from the National Library of Medicine define the problem only from the perspective of government funded scientific and medical research, the identical situation exists with many other subject areas of government information, particularly, legal information, which is aggregated into large electronic databases.

Law libraries are in the unique role of serving the American public by providing access to print and electronic law and law related resources. More and more government information is being published only electronically under licenses that restrict access and use. The technological measures which may be as simple as a password place restrictions on who can use the digital information and often disenfranchise the public. Whereas the public may use the same print resource in a law library, in the digital arena law libraries are no longer able to provide equal access to all users.

While many students and colleges and

universities and their libraries and other institutions do have access to legal and other information through consortia agreements or other forms of licensing agreements to online information, other students and members of the bar and equally important members of the public who are served by these institutions are able to neither access nor use information in online systems such as *West Law* and *Lexis* due to licensing arrangements.

In the paper world these individuals would be permitted to make their use copy of information. Most state college and university libraries and many non-profit organizations has as a part of their mission the obligation to provide members of the public with access to information and to make available the information for the public's use.

There is no distinction among the classes of works needed by users, only the use to which the information is put can be distinguished. That is to say the uses may be educational, personal or commercial purposes. There must be no restrictions on the uses of federal government information because it falls outside of copyright protection.

Finally, we are concerned that as more

and more information becomes available only online the ability of law libraries to provide permanent access to some publications and to preserve and achieve them will be adversely effected. A preponderance of comments from users' communities in the initial rule making including those from the National Library of Medicine and the National Achieves raise very legitimate concerns about the loss of digital information and the need to provide permanent access and to achieve and preserve electronic information.

The anti-circumvention systems create another injustice by denying libraries access to works which they previously and lawfully acquired. In the print world the issues of archiving and preservation are much clearer. Libraries have the historic and important role of preserving and archiving knowledge and our cultural heritage. It is critically important that the electronic information produced today will be readily available to future generations.

Of particular concern to the law library community is the loss of important information content when the publisher of an online resource either ceases publication or goes out of business with no advance warning, such as legalline.com or

instances when CD products protected by technological measures can no longer be reformatted and, therefore, are unreadable.

Technical obsolescence is an equally important aspect of the problem. When an educational institution or achieve for library buys a subscription or has print copy of the book, the library can make a copy. However, if the technological measures prohibitive producing a work in the electronic world, then no archival copy may exist. Although publishers should achieve their works, and in fact some do, more often than not publishers fail to achieve their works. Moreover, when publishers are the sole source for archival copies of their works, replacing the political, social and cultural mission of many libraries and achieves, there is a greater risk of selective archiving.

The judgment of what to preserve and whether or not to preserve should not be solely in the hands of publishers. Unlike in the print world, because there may be no secondary market for electronic works, libraries and educational institutions may be unable to acquire works that they were initially able to acquire, furthermore exacerbating he problem of preservation.

During the lengthy debate over the most contentious provisions of the Digital Millennium Copyright Act. Distinctions were blurred between the act of circumvention and the act of digital piracy. They are not the same.

The need to circumvent technological measures for legitimate purposes of fair use, first sale, inter-library loan, permitted access, archiving and preservation are needed to permit libraries to serve their users in the digital world. Libraries adhere strongly to the limitation of copyright law while providing their users with access to information within the rights allowed users under the law.

We believe that it is essential for the librarian to create a meaningful exemption before Section 1201 does irreversible harm to the rights of users allowed under the statute based on public policy.

Thank you for allowing me to testify this morning.

MS. PETERS: Thank you. Betty.

MS. LANDESMAN: I'm afraid I'm real new at this. Like my colleagues I do have written testimony. Would you like it?

MS. PETERS: Certainly. Yes.

MS. LANDESMAN: Good morning. My name is Betty Landesman and I am a librarian with the Research Information Center, which is what we call our library, of the AARP, which was formerly known as the American Association of Retired Persons. It's now just the AARP for official records, by the way.

MS. PETERS: That makes me happy since I'm a member.

MS. LANDESMAN: The membership age is now 50 and there are not a lot of retired 50 year old people.

Prior to taking this position, which will be a year ago tomorrow, happy anniversary to me, it's a brand new job, I worked at a number of college, university and research libraries, as well as for a vendor of computer systems for libraries. So, you may think I'm here today because I've been around, which I have, but in fact I am wearing the hat today of president of the District of Columbia Library Association. DCLA is one of the chapters of the American Library Association. They like to call us a state chapter, but, okay. And, we have members from all of the many diverse types of libraries in the District, including public, school, academic, medical, law, special and government libraries.

I want to talk today not about the legal aspects of the new provisions of the Copyright Act, for which fortunately I can rely on my colleagues, but about the practical effects of the new Section 1201(a) and the need for a broad exemption that takes those practical effects on libraries into account.

Without an exemption by the Librarian from the anti-circumvention prohibition, libraries will not be able to carry out their primary mission, which is providing access to information resources for the communities of patrons that they serve.

At all of the institutions that DCLA represents, as is true all over the country, electronic services have become an integral part of the services that we provide. As you are already aware from the comments provided during the rule making process, electronic information is invaluable to all kinds of research from the youngest school child to the most in depth medical and legal research. But, much of the material that is necessary to support the information, education and research goals of our library users is increasingly available only in electronic form or where electronic versions of a print counterpart provide additional and valuable research tools that are

simply not available in the print. My written testimony gives some examples of specific titles.

All libraries, whether directly or indirectly, serve the public. I work in a library that is part of a non-profit organization and my clientele are the staff of the association. We support the research on aging that is done by those staff members. That research is then made available to the public through published studies which are available free of charge and also through a database called Age Line, which we produce.

Library materials are available to any patrons outside of our association through inter-library loan in which we participate very actively. And, our library itself is accessible to researchers who need to use our collections or our research expertise. For many people in the communities we serve, particularly the poor, the elderly and school age children, the public library serves as the primary access point for information, both printed and electronic that they need.

In the non-public environment the library, like mine for example, is accountable to the members of its organization, whether that be students, faculty, or staff for the support of their education and research needs. My written testimony

has some statistics on the number of libraries and so forth. So, our concern about the technological protection measures and their potential restrictions on use is the threat that they pose our library's ability to serve our users in the way that we have always done.

We note that some content providers during their comments have suggested that librarians want information for free. That couldn't be further from the case. We spend an enormous amount of money, according to my colleague, millions. According to my date, hundred of millions. A lot of money in fees every year to provide access to databases and electronic materials and services.

In my library, for example, last year the amount, the number of dollars which I will not disclose, but the number of dollars that was budgeted for electronic services was more than double the number of dollars budgeted for print materials. And, I fully expect that this proportion will continue to grow.

My concerns are in three main areas which in many ways will echo my colleagues: cost, inter-library lending and access to information.

First, we expect that technological measures will be used in ways that increase the

overall cost of the information that we already purchased. As the library associations pointed out in their comments, we are very concerned that the effect of these technological measures will be to move us toward a pay-for-use pricing model, as well as the charge for uses that are legitimate and non-infringing under copyright law. That would put additional pressure that I don't think we can bear on already strained acquisitions, budgets and reduce the level of services that we can provide.

Secondly, the first sale and fair use provisions of the Copyright Act provide libraries with the ability to lend the information products that they purchase and to make copies available of these works to patrons engaged in research and scholarship. In addition to supporting the information needs of their own users, libraries share their resources by participating in inter-library loan. Since no library is able to own all the materials that are needed to support the information needs of their users, certainly not mine, it is only by cooperating and helping each other that we have been able to provide the information that our patrons need.

Persistent access control, such as electronic books with limits imposed on

redistribution, would undermine the basic concept of the library as an institution that lends information resources to users.

Finally, I'm concerned that these protection schemes will seriously reduce our library users' ability to make full and non-infringing use of the material that we already purchase, legitimately acquire. The restricts that we already see in electronic resources, licensing arrangements, include limiting access to a particular resource to one computer in the library, to restricting use to a specific number of simultaneous or even consecutive users and precluding access to material after a certain period of time. And, as noted above, the harm these restrictions pose to our communities will fall particularly heavily on those who have no alternative sources for access.

A related aspect of this concern is that technological measures will hamper or negate the ability of libraries to achieve and preserve information products so that they will continue to be available to our users in the future. Researchers of all types need to be able to depend on having access to materials that may not be this years. They may be a few years older and yet these products or access to them may disappear at some

future time, either because they are no longer available from that particular vendor or that vendor has gone out of business or they are simply taken out of the date base and the library is not able to make an archival copy, or because the library no longer subscribes to the product, but is barred access to the information that they did subscribe to in the past.

So, as I ask that as you consider the breadth and focus of an exemption for Section 1201(a) you will keep in mind the importance of libraries in serving all aspects of our society. Since all types of materials are used in research, not only books and journals, but photographs, motion pictures, sound recordings, you need it, it would be impossible to identify specific classes of works that should be exempted. So, I encourage a broad exemption.

Technological measures that control both initial access to a product and also its continued use prevent libraries from providing necessary and non-infringing information to our users. So, please make sure we can continue to do our job. Thank you.

MS. PETERS: Thank you. Now the panel gets to ask the questions and we're actually going to start with Rob and the questions could be

directed to a particular person or to the panel as a whole. Even if it is directed to a particular person, if one of the three of you wants to say, you know, I want to answer that, too, please feel free to jump in.

Let's start with you, Rob.

MR. KASUNIC: A number of you have discussed a broad exemption cutting across the categories and over a number of potential classes of works. What would be the basis for that in the statute and in the legislative history? We do have a legislative history that specifies some pretty narrow interpretations of what a class of work would be: something narrower than a category of work, but not so narrow as an individual type of work as in western movies or something that narrow. How do we deal with this broader exemption that cuts across various categories?

MR. JASZI: If I could start, I think the problem is a real one, although I might quarrel a little bit with the suggestion that some of the exemptions that have been explicitly or implicitly suggested in the last few minutes are “broad” exemptions as distinct from exemptions which are oriented at least in part toward the nature of use, rather than exclusively toward the nature of the

work as such. And the suggestion that it might be possible to cast a definition of a class of works in terms of the nature of use was, of course, one that was raised by your initial notice of inquiry in this rule making.

As I read the legislative history it calls for the class of works defined in this rule making to be one that is focused, and cites as examples of the way in which such a focus might be achieved, the subdivision (if you will) of existing categories: audio visual works broken down to western movies example. I do not read the legislative history as excluding the possibility of the Librarian, in his discretion and taking into account all of the material adduced in the rule making hearings, conceiving of other classes of works which have in other ways their own specific focuses.

So, that would be my initial response and I would add another response, too. To some extent, given the nature of the problems that Section 1201(a)(1) potentially gives rise to, as they have been revealed in the record so far, any approach to the rule making that is strictly limited to sub-divisions of existing statutory categories of works will almost certainly fail to meet the real

issues.

MS. WIANT: Can I just add? I would add to what Peter says and I also would suggest that when we start speaking of categories we have categories of works within the statute that organizes works that are eligible for copyright protection within the subject matter portion of the statute. But, there is nothing in there that suggests that we should further define those by classes of works and indeed if we do do that it will be very difficult to figure out what specific kind of work that a researcher could look at, based specifically on a redivision of, I hate to use the word categories and classes, because it leads us down a road that I think is untenable and, so, therefore, I would reiterate what Peter had said about I think it's more important to look at the uses of the works. Because anybody has a legitimate need for a wide range of information needs and if we narrow these by what one can or cannot look at, we will redirect research in some very limiting ways.

MR. KASUNIC: In terms of the specific requirements under the statute, requesting that the Librarian publish a particular class of works, how do we get to that step? If there is a possible exemption, how do we exempt the type of use that is

being made of a particular class of works? How does that fit in with the requirements that Congress put on the Librarian: to specifically publish a class of works?

MR. JASZI: In fact, to begin again, in the proposal that I suggested, for example, the suggested class is one which, by virtue of being keyed to the forum in which the works in question are represented or fixed, cuts across the statutory categories of Title 17. Also inherent in that proposal is the limitation on the exemption to situations of otherwise lawful use. So, the nature of the use enters into the latter part of the suggestion or recommendation. That's one possibility.

I think another possibility is to think about classes in which the use factor is, so to speak, implicit. The proposals to provide exemptions for “thin copyright” works or for copyrighted works that contain significant amounts of public domain government information, are ones which, although they do not directly reference use, do so by implication, since works of those kinds and categories are, as we have heard, of special interest and importance to the research community.

So, I think there are a number of

different ways, both explicit and implicit, in which the consideration of potential or actual use might come into the definition of an exemption.

MS. PETERS: Charlotte.

MS. DOUGLASS: My question is whether the First Sale Doctrine has any special application to use of encrypted works that are purchased for personal use? Does that make any sense? How does the First Sale Doctrine impact encrypted works where you have bought a DVD for your personal use, for example? Are there any implied assumptions that go with purchasing a work, which would seem to flow from the First Sale Doctrine?

MS. WIANT: Do you want me to start on this? It seems to me that if we keep the exemption, unless we clarify the exemption, that -- clarify an exemption, that the anti-circumvention could indeed do away with the First Sale Doctrine. It seems to me that if we believe, as a matter of public policy that when somebody has lawfully acquired a piece of intellectual property, that we have historically allowed them to share uses and without this there couldn't even be a sharing of use arguably, whether it's a DVD, whether it's an E-book and that would present a critical problem, I think, for the public and I think it would present a critical problem for

libraries to acquire this information that historically they would at least be allowed to use that the public wouldn't be allowed to make a copy, necessarily, but they would at least be allowed to use the information in whatever its electronic format.

MS. LANDESMAN: I think the E-book is a very good example, in fact. What I'm seeing, what we're all seeing, actually, is that in this new digital age the pricing of all the new products, like E-books, and even the conception of the producers of these and who their audience might be is very directed with the individual consumer in mind. And, I've been to conferences about E-books and ever so often, you know, someone will say what about, you know, if I play it for my library, can I lend it? And, we're going, lend? No, no, you buy a single -- and we're going libraries. And, they go, oh, right. So, we have no objection to pricing it in a way that will allow more than one use, as we have always paid more for a subscription to a print journal for a library will cost typically -- well, more, certainly than for an individual, because part of that is because many people are going to use it and that's the understanding under which we acquire it, that we can then share it with our legitimate

patrons for whom we buy that and if I were seeing E-books priced in a way that says here's the library version and this gains -- you can now lend this out, we wouldn't be having a discussion.

MR. JASZI: I would just add that full implementation of Section 1201(a)(1), coupled with the use of so-called second level access controls on electronic information products has the potential for hollowing out all sorts of traditional copyright doctrines, of which first sale is clearly one. Although there might remain a literal first sale right to pass on the physical medium to another person, to the extent that there was no possibility of that other person achieving the ability to read or view the content recorded on that physical medium, the first sale right, which has been a very critical engine of cultural development throughout the history of the United States, would be formally preserved but substantively empty.

And, that I think is true of many of the traditional limiting doctrines of copyright law, that are put under pressure, so to speak, or would be, by full implementation of Section 1201(a)(1).

MS. PETERS: Let me just make a note that there is a separate study that is being done by the Copyright Office in conjunction with NTIA, which

is to look at the effect of electronic commerce and the DMCA on Section 1201(a)(1), the First Sale Doctrine. And, so that is an inquiry that was mandated.

Those arguments that you're making now were made before Congress. Congress is interested in that effect and so we will be studying that particular topic separately from this.

Okay. Rachel.

MS. GOSLINS: Yes. I just had a couple of questions. One is more practical and the other is a little more esoteric so we'll start with the practical one. And, this is for the whole panel, although I'm specifically interested in the experience of the people who had experience actually working in libraries in the recent past.

I think it's fair to say that access protection is probably the oldest form of technological protections we've seen on digital works. Of course, oldest is relative when we're talking about the Internet, but password protections and I.D. and I.P. domain validations have been around pretty much since the Internet. So, in a way we're lucky that we have some historical experience with these kind of protections.

I participated in a study the Copyright

Office gave on distance education where we were trying to look at copy control protections and it was impossible to draw too many conclusions, because there really wasn't a lot of experience with them. But, as librarians you are perhaps the best suited to educate us about your experience thus far with access control protections.

So, I'm curious to know whether in the current world in which there is not a prohibition on circumventing access control protections there are situations in which you have to do that, you have to circumvent access control protections in order to make what you consider a fair use of the work and if you currently experience problems where you face a choice of either circumventing an access control protection or foregoing use of the work?

MS. LANDESMAN: Well, I can -- I can't say I've ever done anything along those lines. And, I think most people haven't either, but I could give a couple examples of why our inability to do that is a real problem. One, is in fact, the I.P. recognition is not the panacea that everyone would like it to be. It isn't just for distance learning. That's typically the context, but the fact is that in most libraries our patrons, whoever they may be, are not in the building or not all in the building.

In my specific case there are 2,000 staff working for the AARP. About half of them are here in headquarter's building in D.C. and the other half are all over the country.

And, they're coming in through an intra-net so it's a very secure environment, but we are still really unable to negotiate an appropriate use of things, because they're coming in from a different I.P. address or because licensing is still, much to my surprise, here it is 2000, is very geographically oriented. I'm looking at a potential license now to acquire some materials for use by the association and the price quote, it says very specifically, this is for a single building. Call us for a quote.

So, we really have a huge long way to go on that. The most concrete example I could give you where our inability to -- even if were to wish to "crack into it" or whatever, has to do with the leasing, whether than actually owning of the information. Most electronic journals or other databases you have the right to whatever is on the database for the term of your subscription.

