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Roundtable Panel II: Digital Video

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Panel II: Digital Video

Moderator: Yochai Benkler*
Panelists: Andrew Appel**
Jeffrey Cunard***
Martin Garbus****
Edward Hernstadt*****
E. Leonard Rubin*****
Charles Sims*****

MR. PENNISI: We will now begin our second panel: whether copyright laws may be construed to restrict the unlicensed digital transfer of video, and how such transfers may be or should be regulated.

As with Panel I, this panel discussion will be preceded by five minutes of remarks by each panelist and followed by fifteen minutes of questions by the audience.

Our Digital Video Panel today includes — and this is alphabetically by firm:

Jeffrey Cunard is a partner in the Washington, D.C., office of Debevoise & Plimpton. He practices in the areas of intellectual property, information technology, and telecommunications. His

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***** Partner, Gordon & Glickson LLC; Adjunct Professor, Loyola University School of Law; Adjunct Professor, John Marshall Law School. University of Illinois and University of Miami, A.B. 1956; University of Miami, J.D. 1959.

***** Partner, Proskauer Rose LLP. Amherst College, B.A. 1971; Yale Law School, J.D. 1976.

most recent engagements include rendering advice on a wide range of digital media, intellectual property (“IP”), electronic commerce, and other matters relating to the use of the Internet. Mr. Cunard represents companies interested in the availability of music and motion pictures in new digital media, as well as providers of online services and companies on computer software-related matters. He helps both vendors and customers in structuring, drafting, and resolving disputes involved in computer software development, licensing arrangements, and outsourcing transactions.

Martin Garbus is a founding partner of Frankfurt, Garbus, Klein & Selz. Mr. Garbus has represented major book publishers, movie companies, and media conglomerates in the United States and abroad in commercial and media actions, as well as major new media entities, Internet companies, networks, and cable television and radio industries. As part of his communications and IP practices, he has represented Salman Rushdie’s publishers; actors, including Spike Lee, Al Pacino, Richard Gere, and Robert Redford; and well-known political dissidents, such as Vaclav Havel, Nelson Mandela, and Anatoly Sakharov. Mr. Garbus has also served as a consultant on media and communications in Canada, England, Australia, and the former Soviet Union. Mr. Garbus was lead counsel on behalf of *2600 Magazine* in a DeCSS¹ case tried this past summer before the Southern District.²

Edward Hernstadt is an associate at Frankfurt, Garbus, Kein & Selz and focuses on media and the First Amendment, discrimination/Title VII law, including civil litigation, entertainment litigation, and IP law. Along with Mr. Garbus, Mr. Hernstadt litigated on behalf of *2600 Magazine* against the Motion Picture Association of America.³

Leonard Rubin is a partner with the Chicago firm of Gordon & Glickson, which concentrates its practice in information technology

¹ DeCSS is a software utility that descrambles the CSS (an acronym for “Content Scramble System”) copy protection system; see *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 214 (S.D.N.Y. 2000) [hereinafter *Reimerdes I*].

² See generally *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) [hereinafter *Reimerdes II*].

³ See *id.*

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 319

and related fields. Mr. Rubin, who specializes in copyright, trademark, trade secret, and entertainment law, is the former general counsel for Playboy Enterprises. He has extensive experience handling negotiations, legal problems, Internet implications, and trial and appellate litigation in the communications, publishing, computer, music, television, theatrical, and motion picture practice areas. Mr. Rubin is presently an adjunct professor at Loyola University School of Law and John Marshall Law School.

Yochai Benkler is an associate professor at the New York University School of Law. He is the director of the Information Law Institute and faculty co-director of the JSD program. Professor Benkler teaches information law and policy in the digital environment, communications law, and property law. His research focuses on the effects of laws which regulate information production and dissemination on the distribution of control over information flows, knowledge, and cultural production in the digital environment. He has written about rules governing infrastructure, such as telecommunications and broadcast law, as well as rules governing private control over information, such as IP, privacy, e-commerce, and constitutional law.

Andrew Appel is a tenured professor of computer science at Princeton University, where he has been a member of the faculty since receiving his doctorate at Carnegie Mellon University. Professor Appel's research focuses on computer security, compilers, programming languages, type theory, and functional programming. He recently provided expert testimony in the landmark case against *2600 Magazine*⁴ for violation of the Digital Millennium Copyright Act ("DMCA").⁵

Leon Gold could not be here today due to an emergency deposition, and Charles Sims will be standing in for him. As you might remember from the first panel, Mr. Sims is a partner in the Litigation and Dispute Resolution Departments of Proskauer Rose, where he concentrates on copyright and First Amendment issues. He

⁴ See *Reimerdes II*, 111 F. Supp. 2d at 294.

⁵ See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

has worked on matters for the publishing, motion picture, and music industries. He was one of Proskauer's lead counsel in the DVD⁶ DeCSS case tried this summer.⁷

I will give the floor to Professor Benkler.

PROFESSOR BENKLER: I would like to use these few minutes not so much to present a position but rather to describe what I think would be worthwhile for us to talk about and ask of the panelists.

First, the combination of thinking about video as a category is one way of "slicing" this. Another is to say that we have quite distinct policy issues on the table before us. One of them, primarily raised by the DMCA, has to do with the protection of encryption as a means of either preserving or extending the rights of copyright owners, and whether such activity is sensible, or even constitutional, in the digital context.

I would urge the panelists to consider — if not during their first comments, to at least focus on this in the questions and answers — not so much what one would argue to a judge but instead what one would argue to a legislature: what is a sensible thing to do, and ought we to think about these problems?

iCraveTV involves more traditional copyright issues — though we may also focus on the technology issues.⁸ *iCraveTV* also involves the question of retransmission and how Internet retransmission fits into our more general law — focused, I presume, primarily on the broadcast, cable, and satellite relationship — of retransmission by one set of media players of content that is transmitted via broadcast and generally freely available to the public.⁹

⁶ Digital versatile disks ("DVDs") "contain copies of the motion pictures in digital form. They protect those motion pictures from copying by using an encryption system called CSS. CSS-protected motion pictures on DVDs may be viewed only on players and computer drives equipped with licensed technology that permits the devices to decrypt and play - but not to copy - the films." *See Reimerdes II*, 111 F. Supp. 2d at 303.

⁷ *See id.*

⁸ *See National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q. 2d (BNA) 1831 (W.D. Pa. 2000).

⁹ *See id.*

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 321

So these are the issues in general. I think they ought to raise the same set of issues that we talked about this morning:

- The need for protection — is protection really needed?
- The particular attributes of the protection — just as we spoke about this morning, whether the protection is misappropriation or a *sui generis* right; whether it is this particular kind of technology protection or a different kind of technology protection. And so there is the need for protection, particularly the design of the rules used to achieve that protection and to serve that need.
- The institutional limitations on achieving that goal — what are these institutional limitations? How much does the Constitution allow? In this case, it is more about the First Amendment than it was when we spoke this morning with respect to the Intellectual Property Clause.¹⁰ Additionally, to what extent does the Constitution permit the institutional solution that the DMCA represents?
- And finally, the costs — or, rather, the needs and the costs are all rolled into the constraints. Why refrain from regulation, assuming there is a need? What might be the concerns we would have about over-protection? Is there such an animal in this case as over-protection? What are the potential social costs we might worry about when we, for example, prohibit circumvention of copyright protection mechanisms?

So, these are the questions that I think are worthwhile having in our minds as we go through the panel presentations.

Largely based on a sense of what people will say initially and where they stand, we might jumble the order a little bit relative to the order on the board with roughly everyone's consent. If you do not, then hopefully it will not be too offensive. I think Marty Garbus will go first.

¹⁰ See U.S. CONST. Art. 1, § 8, cl. 8.

MR. GARBUS: Professor Benkler was one of my teachers. He is one of the people who submitted a wonderful *amicus* brief in the *Universal* case,¹¹ and he taught me a good deal about the law in this case. Professor Appel, on the other hand, as one of the chief witnesses in the case, taught us all a good deal about the technology.

One of the interesting issues about this is: who is responsible for defining the balance between copyright and the First Amendment? If you read the legislative history of the DMCA, there is no question but that the copyright holders prevail over scholars, librarians, and other people who are very much interested in fair use.¹²

The next question is: assuming that this was done by Congress — or assuming that this is the place where the power of money, i.e., the power of copyright holders, is to be felt — what is the role of the courts in evaluating what Congress has done? The question is: how do the courts approach it, what are the various First Amendment tests, and what are the various policy tests that are used?

I will just read you a few words from Judge Kaplan's opinion, because I think it articulates a view that many people espouse, as many courts certainly do. He said, "when we raised the issue of fair use and the First Amendment, that access control measures, such as CSS, do involve some risk of preventing lawful as well as unlawful uses of copyright material. Congress, however, clearly faced up to and dealt with this question in enacting the DMCA."¹³

In other words, it is absolutely clear that lawful uses of copyrighted material are being banned for the first time. Whether you call the statute a "copyright statute," a "para-copyright statute," or something else, it is called the Digital Millennium Copyright Act, so clearly it has very heavy copyright implications.¹⁴

¹¹ See generally *Reimerdes II*, 111 F. Supp. 2d at 294.