Now, let's say I subscribe today to Journel of XYX and in three years I need to cancel that subscription or let's say Journel XYZ goes out

of business, okay, but I can the print of Journel XYZ in 2000 because I can't afford both. The literal truth is my users will have no -- we have nothing to show for those three years. We don't have the electronic version. We don't have the print version. We don't have anything. And, most licenses at this point preclude that or for those databases that have a rolling effect, so you subscribe and what you have access to is what's in the database at that time, but every year they roll off an earlier year. And, this is fairly common.

When that goes you have nothing. We've paid a lot of money, but we do not have the information to give to our patrons. Some libraries, certainly bigger than mine, might wish to -- well, there is a lot of issues with this. We want the publishers to do the archiving and the publishers and saying, why should we archive? The fact is that right now nobody, whether you're doing it or not, you just don't have the access to get at it.

I don't know how concrete that is, but that's what we're up against and I don't have the solution, but that's the problem.

MS. GOSLINS: That's --

MS. WIANT: There are a couple of things I would like to add to that. Yes, it's true that in

many cases that password protection works and I.P. protection works and even those of us in universities with a high level of technological support have difficulty in serving students and faculty from home unless we have something of a proxy server, but we can figure out ways to deal with those. The more critical problem is I'm in a private university, but we still have as part of our mission serving anybody who has need of legal information on the western part of the state. And, for a very long time we were the only significant law library in the state west of the Blue Ridge.

If we have any member of the public who comes in and physically comes to the library for legal information, if that legal information happens to be electronic, typically we cannot serve those individuals unless it's just on a web base, because the licensing agreements typically cover only students and faculty and sometimes those are limiting so that they only cover the law student and law faculty, not even the undergraduate faculty. So, that's problematic, but more problematic is the member of the public who comes to us for legal information and whom we cannot serve because they're restricted. They can't search themselves and even if we were to do it, the licensing agreements would

say you can't have access to this information. It might well be information that is federal government information and of value at a database. It matters not to them that the value is added, they simply want access to information and we can't -- we can't provide it and it is nowhere else available to them in any other form as more and more information becomes available electronically.

Then we have the additional problem that information that has, on occasion, been available to us as was mentioned, disappears from a database. The most significant example that I can think of that is in my written testimony, is an example of one of the major legal databases which for a period of time had a French database and one day it was there and the next day it was not.

Now, many of us cannot maintain collections of primary legal information in either its original language or even an English translation and so our only access would be to that and suddenly it's gone and totally gone. And, for many of us an access would be one of the few major law libraries in the country that have foreign legal collections. So, that becomes problematic for us when that disappears.

And, another example, and while it's not

legal information, just points up the problem of not only access, but when we're talking access we are -- if you control the access, in point of fact you are controlling the use. There is no way, unless we figure out some way to do read only, there is no way that somebody could look at that information.

But, this is a separate point, but it actually speaks in some ways to the preservation problem and this example came up sort of repeatedly during CONFU, but it's an example that I think very clearly does represent, although a situation in which we are all facing, and I would hate to be in 20 years the person who cite checks for a law review article and then finds that the electronic sites are not there to be cite checked.

The example that was given in CONFU happened to be in the software world. For instance, if you had somebody who had, as their research, the development of software programs, I want to say computer scientists. I would not be the person who would be studying the development of software programs, but in the event that that happened there isn't anyone, including the software developers, who are keeping the really early versions of operating systems.

Now, if we don't figure out a way that

libraries are authorized not only to access, but to make copies for preservation copies, there is a lot of that information that simply will be totally unavailable, whether it's licensing or any other way that would restrict access.

MS. GOSLINS: I have one brief follow-up question and then I'll get to my esoteric question, which actually all of you have started to answer already, which makes me very happy.

I just wanted to follow-up briefly on the French database. I guess I want to understand better how that's a problem of access, as opposed to a problem of a producer deciding to no longer maintain a database. It's not that there is an access control that is then preventing you from accessing the French party's databases, but it no longer exists. Right? I just want to make sure I'm not missing something.

MS. WIANT: In that particular instance it is less one of access than one of the library's responsibility to preserve its collection and had we been able to continue to have access to a collection of information that we had acquired lawfully, even after they ceased to maintain it, if for instance we had been given notice, we might have been able to take over the responsibility or collectively we

might have been able to work with say even the law library of the Library of Congress, so that somebody would have kept that information.

MS. GOSLINS: Okay. I love you. You're leading right into my next question. And, I would like to spend a little time understanding the panel's view on the inter-relation between the 1201(a)(1) prohibition on circumventing access control protections and circumventing controls on copying, which is not prohibited under the DMCA, the conduct of circumventing the copy control. All of you in someway have identified concerns about abilities to preserve and archive works.

I believe, Mr. Jaszi, you made a suggestion for types of works that should be exempted, which involved uses made after a legitimately acquired copy is obtained. Ms. Wiant, you talked about when a library buys a print subscription there is an ability to make a copy and that might not be the case in the digital world. And, Ms. Landesman, you've also identified archiving as one of your three major concerns.

And, I guess what I would like to understand a little more is what is it about 1201(a)(1) that would prevent you from making a copy once you have access to work? Because again we have

to remember the distinction between access control technologies and copy control technologies. And, after you have access to a work, how is your ability to copy that work for non-infringing uses, effected by the prohibition on access control?

MR. JASZI: Well, if I might begin, I think the answer to that question lies in fundamental definitions. And, one of those is the definitional distinction between copy and work. The person who has purchased a fixation of a particular work or works has of course now achieved access to that physical copy, but not necessarily access to the works contained in it. And, as the record in this rule making makes clear, the content industries look at the question of access control as having two dimensions, initial access and second level access.

In other words, in the vision of the content industries, the access controls, to which Section 1201(a)(1) speaks include not only controls that would, for instance, control whether someone could initially download an electronic work from the Internet, but also embedded code within that download that would require reauthorization for subsequent consultations of its content.

In effect, in that vision, access and use merge, and access controls -- so-called second

level access controls -- become effectively a means for regulating use. The burden of my suggestion for an exemption today was really that as far as it is possible to accomplish within the scope of this rule making, the thrust of Section 1201(a)(1) should be focused toward issues of controls on initial access, and not toward issues of second level access controls which functionally merge with controls on use.

MS. WIANT: I think Peter said it as well as I could have said it.

MS. GOSLINS: Thank you very much.

MR. CARSON: I would like to follow-up on a question Rachel asked. And, first of all I guess I need to make sure we all understand and maybe that I understand correctly the question Rachel asked. What I think Rachel was asking a couple of questions ago, was basically for whatever evidence any of you have, that up to now, in any way, the technological measures currently in place that control access to works have been impediments, have actually in practice been impediments to lawful uses of those works.

And, if that wasn't how you understood it, I guess I would like to re-ask the question and just make sure we have the universe of experiences

that you are aware of up to now with respect to those impediments that have been imposed by technological measures controlling access.

Does anyone have anything to add to what's already been said?

MR. JASZI: Well, I guess the only addition I would make, although I'm the least well-qualified person, because I'm not in the day to day information use business, is that it seems to me that although the inquiry is a very important one, it goes to only part of what should be the factual foundation for whatever action is taken in this rule making. That is because it's not clear to me, by any means, that we have yet seen the most aggressive, likely implementation of technological controls on access, especially the second level controls to which I referred earlier.

In fact, I think we are likely to see more aggressive implementation of second level technological access controls when Section 1201 takes full effect. So, what I've heard from many information professionals is that there are a variety of situations in which their ability to do their jobs today is to some extent frustrated by access controls, some of which were detailed a moment ago, but I fear that there is every reason to

believe that the worst is yet to come.

MS. LANDESMAN: I think we haven't really seen the impact quite yet, but I keep my eye on the E-book analogy that I mentioned before, because there just aren't that many of them yet, but every meeting I've been to where the E-book producers are discussing our new product and our new this and our new that, has very clearly got a -- I don't know how they do it, but it's a technological thing that gives rights for use to the purchaser only of the book and precludes any other -- lending it to anybody for that matter. And, that is the direction that they're going. And, I think that's going to really start hitting, you know, as the E-book becomes more prevalent than it current is, which should be anytime now.

MS. PETERS: Can I ask you a question with regard to the E-book, or any of you? It really has to do with where you use access versus licensing terms and conditions. It is very clear that when Steven King's book was made available most of the purchasers were individuals. If a library wanted to acquire for its patrons the Steven King E-book, is there any way that you could have worked with the publisher to have access for that? In other words, to what extent can libraries, following what you say

is, you've got to serve the public, you're the place of last resort, work with the publisher to get, through an agreement, what you believe is the access that you need to serve your patrons.

MS. LANDESMAN: I think that's an evolving thing, too. I can only keep going back to the meetings that I go to and the look of astonishment on the publisher's face when the word library is mentioned.

So, I think part of that is I would love to work with the publishers, but the publishers are going down another path. Not all of them. There are exceptions to this, but the development may already be in place that doesn't allow for this. I can't actually answer your question. Certainly we would be happy to negotiate with the publishers, but I'm also seeing -- going back to my licensing question, it's all moving toward a pay-for-use and I guess our fear of the technological measures of that just lets that happen before you can negotiate it out.

MR. CARSON: We're heard the term pay-for-use a lot and I guess to what degree are we there already? To what degree is that a reality today? And, if it is a reality today, what problems does that impose?

MS. LANDESMAN: The definition of use can be very broad. What I've seen so far have been a little broader maybe than that literal thing, but the next effect is say when you have to negotiate a license for use of a product it can be for a certain number of people or -- every vendor has its own version of how that happens and it's either by blocking unauthorized users or providing you only with a certain number of passwords and when that's exceeded the next person can't get on or the CD ROM that we've mentioned, you know, if you buy a CD -- if the information is on a CD or will be a DVD, and the software and the way that works it has to physically be used at one specific computer, because there is all this other stuff that has to get loaded along with it. And, so that certainly effects the use limiting to one person at a time that specific computer.

I don't have personal experience with a, oh, you're the next user, click here and pay us, you know, X amount of dollars, because I'm not sure how far along that is and I can't speak to it personally.

MS. WIANT: I guess in my mind your question raises for me the issue about the extent to which a contract could prohibit legitimate uses

which the copyright law has historically provided. And, I guess I find that an equally unclear area to provide any guidance to libraries about the extent to which any use that's not spelled out, but which otherwise might have been made, they continue to be legal.

I was just trying to think of an example and I haven't played this out completely, so let me just put it on the table and we'll see where it goes. Suppose an academic law school chooses or has faculty among us who typically teach from an electronic course book. Typically that would be licensed for, I guess, for the term in which or if it was a couple terms in any year, would be licensed for use by the students who are specified to be in that class for that particular time.

Now, historically libraries, some of them, choose to keep earlier versions of case books, because the faculty choose to go back for varying reasons or if you're developing a historical area you would want to have that in the collection. Case books are typically licensed annually or by the term, so how does an academic library or any other library maintain an access which might have been a fair use some years down the road, presuming that they still had an electronic file of that particular

information, now would that be a fair use? I would argue it would indeed be a fair use for a faculty member to look at an electronic file that was used in a class X years earlier, but we would have had it only for those students and that faculty in that particular window of time.

It's likely that any negotiated agreement might not even contemplated the use by that or if your school used it and another school was contemplating using a future edition and wanted to looked at an earlier edition, where it wasn't maintained any place else, would that be a legitimate use for someone to actually access and use that?

Now, the access controls would say, no, you couldn't have access. That's where access and use, I think, merge in the secondary use. So, I think there could be -- that's just one that came to mind while I was sitting here thinking about, well, how would you make these pieces fit? And, I think we -- I presume that's why we're here today, to talk about how we might make these pieces fit, but this is one aspect of the problem.

The intersection between how the copyright law and license agreements merge I think is another area that we can't overlook as we talk

about how access controls would effect subsequent uses.

MR. JASZI: In my view we are not there yet. In my view we are only on the threshold, trembling on the brink of a pay-per-use universe. And one of the reasons why we're not there is that legal support does not currently exist for the aggressive implementation of second level access controls.

Whether we would be disadvantaged if all information or much information were to become in the future, available to consumers only on a pay-per-use, or by the drink, formula is, I think, an issue that brings us back to questions of what I might call cultural faith. There is a set of deep underlying assumptions about cultural practice with respect to information use, which I think we might discover many of us share. One is the notion that there is something good -- something positive -- about the kind of ability to use information that comes to us under existing law and existing technology when we purchase or otherwise lawfully acquire a copy of a copyrighted work.

Under those circumstances we are permitted to make use of the contents of that work that's comprehensive, that's repeated, that's

perhaps inefficient, but ultimately productive. I think that the concern about the coming of a pay-for-use information environment is not only a concern about cost, although cost is certainly an issue to be considered, but a concern about the ways in which the requirement to make more parsimonious, more efficient and more restricted use of information in various electronic media would effect our cultural practice.

I realize that that's a very difficult thing to get at in a rule making proceeding of this kind, but I also think that to fail to consider questions about the effects of the implementation of second level access controls on existing cultural practice would be to overlook what might may ultimately be the most important area of adverse affectation likely to arise in connection with the full enforcement of Section 1201(a)(1).

MR. CARSON: Well, on a couple of things Professor Wiant said. First of all I'm not persuaded how relevant it is, but I just want to explore it a little bit anyway. It's going a bit far afield, perhaps. You gave the example of a situation where a university or library might acquire rights for a limited time and then subsequent to the termination of that period may

discover that it has ultimate need to have access again to that work.

Typically, if there is anything typical about this, in those situations does the library or university have the option of negotiating for permanent rights or rights for a limited time and make a choice, no, we only need it for this limited time, so we'll pay the lesser price? Or do you just not have a choice?

MS. WIANT: I think it's fair to say both proprietors and libraries are becoming more sophisticated in their negotiations, but for a long period of time there wasn't a choice because they were not preserving the files and if we chose not to or we were not given the option to even decide that we were going to figure out a way to preserve that information, it wasn't available. So, I would say that the answer to your question is not clear.

MR. CARSON: I had that feeling. I wanted to follow-up on your responses to Rachel as well. You gave a situation where some of your license agreements permit use only by students and faculty. So, if someone else walks into the library you couldn't give them access. I want to make sure in the context of this rule making whether that's a problem in the context of this rule making. In

other words, to what degree are the technological controls preventing you from giving access to that outsider and to what degree is it simply the terms of the license? If you wanted to breach the license you could give them access, I assume. Nothing prevents you in the technology from getting that access.

MS. WIANT: I suppose that is -- in the instance again that's coming to mind, I suppose it is one in which one could violate a provision to do so, it may not be the technological controls, but I can think of -- simply because the piece of information that I'm thinking of happens to be in one of the major legal databases and the way we access that is different. But, the example that is immediately coming to mind is one of let's say a local attorney who has a tax question and needs a private letter ruling, the full text of which are not in print and the access to which is in a major legal aggregated database and because of the restrictions on that we couldn't legitimately supply a walk-in attorney who is not a member of our immediate community.

Now, it is true that that would be -- in that particular instance, because of the database in which I happen to know there was full text opinions

available, that would be a licensing scenario. That's not to say though that if that same information were in some other database on the Internet that it would not be an access problem, as well as again we're back to the secondary use of could one even look at it to decide whether or not that was the private letter ruling they wanted before you actually got to the level of getting a copy.

How one goes about making sure that you've actually located the piece of information that you need, particularly when you can't see it in any other way in a whole text scenario and I'm thinking conceivably that could be in a database for which the access is technologically controlled and therefore the use is controlled. But, because I don't know whether the private letter rulings in full text are in such a database, I can't answer the question in the situation it was a licensing limitation.

MR. CARSON: Okay. What I'm trying to get out is what could we do to help you in that situation and I think what I'm hearing is confusion at best and perhaps there is nothing we could do in the context of this rule making that would help you in that situation.

MS. WIANT: What you could do to help us is figure out an exemption that would at least allow us to look at the information to decide whether it's information that we go to the second level and get a copy.

MR. JASZI: And, I might add that I think one thing you could do to help in the rule making is to make it clear that the use of access controls will not supersede the use of licensing in the future, because I think there is a real possibility that the terms and of use that are open to be negotiated between suppliers and consumers in the present environment would in the conditions of the full implementation of Section 1201(a)(1) come simply to be dictated by technological means.

MS. PETERS: My question had to do with kind of where part of the problem is when we say that there is not fair use at all. What we're really talking only about is access control and your example had a member of the public who presumably was not a student trying to look at a database for a class project, but more likely a practicing attorney who was trying to look at it for a client.

MS. WIANT: But a federal government -- a piece of federal government information that otherwise would not be available for copyright

protection I believe was my example there.

MS. PETERS: Yes. And, you're saying the only place that this is available is in this one database?

MS. WIANT: That I can think of at the given moment.

MS. PETERS: Okay. Because that -- with a lot of information with Lexis and Nexus, I mean almost all the court opinions are available elsewhere.

MS. WIANT: Elsewhere now.

MS. PETERS: Yes.

MS. WIANT: Or becoming increasingly available, yes. But, as I say, there are many examples and there are many examples of federal government information that has historically been in print and that are not becoming only electronically available as well. But, some of those are still available electronically from the government, but there are examples, such as the one I just raised, that don't fall into that category.

MR. CARSON: Let me follow-up on your example, the French database where it suddenly disappeared. First of all are you talking about something where you actually had the physical copy or are you talking about something where you had it

online.

MS. WIANT: No. I'm talking about an electronic database. One day it was there and then without notice was not.

MR. CARSON: Okay. What could we do in the context of this rule making to resolve that, to help you out with that situation? How would anything we do permit you to get access to that when it's no longer there? Okay, that's the wrong way to put it, perhaps, because I think I answered my own question. What could we do that would resolve the problem?

MS. WIANT: As in other formats, when publishers are no longer maintaining in print and now lets say in access, historically libraries if after making a reasonable search in the market, libraries have been able then to make a copy for preservation purposes. Maybe a similar pattern if the proprietors are no longer going to maintain electronic copies, that if libraries were allowed, as they are under Section 108, if libraries are able to make preservation copies if after a reasonable venture into the market that they cannot find a replacement copy at a reasonable cost, that libraries be allowed to make some preservation copies.

MR. CARSON: In this rule making all we can do, I think, is determine whether there are particular classes of work for which the anti-circumvention prohibition, with respect to access, is exempted. How does that solve this problem? Do we have a tool that will really solve the problem for you?

MS. WIANT: I guess I come back to Peter's comment that when you look at access you are in fact looking at use in many ways. I mean, if we can't get access to it, we can't use it. If the restrictions control the access, they therefore control the use and therefore it simply doesn't exist to us.

MR. JASZI: In other words it would be possible in a rule making such as this one, to enable the archival copying of potentially ephemeral electronic information products, despite the fact that those products might bear technological protection measures which would otherwise bar such archival copying.

MR. CARSON: So, you're saying even though this is in a remote database you would download it somehow and then after it is no longer available in that database, if there is any technological protection to access you should be

able to circumvent that protection?

MR. JASZI: Well, I don't know enough about the library technology involved to be able to go to that level of specificity, but my understanding of the problem is that one reason it exists is that under current arrangements, in part because of the use of technological protection measures, archival copying of these materials is not a possibility. Thus, when the materials are gone they're gone.

Again, I don't have the library expertise necessary to answer at the level of precision that I would like, but I think in more general terms the answer to your question is that it would seem to be within the scope of this rule making potentially to enable some forms of archival copying, despite the fact that those forms of archival copying might involve circumvention of access controls.

MR. CARSON: One final line of question. I would like each of you to put yourselves in the place of the register right now. And, it's time to make your recommendation to the Librarian and it's time to tell the Librarian that this is the class or these are the classes of work which you should exempt.

Now, you have all, I think, to varying degrees, sort of hinted or perhaps explicitly stated this in your testimony, but I guess I would like to hear it succinctly now from each of you, what class or classes would you advise the Librarian to exempt?

MR. JASZI: What I've heard today, if I can recap from our testimony, is a series of recommendations. There is the class of works to which I referred in my testimony; that is, works embodied in lawfully acquired copies, which are sought to be used for otherwise lawful and non-infringing purposes.

I think we're also heard that works embodying significant amounts of otherwise public domain -- and particularly government -- information are an area of special concern. Those are two that immediately spring to mind, based on today's testimony. Perhaps as well my colleagues have others to suggest.

MS. LANDESMAN: I would support what he said. I think we get a little hung up between what's in it and the format that it's in. And, I guess a lot of -- it's no different than it was in print, so as he very ably described. This is the type of thing that should be exempted. Whether it's now in a digital format should not be the negating

factor. So, if it were in print then we would legitimately be able to make use of it.

MS. WIANT: I would encourage the Librarian to define classes as classes of legitimate uses of works of lawfully acquired materials and to look at the relationship between 1201(c) and 1201(a).

MR. CARSON: One question for Professor Jaszi. I just want to get a little clarification so I understand what you meant when you talked about works embodied in copies that have been lawfully acquired by users. A typical example, I suppose, would be you get a CD ROM with something on it. I can understand that. Would you also include a situation where you're on the Internet and you're able to download something from the Internet so it's now sitting on your hard drive? Is that a work that you have now acquired that would be subject to this?

MR. JASZI: Yes, it is.

MR. CARSON: Okay. Tell me what wouldn't be subject to that?

MR. JASZI: Any work that is provided electronically in a format which limits the ability to fully download or acquire a copy; for instance, when I go on line I cannot with Lexis and Nexis, download the Lexis/Nexis database. It's not a

facility they provide to me. They provide me the ability to read and the ability to capture portions of the database, but not the ability to capture the collection as a whole.

And, I think we're going to see, as my testimony indicates, a great many other implementations of that kind of limited access electronic information commerce, so much so that three years from now we may well be back talking about the necessity of further qualifying the reach of 1201(a)(1) with respect to those emerging business models. The distinction is between the business model, which depends on the enabling the consumer, by one means or another, to acquire a lawful copy and the many emerging business models which are based on more limited forms of electronic access.

MR. CARSON: It sounds like you're willing to define the scope of your exemption by reference to an almost acquiescence in the technological controls that the provider puts on copying and reproduction and so on, if I understand you correctly. If the content provider won't let you copy the work, then you're willing to say fine, I don't have it, and I'm not entitled to the exemption. If the content provider is willing to

let you copy it, then you have it and you're entitled to the exemption. Is that the effect of what you're suggesting or am I missing something?

MR. JASZI: I don't think you're missing anything. I think that the goal of this, if I can go back to first premises, the goal that the Digital Future Coalition has had from its formation in this process has been that of preserving the existing balance of forces between proprietary control and use privileges in copyright law. One of the central features or aspects of that balance is that existing copyright doctrine facilitates wide ranges of legitimate uses of information by individuals who have purchased or otherwise lawfully acquired copies thereof.

The model of information commerce that involves the distribution of copies has been and continues to be a very important part of the information commerce picture overall. The specific exemption that I'm proposing is one which would be designed to assure that insofar as that model of information commerce is perpetuated its consequences for the consumer remain functionally similar, although the media involved may change.

I absolutely concede the possibility that as new business models are implemented further

issues about the adverse effects from the implementation of Section 1201(a)(1) may arise with respect to those new business models. But the proposal that I'm making today is one that is specifically concerned with, the perpetuation of traditional models of information distribution, which I think will continue to have some vitality in the new information environment.

MS. PETERS: I'm struggling to try to figure out where our direct charge is with relation to all what we're hearing as a whole. Much of what we've heard with regard to the problems that libraries are encountering are problems that we could sit here and discuss whether or not there ever was an enactment of Section 1201. We have said access controls have been in place for a long time. Copyright owners have licensed libraries to a variety of things.

To date, to your knowledge, even though the provisions of the DMCA are not in place, you're not aware of the fact that libraries have basically downloaded like CD ROMs and for preservation purposes because the CD ROM may have an expiration date with regard to the access to the information. I guess, so I'm struggling with where we are today and where we will be in three years, because that's

the period of time that this rule making will cover where there is, because of control of access provision, will not be able to get certain information any other way. Because I think it really is an issue about, as we mentioned in the beginning, it's not how inconvenient it is to get the information, but whether or not you can get the information and I guess I'm still struggling because some of the concerns that you have, which are very legitimate concerns, I'm just not at the point where I can figure out that they really directly relate to our activity with regard to excepts for access controls.

So, I'm kind of back where David is. Given the scope of what our direction is -- having read the -- let me back up. Having read legislative history, when you're directed to create exemptions for classes of works and we know that exemptions are crafted narrowly to address a certain problem, and yet what we hear with regard to the scope of what you think the exemption would be, I have a concern that you vacillate the very protection that Congress intended.

So, I guess my question is, if we exempt broadly, then what happens to the protection that Congress intended to give copyright owners with

respect to the access controls that they would be using?

MR. JASZI: Well, I think that, in fact, the exemption that I have proposed is one which, as I suggested in my testimony, might effectively restore Section 1201 to what was the original Congressional intent.

My reading of the legislative history -- not only the legislative history relating to this rule making, but the legislative history relating to the DMC as a whole -- is that throughout the access control/use control distinction was taken seriously, and that it was the understanding of the principal proponents of the legislation that the term “access” as employed in Section 1201(a)(1) was in effect limited in scope to what might be called initial access or first level access controls.

The exemption that I have proposed is one which would, if employed, in effect restore that understanding of Section 1201(a)(1). I'm not sure that that would by any means cure all of the potential difficulties with the effect of access controls on information consumers. But it would certainly have the effect of bringing the 1201(a)(1) provisions back to their roots or origins, so to speak.

So, far from representing a departure from the original understanding of the legislation as represented by the legislative history, it would, in my view, represent a return to that understanding.

MS. PETERS: My question you were focused on, initial access, if I am a library and I'm negotiating for use for a particular year, I can basically say I want unrestricted access to my patrons, on the premises, for X dollars. It's a fair amount because it's for the whole year for everybody who comes in. Is it not possible that the business model that says I'm going to basically bill you per month, based on usage, could be cheaper or less than the per year projection for the whole? That was anyone.

MS. WIANT: I can think of scenarios where that might be cheaper. Well, one of the problems of this is an inconvenience problem though. I recognize that. If you're in an academic environment where you're being billed on how many times a student chooses to look at whatever and each one of those are charged, particularly when we're wanting an environment where inquiring minds want to know. We would like them to be inquiring and some of that may be an environment in which say school

boards or at the universities or whatever, would have a very hard time estimating cost of how many times somebody is going to look at something.

So, yes, it is a changing business model and probably the other --

MS. PETERS: I'm just trying to get at that per se it not necessarily is a bad model. I mean, obviously with the Internet within a transition and we're going to see many, many new business models and in any business model it's the consumers who ultimately accept or don't accept the business model. So, I was just getting at your focus on, you know, we really should only be talking about initial access versus later access.

MR. JASZI: I see no difficulty with a situation in which consumers, library consumers in this case, or as it might be individual consumers in some other case, can freely accept the consequences of their choice as to the form of access that they receive, provided that there is, in fact, a meaningful opportunity to negotiate that issue. But I am very concerned about the possibility that terms of access will in effect be technologically imposed rather than made subject to that kind of negotiation. It's there, I think, that the role of this rule making, in creating exemptions which may

have an effect on shaping the market environment in which those choices are made, is so important.

MS. PETERS: One of the beauties, I think, of what Congress did is by imposing a three year kind of a look see. It's a way in which you continue to look at what happens and you strike the balance as you see it. I guess I was a little surprised at some of the comments that we received, because working in a library where all of us who work here access to the Internet and I don't have authority to go on bill anything to the Library of Congress. I can spend most of my day going on the Internet and getting a lot of stuff free. So, I haven't seen it as a locking up necessarily of information, but in many ways too much information that was out there and yet we're focusing, you know, the locking up.

So, I guess what I'm trying to get at is what I've sort of heard is, except for some examples that you gave where certain information, whether it's public domain or federal that isn't really available openly, in the next three years what information do we actually think is not going to be available to people who want to use libraries? Is it as broad as you -- I mean, do you -- I want to say, do you honestly -- in the next three years do

you actually predict that we are going to see this massive locking up of information in all categories of works?

MS. WIANT: The short answer is yes.

MS. PETERS: Okay. Does anyone else have any questions?

MR. KASUNIC: A couple of things. Are there any particular technological control measures that seem to be more restrictive than any other? Are there certain things that are less objectionable or controlling in terms of secondary uses or secondary access of works?

MS. WIANT: I'm having a difficult time of answering that, because I think technological measures is one of those totally undefined terms on the one hand and, two, I also am not sure I know enough technologically to answer that.

MS. LANDESMAN: Yes, I'm not quite sure, you know, quite where that is. I personally have a real problem with having to enter a password. And, the reason I say that is that you really don't want to be giving out this password to thousands of people and saying keep this a secret. You also don't want them to have to come to you and you have to log them on. It's just a very difficult, you know, arrangement, but I'm not sure if that's where

you were going.

MR. JASZI: My response is that I don't think so. I'm by no means a very good technologist, but the little I know about the different levels of intensity of access controls, actual or potential, suggest to me that the real distinction among them is not one based on technology, but based on the purposes for which they're implemented. Many of the available forms of technological access control can be implemented for a variety of different purposes, and that to the extent there are distinctions to be made, they ought to be made in terms of the purpose for which the controls are implemented, what they are designed to restrict, rather than on the basis of the technology itself.

MR. KASUNIC: I think that some of the comments stated that certain measures were merely an obstacle to obtaining initial access and that some of those measures were -- in terms of passwords -- less restrictive. That once you had enabled initial access, then it was only a question of using the work. A technology or protection measure didn't really have any other effect on uses. So, I guess part of my question is: are the technological measures distinguishing in anyway between access and the use of works?

MR. JASZI: Well, just to give a simple example, perhaps over simplified from a technological standpoint, but illustrative, let's take the simple measure of the password. We could imagine an implementation of password security which would permit the user, once the password has been requested and given in the first instance, to make continuous and free use of content thereafter. We could, by contrast, imagine an implementation of password security that would require that every time the individual revisited the work embodied in that physical medium or download, the password would be requested again or that the password would be requested every few minutes, so that the use of the work could be billed in five minute periods or two minute periods.

In other words, we could imagine -- at least theoretically and perhaps there would be practical difficulties -- the implementation of a measure like a password as a first level access control or as a relatively comprehensive second level access control. The distinction is not in the technology, but in the manner and purpose of its implementation.

MS. PETERS: Anyone else?

MS. DOUGLASS: I just wanted to make

sure that I got your answer correctly about whether or not we should be looking at 1201(f) fixed this or 1201(g) fixes, like reverse engineering or encryption in the course of doing exemptions or possible exemptions of 1201(a) or should we stick to our knitting and vote that 1201(a) only? I think I heard your answer, if you would clarify it or did you answer that?

MR. JASZI: Well, I'm not sure I answered that.

MS. DOUGLASS: Okay.

MR. JASZI: I would be pleased to try to do so. Your charge, as I understand it, relates to 1201(a)(1) as such, but the question of how that charge should be considered and executed seems to me inevitably related, to some extent, to your understanding of the specific exemptions. In other words, since the specific exemptions of Section 1201 bear on the scope of Section 1201(a)(1) itself, providing in some cases potential carve outs from 1201(a)(1)’s scope, then the question of how adequate or complete those exemptions are with respect to the kinds of legitimate activities to which they were originally addressed seems relevant to your undertaking.

If we were to decide, for example, that

one of the specific exemptions was in fact so narrowly cast that it failed to provide scope for otherwise important and legitimate activities that potentially fell within the Section 1201(a)(1) prohibition, then that conclusion would bear on the discharge of your rule making responsibility.

MS. PETERS: Anyone else? If not, I want to thank our witnesses for their testimony. We really did appreciate it. And, to all of the rest of you, we will resume around 2:30. If you know any of the witnesses who are not and you can tell them that, for this afternoon, it will be around 2:30. It depends on my emergency that I have to resolve.

Thank you very much.

(Whereupon, the hearing was recessed at 12:30 p.m. to reconvene at 2:30 p.m. this same day.)

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

2:30 p.m.

MR. CARSON: Unfortunately, the Register is not going to be able to be with us, at least initially. She is still attending to some other urgent business that she needs to attend to. We're hoping we'll see her before we say good-bye to you today.

I'm not going to repeat the Register's introductory remarks. For those of you on the panel who were not here this morning, I've provided copies for you so you have an understanding of the basic ground rules are. I'm sure you already do, but if there is any doubt in your mind have a quick read of this thing.

And, I guess we'll get started with the panel. This afternoon -- actually do we have everyone here? I see three people up there and I thought we had four --

MR. KUPFERSCHMID: David is here. We can start and --

MR. CARSON: Okay.

MR. KASUNIC: David Mirchin is doing the slide show.

MR. CARSON: He's number one on our list, although I don't -- do we have any agreement

among the people as to who is going to go first? If not, I'll just follow the order on the list, which means we're waiting for David.

MR. KUPFERSCHMID: We were just thinking we would go from, I guess, right to left.

MR. CARSON: Okay. Let's just give David a moment to come and catch his breath.

(Whereupon, at 12:35 p.m. a recess until 12:36 p.m.)

MR. CARSON: This afternoon's panel is first of all David Mirchin from SilverPlatter, Keith Kupferschmid from the Software and Information Industry Association, Joseph Montoro, Spectrum Software and Chris Mohr representing the American Business Press and a number of others.

And, you decided you would go from which side to which side?

MR. KUPFERSCHMID: That way.

MS. DOUGLASS: Okay. Then, Chris, I guess you're on.

MR. MOHR: Good afternoon. My name is Chris Mohr. I'm an attorney in private practice with the firm of Meyer and Klipper. I am here today on behalf of the McGraw-Hill Companies, American Business Press, the Newspaper Association of American, Phillips International, the National

Association of Securities Dealers, Reed Elsevier, SilverPlatter Information, Skinder Strauss Associates, the Software and Information Industry Association and the Thompson Corporation.

These vastly different organizations, some of whom have filed statements and are testifying on their own account, all have one thing in common. They create and commercial market databases. As database producers we, therefore, feel compelled to respond to attempts by certain university and library associations to have databases excluded from the scope of Section 1201(a)(1)(A)'s protection.

More specifically, the argument that databases should be excluded under the, in our view, flawed rubrics of thin copyright works and fair use works seems at odds with the legal frameworks set forth in the NOI and the statute. We also believe that such a determination would be ill-advised as a matter of public policy.

The world of databases is not a homogenous one. Databases vary greatly in their subject matter, methods of organization and the manner in which protected expression is integrated within them. Databases also feed the needs of a variety of organizations in both the non-profit and

for profit markets. The companies I represent today from small businesses to much larger corporations collectively invest billions in the creation and distribution of material in nearly every field of human endeavor.

The Internet has conferred tremendous benefits on the database business. It has made distribution of these products possible on a scale and in a manner never imagined just 10 years ago. In all likelihood increases in band width and processing power will make today's technologies seem hopelessly slow and archaic just a decade hence. The other side of this equation is, as you well know, that digital technology enables unscrupulous users to make perfect and instantaneously distributed copies of a work at a fraction of the cost of creation.