¹² See H.R. CONF. REP. NO. 105-796, at 75 (1998), reprinted in 1998 U.S.C.C.A.N. 639, 652.

¹³ See *Reimerdes II*, 111 F. Supp. 2d at 328-330; see also *Reimerdes I*, 82 F. Supp. 2d at 219-20 (S.D.N.Y. 2000).

¹⁴ See 17 U.S.C. § 1201 (2000).

One of the questions you deal with in the law is whether there are less restrictive means of dealing with the same problem than stopping free speech? You have criminal penalties, and a whole body of law which deals with contributory infringement. In other words, prior to this time, it is not that the copyright holders were helpless. There are other ways in which copyright holders could protect their interest. So the idea that if you do not have this statute the world is going to fall apart, or that copyright holders will be without any protection, is a little too simplistic, I think.

One of the things that this statute¹⁵ does, for example, if I wanted to make a DVD or something else with public domain material and they put on CSS,¹⁶ that would stop public domain material from being available to the public, for the first time. If I were a 14th-century scholar at Fordham, and I wanted to have access to new books and libraries that have e-books with CSS controls or something like that, I would not be able to do that any longer. In other words, what this statute says basically is “these are the things you cannot do.”¹⁷

But then, they make certain exceptions for certain people who can do these things, and what it ultimately becomes is kind of a licensing statute.¹⁸ For the first time, you have to ask permission from people.

So basically, I think the way this question is framed, it is clear that in *Harper & Row* the court attempted to strike a balance between copyright law and First Amendment law.¹⁹ It is clear that this statute disregards that balance.²⁰ Whether or not the statute can disregard the balance; whether in fact Congress can appropriately say that we overrule *Sony v. Betamax*;²¹ whether the MPA²² can go before Congress and other copyright holders and say “fair use is still protected,” fair use *is* still protected. There are many congressmen

¹⁵ *See id.*

¹⁶ *See supra* note 1.

¹⁷ *See* 17 U.S.C. § 1201.

¹⁸ *See id.*

¹⁹ *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1984).

²⁰ *See* 17 U.S.C. § 1201.

²¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²² Motion Picture Association.

who in the debates talked about how fair use is protected,²³ and the statute even has some language about fair use being protected.²⁴ Nonetheless, what this court decided — and it may be upheld by a higher court, or it may not — is that fair use is effectively banned.²⁵

We also had testimony in the *Universal City Studios* case, not surprisingly, that videos are on the way out.²⁶ Pretty soon it will all be DVDs. For those of you who have been following the e-book market, most publishers are projecting that within six or seven years at least half the market will be e-books at \$3.95 or something, and then the hardcover books will be \$70 or something like that for the more selective consumer.²⁷ So within a period of time, everything will be under a process similar to this.

Now, Professor Felton, Professor Appel's colleague at Princeton, said in the case that with the release of DeCSS,²⁸ ultimately the DVD will have to change its security system because certain kinds of people will break it. It may even make DVD hardware valueless. So he says, "I have an obligation to tell the consumers what is out there

²³ See H.R. REP. NO. 105-551 (II), at 25-6 (1998).

²⁴ See 17 U.S.C. § 1201.

²⁵ See *Harper & Row*, 471 U.S. at 579. In his dissent, Justice Brennan, with whom Justice White and Justice Marshall joined, stated:

Although the Court pursues the laudable goal of 'protecting the economic incentive to create and disseminate ideas,' . . . this zealous defense of the copyright owner's prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture. Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine.

Id., see also *Reimerdes II*, 111 F. Supp. 2d at 322, 324.

²⁶ See *Reimerdes II*, 111 F. Supp. 2d at 310, 337 ("[E]ven if movies were available only on DVDs, as some day may be the case . . .").

²⁷ See generally Paula J. Hane, *E-Publishing Competition Heats Up; Traditional Booksellers get into the Game*, INFO. TODAY, No. 2, Vol. 18, Pg. 32 (2001) (stating that Barnes & Noble Digital is offering readers low prices for e-books (from \$5.95 to \$7.95), which, until now, is quite a bit lower than other e-book pricing. The reference and textbook publishing fields have seen a flurry of digital publishing initiatives and partnerships. The textbook area, in particular, is considered to be a key point for development and growth of e-books.).

²⁸ See *Reimerdes II*, 111 F. Supp. 2d at 311, 315.

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 325

so that they can know what to do.”²⁹

In talking to his class, for example, he can talk about DeCSS.

Jane Ginsburg, a law professor at Columbia, refers to a URL site which has DeCSS. So it is clear that DeCSS is permitted for some people; it is not permitted for others. In this case, it was a journalist. You will have to read the decision to go deeper.³⁰

It seems clear to me that the *New York Times* can write about this case, claim that people say that it is a way of getting free movies, say that there is a group of people who even advocate getting free movies, talk about open source, and refer to the site. It seems to me that the *Times* ought not — and cannot — be punished for that. Nonetheless, thus far in this case, the journalist — whose history is different, yet remains a journalist— has been punished for that.

So I think these are very profound issues.

PROFESSOR BENKLER: Ed Hernstadt will go next.

MR. HERNSTADT: I worked with Marty on this case, so first I have to say that I agree with everything Marty said.

The question as framed does pose certain problems, because the real answer is that copyright laws already restrict the unlicensed transfer, use, and rebroadcast of video works. Any use, transfer, or rebroadcast of a video work — whether it’s digital or not — that constitutes copyright infringement is restricted. It is illegal.

The real question is: does the DMCA add something else to this? It does. The Digital Millennium Copyright Act has nothing to do with copyright infringement — even though, as Marty pointed out, it has the word “copyright” in it and it has a lot to do with copyright. It

²⁹ See generally *id.* at 294.

³⁰ See generally *id.* at 338. The court stated that:
Many of the possible fair uses may be made without circumventing CSS while others, i.e., those requiring copying, may not. Hence, the question whether Section 1201(a)(2) as applied here substantially affects rights, much less constitutionally protected rights, of members of the ‘fair use community’ cannot be decided *in bloc*, without consideration of the circumstances of each member or similarly situated groups of members.”).

is § 1201 of the Copyright Act.³¹ The DMCA is only about access to copyrighted materials that have been stored in a digital format. Section 1201(a)(1) is using some kind of a technological measure to get around a protective device, such as CSS, that protects the digitally stored copyrighted material.³²

Our case, the *Universal City Studios* case, was about making technologies available that would permit you to circumvent some kind of technological measure.³³

It is a lot of words, but basically it means that you could take a DVD, which is just a storage device, put a movie on it, tie a piece of string around it, and you have got some kind of a technological measure.³⁴ A “technological measure” is defined in the Act as something that requires a process to get around.³⁵ So, if you have to untie a string, there is arguably a process there. Effectively, that is what it is.

Suddenly, that copyrighted material is different than any other copyrighted material in the world, and in the history of the world — books, CDs, videocassettes, stone tablets, words written in sand. It is the only time that you have no right.³⁶ You—the public and anyone other than the author (if the author has signed the rights over to a distributor) — have no right to access copyrighted material without some kind of permission.³⁷

The limits, the restrictions on copyrighted material today, are set forth very clearly in the Copyright Act.³⁸ Fair use is permitted.³⁹ A number of uses are permitted.⁴⁰ Those uses, as Marty mentioned,

³¹ See 17 U.S.C. § 1201 (1994 Supp. IV).

³² See *id.*

³³ See *Reimerdes II*, 111 F. Supp. 2d at 294.

³⁴ See 17 U.S.C. § 1201 (1998).

³⁵ See *id.* § 1201 (a)(3)(A).

³⁶ See generally David Nimmer, *A Riff On Fair Use In The Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 674-86 (2000).

³⁷ See *id.* at 718-19.

³⁸ See 17 U.S.C. §§ 107-112 (1994).

³⁹ See *id.* § 107.

⁴⁰ See *id.* §§ 108-112. (some of these rights include: reproduction by libraries and archives (§ 108); exemption of certain performances and displays (§ 110) and; Ephemeral Recordings (§ 112)).

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 327

under the DMCA have disappeared. There is no such thing as fair use or any of the related things, like reverse-engineering⁴¹ or encryption.⁴² None of that stuff exists if copyrighted material is stored digitally and some kind of circumvention device is put around it.

What are the costs? You could have a situation where someone prevails in a lawsuit where they are sued for copyright infringement and for violating the Digital Millennium Copyright Act. They could win by presenting a full fair use defense and they could defeat the copyright infringement claim, but they can still lose on the Digital Millennium Copyright Act claim. That does not make any sense.