Congress, therefore, concluded that the threat caused by unauthorized access to such works would result in publishers refusing to fully embrace digital media, unless legal protection from circumvention existed. Congress enacted the DMCA to "facilitate the robust development and world-wide expansion of electronic commerce communication, research development and education by making digital networks safe places to discriminate and exploit

copyrighted material."

Our position is more fully set forth in the reply comment we filed and I will not go through all of it here. In short, nothing we have seen in either the initial round or the reply comments leads us to believe that an exemption is warranted for any class of works, much less one made up of databases. The reasons for this belief are as follows.

First, as a general matter, as both the legislative history and the notice of inquiry make very clear, proponents of an accepted class of works bear the burden of demonstrating the necessity of a delay in Section 1201(a)(1)'s effective date. This point is set forth extensively in the NOI and legislative history and it sets the framework for the Librarian's determination. Nonetheless, many comments have viewed the burden to be on copyright owners. This view is simply mistaken, but so strongly espoused that we felt it necessary to repeat it here.

The burden extends to several areas. First, the proponent of an exemption must properly identify a class of works. The legislative history instructs us that this category must be carefully drawn in order to preserve the incentives Congress intended the statute to foster. Despite the

enormous diversity of the database, the association comments have attempted to lump these products together under the umbrellas of fair use works and thin copyright works. This approach, in our view, has several fatal defects.

First, one cannot blindly lump databases into one category. The argument rests on the premise of because certain works of authorship, specifically scientific and academic databases or databases, generally contain large amounts of information and unprotected expression they should be exempt from the access control provision. This argument is boundless. Every copyrighted work contains material to which the copyright does not adhere and by the nature of the regime itself every work is potentially subject to fair use.

What Professor Jaszi's comments this morning seemed to me did was to attempt to create a reverse presumption that because a work is subject to fair use -- because a work is potentially subject to fair use, that that work should be excluded. This effectively eviscerates the protection and repeals Section 1201(a)(1)(A). We believe that that answers essentially a question that was not asked in this proceeding.

With respect to the definitions of works

proffered by the AAU, the universities offer no method by which thin works may be distinguished from their thicker counterparts. Not all databases contain a thin protection or material. Some contain great originality and section coordination and arrangement. Others contain works composed entirely of the "thicker" copyright in photograph, new stories or paintings. We believe that such a distinctions would be unworkable in practice.

Moreover, if one look looks at the list in the comment, the list ends with the word et cetera, which is not, in our view, a good way to develop a narrow and focused class.

Third, there seemed to be an assertion that because a non-profit user makes use of the materials it is entitled to an exemption from the prohibition against unauthorized access. We did not find support in the language of the legislative history that a class of user can define a class of works. The flaws in the class of user distinction become more apparent when one considers that database producers, such as SilverPlatter, market their products primarily to the non-profit educational communities.

The adoption of that kind of framework effectively penalizes certain publishers that derive

most of their revenue from these markets. Given Congress's stated desire to make content richly available in all markets, such a result seems to run contrary to legislative intent.

Finally, we believe that adoption of the AAU's recommendations with respect to either fair use or thin works would have disastrous practical effects for database producers. Database publishers typically invest tremendous effort into producing products that are thorough, accurate and comprehensive. The current scope of copy right protection and compilations has caused several entities to modify their business plans and they question the manner in which these products and services are offered making investment in future products increasingly risky. All that stops an infringer from eviscerating the fruits of their labor is the originality surrounding selection coordination and arrangement. Once the egg shell has shattered the yolk is free for the taking.

Protection from unauthorized circumvention of the technological measure preserves incentives and current law to create and distribute these valuable products.

In short, neither the university comments, the library comments or, in fact, any

other comments have identified a class of work with the precision that Congress asked for. This is an element of the case that must be proved and it is one that has not been proven.

The next point of proof borne by proponents of an exception is that of showing substantial adverse effects. The universities in advocating that databases as a class be exempted have not documented a single instance of an adverse effect. With respect to the libraries, we believe that the adverse effects listed simply do not meet the test of causation.

Now, the legislative history here is instructive and as it was said earlier this morning, that adverse effects means more than inconvenience or individual antidotal cases. Moreover, in this situation the proponents of an exemption must show actual "extraordinary circumstances," that's from the manager's report, where non-infringing use is likely to be curtailed.

The libraries' claims, for example, that many databases include technological measures that limit the number of users. If five users are allowed access, number six cannot make any fair use. The same is true if one of them gets there after the library closes. These so-called adverse effects

cataloged revolve around inconvenience, not around any chilling effect of the prohibition of non-infringing use.

Finally, the proponent of an exemption must show that on balance the positive effects of the statute are outweighed -- rather, that the negative effects are outweighed by the positive effects. Now, we've heard a lot about potential negative effects that might occur and statements by the librarians that bad things might happen and maybe some of those concerns are justified and maybe they're not. But, we heard nothing about the positive effects that security measures have allowed.

For example, password controls and more sophisticated technology enabled Reed Elsevier to embark on its academic universe program. And, they submitted a separate comment to the library detailing the way that that program works. Secure web access has enabled *Lexis* and *West Law* to be available from any computer on the plant, via the World Wide Web. Ninety percent of daily newspapers have online web sites and lots of them don't charge subscription fees.

Maps, another class singled out by the universities for exemption are routinely available

on numerous web sites. We don't see on balance the substantial adverse effects referenced in the legislative history, which warrant exercise of the discretion to issue an exemption.

For these reasons and those more fully laid out in reply, we believe that the record does not support an exemption specifically for databases of any kind. Thank you for the opportunity to present our views and I'll be happy to answer any questions that you might have.

MR. CARSON: Thank you. Next is Mr. Montoro, I believe. No, Mr. Mirchin.

MR. MIRCHIN: Okay. Thanks. So, here you are in the middle of the afternoon, the trough point of energy in the day and you're sort of wondering, you know, should I join Marybeth in her important meeting. I can hear this on the audio feed later, why do I need to stay here? So, I just wanted to tell you that I was recently at a talk and there were fewer people than here, but fortunately I was able to get a picture of them and I thought I would share that with you.

Now, I can't say that actually if you were to stay here you would have the same benefit as these nine people, but hopefully what you will get out this afternoon's presentation is an overview of

SilverPlatter Information, what our company does, what access controls we use, how those access controls benefit the users, how we would be harmed by the suggestion to exempt so-called “thin copyright” works and “fair use works” and finally just to say that these two classes, as well as the other classes that were mentioned this morning, are not really the definable classes of works that I see as part of this rule making.

First of all, SilverPlatter. What do we do? We're a small but globally oriented electronic publishing company. We were founded in 1985. We employ about 175 people, mostly software developers, librarians, database designers, a lawyer. Our main office is in Norwood, Massachusetts. As I say there are many charming New England villages and then there is Norwood. And, then we have offices in London, Amsterdam, Berlin, Paris, Hong Kong and Sidney and I work in Norwood. Okay. So, there you have it.

We publish about 250 reference databases in electronic format. Typically they're abstracts of articles and full text of articles in areas like medicine, humanities, sciences. An example, actually, is AgeLine mentioned this morning by Betty Landesman, published by the AARP. They licensed it

to us and then we do some database formatting. We have a consistent look and feel for all 250 databases. You can search across all of them and we do the marketing and the search and retrieval software.

Some of the other organizations that we would license from would be professional societies like the American Psychological Association. It has PsycLit, which is a database of about maybe 1,000 psychology journals. We also license from private companies like Bell and Howell Information and Learning. They publish a product called Dissertation Abstracts. It's a database containing abstracts and full text of dissertations and master's theses. Our primary markets are university libraries and medical libraries. Basically we're marketing to libraries. Our smaller markets are public libraries and then research libraries inside corporations like biotech companies, pharmaceutical companies, engineering companies. And, most of our sales are outside North America.

So, that's what our company does. Now, I want to tell you about what access controls we use. Our databases are accessible via the Internet or servers that are located at the customers' premises. We have networking software we call

SilverPlatter's ERL, electronic reference library, software. The customers choose how they want the information. Do they want it over the Net or do they want it typically on a CD ROM, which they can then load onto the servers? We've used access controls since our earliest days, since 1985. So, if you get the product on the ERL servers or the Internet our networking software allows access both from local area networks, as well as wide area networks. The access controls that we use are IP filtering, Internet protocol filtering, as well as password and user name.

The customer receives a Database Authorization Sheet, and I'll just show you what one looks like, which indicates the numbers of simultaneous users that they can have. So, this is an example where we have a license ID number and then we have the customer name, okay. And, then we have a particular server ID. It could actually be many servers at a university. And, then we give the maximum number of users that they can have access the database. Ninety-nine is our unlimited use number.

I should add here that the price per user drops dramatically as you increase the amount of access. So, if you have one simultaneous user

that can access the database at one time it is a certain price and as you go up to 2-4, 5-8, 9-12 the price per user goes down dramatically. The Database Authorization Sheet says whether you are allowed to install it to a hard drive and then finally there is an expire date when you can us it until and then there is an authorization code. And, that code, that 40477182. It's a unique code for each university and it's generated randomly. They have to enter that into the servers and that indicates which databases they can have access to and the maximum number of simultaneous users simultaneous users who can access the database.

So, that's the access controls that we use. To insure access from a particular university, we use Internet protocol filtering, so it says all of these people who are accessing are coming from harvard.edu or stateuniversity.edu, but the problem with that is that it can be very restrictive, because the faculty members who are on sabbatical, there are students who are accessing it from their AOL account, so we say, fine. This allows them to access it from anywhere in the world, because if they are not coming from harvard.edu, then they just type in user name and password and they can access it from anywhere.

So, the advantage here is that the technology controls actually are allowing us to provide much broader availability of the information than was formerly available.

So, what are some of the benefits of these technological protection measures? Because, one of the things that Congress instructed the Librarian in this rule making is, I know there is all this negative stuff out there, but maybe there are some positives. So, I just want to tell you -- go over the five habits of highly effect access control technologies.

First, this allows us to meet the varied needs of different institutions. For some large institutions, research institutions, they can have an unlimited level of access or they can have a specified level of access. And institutions in fact are all over the board. We have a lot that have unlimited -- have chosen unlimited access, some 5-8 users, et cetera. And, some down to one simultaneous user.

The fees are fixed for a year for any of those bands, so there is no additional pay-per-view or pay-for-use. You decide, okay, I want five to eight paid simultaneous users. That's it. You don't pay any more the rest of the year. We're not

charging for any of the additional users.

Secondly, we don't dictate at all what use is made of the information. It is really access control. When they get access to it they can do whatever they're permitted to do by law. We're not controlling subsequent use, how they're using it. We're not controlling fair use.

Thirdly, this allows remote access and more convenient access to information. So, if you're sailing you can then get access to our data. Unlike some of the comments made in the -- the initial written comments, we don't tether it to a specific computer in the library. We really free it up to allow the information to be accessed from anywhere.

Fourth is we, contrary to what some of the statements made, we're not exacerbating the digital divide. By limiting unauthorized use we actually allow anyone who walks into a library or uses the library to use it. So, for example, if that person wanted to go into Sarah Wiant's library at Washington and Lee, they could do that. We're just saying you can only have five paid simultaneous users. You decide, do you want to have walk-ins allowed to use the database? That's up to you. You, the library, are allowed to do that. Our

technology certainly is not preventing that.

And, finally, I think what is important to realize is that the access controls are not new. I mean, these are not new things -- I think it was the American Library Association that said that -- they worried that there was going to be a wide range of controls just now being deployed by content providers. We have priced our products on the concurrent model for 15 years. We've used our current access control technologies, essentially unchanged, for the last six years. This is a model that's really been worked out with the libraries and I would urge that it doesn't make too much sense to be meddling with this scheme, which has actually worked out pretty well.

The other thing that I would raise is that what's here in today's rule making is a three year time window. We're not saying what will happen forever. There were a lot of comments this morning saying, like Peter Jaszi was saying, the worst is yet to come with access control or you haven't seen the most aggressive use of access controls, but you will starting October 28th of the year 2000. And, sorry, this was the most aggressive guy that I could think of, James Carville, if you remember him.

In other words these are words from this

morning, as you know, we're on the brink of bad access control. We're on the threshold of it. Betty Landesman mentioned that we haven't seen the impact yet. And, we talked about the E-book example. I guess what I see is that in terms of actual real harm that we see today, I'm not saying that there are no examples that you can find, but it's not really there. And, in fact, even the panel this morning said we think it's going to get worse. I would say, let's see what happens, because in the past there have been also a lot of these things that they talked about, which is geographic location of the information tethered to computers. That all was true five and 10 years ago, but the publishers responded. So, if you looked at a license agreement, for example, SilverPlatter five and 10 years ago, you actually would see lots of geographic boundaries, but over the course of time our market was saying, well, wait a second, we don't want that anymore. We want remote learning. We want professors on sabbaticals to have access to it and, in fact, the licenses and the technology in sync have allowed that that wider access.

So, I would say, even in the E-book example there is not -- really E-books are not being used all that much. Let's see what happens and

let's see how the market accepts the idea if you can't pass it along to someone. I am sure that there will be other competitors that say, you know, my book you can pass along to someone else.

And, fourth, I would just like to say in the written comments that the Association of American of Universities stated that it should be permissible to circumvent access for thin copyright works. So, what they called thin copyright works are works like scholarly journals law reviews, databases primarily valuable for the information they contain. I guess I would just like to say, for a company like SilverPlatter, in our self-interest, all of our SilverPlatter products are databases. That is all we sell. We license these from database producers who have been slaving away in dimly lit basements since 1911, putting together their databases. All we're trying to do is have some access protection and someone comes along and tries to circumvent that access protection they scream, but can they help it? No, because based on the comments here, even if a customer pays for only one simultaneous access, it will be permissible to circumvent and permit unlimited use.

What I would say is that Silver Platter was successful in our business model because we

specifically moved away from the idea that every single minute the clock was ticking in the background for every use. I mean, what we really wanted to have, and as we've done, it's a model of unlimited use within a certain access level. So, my conclusion would be that the access controls really increase the availability of copyrighted materials. If we couldn't use access controls, that's exactly what would lead to pay-per-view because we couldn't enforce the concurrent user model. We couldn't enforce even our other access controls -- or I should say not that we couldn't enforce, but that it would be permissible to circumvent the Internet protocol filtering, the user name. Then we wouldn't be able to say to a university, you can have unlimited access, because they could let in anyone from any other university in the world. From an economic point of view, it simply doesn't work. I mean, we cannot have -- instead of having our 15,000 subscriptions out there, to have one university having a single subscription and letting everyone else in for free. It's just not going to work practically in the market.

And, the losers are not just SilverPlatter, its employees, its investors, but also the customers. I mean the whole thing we're

about here is providing good, high quality databases for our users. The other problem is there is not really a narrow and focused sub-set. It's impossible to distinguish who's who here. What's a thin copyright work, what's a thick copyright work? You can't really tell the disguises from what's beneath it.

It's not something in the Copyright Office that you check off. Oh, hey, I'm registering a thin copyright work. And, then there are other aspects here that are really problematic in this supposed class of works, which is why should scholarly journals not be protected? To me that seems like the stuff you do want to protect rather than the checkouts, the stuff that you see on the check-out line of the supermarket.

Finally, the “fair use works” has the exact same problem. This is not a class of works. This is a defense to infringement. Our entire market would be considered fair use works. It's the scientific, educational and research community and it would undermine a company's viability, like SilverPlatter.

So, in conclusion the final answer is that we feel that the people, the proponents have not met their burden of proof of saying why there

should be an exemption, why there should be a class of works. There is no basis for permitting circumvention for scholarly journals or other databases under the rubric of fair use works or thin copyright works. These works contain a significant amount of copyrighted material and so I just say there is really no defined class that I see yet -- I've seen some defined classes. I don't think those make sense, like fair use works, and I haven't seen any other defined classes that I think are appropriate for this rule making. And, finally, there are benefits from access controls that facilitates remote access, allows sharing of resources between universities and consortia, permit smaller universities and medical schools to pay a small amount and larger universities to pay a larger amount and we do, in fact, permit walk-ins.

Thank you very much.

MR. CARSON: Thank you. We'll move across the isle to Mr. Montoro.

MR. MONTORO: Thank you, sir. My name is Joe Montoro, and my presentation is not as colorful, unfortunately, but I will try to get in some reasons why I think there should be some exemptions to the copyright, 1201(a).

Thank you for inviting me to come before

you today. As a software developer and a U.S. citizen it is a great honor for me to take part in our legislative process and I deeply appreciate the opportunity.

While do not officially represent any trade groups or organizations, I do represent the views of numerous individuals, businesses and universities that have expressed first hand problems with various technological means. I will also echo the opinions of several well-known authors such as Ed Foster of *InfoWorld Magazine*, who has written about computer and technological issues for over 20 years, as well as Jim Seymour of *PC Week Magazine*.

Reading the DMCA and its legislative history has raised some areas of concern. As per the summary of the DMCA from Copyright Office, Section 1201 divides technological measures into two categories: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work. Copying is used in this context as a shorthand for the exercise of any of the exclusive rights of an author under Section 106 of the Copyright Act. Consequently a technological measure that prevents unauthorized distribution or public performance of a work would fall in this second category.

Making or selling devices or services that are used to circumvent either category of technology measure is prohibited in certain circumstances described below. As to the act of circumvention in itself, prohibition prohibits circumventing in the first category of technical measures, but not the second. And, where I actually have a problem is trying to draw that line in what is access and what is copy control.

Distinction was employed to assure the public will have the continued ability to make fair use of copyrighted works. Since copying of a work may be a fair use under appropriate circumstances, Section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By contrast, since the Fair Use Doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access prohibited.

My understanding of Congress's intent in establishing the prohibition on circumvention of access control technologies is to primarily to prevent cable and satellite theft and to control illegal access to software, primarily over the Internet. An example would be downloading a trial

program such as Norton's Anti-Virum, that requires a password or a serial number to make it a registered version. Once the program has been purchased or registered, the access control technology is no longer in effect. The consumer is no longer burdened by the protection measure and can run and make a backup of the program. Someone selling or distributing a serial number that would illegally create an authorized version of that trial program -- or excuse me, create an illegally authorized version of that trial program, would violate this act. With Section 1201 implemented in this manner, I have no objection whatsoever.

What does concern me, however, is when one purchases a software program or DVD, becomes an authorized user and the access control measure remains in effect. These are similar to Mr. Jaszi's comments this morning. In a case such as this will the lawful user be able to make a fair use of this work?

The issue before us is whether persons who are users of a copyrighted work are or are likely to be adversely effected in their ability to make a non-infringing use of copyrighted access controlled works and the answer to that question is yes.

In the world of computer software there exists something called the hardware lock or dongle. It is a small device that goes on the back of an IBM compatible printer port and prevents unauthorized copying or distribution of the software. As a class of work, these fall under category two and it is not a violation to circumvent these devices under this act.

It is important to distinguish and make clear that the large majority of these devices are used simply to prevent unauthorized copying or distribution. We are starting to see, however, some devices that control the number of uses, the number of times you can use a program. Here a user has paid up front for a specific number of uses. A good example might be the software that this Copyright Office used to scan our 364 letters in response to this hearing. The software Adobe Acrobat Capture is priced from $699.00 and includes the ability to scan 20,000 pages. It comes with a dongle or hardware lock. Under ideal conditions, when 20,000 page have been scanned the device no longer functions and you may purchase the additional pages or buy an unlimited page version for $7,000.00.

A typical user has received authorization to access this work, but this device

also prevents one from making unauthorized copies or the distribution of software. As implemented it prevents the authorized user from making a functional archival copy of the program because of the usage control device. This would be a fair use under previous copyright law, but not under Section 1201(a).

The intent of Congress and the courts was clear before 1201(a) that if anything happens to the original software program the archival copy can be used and the user can continue with the quiet use and enjoyment of the program. With these hardware lock devices that is not possible and these works cannot be preserved. If the lock were damaged and could not be replaced, then the user would not be able to use the remaining pages that they had already paid for.

The same problem exists with DVDs, unfortunately because of the Content Scrambling System. A consumer that lawfully acquired a DVD is not able to make a backup of that media. Media and hardware can be damaged and I would ask who has not come across a bad floppy disk, a chewed up videotape, a scratched record or a damaged compact disk?

I am not suggesting that the rights of

manufacturers be ignored. I am a software developer. I hold six registered copyrights with this office, a manufacturer and of course a consumer. If a software manufacturer wants to protect their software with a hardware lock, so be it, providing the authorized user has a way to use that software in an unencumbered, non-infringing way once they have made a purchase. Circumvention or replacement technologies should be made available to them providing they can provide the proper authentication.

The reason an exemption for fair us is needed, on October 12, 1998 in a statement by the President, Mr. Clinton said "This bill will extend intellectual protection into the digital era while preserving fair use." Fair use policies are intended to protect the public interest and I hope that during my testimony I can show you why they are needed in this case.

There are numerous problems a consumer faces when using these devices. While most manufacturers will replace a damaged lock device, as a general rule they will not simply replace lost or stolen lock devices. They require the end user to purchase another program at whatever the retail cost may be. This could be devastating to a small

business, a library or educational facility.

Harvard locked software programs can be very expensive. A program called 3D Studio by AutoDesk cost $3,000.00. Another called Mastercam by CNC Software is over $13,000.00. Surfcam by Surfware is priced around $22,000.00. Others are priced even higher. Some companies are honest and up front about their replacement policy, such as 3D Studio. To replace a hardware lock that is lost or stolen or destroyed you need to purchase another copy of 3D Studio Max. Another company, Cadlink Technology said if the security device is lost, stolen or damaged by whatever means, a replacement must be obtained from Cadlink before the software will function properly. Cadlink can charge the full current list price of the original software to replace the security device. Others make no mention of it in their documentation or their web sites. Can you imagine Ford Motor Company telling a consumer, Ford will not replace a lost or stolen ignition key and that the consumer must purchase a new automobile at the regular price? Would anyone tolerate this, but yet we do here in the computer industry.

Computer theft and damage is a very real concern and if the authorized user of a program has

a hardware lock device on the computer they are simply out of luck. According to statistic 26 percent of all notebook reported losses in units were due to theft in 1998. An estimated 1.5 million computers were stolen, damaged or otherwise destroyed during 1998. An estimated $2.3 billion in computer equipment was lost, or stolen or damaged by accidents, power surges, natural disasters and other mishaps during 1998 and the numbers were even higher for 1999. In a library or university setting there are many people who have access to these devices and it is these institutions that are the least likely to be able to afford purchasing another program.

Technology changes very fast. What is current today my be old technology tomorrow. It wasn't too long ago that we all used 5¼ inch floppy disks. Even Time Warner concedes "many technical protections are still in their infancy." It is reasonable then to believe that just as in the past today's media and technical protections will become obsolete. Examples of this include vinyl records, 8-track tapes, laser disks, DIVX, which was Circuit City's failed attempt at the pay-per-use CVD, and 5¼ inch floppies. High Definition Television is also on the way. The current DVDs are not of HDTV quality. Is there any guarantee that future DVD

players will be able to pay today's movies? Considering that just two weeks ago the FCC began proceedings to resolve compatibility and copy protection issues involving digital television receivers and cable systems, it is not very likely.

The National Library of Medicine has experienced problems where they have computer programs on obsolete disk formats that incorporate technological measures that do not permit the information to be restored or archived to other platforms. They are forced to maintain obsolete operating systems and equipment to access these materials. This is not a cost effective way to enter the 21st century.

All of the concern regarding the year 2000 and its effect on computer systems and software was brought about because of the real possibilities of network and computer shutdowns and errors in software. Jason Mahler, vice president and general counsel of the Computer and Communications Industry Association whose members include AT&T, Bell Atlantic, Intuit, Oracle, Verisign and Yahoo said "the year 2000 problem demonstrated software programs of all types can require error correction.... Once one has lawfully obtained a copy of a software program, he or she should certainly

have the opportunity to repair that program so that it functions properly."

Many of these devices have a limited life span since they use a small proprietary built in battery. When the battery dies, the hardware lock becomes non-functional and once again a program that costs thousands of dollars is worthless if the device cannot be replaced.

Technology companies are constantly being bought and sold and some simply are forced to go out of business. If a company goes out of business, there is no one to support the authorized customer when a hardware lock is damaged and needs to be replaced. Here a perfectly good software program becomes worthless without the hardware lock and the consumer suffers. Steven Jacobs, president of Individuals with Disabilities at National Cash Register Corporation used dongled software from Microsystems Software. Every member of that division works on a volunteer basis and the software evaluates the abilities of children with disabilities. Microsystems was sold to the Learning Company, who no longer supports these products and Mr. Jacobs wrote "one of our dongles is broken leaving us out in the cold." Another letter says "We are a manufacturer that has a program called

"NSEE verify" that was sold through Microcompatibles. It has a black dongle block. The company was sold to Preditor Software and Preditor has discontinued the software product and does not support it anymore. WE have had hardware lock burnouts in the past and almost could not get a replacement last year."

In another example once a company has been acquired their software program is generally phased out. After a period of time, the program and lock device is no longer supported because companies either want the customer to upgrade to the newer combined product or they are using a different hardware lock device. So, even though the software they purchased for $6,000 some five years ago still serves all their needs, they are being forced to upgrade at nearly twice the cost. This says nothing of the costs associated with training employees to use the new computer program. One example is a gentleman named Bill Hendershot. He won an Emmy Award for his creation of time base correctors in the video industry. He quotes "he had a hardware lock fail..... and we had no success in dealing with the company to replace it. They tried to find another old key, but none would work. Our PADS systems has now been down for over 30 days." I

don't think we can ask consumers to tolerate this kind of problem.

Some, such as the Software and Information Industry Association have suggested "at first blush.....these examples appear to justify the creation of an exemption to Section 1201(a)." The SIIA goes on to say that other options make this exception unnecessary. The first option they list is "if consumers are concerned about having access to code due to irreparable damage to the access control technology or the demise of the copyright owners' business, they an use trusted 3rd parties to escrow the software code in confidence to ensure future access to the content if such events occur." That was reply comment number 59. The mistake made here is simple and obvious; consumers do not have access to the source code written by a developer. Further, developers are not required to escrow their materials with any 3rd party and even if they were, it does not overcome the issues of fair use, interoperability, theft and security testing and research. The second solution the SIIA offers is "to get the copyright owner or the manufacturer of the access-control technology to "fix" the technology." The problem with this logic is twofold. First, the question was what do we do when

the copyright holder is out of business or the product is no longer being supported? Second, because of the secure nature of the technological measure, only the developer of the software, not the manufacturer of the hardware lock, can program the dongle or fix the application. The reason is because these devices have unique information embedded in them from the developer and there are also unique codes that are embedded in the software program that only the developer would know.

Jim Seymour in *PC Week Magazine* wrote about another reason we cannot depend on the manufacturers to fix a problem. PC Week Labs does product evaluations and AutoDesk sent in their software 3D Studio, an animation program, to be evaluated. The techs couldn't get the program to run with the security device, so AutoDesk sent another one, but it wouldn't run either. They tried another computer with the same results. When they contacted AutoDesk again they were told, "Buy another computer." Reminiscent of earlier testimony today, Mr. Seymour goes on to say that "dongle makers and the software vendors that support them argue that dongles are essentially trouble fee, no burden at all to honest users." He goes on to say, "Ahh, if only that were so.....dongles cause a world

of trouble for those unlucky enough to buy applications using them."

When AutoDesk's customer satisfaction director said to Ed Foster of *InfoWorld* magazine, AutoDesk has found dongle type hardware locks more annoying than authorization code schemes, Mr. Foster received a wave of dongle hell letters from readers that had similar experiences. One reader from an academic institution reports that out of 16 computers the school had recently upgraded from AutoCAD version 13 to version 14, 5 were put out of action when the dongles failed. Many readers report having to put up with multiple dongles, a situation that can lead to trouble. Another reader wrote "some vendors always say, "If you have multiple dongles be sure to put ours on first or else the computer might hang or crash"."

The availability for use of copyrighted works. The availability of dongle-protected works for use by libraries, companies and universities is also diminishing. Some refuse to use software that is protected in this manager. The loss to our students is that schools will be forced to select alternative software that may not be the most common or the best in the field. For example, AutoCAD is the largest and most used CAD program and often

comes with a hardware lock. It is used to design anything from houses to gears. By schools selecting another program that is not dongled, the students really don't learn on the platform they need to, in order to prepare them for entry into the job market.

I have some quotes here from people. I'm going to try to move through these.

Incompatibility problems. While the manufacturers of these devices claim that they are trouble-free and transparent to the user, they are anything but. On the companies' web sites are many examples of incompatibilities and conflicts. Often months will go by before a solution is found, in some cases there is no solution. Incompatibility problems and hardware conflicts exist, hardware conflicts such as not being compatible with new Hewlett Packard printers, where the lock device cannot support bi-directional printing, the computer is too fast, so it can't find the lock device, too many lock devices on the parallel port, so the lock device can't be located, the lock device won't work with a certain chip set, the driver is not compatible with a new service pack release of Windows NT.

One fear many people have is that not only expensive high end applications will use these

technologies, but everyday software and even kid games will come with these devices. Unfortunately, these people are correct. In a document by Hewlett Packard, "My Interactive Pooh," that's Winnie the Pooh, comes with a dongle. This device causes incompatibilities with Hewlett Packard DeskJet printers. They've gone on to say that they actually found problems with the dongles and that you should contact the Mattel Company to try to get your product replaced.

I don't think I'm exaggerating when I say that we are inviting a technological nightmare and soon will see a protection device on every piece of software we use. In anther HP document two-way communication cannot be established with a printer using a dongle. HP's solution is to simply remove the dongle. So, now you can print, but cannot run your program. And, sometimes a hardware lock driver will be updated by a new application, cause the older application not to work.

It's the consumer that suffers while they wait for some software genius to figure out what the problem is and/or if it can be fixed. One of the lock companies commissioned a study to use the findings as a sales tool against competitors. The results was the Rainbow's documentation and

frequently asked questions on their web site specifically mentioned security key daisy-chaining constraints and hardware revision incompatibilities among selected security keys. And, we've got documents under here to back that up.

The interoperability is another issue. In an age where interoperability between computer platforms is more and more important these devices force us to take a giant step backwards. One customer was referred to me a software manufacturer, PADS, who sent the customer a demo of their product which he like enough to purchase. After the customer purchased it he was surprised to find the full working version came with a parallel port hardware lock device. The customer called PADS to inform them that a Macintosh computer does not have a parallel port in which to put the lock and that he was running IBM compatible software on his Macintosh through a program called Soft Windows. Rather than lose a $4,500.00 sale, the software manufacturer referred him to my company to purchase one of my programs.

Several companies view a cross platform solution as important. Insignia software has developed Soft Windows for the Power Mac which allows you to run your Windows and DOS programs.

They've also develop soft-UNIX as well.

The same statements are true for DVD. Being able to view or operate a DVD on other platforms such as Linux is also at issue. The Justice Department has spent a considerable amount of time and money investigating MicroSoft and one of the reasons given by the Assistant Attorney General of the United States for splitting up MicroSoft was that they would not make their office software available on a competing platform like Linux.

There are physical problems as well. for a university, library or other facility that must run some of its software on a server or a laptop, there is a physical problem. When a business such as Durham Electric Company in North Carolina has 6 dongles hanging off the back of a computer, imagine the number that a university or library has or will have in making works available to the public.

Today's laptops are as powerful as any desktop computer and more people than ever before either commute or take their laptops on the road. What is it like having 5 to 10 inches of hardware sticking out of your laptop? And, if I may, I would like to show you. These are 6 dongles that the man in North Carolina had to put up with to use his

computer and let's take a look and see what it looks like on the back of a laptop. Okay. That will give us some idea of what we're looking at.

Now a library or an educational facility that has multiple programs, that has multiple software that they're trying to instruct with or databases -- I'm not sure about the databases, Chris, but this is a real concern. This is only 6 from one electric company, yet alone a library or any other kind of educational facility will just go further and further. And, it gets to the point where it is ridiculous.

In addition, these companies also say that the lock device, as you've heard earlier, needs to be first. So, okay, when I want to run this one program, this one needs to be the first one, but when I want to run the second program I've got to go over here and it's just a physical nightmare.

Does the act of circumvention effect the value or price of copyrighted works? Not paying for software you obtained illegally wrong and it deprives the developer the fruits of their labor, but we need to distinguish this act from an authorized user gaining access to a product they are authorized to use and have already paid for. Here the only negative impart would be to the company or

individual if they were not able to use what they paid for. The effect of circumvention for authorized users will increase the sale of DVDs and software, where previously unsupported platforms are now available and those institutions that have policies against using dongled software will once again become users.

No one wants to see computer software pirated, however, there are other ways to protect software besides hardware lock devices, such as pass codes, software license files where the program checks for the presence of the file and the software protection systems that permit functional archival backups and fair use. Perhaps we should follow the lead of a company called Unisoft of Milford, Connecticut. Unisoft is a software developer that used dongles on their software from day one. When the manufacturer of the dongle discontinued the model, they considered other brands. Their conclusion, "A determined pirate can make an unauthorized copy of software and make it run regardless of dongles. To a legitimate user, however, a dongle is an inconvenience at best, and at worst makes completely legal software completely useless." ".....we are more interested in satisfying our legitimate customers than foiling

pirates.....we will, however, aggressively investigate and prosecute any and all illegal copying of our software, but will not do it at the expense of our honest customers." They now usa a simple license file and pay a referral fee to the customers if the customer gives a copy of the software to someone and they end up purchasing. They value their support, their subscriptions and feel that that adds significant value to their software and that it is reasonably priced. "Most of all, we don't think that our customers would try to cheat us."

In my conversation yesterday with Mr. Lareau, the vice president of sales at Unisoft, he confirmed that customer satisfaction has increased and there are less headaches for the company and was not able to identify any decrease by using this policy, any decrease in sales.

An independent study that was done in Canada bears this out. Of those polled 48 percent had an unfavorable opinion of hardware lock software and 52 percent felt that there was a need for a replacement device.

I'd like to stress again that most of these devices are primarily used to control unauthorized copying or distribution, however, the

rights of the consumer to use and enjoy software in a trouble-free manner must be of foremost concern, whether the technological measure controls access or controls unauthorized copying or distribution. The computer industry needs an alternative to hardware lock devices and the problems they pose and should let the marketplace determine what is effective and what is not. As Mr. Leahy stated in the conference report on the DMCA dated October 8, 1998, this legislation should not establish or be interpreted as establishing a precedent for Congress to legislate specific standards or specific technologies to be used as technological protection measures, particularly with respect to computers and software. Generally, technology develops best and most rapidly in response to marketplace forces.

To date we have only looked at this issue tin terms of black and white, either access control technology is circumvented or it is not. I submit we should look at it in a third way. We should let the industry develop legitimate ways to replace troublesome access control and/or copy prevention technologies if one can do so and preserve the rights of the copyright holder.

Through my software development I have been able to create a one for one hardware lock

replacement that is done in software, that has all the functionality of the original device, yet cannot be copied unless you are authorized to do so. Through this product I have been able to overcome every objection raised regarding software, including interoperability, compatibility and fair use while still protecting the rights of the copyright holder.