One of the biggest problems concerning how the Act is written is contained in this question: does it restrict the unlicensed transfer, use, or rebroadcast? That presumes that a license is required for all use. Under the existing regimen, it is only required for certain types of uses.⁴³ That distinction has been wiped out.

PROFESSOR BENKLER: Chuck?

MR. SIMS: Needless to say, Ed agrees with Marty, and I disagree with both of them on almost every point, and Judge Kaplan agreed with us.⁴⁴

PROFESSOR BENKLER: Are you suggesting his views are more relevant?

MR. SIMS: No, they are tentative, but they are — what is the phrase — “they are infallible because they are final,” or something? They are not final, but we will get there.

⁴¹ Reverse engineering of software is determining how a specific software program operates by working backward from a finished program. See Terril Lewis, *Reverse Engineering Of Software: An Assessment Of The Legality Of Intermediate Copying*, 20 LOY. L.A. ENT. L.J. 561, 562 (2000).

⁴² Encryption technology is defined as the “means of scrambling and descrambling of information using mathematical formulas or algorithms.” See 17 U.S.C. § 1201(g)(1)(B) (2000).

⁴³ See generally 17 U.S.C. §§ 109-122 (1994).

⁴⁴ See *Reimerdes II*, 111 F. Supp. 2d at 321-24.

I want to focus on the questions you raised, Yochai, because I think they are a better way of going through this: first, the need for protection; second, what kind of protection, if there is a need for some; and third, whether the Constitution permits it.

Ed described, in a horrified tone, the technology which prevents access to books, to First Amendment materials, and prevents us from getting at them and using them when and where we want. Isn't this a horrible thing? He was really describing the lock on the front door of the New York Public Library at 42nd Street, and that really is a model for what Congress did.

Why did Congress pass this statute, notwithstanding the continuing existence of the copyright law? Well, Congress did so essentially to avoid, on behalf of content owners who were willing to invest in technological protection, precisely what has happened to the record and song-writing industry.⁴⁵ Yes, there is a copyright law, and it is largely difficult, if not useless, for record owners in a world of Gnutella.⁴⁶ What Congress concluded, after extensive hearings, is that the risks of perfect digital copies were different in kind from anything that we have faced before.⁴⁷

Yes, VHS piracy does exist and there are VHS pirate factories in southeast Asia.⁴⁸ And the MPAA⁴⁹ spent a lot of money on street corners, near the bus station, and in towns around America dealing with analog VHS piracy.⁵⁰ But every copy that is made is degraded from the first one, and so those rights have been deemed to be manageable with continuing investments.

But, Congress concluded that digital piracy would be different because, with one push of one button, you can make available to 20 or 80 million people worldwide, a song or a movie — any kind of

⁴⁵ See H.R. REP. NO. 105-551 (II) at § 107(a) (1998).

⁴⁶ Gnutella is a fully-distributed information sharing technology. See Gnutella at <http://www.gnutellanet.com> (last visited Mar. 4, 2001).

⁴⁷ See S. REP. NO. 105-190 at 65, 105th Cong., 2d Sess. (1998).

⁴⁸ See Jane Moir, *Hong Kong Praised for Taking Right Path in Battle Against Copyright Crime*, S. CHINA MORNING POST, September 21, 2000 at 3.

⁴⁹ Motion Picture Association of America.

⁵⁰ See Ernest Plock & John E. Siegmund, *Entertainment; 1991 U.S. Industrial Outlook*, U.S. Dept. Commerce. (1991).

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 329

content. Congress concluded that copyright has protected incentives to creation, and that those incentives are now in jeopardy because of the dangers posed by instantaneous digital copying. So, Congress said, ‘they are entitled to protection.’⁵¹

What kind of protection did Congress give? Essentially it is the protection of locks and keys. Content owners are allowed to put locks around their property — that is, encryption — and they are entitled to have people not provide openly to the public the decryption utilities.⁵²

The analogy, which either the court used or was presented to the judge — and I believe moved him — was: Look, General Motors has a fleet of automobiles out there, and there are lots of different keys, but there is a master key that works for the whole fleet. Congress or state legislatures can make it unlawful for somebody to take that key and provide it, or provide information about it, to the whole world. If the lock on the front door of the Metropolitan Museum (“the Met”) were a numerical code rather than a physical bronze key, it would not matter — the government could protect the proprietors of the Metropolitan Museum and keep people from going in there at will, even though there is enormous First Amendment value to all the materials that are in there.⁵³

So, Congress essentially said, ‘given this huge risk that content owners face and our job of protecting incentives to creation, we are going to allow them to provide encryption.’⁵⁴ We are going to make it improper — unlawful, I suppose — to provide those to the public.’ That is what Congress did.

Does the Constitution prevent Congress from doing that? I think no more than it prevents Congress or a state legislature from making it unlawful to open the front door of the Met or to break down the door of the Met. It is an additional crime if you go in and steal a painting, but you have committed a crime in the first place if you merely break open the door or, assuming that it is a numerical code

⁵¹ See generally H.R. REP. NO. 105-551 (II), 105th Cong., 2d Sess. (1998)

⁵² See generally 17 U.S.C. § 1201 (2000).

⁵³ *Reimerdes I*, 82 F. Supp. 2d at 226.

⁵⁴ See *supra* note 52.

which is protected by the First Amendment, if you provide that code to the public. What you have done is you have risked, you have jeopardized, important First Amendment materials. If owners cannot protect those, there will be fewer for everybody. That, at any rate, was what Congress concluded, and I do not think that anything in the First Amendment says that they could not.

Now, I just want to address a few of the comments that have been made, because I do think that it is important to correct them.

Marty referred to this poor journalist who has been punished. Well, there is no punishment out there. This is a case for an injunction, and he has been enjoined from providing to the public this decryption utility.

One of the more interesting things that I have actually seen, by way of interviews lately, was one of Stephen King, where he was describing his first go-around when he and his publishers put a book online for a very small price — I think it was \$2.00 or \$2.50 — and he said what amazed them was that they could see, on the computer traffic, that there were hackers around the country who were spending upwards of 40 to 48 hours trying to break the technologic protection, the encryption utility. He said, “Look, this is totally uneconomical for them to do. The thing costs \$2.50. Whose time could be worth 40 hours?”⁵⁵

But, they wanted to break it because it was there. People all around this country, and I am sure all around the world, feel that way. Congress acted to protect content owners from exactly those kinds of people. I believe Judge Kaplan found that the defendant in this case was that sort of person.⁵⁶

Now finally, let me address fair use, because the suggestion has been made here that this law does not permit fair use. I submit that

⁵⁵ See *Stephen King Discusses His Latest Book, “The Plant,” and His Plan For Selling It Over the Internet*, Today: NBC television broadcast (July 24, 2000).

⁵⁶ See *Reimerdes II*, 111 F. Supp. 2d at 346 (“Defendants, on the other hand, are adherents of a movement that believes that information should be available without charge to anyone clever enough to break into the computer systems or data storage media in which it is located.”).

2001] *SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY* 331

that is a preposterous proposition and one that has no meaning. Whether it will have meaning ten years from now, or five years from now, who knows? Judge Kaplan said, ‘when and if that happens, let me know.’⁵⁷

But there was a submission, which I think really focuses on the quality of this point, by a professor of law at the Harvard Law School, who said, “This law violates my First Amendment rights and prevents me from exercising fair use because I teach trial advocacy, trial practice, and I need to be able to use these great scenes in movies like *THE VERDICT*, and this law violates my First Amendment right to do so.”

I think the answer to that professor — and to anybody else, at least now, who goes down this road — is that it does not. You can take the VHS, you can bring the DVD and a \$299 — last Christmas, probably cheaper this Christmas — video player into your classroom and play whatever clips you want of this movie. You can criticize it to your heart’s content.

I grew up in a time before there were VCRs. The fact was that, to exercise fair use with respect to a movie, I had to go see the movie and wait until it came around. And if it was *CINDERELLA*, which Disney only released every five years, I would have to wait five years. That was not a violation of my First Amendment rights, and it did not deprive me of fair use.

The fact is that now, and for the foreseeable future, any content that is on a DVD is subject to whatever § 107 of the Copyright Act says: criticism for purposes of scholarship, analysis, whatever — all of the things you can do by way of fair use — you can do with respect to DVDs.⁵⁸

What you cannot do is make a perfect digital copy unless you have permission to do that. When presented with the interest in making perfect digital copies, as opposed to analog ones, the interests of those users, weighed against the harms to the continued incentives for the creation of material, were simply balanced in a particular way

⁵⁷ *See id.* at 323.

⁵⁸ *See generally* 17 U.S.C. § 107 (1994).

that Congress chose. And that is Congress's power under our system.

PROFESSOR BENKLER: Andrew Appel?