I would respectfully submit that an exemption be made so that once a person has lawfully acquired access to a work subsequent uses of that work will be exempt under fair use. At the very least this should be applied to computer software and DVDs where media can be damaged and there will always be an issue of compatibility and interoperability.

Lastly, it would be a waste of resources for any institution, agency or user that my qualify under current or future exemptions to bypass or replace a technological measure themselves when this is not their field of expertise, therefore, companies should be permitted to advertise and provide these services providing certain criteria that you decide is met.

Once again, thank you for the opportunity to appear before you and I look forward to answering any questions you may have. Thank yo.

MR. CARSON: Thank you, Mr. Montoro. Mr. Kupferschmid.

MR. KUPFERSCHMID: Good afternoon. I'm Keith Kupferschmid, Intellectual Property Counsel for the Software & Information Industry Association. I appreciate the opportunity to testify here today and would like to thank the Copyright Office and the panelists in particular for both conducting these hearings and for creating what I consider to be a very open and efficient rule making process.

By way of background, I would like to talk a little bit about SIIA, which is the principle trade association of the software and information industry. We represent about 1,400 high tech companies that develop and market software, electronic content for business, for education, for consumers, for Internet, and for entertainment purposes. Our membership is quite diverse. In fact, especially in relation to other trade associations, we have information companies as our members, such as Reed Elsevier, the West Group, the McGraw-Hill Companies. We have software companies, such as Oracle and Sun, hardware companies like Hewlett Packard and Apple and many e-commerce companies, such as America OnLine and Cybersource. So, as you can see, just from this diverse interest,

diverse membership that we have, our members represent a wide range of business and consumer interests.

Our members create and develop new and valuable access control technologies for use by others. They also use access control technologies to protect their proprietary content. And they purchase and license software and information products and other content and services that utilize these access control technologies. So, our members basically span the gambit of all the effected interests that might be at issue here in this rule making process.

Consequently, our members are extremely interested in the issues relating to the protection and use of access control technologies and the relationship between fair use of copyrighted content as it relates to the anti-circumvention provisions in Section 1201(a)(1) of the Digital Millennium Copyright Act. Because of the many interests of the SIIA members and because of time constraints, I will divide my testimony into two separate sections. The first section of my testimony will focus on general concerns of SIIA and its membership and in the second half I will attempt to address four specific concerns raised by the comments that were filed.

Because of the time constraints, however, I will just summarize our comments and hopefully expand upon them with some of the questions that are asked. A more detailed discussion of our comments can be found in our written reply comments and in any post-hearing comments that we may file and based on some of the comments I've heard today, I think we probably will be filing some post-hearing comments.

In sum, we concluded that none of the initial or reply comments submitted, either individually or taken as a whole, provide sufficient concrete evidence to justify the creation of an exemption to Section 1201(a)(1).

Let me go into my three general comments. First and foremost, several commentators contend that the burden of persuading the Copyright Office in the rule making is on proponents of the prohibition. I am not going to go into a detailed discussion of the statute, of the legislative history or the notice of inquiry itself, but if you review those sources or review our written statements or the other written statements of those in the copyright industry, you will see that each of these documents, each of these three sources clearly establish that number one, the burden of persuading the Copyright Office that a certain class of work

should be exempt from the prohibition in Section 1201(a)(1) is on those who seek to establish an exemption, not on the proponents of the prohibition.

And, then number two, these resources also establish that the burden of persuasion is extremely, extremely high and based on what we have seen the proponents of an exemption have not met this burden at all. Those who seek to establish an exemption must prove that the prohibition has a substantial adverse effect on non-infringing use and those words, each of them, have a very significant meaning. In this regard mere inconvenience or individual cases are insufficient evidence. Proponents of an exemption rather must come forth with evidence that establishes distinct, verifiable and measurable impacts. None of the proponents provide this evidence.

Those who seek to establish an exemption must also establish a causal connection between alleged substantial adverse effects and the prohibition in Section 1201(a)(1). If the adverse effects are caused by factors other than Section 1201(a)(1), then the Copyright Office should disregard such effects and I think this mandate is especially important given that the prohibition in Section 1201(a)(1) has not yet come into effect. We

fail to see how any of the alleged existing adverse impacts complained of in the comments can be caused by a provision that has not come into effect yet.

In fact, because the prohibition is yet to become effective, to the extent that any alleged existing adverse impacts complained of in the comments are bona fide, I'm not saying they are, but to the extent that they are, they must have been caused by some factor other than the prohibition itself, because the prohibition is not in effect.

It is SIIA's view that none of the comments submitted to the Copyright Office comes even remotely close to meeting the high burden established by the law. The comments fail to provide distinct, verifiable and measurable impacts and none of the comments establish a causal connection between the supposed adverse impacts and the prohibition.

My second general comment deals with, I guess as the Library Association has suggested, the right of fair access. We consider this to be somewhat a twisted view of the fair use exception, one that is sweeping enough to allow hackers to circumvent access control technologies in order to make fair use of protected copyrighted content.

Now, in thinking about what my comments

were going to be here today, I did consider characterizing the views of these commentators as perhaps overly broad, but I thought that that might actually suggest that this narrow interpretation has some basis in law and fact. I want to be absolutely clear, it does not. In fact, Congress clearly considered these issues and rejected the Library Association's interpretation on its face. Fair use is an affirmative defense. As such it is a privilege, not a right. The fair use privilege has never been used to allow a party to get access to copyrighted work where the party does not otherwise have the authority to access that work.

In fact, because the fair use privilege is an equitable defense to infringement, case law has shown that no fair use defense may be had where access to the copyrighted work has been gained illegally. SIIA supports the Fair Use Doctrine. We recognize the important societal good, as well as the public and private benefit that results from the doctrine. Now, while SIIA supports the Fair Use Doctrine, we cannot support the twisted interpretation supported by the libraries and the other commentators.

My third and final general comment relates to the general lack of understanding of the

scope of the rule making and the prohibition itself. In particular, several commentators failed to distinguish between the protections afforded by Section 1201(b) and 1201(a)(2), which are not subject to this rule making and those in Section 1201(a)(1) which are. Several commentators also incorrectly believe that Section 1201(a)(1) covered public domain and other non-copyrightable materials when, in fact, it does not.

And, finally, several commentators failed to consider the existing exemptions in Section 1201, such as those that exist for security testing and for reverse engineering. Given the limited time today, I will merely direct you to our formal written comments submitted by SIIA for a detailed explanation of why these arguments are either incorrect or immaterial to this rule making.

With that let me move on to my specific comments. The first one I would like to deal with is the American Association of Universities and to a lesser extent the Library Association's recommendation that an exemption for so-called thin copyrighted works and fair use works be created. There are several problems with this so-called classes of works, I guess if you can call them that.

First, these so-called classes are

extremely broad and indefinite. As a result they do not comply with the congressional mandate that the class of works be a sub-set of the categories of works in Section 102 and be narrow and focused. So, it fails on two accounts.

Second, the AAU provides no means to distinguish between works that qualify as thin copyrighted works or fair use works and works that do not qualify. In fact, as Mr. Mohr mentioned, they even have an et cetera thrown in there in case they may have forgotten to throw anything in there.

The AAU also failed to provide even a single example of how its members would be adversely effected in their ability to make non-infringing uses of these works. Presumably, if the works are causing a substantial adverse effect, they should be able to come up with at least one example, but nevertheless the comments, as far as I can see, don't have one example in them.

And, finally, with regard to this categorization of thin copyrighted works and fair use works, I should mention that adoption of a thin copyrighted work exemption or a fair use work exemption would clearly adversely effect the availability of these works. Because databases and other fact intensive works are accorded a lesser

level of protection by the courts as compared to other types of copyrighted works, the owners of these works are more reliant on technological protections to protect against illegal uses of these works. As the result, exempting so-called thin copyrighted works from Section 1201(a)(1) would lessen the incentive for owners of these works to distribute them to the public.

The second set of specific comments I would like to discuss is related to concurrent access. The Library Association suggests an exemption is appropriate to ensure that their users are able to concurrently access the works they license. To the extent that there is any adverse impact resulting from a work being protected by technology that controls the number of concurrent users, this impact is insignificant and more than offset by the numerous benefits libraries and their users have gained from having greater access and less expensive access to these works.

While technological measures may impose certain limitations on concurrent access, these limitations pale in comparison to those libraries and their users have been and are currently subject to with regard to non-electronic copies of works. In particular, the suggestion that there should be

an exemption for concurrent access is of great, great concern to SIIA's software and information company members. Many of these companies routinely license their copyrighted products to consumers in a way that limit the number of concurrent users.

Consumers enjoy this licensing option and find it beneficial to their business model. If people were permitted to circumvent the technologies that allow such limitations on concurrent access, the concurrent access licensing system would quickly become ineffective and obsolete. In its place software and information companies would be forced to use other licensing alternatives, perhaps to the detriment of consumers of these products.

The third set of specific comments I would like to discuss relate to preservation and archiving. Some comments suggested an exemption be created for preservation and archiving when a user has initial lawful access to a work. This recommendation is based on a perceived concern that access control technology will prevent libraries from archiving or preserving works protected by such measures. If an entity has initial lawful access to a work and desires to make a copy of it for preservation or archival purposes, to the extent it is prevented from making such a copy, it will be a

result of a copy control technology protected under Section 1201(b), not access control technology protected under 1201(a).

Thus, the preservation and archival issue is actually one that falls outside the scope of this rule making. If, however, the Copyright Office should conclude that the preservation and archiving issue falls within the scope of this rule making, we assert that the commentators have failed to provide the requisite evidence to establish that an archival and preservation exemption to Section 1201(a)(1) is necessary.

In this regard we point out that one of the focuses of this rule making is whether copyright content is available to persons who desire to make non-infringing uses of such content. Accordingly, if copies of a work are available for non-infringing uses through a license, then there would be no reason whatsoever to create a statutory exemption to Section 1201(a)(1). Because none of the commentators have demonstrated an inability to license the materials and, in fact, the commentators say the opposite, they are able to license the materials, we find no justification for a so-called preservation or archival exemption.

My final set of specific comments relate

to hardware locks. Several commentators recommended that exemptions be created to address situations where a company goes out of business and there is no one to support the authorized customer when a hardware lock is damaged, it is lost or is stolen. The first point I should make in response to these comments, and I cannot make this emphatically enough, is that it is extremely rare, I mean extremely rare for someone to lose a hardware lock. The reason for this is because the locks and the software that it protects are just too darn expensive and too valuable. Therefore, people who own these locks and software products take the utmost care in protecting the software and the locks against theft, against loss and against damage.

In the unlikely situation where a hardware lock is damaged, lost or stolen, there are real life solutions to these problems that are easily implemented without the need to establish an exemption. The best of these solutions is for the consumer to protect his or her investment in the software by taking out an insurance policy. The software that is protected by the hardware locks is not inexpensive. Contrary to Mr. Montoro's comments and with apologies to my colleagues in the recording industry, this software is not a scratch record. It

is a lot more expensive than a scratch record. It is a lot more valuable than a scratch record. A single program can cost as much as $22,000.00 or even more. It is, therefore, extremely reasonable for any business or university to protect its investment in such valuable items, just as it does with other property that has similar significant value.

In addition, there are numerous third party companies that offer to escrow software and hardware locks, in confidence. As Mr. Montoro mentioned, this is not required. But if companies are really concerned about these products being lost or stolen or destroyed, then this is something they should negotiate, in their license agreement.

Another option is to get the copyright owner or manager of the access control technology to fix the damaged technologies. In talking to our members, in virtually all cases, if we're talking about damaged technology and I think Mr. Montoro from his comments does not dispute this, if we're talking about damaged technology, then they will in fact, in most cases, fix that technology. In the rare instance that a fix is necessary, this is often the solution that software companies and their customers come to.

Now, where the copyright owner is out of business, I guess I thought the question is to, well then who has standing in this 1201(a)(1) to begin with? So, I just throw that out for consideration.

And, just touching upon very quickly some of Mr. Montoro's other comments, he mentioned things about printer problems with printer complaints and other interoperability problems. I'm not exactly sure what this has to do with defining a class of works or trying to create an exemption under 1201(a)(1). Another thing I think is worth mentioning is that regardless of Section 1201(a)(1), these companies will continue to use dongles, so they will continue to have these problems if in fact these problems are accurately reflected and I have significant doubts that they are, of course.

And, then also, something also worth mentioning how it is explicitly considered whether to make any of the rights or the exceptions technology specific. And, they said no, that's not a wise way to go. Congress decided to not make any of these an exemption or a right specific to a certain type of technology, realizing that technology is going to change over time.

So, anyway, that's the extent of my comments. I would like to again thank the Copyright

Office and the panel for giving me the opportunity to testify here today. And, I will be pleased to answer any questions the panel might have, either here today or following this hearing, in writing later. Thank you very much.

MR. CARSON: Thank you. And, once again, thanks to everybody. We'll now move on to questions and we'll start with Rachel Goslins.

MS. GOSLINS: Hi. For those of you that were here this morning my questions are going to follow a similar path and start at the practical end and move to the esoteric. But, actually to begin I would just like to ask a fairly simple question, just for my own personal edification while anybody on the panel can answer them. I'm particularly interested in the answers with the software experts here.

And, that is, how easy is it to circumvent these kinds of access control protections that you're talking about? Mr. Mirchin, you detailed technologies that I'm not anywhere near understanding, but they seem to be pretty sophisticated authentication systems. And, what I would need to circumvent that? And, what kind of time and resources will I need, just a computer program and I guess that goes for you as well, Mr.

Montoro, with the famous dongle, sort of what does it take to get around them?

MR. MIRCHIN: The authorization code, we don’t know of any examples where people are circumventing it, which doesn't mean that they're not. Our technology people tell me that that's pretty secure. Using a password I would say is sort of the other end of the spectrum in that typically it's administered by the institution itself. Our view is that it's in the institution's interest, because they have limitations on server capacity, to typically limit it to people who are actually somehow related to the institution. So, we're really relying on them. You know, that really is something that is much easier to circumvent.

MS. GOSLINS: And, how do you decide when you use one or when you use the other?

MR. MIRCHIN: Oh, we actually use both in every instance. The using of a password is a way if people are not coming from universityofmaryland.edu. It allows those people who are not local to be able to access the database. If you're coming from the institution, you don't need to use a password. So, it's another way of access in, really, rather than preventing anyone from getting access.

MR. MONTORO: I can only speak as to the dongle incident. There is a couple of ways to do that and one way to circumvent the dongle is to modify the actual application itself, where you would go in and when the dongle or when the program goes to look for the lock device, you would modify the program portion of that so it no longer looks for the lock device. That's certainly is, obviously, illegal to do, because you're violating the owner's copyright when you enter that program.

The other way is a different way. It's what we've been able to do by no circumventing, but replacing. And, the way I do that is my writing software that actually knows the contents of what's inside one of these devices. It responds in the appropriate manner when the software program looks for the actual device and instead it finds our software and that's all we've been able to not circumvent, but replace the technology. The technology that I have also then relocks itself back to the computer, which protects the copyright holder. So, it can't be redistributed and you're not going to see 500 copies of that same program out.

MR. MIRCHIN: May I say one other thing on using the password? We also monitor logs to see

some general usage from a particular community. So, to the extent that we were getting a sense that that -- that the user name and password was not effectively controlling it to a particular community, there are a lot of things that we could do. For example, change the user name and password and require that to be redistributed. So, there are things that we could do if we felt that it was being abused.

MS. GOSLINS: I guess what I'm trying to get at is we're heard a lot about how adversely effected the date base industry would be if we crafted any kind of an exemption to the prohibition access control that effected databases and one thing I would like to talk about in a second is how that would be different from the last six years of experience that your company has had in using access control protections, it seems pretty effectively. Even were we to exempt all databases from the access control protection, you're still better off then you were before the passage of the DMCA because you have the prohibition on the manufacturer and marketing design of devices and it sounds like, from what you're talking about, that when you have sophisticated access control protections, you're going to need some kind of software, some kind of

device to circumvent -- anyway, so I guess what I would like to hear you talk a little bit about is how much value added the conduct prohibition really gives you if a librarian is not really going to be able to get around your user ID authentication servicer.

MR. MIRCHIN: I guess a couple of things come to mind. One is I would say that probably applies not just to us, but applies actually to every copyright owner. Congress decided that if a copyright owner decided that they wanted to use access control technology, then they should be allowed to do it and that it should generally be prohibited to circumvent it. So our situation is actually no different than anyone else's. And, I would say though, my sense is in terms of how it would be interpreted, which is when you start getting carved out, when everybody gets protected except you, I have to believe that the way the courts might interpret it would be, in a way to be detrimental to database owners or my sense is that the court could very well find ways to carve out and say, well, it's clear that the Copyright Office in this rule making felt that you were entitled to a lower level of protection. So, I am a little worried about what would happen.

MR. MOHR: I'd like to add to that a little bit. I mean, I think also there is a practical concern and that what has changed in the last several years is the ability of competitors. If a database compiler invests a lot of money verifying information and being sure it's accurate, if someone can get in -- if someone can get access to that, the remedies for using the material that was invested in are very, very scant. And, that is certainly a concern of the companies that I represent.

MS. GOSLINS: Ah hah. That brings me to my next more esoteric question. Many of you and your member countries or the entities that you represent have been active in the progression of the database bills before Congress. And, as I'm sure you're all aware there is no bill yet. So, my concern or a concern that has been raised in a number of the comments, is it by prohibiting circumvention of access controls on largely factually based databases, which have a sort of thin, I know, I apologize for using the word, I know it's touchy, selection and arrangement copyright. We are, in fact, creating de facto database protection. This is not going to be true for a lot of databases that have copyrightable content in

them, but I believe as, I think it was you, Keith, talked about databases that are not as protected in the courts, precisely because of this issue and then have to rely more severely, more strongly on technological protections.

I'm not saying that someone who puts a tremendous amount of effort in selecting and arranging factual or public domain material is not entitled to a return on his or her investment or to some kind of protection under the law. My concern is that the pretext of protecting the copyright and that's the appropriate vehicle to do that. Congressional intent is always a bit obscure. It's hard to know what Congress intended in any case and especially sometimes in the context of 1201, but I'm pretty sure that they didn't intend to circumvent the process of the database bill. So, I would be just interested in hearing your responses to that.

MR. KUPFERSCHMID: Let me -- first I think my colleagues here also to respond, but let me first also actually -- I didn't get a chance to respond to your previous question, which is that, you know, we're dealing with big new technology like the Internet and so distribution mechanisms and business models are going to be changing over time, along with technology. So, while we have, our

companies have certainly used these technologies in the past, perhaps they have not used them as they do today and certainly not as they're going to use them in the future. You know, big things certainly now days in the software industries if you go on to find these warez web sites and they will tell you exactly how to crack -- how to get behind some technology or crack some code or something like that. So, that's exactly why we need 1201(a)(1) for that type of thing, where maybe someone is not providing a device or a service.

To get to the second part or the next question or the question that is actually on the floor right now, is, if I understand your question correctly, I think if you look toward what the Congress's intent was, Congress's intent is -- especially when it comes to the exemptions and exceptions, you see right there on the papers what they thought the reasonable exceptions or the appropriate exceptions that are put in, such as reverse engineering and security testing and things like that and the fact that, you know, this was never discussed or proposed that there be sort of -- I guess, certain works such as, I could say so-called thin copyrighted works or fair use works, be exempted at that time and if it was, I'm sure it

would have been shot down for the fact that how do you -- as I mentioned in my comments and I think others mentioned in their comments, well, how do you define those works? I mean, I have no idea how to define those works. I read the comments; I still have no clue how to define those works.

And, as I mentioned earlier, the burden of proof is on the proponents of an exemption to define how these works, you know, what these classes of works are. So, I'm still sort of waiting to hear from them as to what exactly -- what works we're talking -- we're actually talking about.

I think -- I hope that sort of gets to your question -- the answer to your question.

MR. CARSON: Would you be more comfortable if we just exempted databases? It's easy to define.

MR. KUPFERSCHMID: No. But, then as I think David mentioned in a previous question, what you do is you're creating this negative implication, certainly, that databases are not, you know, worthy of copyright protection, not worthy of the protection the other words are afforded. What's next, are you going to limit the term of protection for databases to five years perhaps? I don't want to give you any ideas, but, I mean, what path do we

go in 20 years?

MS. GOSLINS: Do you --

MR. MOHR: Yes, I would like to add a couple of things. I mean, part of the concern is really that 1201(a)(1) only applies if there is an access control and there are people who still, for example, put out printed compilations. That increases improvements in scanning technology, for example. It's very easy to scan that in and put it on a CD ROM. I mean one of the, you know, best known cases in this area arose from someone simply keying a compilation, extracting the facts and keying the compilation into a computer and then selling it on CD ROM.

Secondly, it does not, in that same vein, it does not protect people who adopt a broadcast model and sell advertising on a web site. That has nothing to do with 1201(a)(1).

MR. MIRCHIN: And, I would just add that I actually don't think that it would expand or contract the amount of protection that databases would have. The same standard that's been applied to this string of database cases would apply here, which is is it a copyrightable work? If it is, you can have access control technology which can't be circumvented. Is it not copyrightable, not part of

1201 and, therefore, it's not illegal to circumvent? So, I think actually I don't see that as --

MS. GOSLINS: That brings up an interesting question that we've talked about. How should we think about a user who circumvents access control protections to a database sole to get access to a public domain work? How do we think about that? Is that not to get access to selection and arrangement, but just wants the text of *Feist*?

MR. MONTORO: They're not a lawful user, correct?

MS. GOSLINS: What?

MR. MONTORO: They are not a lawful user?

MS. GOSLINS: What do you mean by lawful user?

MR. MONTORO: They're gaining access improperly, not --

MS. GOSLINS: They're circumventing access control protections to a primarily factual database, but that has a layer of copyright protection, but just to get access to the text of the public domain document.

MR. KUPFERSCHMID: I guess, and I'll let Chris take over in a second, from a technology standpoint, I don't know how this is done. I mean,

if you're accessing the database you're accessing the database. And, especially if you don't have access in it, how do you determine beforehand what is the government information and what isn't?

MS. GOSLINS: Well, in the case of a legal database you could tell what is -- you know, what are the head notes and what are the actual text of the case.

MR. KUPFERSCHMID: And, I guess what I'm saying is I -- just knowing how our members at least or many of our members distribute their content or databases, I just don't know how you would make that division, how you would draw that line between -- I mean, I understand how you can see what is the government information and what is not, but when you're talking about the access control measures, how do you circumvent and not get to the protected coordination, selection and arrangement? Because you are circumventing to get to that. They're intertwined. You can't separate one from the other.

MR. MOHR: And, I would also -- I mean, I'd also like to add to add to this. I mean, that this information -- I mean, the sort of common sense answer that comes, is why does this person need FEIST from us when it's, you know, readily available through a host of other sources?

MS. GOSLINS: Maybe that was a bad example. We heard one of the librarians this morning talk about tax decision, I guess, that are not available online, that are not available anywhere else, even though they are public domain documents, other than through a research database that the library had access to.

MR. MOHR: Well, if it's, I mean, if it's government information I don't know exactly -- I mean I'm not a tax lawyer. I don't know how one goes about finding such things, but I do know that there are obligations on the government to disclose certain things and to make certain things available. If a private service aggregates that material has value to it and makes it more convenient to users to get it, I would think that conditions under which those materials are made available are a licensing issue between the library and the publishing company and have nothing whatsoever to do with 1201(a).

MR. MIRCHIN: I would say also there is a real practical economic impact. I mean, some of our largest databases are arguably government domain databases, Medline put out by the National Library of Medicine. The reason I say arguably is, the question is, are those abstracts that are written in that database by the publishers or individual

authors? It is not clear to me if that is public domain or not, but let's take other examples by the Government Printing Office.

But, if you allowed databases that contain government information, public domain information, to be circumvented, then really you're saying that companies can't have any pricing model at all based on usage. So, for our situation we would be in a situation where we can't say, okay, you, University of Michigan, a large user, you might want to have unlimited use and you, small Western University might want to just have a single simultaneous user. If we can't have different pricing, then we're going to have to do something in the middle, essentially. So, the result is not going to be beneficial to users. I see that's not very convincing to you.

MS. GOSLINS: I think it's a great argument for database protection. I'm just not sure it's a great argument for using a few copyrightable elements of a factual database that's concerned primarily with public domain information, to consider that a work protected under this title, the title being the act. Then again, nobody is saying you can't use your own -- do whatever pricing law you want and employ vigorous access control

protections that nobody -- that it wouldn't be in anybody's time or interest to break. It would be more cost effective to pay your licensing fees. And, we're talking about a very narrow value added here to the arsenal that you already have as a database producer of protecting your investment.

MR. MIRCHIN: Then you're saying that the selection coordination and arrangement that compilation copyright is the class of works that's not protected. I mean, that's sort of what you're saying. And, that really -- to me flies -- you know, Congress could have said, compilation copyrights are the class, is one of those exemptions. They didn't do that.

MR. CARSON: We could say that.

MS. GOSLINS: Sorry. Christopher, comment?

MR. MOHR: Yes. I just wanted to add one more point. I mean, again, I come back to the burden of proof. I mean, there is no evidence that this is necessary. I mean the -- you've heard testimony today that it's, you know, basically about inconvenience. And, that, as the legislative history stated, does not warrant the issuance of an exemption, now at least in our view.

MS. GOSLINS: I see we're losing a lot

of audience members, so I'm going to turn over the mic so it will be more entertaining.

MR. KASUNIC: Okay. Following up on some of those same comments then, in fear of losing more audience... If something is protected, you're talking about there being no showing, for Chris, of there being any adverse effect. But, something that's clearly in the public domain, when we're taking about factual material, it's not something that -- you don't have to make a showing of an adverse effect for something that's not protected under Title 17. That's not something that is covered by 1201(a)(1). When the factual materials itself is not necessarily something that falls within the scope of 1201(a)(1), which only protects works that are protected within Title 17. So, who should really -- when we talk about burdens, who should bear the risk of this technology now that's currently in place? Some of this technology is not really discriminating between the copyrightable elements of these databases or compilation which would be the selection and arrangement, or I believe you said that for SilverPlatter, that the protectible elements and there is the search engine within the database. That would be something that is copyrightable and would be protected under the

scope of 1201(a)(1), but some of these masses of facts are just not within the scope of copyrightable material that would be protected. So, if the technology that is currently in existence and this is within the current period, right now, we're talking about what adverse effects are going to be in the future. But we're also looking forward to what some of the changes in technology are going to be. The technology could become more discriminating at some period of time and be applied to only the copyrightable elements as opposed to both the copyrightable and the non-copyrightable elements. Who should bear the burden of this current state of non-discriminating technology? Should it be the public that are the ones who should not be able to gain access to these public domain elements at this point, because the technology right now is not discriminating and is just broadly protecting both copyrightable and uncopyrightable elements?

MR. KUPFERSCHMID: Let me take a stab at that one. I think it is very, very clear that, based on the statute, the legislative history we have, that the burden is on, should be on, proponents of an exemption. I'm a little concerned that the fact that the creativity in the selection, arrangement, coordination of databases is being

somewhat discounted here. Where there is sufficient creativity to warrant copyright protection in the selection, arrangement, coordination of a database, I mean, why is that creativity any less worthy of any less protection than any other creative work just because it happens to include public domain material?

If the selection, arrangement, coordination is not worthy of copyright protection, is not sufficiently creative, well, then it's not covered by 1201(a)(1). Now, maybe we'll have a database bill and the investment, rather than the creativity will be protected, but I just -- I'm concerned also that we're kind of skipping over the fact, which is ignoring the fact that -- about the creativity that is involved in the selection, coordination, arrangement and there is, I know, just from talking to our member companies, how much effort they put in and creativity is involved in these databases. And, I would really -- and that worries me if we just sort of skip over that and talk about the material that's in the databases. It's copyrightable, maybe owned by somebody else, or maybe it's public domain information or maybe it's government information.

So, I think the burden of proof does not

change here. It remains on the proponents of an exemption.

MR. MIRCHIN: And, I don't -- I haven't seen in the record any need for it. I mean, I haven't seen people saying they can't get access, information isn't available, they can't get to Medline. In fact, a lot of the products that are done in the private sector are also done, often for free, in the public sector and actually an example is Medline, put out by the National Library of Medicine. You can go to Pubmed and yet a lot of the private providers, like SilverPlatter, still license a lot of it and the reason is because we provide some other benefits.

The other benefits might be that you can search across a whole range of databases, so in other words, I think there really needs to be some showing that people are not being able to get at this material, that there is a real problem that needs to be addressed.

MR. KASUNIC: There was a lot of discussion about what is not a class of works and I heard a lot of specifics about what things that were claimed to be classes of works and how they didn't fit in. Can you offer any assistance in what criteria we would use to figure out what is a class

of works?

MR. KUPFERSCHMID: I think I'll leave that up to those who want an exemption. I mean, I really -- I don't. I don't think an exemption is appropriate and I honestly don't have any helpful hints to help these proponents of the exemption out.

MR. KASUNIC: If we decide that databases is a class of works that fits in there, then would the exemption be something that should be related to a particular use of that database, or should we just exempt all databases per se.

MR. KUPFERSCHMID: I'm not sure I follow your question, but certainly if you're talking about exempting all databases per se, I would have a problem with that. I think you certainly have the definitional problems with databases, or at least as some would have you think that we have definitional problems defining a database, so, I don't think you resolve any issues by just saying okay, databases are not, you know, aren't -- don't warrant the protection here and as I mentioned before, I think we're going down a really bad path here by creating some negative implication and if we start off with databases, well what category of works might be next? You know, in that vein I should add that databases is sort of a -- is not really a very

narrow sub-set as required by the Congressional mandate, as a sub-set of a class of works.

MR. MIRCHIN: Yes, I would just say, again, as a practical matter, you're talking about a lot of organizations that put a huge amount of time selecting, you know, these are the economics journals we're going to include; these are the ones we're not; these are the proceedings we're going to include from various economic conferences; these are the ones that are not, as an example. And, saying that that selection and arrangement is entitled to no copyright protection would sort of write that out of the copyright law.

You know, there is nothing here that says that that's entitled to less copyright protection.

MR. CARSON: And, yet you have a database let's say of -- well, let's take one that I'm more familiar with and that's easy for most people in this room to relate to I suppose, because you have a database of judicial opinions. You may have engaged in a great deal of selectivity and creativity in determining which judicial opinions to put in that database. If I have access to that database and I decide I am going to reproduce one of those judicial opinions in whole and in fact I'm

going to distribute that opinion to everyone I know, you wouldn't have a leg to stand on in a copyright infringement suit, would you? Your copyright doesn't protect that. Your copyright protects the overall selection, coordination and arrangement, not the individual work within that database.

MR. MIRCHIN: I think in the 8th Circuit it's still okay.

MR. KUPFERSCHMID: But, I mean, we're still talking about access here and what you're talking about is reproduction and distributing, which is something entirely different.

MR. CARSON: Granted. Which is sometimes how we do it. But, I think maybe I'm hearing an overstatement in terms of what the copyright is protecting and that's what I'm trying to get at right here.

MR. MIRCHIN: I mean, it's clear we're taking about the access, distinguishing between the access and the further use down --

MR. CARSON: No question. No question.

MR. MIRCHIN: Okay. Okay.

MR. KASUNIC: Well, I think we're going full circle back to some of the original questions that were asked. So, if we understand that there is copyright protection -- and not demeaning that

protection in anyway by saying that databases or compilations of any sort are not deserving of that creativity. While I don't know about using the term “effort”, which is something that we've been told is not a consideration in this, but rather whether there is originality in compilations or in the creation of these works. But that copyright is limited. Whether we like it or not, it's a thin copyright that is involved here. And should these technological access control measures be allowed to lock up these entire works, including things that maybe should be accessible to the public. There is a claim that the public has a right to access, at least -- not the creative original parts that is entitled to copyright protection -- but some of the other elements that are part of the public domain.

MR. KUPFERSCHMID: But, once again, I don't know how you separate the creativity selection and arrangement, which protectable by copyright and if it's not we're talking about some other issue. But, I don't see how you separate that and the particular work. I mean, if you're talking about accessing one work of many works, then you're talking about a different situation, because the access control technologies that we're talking about generally they would cover the entire database, not

a particular work, because then you're talking about a different issue.

I mean, if you're talking about an act to circumvent an access control technology that covers, that protects only one particular work of the database, then you're not talking about protecting the database.

MR. KASUNIC: I'm talking about the one particular work in the database, unless there could be something that would obtain copyright protection if you were talking about collective work, and you have individually protected works within that.

MR. KUPFERSCHMID: Yes.

MR. KASUNIC: We're talking about a compilation of facts in terms of a database.

MR. KUPFERSCHMID: And, you're trying -- if I understand you correctly, you're talking about, well, why shouldn't people be able to get at that one fact, right?

MR. KASUNIC: At the factual material, as opposed to any particular selection or arrangement. If you have a database that has a search -- the search engine would be the tool that would select and arrange the data within a database. Isn't that --

MR. KUPFERSCHMID: If you're talking

about circumventing an access control, technological measure that's protecting a database, in order to get at the underlying facts, I don't see how you circumvent that technology without also accessing the selection, arrangement and coordination of that database. That's what I'm saying, they're two -- they're intermingled. And, that's talking about access control technology protecting a particular fact and that's outside the range of what we're talking about here.

We're talking about when a user protects a database. By circumventing that you're -- not only are you -- well, I mean, you're getting out the underlying factual information that's incorporated into the database, but you're also getting at the selection, coordination and arrangement of the database. They're intertwined.

MS. DOUGLASS: Does it have to be?

MR. KUPFERSCHMID: I'm not a technology expert, so I don't really know the answer to that question, although -- I mean, that's what database owners are concerned with, protecting their database, so that's what they're going to protect.

MS. DOUGLASS: Can't you code it separately? Can't you code separately the uncopyrightable material and then hold the other

part differently?

MR. KUPFERSCHMID: Well, I mean for one thing I think you're talking about -- that is obviously on a case by case basis, depending on the database you're talking about and secondly that's a tremendous burden to put on -- to put on any copyright owner, especially, certainly database owners where you can have fields upon fields upon fields of information and, you know, determining and labeling exactly what may or may not be public domain. I mean that's a unbelievable amount of effort.

MR. KASUNIC: So, should the public bear that burden now to try and make that determination, which they can't make, because they can't access it to begin with, so that this really becomes circular? Who should bear that burden of making that decision of only protecting the appropriate material which would be the copyrightable material, at least to gain protection under 1201(a)(1)?

MR. KUPFERSCHMID: Going back to my original statement. The burden is on the proponents of an exemption here. The law is what it is and it's proponents of an exemption or an exception, they're the ones that need to go forward and prove their case and I haven't seen it yet. I mean, I

think that's why we're having some difficulty here, because maybe if we had some facts from which to work with, we could have more detailed conversation, but we're sort of talking in theory.

MS. DOUGLASS: The law is what it is, but a lot of people say on one side that the law provides for fair use and on the other side people say that you don't really need to talk about fair use, you need to talk about negotiated use.