PROFESSOR APPEL: Well, I do want to talk about fair use. I am all for promoting the progress of science and useful arts by securing certain rights to authors and inventors. But the copyright law has long recognized that the progress of science and the political health of a free society is served by permitting readers to use, analyze, criticize, and quote works of literature and video without a license.⁵⁹ To publish or rebroadcast a copyright work, I need a license, but not to make a fair use.

The anti-circumvention provisions of the DMCA, although they were motivated by the goal of preventing the illegitimate rebroadcast of video works, sort of throw out too many babies with the bathwater. It restricts freedom of speech by preventing computer scientists from communicating ideas about computer programming. And specifically in the area of computer security, if there are security systems that we find in our research to be insecure, we like to publish the explanation. This leads to progress in the design of security systems.

Judge Kaplan's ruling effectively censors a certain kind of discussion of security mechanisms.⁶⁰ It prevents purchasers of videos from playing them on the equipment of their choice.⁶¹ And there may be all sorts of reasons to have different kinds of equipment for playing videos. If I am a professor and I want to quote a scene in a class, there are much better ways than dragging in a TV. I may want to have it integrated in some way with my PowerPoint presentation. So it sort of hinders fair use.

Other purchasers who want to play the movie on the equipment of their choice may not want to buy a certain kind of DVD player or software. This sort of ties the distribution industry to the content industry a little too closely.

⁵⁹ *See id.*

⁶⁰ *See Reimerdes II*, 111 F. Supp. 2d at 346.

⁶¹ *See id.*

2001] *SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY* 333

But then, the two things I want to talk about in more depth are new kinds of fair uses and the notion of the licensing of fair use.

If I click through a license agreement on my way to seeing some future DVD, and the license agreement says I will submit any criticism of this movie to the publicity department of Universal Studios, this seems to be permitted under the DMCA. But I do not think it conforms to the values we expect in a democratic society.

I talked about analysis of movies. There are technological means of analyzing movies that may be increasingly important in the future. If I am a public health researcher and I have a video library of lots of old Hollywood movies, and I want to look for scenes with cigarettes in them, I can hire an assistant to watch hundreds of hours of movies, but maybe I would like to have a computer program watch the movies for me and just pick out the scenes where there might be cigarettes. To do this the computer program needs access to the unencrypted content of the movie. I need to circumvent the protection mechanism. The protection mechanism says that I can play it on a DVD player and send it to the screen, but I cannot subject the content of the movie to automated analysis.

A basketball coach may want to find all the times in the opponents' last ten games where jersey number 81 drops the ball. Or there may be some scene in a video that I believe is faked, and I want to examine the motion of the objects to see whether it conforms to the laws of physics so I can make an automated analysis. But that cannot be done accurately without access to the digital, unencrypted form.

So these technological protection mechanisms artificially inhibit many kinds of fair uses. And I do not think the idea that you can drag a TV set somewhere and show the movie is really related to those fair uses.

Now, a lot of the technological analyses that I have described are not really mature, but there really are researchers working on video content analysis or object-based video coding. They need access to the videos to develop these analyses so that the public health researchers and the basketball coaches can use them.

When they write to the movie studios for a license to get digital works, the movie studios are generally unresponsive. I know this from talking to the scientists.

And finally, they should not need a license for this kind of access. The DMCA is sending us down the road of needing licenses to analyze and criticize the works of others.

MR. RUBIN: I am having a little problem discerning whether we are talking about what the law is, or what the law should be. I think our discussion has focused so far on what the law should be, and not what it is.

I also have the feeling that the debate that we are having this afternoon and that we had this morning probably tracks, to at least some degree, the debate that Congress had before passing the DMCA.

One of the problems with laws like the DMCA is that legislators are not techies, and techies are not legislators. Of course, every attempt by legislators to predict what is going to happen down the line in connection with the development of technology is going to be uninformed, at least to the degree that the legislators are going to have to be educated. The education process is not going to be anywhere near as deep as the techies' education that is brought to that particular process.

There has always been a war between technology and legislation.⁶² It goes way back to the 1909 Copyright Act⁶³ and the failure of Congress in those days to predict what was going to happen with the record industry, the consequent interpretations of the courts of what Congress meant by that Act, and the development of records

⁶² See, e.g., Richard D. Marks, *Communications Symposium: High Technology Legislation as an Eighteenth Century Process: Does Congress have the Capacity to Legislate Effectively in any Area of Technology that is Complex and Fast-Moving*, 6 STAN. L. & POL'Y REV. 17 (1994).

⁶³ 1909 Copyright Act, ch. 391, 61 Stat. 652 (1947) (codified as amended at 17 U.S.C. §§ 407, 410 (2000)).

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 335

afterwards.⁶⁴

The Copyright Office, I believe filed an *amicus* brief supporting the theory that the Audio Home Recording Act of 1992⁶⁵ does not immunize Napster from liability for contributory copyright infringement.⁶⁶ But, on the other hand, a member of Congress has written the Ninth Circuit saying, ‘this brief does not necessarily reflect Congress’ view’⁶⁷ — a little confusing.

The missing equation from this discussion’s point of view — and maybe it should be missing — is the motivation, because I have yet to see in any of these cases a motivation on the part of the allegedly infringing conduct to somehow challenge the law. There has always been, it seems to me, a different motivation — whether the motivation was eventual profit or just to try to defeat the technology because it is there. It does not seem as though the original motivation was to say the DMCA or other copyright laws are somehow wrong.

Maybe they are, because I do not think anyone on this panel today, this morning or this afternoon, will dispute the right of artists to be compensated for their creative efforts for a limited period of time. I think that is a concept that is firmly embedded in our jurisprudence.

The question then becomes: how do you balance that right against other rights guaranteed by the Constitution, including the First Amendment? I do not hear anything in the way of enforcement of

⁶⁴ See, e.g., I. Trotter Hardy, *Copyright And “New-Use” Technologies*, 23 NOVA L. REV. 657, 660-61 (1999).

⁶⁵ See The Audio Home Recording Act of 1999, Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1001-1010 (1999)).

⁶⁶ See *Govt.’s Napster Brief Raises Questions on DMCA’s Future*, VIDEO WEEK, Sept. 18, 2000 (The U.S. Copyright Office’s *amicus* brief challenged Napster’s argument that the Audio Home Recording Act, by shielding its users from liability, makes Napster incapable of being a contributory copyright infringer.).

⁶⁷ See David McGuire, *Sen. Hatch Refuses to Endorse DOJ’s Napster Stance*, NEWSBYTES, Sept. 19, 2000. (In a letter to the Ninth Circuit, Sen. Orrin Hatch “made it clear that Congress does not necessarily agree with the Justice Department’s decision to support the recording industry in its legal attack against Napster, stating, “[g]iven the importance of the issues to be decided, I think it important that the Court be under no misapprehension that the brief . . . necessarily expresses the views of the Congress in this matter.”).

First Amendment rights that is going to say “let’s copy freely everything that might be available electronically, without regard to whether the creator gets paid or not.” Some of my co-panelists may disagree with that statement, but I have not heard that yet.

So the real question now, I think, is not whether the copyright law as it presently stands prevents the use of video by people not authorized to use it. The question is whether the law should be bent in order to allow the creators to realize some fair return for their work, as has been set out in the Constitution, versus the right of people to use these works in a way also contemplated by the Copyright Act.

I guess the bottom line is that I agree with everybody here. No, I do not mean that. What I really mean is Chuck Sims makes a point: is it wrong to have a lock on creative material in the same way that you have a lock on your car? And Marty and the others make a point when they say, “But wait a minute, shouldn’t we have the right to at least do some sort of excerpting for other constitutionally valid reasons?”

That is it.

PROFESSOR BENKLER: Jeff Cunard?

MR. CUNARD: I am actually not going to talk about DeCSS.⁶⁸ But I did want to show this slide to suggest that, in fact, DeCSS can be distributed in less sophisticated technological forms — namely on this T-shirt. It was partly the subject of trade-secret litigation regarding the unauthorized disclosure of DeCSS.⁶⁹

I am actually going to talk about something that has not yet been discussed, which is the *iCraveTV* case.⁷⁰ I also want to talk about a couple of other things — search engines and technological measures

⁶⁸ See *supra* note 1 and accompanying text.

⁶⁹ See Steven Bonisteel, *DVD-Cracking Lawsuit Targets T-Shirt-Borne Code*, NEWSBYTES, Aug. 2, 2000 (Copyleft, a vendor of open-source software products, sells T-shirts containing snippets of the source codes from the DVD-descrambling program, DeCSS.).

⁷⁰ See *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d 1831 (W.D. Pa. 2000).

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 337

to prevent unauthorized Internet retransmission of digital video and, potentially, other works.