As a matter of fact, I believe I heard you say that you really are not necessarily referring to fair use as much as you are referring to negotiated use or use that you have to have -- that provides for a contract.

In other words, what I really want to know is how does fair use figure in the 1201(a)(1) calculation? Some people say that there is no such thing as fair use unless you tried to make an agreement and you failed to make an agreement. How does fair use actually figure into 1201(a)(1)? Are you always talking about first obtaining permission?

MR. KUPFERSCHMID: Fair use has nothing to do with this inquiry at all on 1201(a)(1). It really doesn't. We're talking about circumvention of access control technologies. We're not talking about copying, distributing, anything like that.

We're talking about access. To give you an example, I have tons of stuff back in my office that a lot of which is protected by copyright. That doesn't give you any right to break down my door and access that information under the guise of fair use. And, so when we're talking about 1201(a)(1), fair use has absolutely nothing to do with the consideration here.

I mean, you'll see from the library comments, they don't even call it fair use. They call it a right of fair access, which sort of comes out of nowhere.

MR. MOHR: I would also add to that that this was something that was considered by Congress and rejected.

MS. DOUGLASS: So, fair use is out the window as far as access control is concerned.

MR. KUPFERSCHMID: I wouldn't say it's out the window. It's never been in there to begin with.

MS. DOUGLASS: It's not part of the calculus at all.

MR. MONTORO: Well, I think it does make a difference though after you have lawful access to the program. After you have a lawful access then fair use does come into play.

MR. KUPFERSCHMID: I would agree, but then, of course, you're talking about a different situation and one that is not within the scope of the rule making.

MS. DOUGLASS: I have a hypothetical. Suppose that you suspected someone had taken part of your encrypted -- taken part of your copyrighted material, one of our databases, and put it in some encrypted material. Should you be able to circumvent that technological measure to find out whether or not your material was contained in that encrypted material? Suppose you think --

MR. MIRCHIN: So, what would be --

MS. DOUGLASS: Suppose SIIA has a flashy database and, not that SIIA publishes databases, you know, members do, but anyway, suppose they did. And, suppose you, SilverPlatter, thought that hey, they've got Psyclit in that database, would you be able to circumvent any access control SIIA had in order to find out? Should you be able to, would you be able to?

MR. MIRCHIN: We would never be circumventing any access control.

MS. DOUGLASS: So, you shouldn't be able to?

MR. MIRCHIN: Well, I guess I'm not sure

why that should be different. Yes, I guess it just doesn't seem to me like that, the fact that they use encryption should make it different that I should be able to do that or not.

MS. DOUGLASS: Shouldn't be able to, even if it's for what you might think would be a legitimate purpose?

MR. MIRCHIN: Well, I mean, there is an exception on the encryption research and all that.

MS. DOUGLASS: So, you would be conducting encryption research to find out whether they had a --

MR. KUPFERSCHMID: I think what he's trying to get at is is that there is -- I mean there -- you basically you look to the law. You look to the what the exceptions are. If you want to get at the underlying database and it falls within one of those exceptions, great, but I mean I don't think the situation you state does.

MS. DOUGLASS: So, you wouldn't be able to do it?

MR. KUPFERSCHMID: No. I mean, according to my reading of the law, no.

MS. DOUGLASS: And, you shouldn't be able to do that sort of thing?

MR. KUPFERSCHMID: There are other ways

to find out whether somebody is taking your material.

MS. DOUGLASS: Okay. I just want to have a -- I just have one final just general question, just sort of a -- for my information. You license your databases or do you sell them?

MR. MIRCHIN: We license them, largely. I mean, there are actually some exceptions where they actually are sold, but that's really rare.

MS. DOUGLASS: And, do you register them for copyright protection? I don't want to put you on the spot. Maybe you don't know.

MR. MIRCHIN: Well, we have a really small legal department and we personally don't register them. I actually believe probably the database producers do. The problem of the dynamic databases and registration is that some of them are changing on a daily basis or more frequently than that. And, there is always the question of, you know, how are you going to register them. We personally do not register the databases. We have probably in excess of 2,000 updates a year in various databases. So, we don't.

MS. DOUGLASS: I'm just trying to find out whether you registered them as published works or whether you considered them as published works,

whether you considered them as unpublished works, et cetera, et cetera.

MR. MIRCHIN: I would say -- I mean, SilverPlatter's interest in this, as well as, obviously, database protection, you know, we're all fellow travelers, is that -- the issue for us is it's our supply. It's our life blood. I mean, if there is not protection, if the database producers cannot make a reasonable living, there simply is no, you know, there would be -- there would be no supply for us. So, that's -- that would be our interest in that sort of thing. So, how they register in terms of copyright, actually I don't know.

MS. DOUGLASS: I'm just trying to generally get at the idea of whether these are considered to be published works, are they considered to be unpublished works? Are they then -- do you have any -- as a published work are there any things that sort of follow as far as use is concerned, in terms of what should a purchaser be able to do with the work once he purchases it? I guess that's my point.

MR. MIRCHIN: I guess you know, that really raises sort of a general issue which is, you know, in -- also in terms of this rule making, that there are a lot of things that are happening well

outside the access control technology, in terms of the use that people make. I mean, often that's very much a licensing question and a lot of these issues actually come up very much in the licensing context, rather then the access control context.

MR. CARSON: Chris or Keith, do you want to add any views at whether in general databases should be considered published or unpublished? Obviously that depends on a case by case basis. I mean I don't -- I never asked actually what our members' practice is, but I'm sure it also -- for them it's on a case by case basis.

MR. KUPFERSCHMID: No.

MR. MOHR: I mean, it seems that -- I would echo that.

MS. DOUGLASS: So, you -- so, they might be published, they might be unpublished. Is that what you're saying?

MR. MOHR: Yes. Just like any other work.

MR. CARSON: My memory is failing me, but my notes, assisted by a vague recollection, tell me that at least one of you made a point that you can't define a class of works by reference to the type of use someone is making of it. And, I'm wondering if anyone would like to champion that

point of view and explain to me why you can't do that?

MR. MOHR: I believe the point was class of user.

MR. CARSON: All right. Let's do it that way.

MR. MOHR: I mean, the problem with doing it that way is basically that the way this issue has been phrased is in terms of education, library, other miscellaneous uses, that they use the entire gambit of copyrighted works. It's basically a way of writing the prohibition out of the statute, in our view.

MR. KUPFERSCHMID: If I could just -- I'm sorry, just stop for a second, just because this was actually considered by Congress and rejected and they went with the other approach, which is to define class of works. So, they actually reviewed the legislative history and the proposals -- this was actually proposed and rejected and instead when with the class of works option. So, that's, at least from my understanding, was actually considered at one point and decided that was not the way to go. But, anyhow, I didn't mean to cut you off, Chris.

MR. CARSON: Is there anything in the statutory language that forbids us from deciding,

all right, we're going to decide that one class of works is databases when used in an academic library. I'm just -- I'm making this up on the fly, so that may not be a good example, but let's just say that that's -- someone comes forward with evidence that that's where there is a real problem. Why can't we narrowly define a class in that respect?

MR. KUPFERSCHMID: I think that if somebody and that's a big, big if, somebody were to come up with that evidence, then we would certainly have to determine if that evidence corresponded with, number one, if there is a causal connection between that evidence and the prohibition, if that evidence was substantial and that that evidence did correspond with the class of works, but once again we're sort of talking about this all in theory because you don't have any actual information to deal with. But, I would be happy when they come forward with the information to talk about it in detail then.

MR. MIRCHIN: I know I just say again, would sort of say, just wait a second. It says class of works. Now, you're talking about class of works, but in terms of the users that are -- and the uses that are being made of it. And, I wouldn't want to make your job anymore difficult.

MR. CARSON: All right. That's a question that has been asked a number of times. What on earth is a class of works in the context of Section 1201(a)(1)? How do we determine what a class of works is?

MR. KUPFERSCHMID: Right about now I'm glad I don't work at the Copyright Office.

MR. CARSON: Would you take my resume?

MR. MOHR: I would just like to add one more thing to that. I mean, another thing is that on balance there has to be a balancing and the benefit from these measures, you know, is outweighed by the negative effects. I mean, again, that's a burden that the proponents of an exception bear and that is something, at least in our view, that has not been shown.

MR. MIRCHIN: This isn't a test. You don't fail by coming up with the empty slate here. In other words, what I really mean is that it is not incumbent on you to sort of, you know, I think it is incumbent on people who want to propose an exemption to propose some genuine exemption and see what the evidence is behind it. And, then we can actually address it, but I mean I guess I haven't seen the evidence of people genuinely being harmed that they can't get at the information because of it.

MR. CARSON: Mr. Montoro, I don't want you to feel ignored.

MR. MONTORO: That's all right.

MR. CARSON: So, I'm going to ask Mr. Kupferschmid some questions. I'm picking on you as the punitive representative of the software industry.

Let me first ask you whether SIIA has any particular point of view with respect to whether people should, as a general proposition, be able to circumvent the protections that dongles provide with respect to software?

MR. KUPFERSCHMID: In our written comments and also I tried to address them a little bit today, I mean, the answer to that is no, unless of course, like I mentioned before, for some reason it falls under -- within one of the exemptions. And, I can actually cite an example and I think this is backed up by Mr. Montoro's comments. He discusses the fact that universities like to use the AutoCAD programs and which cost a lot of money, but the fact is that the dongles for these programs keep in getting stolen. And, guess what, they're being stolen by students and the software is also being stolen.

I mean, that's exactly the type of thing

we're trying to prevent. And, if there is an exemption for lost, damage or stolen dongles, then universities aren't going to take any precautions at all to make sure that their dongles aren't stolen. But, if the burden falls on those who actually purchase the software and the dongles, then they will take out insurance to protect themselves and maybe they'll lock up the dongles when there is no one, you know, watching the computer, the security guard or whatever they use. They're lock them, that type of thing. So, it's best here, certainly, from this standpoint to put the burden on those who actually are purchasing the software to make sure it's not stolen or lost.

MR. CARSON: Mr. Montoro, you're raising your hand. I gather you would like to say something.

MR. MONTORO: Thank you, Mr. Carson. And, sorry, Rachel.

It's amusing and it's amusing, I guess, because for those that are really in the situation, educational facilities and to take a lock device, to take it back whether you've got 30 computers, perhaps, in a shop, is not a real practical solution. What I suggested perhaps of having a replacement technology made available is something

viable, of course. That could be used and that could be used effectively.

I might agree with Keith, I'm not so sure that what I have talked about with these dongles is actually access control. But, I never quite heard and I would like the Copyright Office maybe to clarify that what we are talking about is copy protection instead.

MR. CARSON: Let me ask you, Keith, do you have a viewpoint on whether dongles are access control measures? Are they something that fall within the scope of Section 1201?

MR. KUPFERSCHMID: I think -- I mean, I think they are access control measures from what I understand about the technology, but I do -- would like to leave the opportunity open, because of my more technical experts back in the office and what have you. But, my understanding is they are in fact access control technological measures, you know, but obviously if you don't have access you can't copy either.

MR. MONTORO: I believe what Keith, what he had said earlier in his testimony, however, was that he believed that these devices were copy protection devices unless the Copyright Office ruled otherwise, if I characterize that correctly.

But, the problem, again --

MR. KUPFERSCHMID: I'm not sure I said that, but go ahead.

MR. MONTORO: So, there is a problem with these devices. They cannot be backed up. If they are -- what happens after you receive your first access? Let's say this is -- I purchase a program. It comes with a lock device. Now, I am a lawful authorized user to use that program, but without this device I cannot use that program. Does it mean that I -- is it then an access device or is it copy protection device. And, I think that's what Mr. Jaszi was trying to get at this morning, where he was talking about second usage and that's where I'm going also.

MR. CARSON: Keith, I would like to follow up on a comment you made. I can understand the fear of a potential for abuse if someone just says we lost it, it was stolen, go back and get another one or being able to circumvent in those case. I understand the potential for abuse there. But, at least what we're hearing from Mr. Montoro is there are cases where it's damaged. And, you can't get the company to replace it. A, what on earth would justify a company in refusing to replace it and second, if that company refuses to replace it,

when it is demonstratively proven that the thing is just damaged. Here it is, it's damaged. I didn't give it to someone else.

What on earth would justify not permitting a person in that position to circumvent?

MR. KUPFERSCHMID: A couple of things. One, as I mentioned, is that there are third parties that will agree to escrows and this happens all the time. Will escrow software. Will escrow hardware locks, that type of thing. They will do that, so if that's a concern of yours, certainly you can do that. But, that's beside the point.

MS. GOSLINS: Although that requires the permission and effort on the part of the software publisher, right?

MR. KUPFERSCHMID: Oh, sure.

MS. GOSLINS: There is no guarantee that --

MR. KUPFERSCHMID: Without a doubt.

MS. GOSLINS: -- that they would make that available to the third party.

MR. MONTORO: Hindsight is 20/20. After somebody has gone out of business, trying to say that they should escrow this material for future people to use is a little too late at that point.

MR. KUPFERSCHMID: Escrow is something

you would do at the time of agreement, certainly, and that is actually a practice that is somewhat common. We have a lot of members, a matter of fact --

MR. CARSON: Can I stop you right there?

MR. KUPFERSCHMID: Yes.

MR. CARSON: Just for a second. I've got another point. This may be my ignorance. How do you meaningful escrow a piece of hardware and what does that mean?

MR. KUPFERSCHMID: You would just get a third party who would basically hold that hardware and if the dongle wasn't operable, then you would have this other, this other hardware that sort of been, sort of in storage, I guess, for lack of a better term.

MR. MONTORO: It's not possible. I'm sorry, it's not possible to do that. The hardware piece is unique to each customer. That would mean that the manufacturer would have to send out one dongle, one of these pieces to the customer when he gets the software package and one to a third party escrow person to hold onto it in the eventuality something happened.

MR. KUPFERSCHMID: But, that's exactly what we're talking about. That does happen.

MR. CARSON: Is that a typical practice?

MR. KUPFERSCHMID: For dongles, I really don't know. With software, it is. Let me take that back, depending on the software, okay, it could be a typical practice. I mean, we're talking about many different software products here.

MR. CARSON: Okay. Let's assume that that didn't happen. You know, there wasn't a, I guess another dongle in the hands of some third party escrow. The user's dongle is broken. And, he goes back to the software company, if it still exists, and says, hey, it's broken. Here, I'll ship it to you. You can look at it. You can find out for yourself. And, the software company says, too bad, buy another $7,000.00 software package. Why, under those circumstances, should the user not be permitted to circumvent?

MR. KUPFERSCHMID: And, this actually was -- now, you're getting back to the very first point I wanted to make, which is what I read in Mr. Montoro's comments, I said -- I mean, gee, is this right and when I called our software companies that have an interest here and use dongles and, I mean, they informed me that is actually not the case. I mean, if -- and I think actually there is one line, although I don't have it handy, in Mr. Montoro's

testimony where it says, if you're talking about lost or stolen, but if you're talking damaged dongles, in most cases the software provider will actually replace that or work with the customer.

I mean, they don't want to lose customers it's bad business. So, they will actually work with the customer in virtually all cases. In talking to our members this was confirmed.

MR. CARSON: Let me make sure I'm not misunderstanding what you said. Have there been cases? Are you aware of cases where you have the damaged dongle and there is simply no recourse from the software company?

MR. MONTORO: Well, the first instance would be if a company went out of business and there was nobody to go back to and I mentioned that already.

MR. CARSON: Right.

MR. MONTORO: Generally, companies will replace one that is damaged, if they are still around to do so. The problems come up, of course, that if the lock device is lost, there is a burglary and I think Keith raised earlier the point that you should go ahead and you take your software and you lock it up, you lock up your hardware lock at night. Well, the truth is that most people will obviously

lock up their software and keep it in a certain spot. The software, however, is already install on your computer. Once it's installed on the computer with the hardware lock, you don't ever touch it. You don't climb behind your desk every night before you go home to remove a device.

And, so those are real problems and we've had people actually call us, hey, I've got a police report, this is exactly what happened. It's to the dealers, typically that deal the software that's out there, they -- generally it's up to them if they're going to replace something or not and the problem is that they are motivated by making another sale. And, I've come across this once before, where they had no incentive really to help out somebody if it's actually been lost. They will say you simply can go ahead and try to claim it on your insurance.

And, I've had customers come back to me and tell me my insurance does not cover this.

MR. CARSON: Okay. Let's take your scenario where the software company is out of business. What's your response to Mr. Kupferschmid's point that if a software company is out of business, who on earth has got a claim against you under Section 1201(a)? What's your problem?

MR. MONTORO: It's still breaking the law as I understand the way 1201(a) would be. You're still circumventing a device -- a copyright protection device or even maybe an access control device, depending on how we define it. So, whether you're breaking the law and no body knows about it or you still maybe breaking the law and that's why we need the exemption.

MR. CARSON: That's all I have. I want to thank you all for sharing your thought with us. Our work still -- we still have a lot left to do, just in the next two days. I apologize on behalf of the Register who really did want to be here. She will have the opportunity of reading the transcript and/or hearing the audio tape of your testimony. As we mentioned at the outset, it may well be that after you've all left we'll realize, oh, my God, we really should have asked you this question or that question or the Register herself may well have some questions that none of us thought of and we are certainly reserving the right to get those to you and ask you to get back to us in writing in sufficient time that that can be made part of this record and hopefully in time for others to comment upon that in their post-hearing comments.

So, with that we will adjourn until

tomorrow morning at 10:00 a.m. Thank you, everyone.

(Whereupon, the hearing was adjourned to reconvene tomorrow at 10:00 a.m.)