We represented one set of plaintiffs in the *iCraveTV* case: the sports leagues.⁷¹ The other main set of plaintiffs was the major motion picture studios.⁷²

When *iCraveTV* announced its business plan at the end of last year, it was a cover story on *USA Today*.⁷³ It became a very, very important case. Why was it so important, because it challenged the historic methods of distributing content on a territory-by-territory basis.⁷⁴ *iCraveTV* took over-the-air television signals, in this case from WUTV, stored them on a server in Canada, and then retransmitted them over the Internet.⁷⁵

iCraveTV argued that such retransmission was permitted under Canadian copyright law, though it is not permitted under U.S. copyright law, and further argued that it had intended that the only viewers of the *iCraveTV* stream would be Canadians.⁷⁶ To purportedly limit viewers to Canadians, *iCraveTV* asked that people supply some evidence that they were in fact located in Canada.⁷⁷ They could do so by typing in a three-digit Canadian area code, which was helpfully supplied on the Web site itself.⁷⁸ *iCraveTV* was sued and a preliminary injunction was granted.⁷⁹

The case raises several interesting questions, none of which are matters of first impression:

First, the question of whether infringing acts that originate outside the United States can be the subject of suit inside the United States. The judge held here that the public performance was in the United

⁷¹ *See id.*

⁷² *See id.*

⁷³ Kevin Maney, *Little Net Firm Rocks TV Giants Sending Channels on Web Awaits Court Ruling Today*, USA TODAY, Feb. 8, 2000, at A1.

⁷⁴ *See* Robert Cribb, *New Company Puts TV Stations on Internet*, CANADIAN PRESS NEWSWIRE, Nov. 29, 1999.

⁷⁵ *TVRadioNow*, 53 U.S.P.Q.2d at 1834.

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *See id.* at 1838.

States and, therefore, there was an infringing act in the United States.⁸⁰ There had been an earlier case on that question, the *Conus* case,⁸¹ but the Internet brings to full front and center the question of asserting U.S. jurisdiction over “extraterritorial” acts of infringement.

It was unquestioned that iCraveTV was both copying the programs in Canada and then streaming them into the United States. It was interesting that the court relied on the *Kirkwood* case,⁸² an important Second Circuit case which we were also fortunate enough to be able to litigate. *Kirkwood* says, essentially, that program providers have control over the means and methods by which they distribute their programming — in that case, radio programming — electronically, by means of geographic segmentation.⁸³

iCraveTV has gone out of business. There is, however, a new company called JumpTV.com that has announced that it is going to start business from Canada very soon.⁸⁴ They claim they have a foolproof method of making sure that the only people who access their Web site are Canadians.⁸⁵ They use a technology called “Border Control,” which basically looks at your IP address and says: “Your IP address suggests that you are coming from the United States. Are you in fact coming from the United States? Type in your domain name.”⁸⁶ So when I typed in “yahoo.fr” or a “co.jp” address, it determined that I in fact was not coming from the United States. So it is fairly easy to spoof a system that is based purely on an IP address.

Another interesting lawsuit was filed earlier this year against RecordTV.com.⁸⁷ This was a business that, with so-called “one-click

⁸⁰ See *id.* at 1836.

⁸¹ See generally *Conus Communications Co. Ltd. P’ship v. Hubbell*, 2000 WL 979133 (Minn. Ct. App. 2000).

⁸² See generally *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998).

⁸³ See *id.* at 111-12.

⁸⁴ See generally Ed Hore, *JumpTV Wants to Put TV Signals on the Internet*, THE LAWYERS WEEKLY, Jan. 12, 2001.

⁸⁵ See Hore, *supra* note 84.

⁸⁶ See *id.*

⁸⁷ See generally *Movie and TV Studios File Copyright Suit Against ‘Internet VCR’ Site*, TELECOMMS. INDUS. LITIG. REP., Aug. 2000, at 8.

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 339

recording” streamed your favorite television program over the Internet.⁸⁸ If you are not at your VCR, or you do not know how to program it, you use your Internet connection to connect to RecordTV.com and ask them to record the program for you.⁸⁹ You just click to the program schedule, and the next time you log on you would be able to get access to the program that had been recorded.⁹⁰

In June, 2000, the major motion picture and media companies sued RecordTV.com, essentially based on some of the logic of the *iCraveTV* case.⁹¹ If you go to RecordTV.com today, you will see the following legend: “This website is currently NOT showing any video while we resolve legal issues . . . If you wish to reach our legal counsel you may at . . .” The e-mail and Web site of the defendant’s counsel is helpfully provided.⁹²

I want to talk next about sharing. I think sharing technology has been relegated probably to the next panel. However, issues that apply to digital video apply to digital music, and vice-versa. I think that everyone knows that sharing is not just an MP3 problem; it applies to movies, computer programs, books, and everything else now.

The major movie studios and record labels believe that sharing is not a fair use. They are very concerned about sharing — not just the centralized sharing scheme represented by Napster and Scour,⁹³ but of course, also the peer-to-peer arrangements of Gnutella.⁹⁴ Obviously, one can search on a file-specific basis to look for video files and find file extensions of a certain sort, particularly .dvr. If one went to Gnutella recently, one could find MISSION IMPOSSIBLE, EYES WIDE SHUT, BATTLEFIELD EARTH, and MISSION TO MARS.

⁸⁸ See Paige Albiniak, *Simon Says, 'It's Legal,'* BROADCASTING AND CABLE, May 29, 2000 at 10.

⁸⁹ See <http://www.recordtv.com> (last visited Feb. 18, 2001).

⁹⁰ See *id.*

⁹¹ See Greg Miller, *Entertainment Firms File Suit to Shut Down RecordTV.com*, L.A. TIMES, June 16, 2000, at C1.

⁹² See *supra* note 89.

⁹³ See generally Matt Richtel, *Movie and Record Companies Sue a Film Trading Site*, N.Y. TIMES, July 21, 2000, at C2.

⁹⁴ See *supra* note 46 and accompanying text.

Fundamental enforcement issues are raised by dispersed networks. These issues are, I think, useful to talk about. A lawsuit was brought against Scour.com by movie studios and record companies.⁹⁵ If one goes to Scour.com, one can gain access to both movies and records.⁹⁶

Finally, I want to talk about technological means of trying to address these problems. Five companies have come up with Digital Transmission Content Protection (“DTCP”)⁹⁷ technology. Essentially, the idea behind DTCP is that content coming into the home from an external source will be protected through a licensed technology, which will have associated rules with respect to what can happen to the content. One of the rules deals with how many copies one could potentially make. Another rule states that the DTCP-protected content is not permitted to be sent to the Internet by DTCP-licensed products.

DTCP is relevant because it suggests that questions of fair use, i.e., how many copies can be made, are not reasonably going to be set in the crucible of courts or Congress, but in the context of technology-licensing discussions. Importantly, however, DTCP relies on the DMCA because people who hack DTCP will find themselves on the other side of an anti-circumvention lawsuit.

Thanks.

PROFESSOR BENKLER: Amazingly enough, we have actually preserved enough time for a good deal of discussion. Perhaps we should let the panelists, if they want, very briefly make points that direct our discussion. And then really invite conversation from this wonderful audience.

Ed?

⁹⁵ *See id.*

⁹⁶ Scour is a broadband Internet portal that allows people to download music, movies, e-books, images, and documents. *See* <http://www.scour.com> (last visited Mar. 4, 2001).

⁹⁷ *See generally* Press Release, Intel, Digital Content Protection Solution Proposed by Leading Consumer Electronics, Computer Companies, Feb. 19, 1998 *available at* <http://www.intel.com/pressroom/archive/releases/con21998.htm> (naming Hitachi, Intel, Matsushita (Panasonic), Sony, and Toshiba as the five companies responsible for developing the industry-wide standard).

2001] *SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY* 341

MR. HERNSTADT: I will make two quick points.

One is when you were doing your PowerPoint presentation, you explained that the poster that you were using was fair use. If you had taken that from a DVD, you would have violated the DMCA. Your PowerPoint presentation, if you had used any images through a DVD, would have violated the DMCA, even though your fair use defense would have been perfectly valid.

Interestingly enough, Michael Eisner,⁹⁸ when he was making a presentation to Congress, took images from DVDs and did a PowerPoint presentation, because that is a very effective way of making a presentation without having to change DVDs every five seconds.

I would like to just address one thing that Chuck said, which is this whole metaphor of the lock on the library and the lock on the fleet of cars. That is completely misleading because CSS is not a lock on a library that prevents you from going in and borrowing a book. You have bought the book. It is like telling you that you can buy a book at a bookstore, but only use it in certain prescribed ways. It essentially eliminates the notion of purchasing copyrighted materials on a particular medium that you own and control. It makes it essentially solely a licensing arrangement.

By buying a DVD and spending a lot of money for it, you can take it home, but you have the right only to view it. You do not have the right to do anything else with it, which is different than any other copyrighted material.

So when he says it's the lock on the library, don't forget you own the library—you have purchased that DVD. It is like you bought a book; it is like you bought a CD.⁹⁹ You can take a CD home, you can take five seconds off the CD and put it on your answering machine. You cannot do that with a DVD.

⁹⁸ Michael Eisner has been the chairman and chief executive officer of The Walt Disney Company from 1984 to the present. *See* <http://disney.go.com/investors/earnings/q400.html> (last visited Mar 4, 2001).

⁹⁹ Compact Disc.

MR. SIMS: Well, you buy what you buy. If you buy a book in French, that is what you have. You may want it in English, but you do not have the right to commission and make available to the public an English translation. If you buy it in French, the author has that right.

MR. HERNSTADT: That is correct, but you do have the right to make fair use of it.

MR. SIMS: You do, and anybody can make a fair use of any movie that is available.

The key two words, it seems to me, to underline what Congress did and the choice it made are “dumb machines.” These machines we are dealing with are dumb. The point is not that Andrew cannot think of interesting things that would be nice to do with movies. It is that the machines cannot distinguish between the Andrew Appels of the world and the Eric Corleys¹⁰⁰ of the world or the mob pirates of the world. The machines are dumb.

And so, Congress had to decide whether the content owners were going to lose effective protection in order to protect and permit other uses, or whether by balancing, as Congress is entitled to do, it did not make sense to them to protect the incentives to creation (leaving the problem of other fair uses for future legislation or to be dealt with in other sorts of home remedy ways). That is what Congress decided.

I do not think the possibility of somebody indexing movies, which may not be available on VHS at some point in the future, is a reason for Congress to be forced to make a different choice than the one they made.

PROFESSOR BENKLER: It would be good now, I think, to invite people from the audience to weigh-in. Perhaps we should start by focusing on the concern with fair use on one side, and the potential for loss of a tremendous source of revenues on the other,

¹⁰⁰ Eric Corley is the founder of *2600: The Hacker Quarterly*. He is considered a leader in the computer hacker community, going by the alias Emmanuel Goldstein. Corley's company, 2600 Enterprises, Inc., made DeCSS available for download from their website, www.2600.com. See *Reimerdes II*, 111 F. Supp. 2d at 308-09.

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 343

and then maybe move from there to the constitutionality issue.

PARTICIPANT [Stuart Rosen, Broadcast Music]: Stu Rosen from BMI.

Mr. Garbus, you said that the *New York Times* might be treated differently or be permitted to do things that your clients or other people could not. You said they could link, while others could not. But you also said that they could analyze, report on, criticize, or discuss the code, while others cannot. That is not my understanding of the decision. Did I misunderstand you?

MR. GARBUS: No. Let's assume that the *Times* and Corley wrote the exact same story and the story said that they are selling crack on 125th Street and somebody went out there and bought crack. I think, under the interpretation of this case, Corley could be punished for it, but I do not think that the *Times* would be. I think that he is making a distinction between different kinds of journalists with different motivations.

In this case, Corley himself did not admit to downloading any film.¹⁰¹ He never was involved, so far as anyone knows, in any infringement of a film. He did not make a nickel off a film. So the standard tests that are used in contributory infringement of copyright cases are not met in this particular case.

Now, what the court did was come up with a damage scheme.¹⁰² By the way, relative to what Mr. Cunard said, if you go to the Disney search engines now, Infoseek¹⁰³ or Northern Light,¹⁰⁴ you will find the actual DeCSS code all over the place. You will be sent to European sites; you will be sent to other sites.

¹⁰¹ See *Reimerdes II*, 111 F. Supp. 2d at 314.

¹⁰² See *id.* at 343-46.

¹⁰³ Infoseek, formerly found at <http://www.infoseek.com>, was purchased by The Walt Disney Company in November 1999 and merged into their GO.com service. GO.com is an Internet portal focusing on entertainment, recreation and leisure content. See <http://www.go.com> (last visited Mar. 4, 2001).

¹⁰⁴ Northern Light is an Internet search engine, which claims to be the developer of the first "research" engine. See http://www.northernlight.com/docs/about_company_mission.html (last visited Mar. 4, 2001).

PROFESSOR BENKLER: U.S. sites.

MR. GARBUS: U.S. sites. So another interesting issue is the efficacy of law. That does not mean you should rip down the law, but it certainly raises a question of the extent to which the law becomes somewhat foolish.

But getting back again to what you said, I think they set different standards for different kinds of media doing fundamentally the exact same things. You can describe DeCSS without just describing the numbers; there are other ways of doing it.

PROFESSOR BENKLER: We had a question over there?

PARTICIPANT [Steve Chaneles, Sportsline.com]: My name is Steve Chaneles from Sportsline.com.¹⁰⁵

Most of the factual scenarios discuss the direct copying of a copyrighted work. The question I have is: with the Internet and convergence of various media, where will the line be drawn as to whether or not something is copying a copyrighted work?

Specifically in the sports context, many of you may have seen, in the media, that the NBA and the other professional leagues are taking their Web properties in-house. Distinguish broadcast of a football game and, on the other hand, a graphical simulation of that event from factual data. Is that a copying of the broadcast?

PROFESSOR BENKLER: Different issue.

PARTICIPANT [Mr. Chaneles]: Or is that a creation from uncopyrighted material?

MR. GARBUS: I think that is a different issue. That deals with whether intellectual property is transformative or derivative. It seems to me it depends on how close it is to the original, et cetera.

But let me mention something else in that context, which relates to what I was saying about public domain material and privately-owned

¹⁰⁵ SportsLine.com is an Internet sports content portal. See <http://www.sportsline.com> (last visited Mar. 4, 2001).

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 345

material. Bill Gates has made this vast photographic library.¹⁰⁶ That library basically distilled a great deal of public domain photography. Now he has bought the photographs, so he will then put out a DVD or a digitized book which will have all of these photographs on it, and the only way you will get to see them is if you have his book or sets of photographs. The original copies of the photographs degrade quickly. Digital material does not degrade. So what you are then going to see is people buying his version, putting it on DVDs, encrypting, and selling it for a profit. I mean, that is really one of the issues you have to deal with when you discuss this.

MR. SIMS: But if it is public domain, you can get it somewhere else.

MR. GARBUS: But not if he digitizes and has the copyright to the new digitized version.

MR. SIMS: You mean every copy?

MR. GARBUS: Exactly.

MR. SIMS: I am not aware that he is doing that. It is true that he is buying one copy of lots of photographs.

MR. GARBUS: He is digitizing the photographs so that he has the sole and exclusive possession of the digitized versions of the photographs in this particular library.

MR. SIMS: But that is true of private collectors who own old medieval manuscripts.

MR. GARBUS: No, no, here he has a market of, let's say, 10-to-20 million people to whom he markets something. Public domain material becomes part of his marketing tool.

MR. RUBIN: But I do not think that implicates the copyright law. I do not see how it does. If these public domain materials are out there and they are absolutely bought up, now you are talking about somebody who owns this collection.

¹⁰⁶ See Jason Nisse & Andy Blackmore, *Photo Finish: Gates and Getty in Battle for Planet Earth*, INDEPENDENT (London), Feb 20, 2000, Business Section, at 1.

For example, I do not see that anybody has a right under the Copyright Act to decide that my bedroom furniture is really interesting and, therefore, has a right to go in and take a picture of it or make a drawing of it and take it out and use it to illustrate the way interior decorating works.

MR. HERNSTADT: I do not think that is what Marty is talking about. Let's think of a different situation, where someone goes to caves near the Dead Sea and finds some scrolls.¹⁰⁷ These are the only versions of certain books in the Bible that anyone has ever found, and they are absolutely unique in the world. Let's say that they are public domain. Someone takes them, transcribes them, puts them on a CD, and sells them. You can do that. But let's say they also put some kind of encryption device on it. Scholars cannot access that material.

One of the examples that Andrew raised in his submission to the Copyright Office on the rule-making procedure for the DMCA was: what if you want to access the text of William Shakespeare to find out the frequency of the use of two words in the same sentence? Well, scholars will not be able to do that with this new discovery, which is unique and in the sole control of a person who is entitled to make money from selling it.

So, I think the Copyright Act is implicated in that they certainly have the right to sell it, and they certainly have the right to control the distribution of the materials they sell. But I do not think they can sell it in a format that prevents fair use.

PROFESSOR APPEL: I think the difference between the picture of the bedroom furniture and the Bettmann Archives¹⁰⁸ is that before these technological means came along, you either published something and contributed to the public discourse, or you did not. If

¹⁰⁷ The Dead Sea Scrolls are ancient documents found between 1947-56 in caves near the Dead Sea. The Scrolls are considered by scholars to have religious significance. See http://www.usc.edu/dept/LAS/wsrp/educational_site/dead_sea Scrolls/ (last visited Feb 18, 2001).

¹⁰⁸ The Bettmann archive, also known as the Bettmann Collection, is a series of high-quality stock photography owned by Corbis Corp. See <http://www.corbis.com/corporate/press/background/default.asp> (last visited Mar. 4, 2001).

2001] *SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY* 347

you published something and you contribute to the public discourse, then people have a right to respond and, after a certain limited term, they have the right to respond in very extensive ways because the copyright has expired. We are losing this kind of public discourse.

MR. SIMS: That is just demonstrably not true. There were all these movies. The reels were owned by whoever owned them. And after the copyrights expired, nobody had a right to go in and seize them. Every year in museums lovely paintings are lent by people. They then go on the block, and some of them get sold to other museums, which I am in favor of. Some of them get sold to Swiss collectors, and we never see them again. It makes me sad, but it is not a violation of the First Amendment or of fair use.

MR. CUNARD: We should, in thinking about this, preserve the distinction between the copy and the copyrighted work. There is obviously a distinction between selling millions of DVDs that would be encrypted with CSS and pictures in a museum. Eventually, movies would fall into the public domain. The DMCA does not have a statute of limitations in the sense that devices permitting the implementation of technological measures are prohibited for all time, even if the works themselves are in the public domain. So that essentially means that most people will, as a practical matter, be unable to access those works after they are out of copyright.

The DMCA raises larger public-policy questions — not the subject of this discussion — about what to do about access to works where technological measures become obsolete. Does one have to maintain all of the decrypting technologies that have ever been used by every copyright owner to get access to those works? The need to do so raises, I think, a series of important questions for archives and libraries, one that I hope that the Copyright Office will address in its DMCA rulemaking.

PROFESSOR BENKLER: But there is also a specific issue that is raised here. To what extent does our policy or the First Amendment relate to how we regulate the possibilities created by new technology?

The primary question with the Corbis database,¹⁰⁹ some of which were public domain photographic works, has to do with whether or not law should prevent people from taking these digitized copies and making other uses of them. It is not just a question of whether Bill Gates can charge people who want to get the service, but whether people can get around having to find an original copy and scan it in order to make their own digital copy simply to get the digitization. There the traditional answer might be: “well, if it is a perfect copy that is just intended to represent accurately the original, maybe it is not original enough to have copyright protection.” Then we have the question of whether a database right would cover it and whether it would cover the public domain materials in it, et cetera.

This goes to Chuck’s point about when I had to go to a movie theater to make a fair use of CINDERELLA. The answer is ‘that may well be true,’ but now we have new possibilities. We have new possibilities of speaking effectively and criticizing effectively — for example, incorporating snippets of movies in a PowerPoint presentation or in a multimedia paper that we post on the Web as a new mode of publishing.

The question is: “How do we design the way that we use these new technologies?” Do we use the possibilities of fair use for more effective transformative use and criticism and communication, or do we not? Fair use originally flowed from the impossibility of controlling a work after it was first sold.¹¹⁰ Now technology allows for greater control, the encryption and the possibility of licensing per use, something that was never technically possible before.

So, legally we will enhance all the aspects of the technology that let owners control all valuable uses. We will prohibit all aspects of the technology that allow for more effective utilization and manipulation of cultural products by the users of the cultural product. That is the policy choice.

¹⁰⁹ See Nisse & Blackmore *supra* note 106.

¹¹⁰ See generally NIMMER ON COPYRIGHTS § 13.05 (covering the history and parameters of the fair use defense).

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 349

So, it is not good enough to say that we were able to do only one thing in the past; therefore, it is good enough to do that same thing in the future.

PARTICIPANT [Professor Jane Ginsburg, Columbia Law School]: Jane Ginsburg, Columbia Law School.

The first thing I want to specify is that I do not have DeCSS on my Web site. I merely link to DeCSS.

I think that I would like to elaborate on this last discussion because I think there are two different issues, and they should be kept clear.

One is the fair use question, which might be characterized — elaborating on what you just said, Yochai — as whether Congress correctly struck the balance between protecting copyright owners (who are afraid of some of the possibilities of this new media) as against the enhanced convenience of fair use through the new media.

We are not talking — at least not unless we get some lock-up, which is an issue too — we are not talking about being unable to engage in these activities. Rather, we are talking about not being able to do them in the most convenient fashion. I think that is an important issue. I am not voicing an opinion as to where the balance is. I just think it should be clear that the balance is what we are talking about.

Two, lock-up. The Bettmann Archives¹¹¹ is an interesting example, because there seem to be some thoughts about what access we had in the old days that may not be entirely correct. If you take the Bettmann Archives, as Jeffrey said, the owner of those photographs controls the copy, and by controlling the copy may be able to control reproduction. Maybe it is licensed to the newspaper with the restriction that “you can reproduce it only at *X* level of quality,” which makes its further reproduction not very worthwhile. So, in effect, a copy is made available for reproduction, but not in a way that competes with the owner’s exploitation of this admittedly public domain work. But it is an incursion on access of some sort through control of the visible copy.

¹¹¹ See *supra* note 108 and accompanying text.

Now let's take Corbis, which is going to digitize the Bettmann Archives.¹¹² Those works are still in the public domain, but now they are released in a form that may make it easy to copy at a quality that would be comparable with the original. So will you be able to lock that up against further copying by means of a now legally protected technical device?

I think that Jeffrey might have slightly misstated the DMCA to the extent that there is a time limit. It is the same time limit as copyright. The DMCA protects only against the circumvention of an access protection guarding a work falling under this title.¹¹³ So if you access-protect a public domain photograph, you cannot circumvent that access.

PROFESSOR BENKLER: What do you do with the anti-device provision, though?

MR. HERNSTADT: Right, that is the problem.

PARTICIPANT [Professor Ginsburg]: You cannot circumvent that protection.

But now Corbis might say, "Ah, but I have a compilation of photographs and the compilation is a work protected by copyright, or the scholarly introduction I append to all of these public domain photographs is a work protected by copyright." So the whole thing is protected, even if the individual components are not. And you cannot get to the individual components unless you circumvent the whole thing. That is the lock-up problem.

That is a problem that was called to the Copyright Office's attention by a lot of people during the hearing process, and we will see the fruits of that in a couple of weeks.

I think that there is an issue about putting on a copyrighted veneer over a public domain document that does have to be dealt with. But I think that one should not equate the fair use problem with the digital lock-up problem. The fact that this is a highly convenient,

¹¹² See *id.* See also http://www.corbis.com/corporate/press/releases/content_default/prfiles/PR4%5F24%5F00.htm (last visited Mar 4, 2001).

¹¹³ See Digital Millennium Copyright Act, 17 U.S.C. § 1201(a) (1998).

2001] *SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY* 351

highly manipulable format from which it may be very desirable to do lots of things does not mean that it is the only format.

So, I think one ought to be evaluating what are the pros and cons of transposing the familiar fair use to this more convenient format. Is convenience the overriding argument for fair use if there are reasonable alternatives? That is just another way of stating the policy choice.

PROFESSOR BENKLER: Let me just get you to elaborate a little bit. Andrew raised issues that were not about convenience. They were about new types of learning that could only be achieved because of the unique manipulability of a particular medium. So there are issues — and those are the ones that Chuck, I think, was focusing on — that have to do with convenience in a broad sense: quality of reproduction, for example, VHS versus DVD.

But there are certain aspects — and I think Andrew gave the examples — that have to do with unique new learning and speech possibilities created by the digital medium that are not available in any other medium. What do you do with those?

PARTICIPANT [Professor Ginsburg]: Well, he said you could hire a student to watch hundreds of hours of films. There are probably some students who would happily volunteer for that task. But I recognize that it is not very appealing to say you have to spend all this extra time and money doing things the old way, given that there is now a new way that the copyright owner is thwarting.

I think it is an interesting question whether there may be access to unprotected copies for various scholarly uses. It has been proposed that the Library of Congress should be the place that you could always go to if you wanted to do exactly what Andrew wants to do. Now, librarians tend not to be really enthusiastic about that. They do not really want to be the keepers of the fair-use flame. But it is an interesting question, how you accommodate these differences.

There is, in the DMCA, an exception for security testing.¹¹⁴ Now, some people are not happy with that exception because they feel it is

¹¹⁴ See 17 U.S.C. 1201(j).

not open enough. You have to be kind of an official security tester. Therefore, if you are not an official security tester within a recognized institution (and all the other criteria that are in the statute), you just have to be very good at breaking into things and showing people the weakness in their system. You are barred by that provision.

But, I think that was an attempt to balance those who have a bona fide research and new fair use-type argument with the concern that it is a slippery slope. If you have no limits as to who is entitled to do this, whether it be a recognized institution or something, then you may well not have any prohibition at all.

So I guess, to some extent, one of the policy questions is the concern today that technological protections have swallowed fair use. The concern on the other end is that fair use is the tail that is going to wag the dog. And fair use is going to end up swallowing whatever copyright protection is left because there are no adequate lines drawn.

Somebody is going to be unhappy either way. I do not think anybody, even those who passionately believe in all those rights, thinks that the DMCA was a model of anything favorable. But nonetheless, I think that the policy choices do need to take account of the enhancements, but also recognize that there is an awful lot of potential for pretense.

That is also the problem that Judge Kaplan was confronting in his distinction between the *Los Angeles Times* and 2600.com.¹¹⁵ The suggestion was that maybe the *L.A. Times* would have a stronger First Amendment claim than does somebody who claims to be performing an act of civil disobedience while eluding a previous court order.¹¹⁶ So there is a spectrum.

PROFESSOR BENKLER: Jeffrey?

¹¹⁵ *Reimerdes II*, 111 F.Supp. 2d at 294.

¹¹⁶ *See id.*

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 353

MR. CUNARD: I just wanted to say that your article on the *Free Republic* case,¹¹⁷ Professor Benkler, focuses on the conduct-device distinction, which was one of the critical distinctions that Congress focused on when it was considering this legislation. There was an enormous amount of concern in Congress about fair uses being overridden, and there was a last-minute negotiated resolution to have the Copyright Office conduct this study. There were a number of people who thought that the DMCA itself could have been held up had people pressed very, very hard to get a fair use right into Section 1201(a)(1).¹¹⁸

The real issue, though, is that the average librarian or other fair user cannot really break an effective technological measure by himself or herself, absent a device. This reality raised the question of how to define a device that could be made available only for fair uses, or for perhaps some of the other exceptions that are set out in the DMCA, but not for other uses. The effort to craft a fair use exception for devices ran aground because it proved very hard to identify precisely the purposes and functions of a device that would be available only to “pick locks” legitimately, as opposed to illegitimately.

MR. GARBUS: Was there an awareness that it might not be possible to find such a technology?

MR. CUNARD: Well, I think it was possible to develop such technologies. The question is whether one could define them in the statute rigorously enough. In other words, could one authorize some tools for legitimate breaking and entering — in other words, to allow me to get into my own house, where I have a right to get into my house — but prevent those same tools from being made available to

¹¹⁷ Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

¹¹⁸ Senator Leahy remarked that, in view of the inability of the Conference on Fair Use (“CONFU”) to agree on guidelines for applying fair use to digital distance learning, “all members on this Committee are as anxious as I am to complete the process that we started in Committee of updating the Copyright Act to permit the appropriate use of copyrighted works in valid distance learning activities. This step should be viewed as a beginning-not an end, and we are committed to reaching that end point as quickly as possible.” See S. REP. NO. 105-190 at 65, 105th Cong., 2d Sess. (1998).

the unauthorized lock-picker. That was a very, very difficult problem, and, ultimately, it influenced the final approach to 1201(a)(1).¹¹⁹

PROFESSOR APPEL: I must say that I am pessimistic about the technological prospects, for being able to draw these lines technologically. So, in fact, the very last slide that you presented had a little “X” somewhere. It let things onto the screen but not onto the Internet. It is not clear that really is going to work. If you can see it on your screen, somehow you have got something.

So, there may be ways to circumvent it. It is going to be very hard to prevent this circumvention, except through these very heavy-handed legal means. So, I do not think that anything is going to jump out of a machine and provide a technological solution to these problems. We will just have to discuss them as we are discussing them.

MR. CUNARD: A ten-second amplification on that. The “X” on my slide, to illustrate that content protected by DTCP is not permitted to be output to the Internet, was intended to reflect the fact that the license for the DTCP technology states that a product using that technology may not send protected content out to the Internet. So, if someone has a licensee of this technology and makes a product that sends protected content onto the Internet, product manufacturers could be sued for breaching the terms of the license.

If someone else comes along and hacks that product, which you are suggesting could be likely, there is little, contractually, that could be done about it. But the DMCA might be available. The license has various provisions as to how robust the implementation of the technology has to be to be “hacker-proof,” to the extent possible, with obligations to distribute upgrades and the like if the implementation is hacked.

PROFESSOR BENKLER: But, I thought that was actually a fabulous slide and very useful. One of the things that I saw there, particularly that little “X” to the Internet, is the need of the movie

¹¹⁹ See 17 U.S.C. § 1201 (1998); see also H.R. REP. NO. 105-551 (II), at 39 (1998).

2001] *SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY* 355

and the recording industries, which rely on control of instances of individual copies and collection of rent for access to those copies. That requires a hermetically-sealed system. Wherever there is leakage, there is potential for that entire model to unravel.

So, it seems to me that the policy choice is not just a question of convenience-versus-incentives. It is the question of whether we will, with law, make sure that our cultural goods operate in a hermetically-sealed environment (where the producer has to control every aspect, from the moment of production to every instance of consumption, in order to retain the viability of the business model). That has never been done.

It is not a balance that is the traditional balance. And when you are thinking not about First Amendment doctrine, but about the concept of how we use our culture, think about movies and texts, and our ability to talk about our environment, making an institutional choice whose endpoint is a hermetically-sealed system may not be the smartest thing. Maybe we should create the legal incentives for the producers to come up with more robust business models rather than something that relies on hermetic control from end-to-end of every single use of the product.

PROFESSOR APPEL: Let me comment on that briefly. If I shoot something with my video camera, I can give you the videotape. If I record something with my garage band, I can give you the cassette. This works because you have the tape player or the VCR. But when Mr. Sims said that we can show the VHS in our classroom because the VHS will always continue to exist along with the DVD, well, we also have the right to show the Betamax version in our classroom.

As we evolve towards this hermetically-sealed mechanism, a lot of the proposed technological mechanisms for distribution of content do not actually allow you to put a home-recorded, self-shot home video into the player and have it play. And so now the only things that will play on your player are the commercial ones. Non-commercial speech will be technologically prevented because most people will not bother to have two players, one that can play the licensed commercial discs, and one that can play a video that their friend made.

MR. CUNARD: That may be true of technologies in the future. It is not true of CSS or DTCP. People may choose to insert codes to signal that they want their content copy-protected. One could author a homemade DVD disk when there are DVD recorders, and not use CSS, and the disk should play back perfectly well.

PROFESSOR APPEL: Well, let me give a specific example. A professor of music at Princeton edited a CD and wrote it onto a CD disc using a computer. He sent it to my colleague, a professor of computer science, who put it into his DVD player (which can also play audio CDs) and it said “no disc.” The reason is that he wrote it to a disc that is not enabled to play on CSS-equipped DVD players because one bit is not written to the disc somewhere. This is a protection mechanism. It is not the CSS protection; it is a different one. It does not involve encryption at all. It is meant to control the unlicensed piracy of content. But it has had the effect, literally, of preventing communications by individuals of their own creative works.

MR. HERNSTADT: I would like to add something in light of what Professors Benkler and Ginsburg said. You are cautioning that we not look at fair use as the end-all and be-all, that it might swallow too much, because what you are looking at is not the most convenient, rather than no possible use.

I do not think that is entirely accurate, and I think in the big picture it is going to become less and less accurate. There are certain materials that are unique to DVD, that you cannot find on VHS. This is apart from the reality that “not convenient” translates for some people to impossible.

But setting that aside, there are materials on DVD discs that are designed and appear only on DVD discs, and that is one of the advertising tools that they use in selling you the DVDs, that you get all this special material.

Increasingly — at least, this is what we learned in the case — materials are going to be released only on DVD and not alternative formats. I think that because the DMCA is about controlling access to content, that is going to be particularly true. If you can control the

2001] *SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY* 357

access to content by putting a protective measure around it, the content owners are going to do that. And, increasingly in the future, you are going to find a situation where the only alternative, or the only place you can find certain copyrighted materials, is on a medium or in a format that is content-protected, and the DMCA will apply.

PARTICIPANT [Professor Ginsburg]: I think that is what the Copyright Office said the three-year global study is supposed to be for.

MR. GARBUS: But one assumes how the Copyright Office will come out. In other words, one assumes that the situation that Ed just described will be so — namely, that everything will be on DVDs and that everything will be protected, and the Copyright Office will not interfere with that.

MR. HERNSTADT: And moreover, I think, we are talking about fair use. If you think about fair use in one way, because you are considering it as opposed to one more convenient and one less convenient way, you might devalue fair use, as compared to when you think about it as the only alternative.

PROFESSOR BENKLER: Maybe we could use the last few minutes to talk more specifically on the First Amendment side of this problem. I would like to propose to everyone that there are really two independent types of First Amendment arguments here. One has to do with the fact that computer scientists are speakers of a certain set of languages, called computer languages, and that their rights to communicate about what they do are constrained by this particular form. That is one set of concerns that limits the speech of one subset of people.

Then, there is another set of concerns, and that has to do with, in a sense, side effects on technically unsophisticated people. One of the fascinating things about Judge Kaplan's opinion is that it explicitly said Congress decided to make fair use of digital materials unavailable to technically unsophisticated people, which presumably

358 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* [Vol.11:317

is most people here.¹²⁰

There is an effect on the way that people can use video materials if they are not technically sophisticated that is implicated by this balance — call it lack of convenience, call it lack of availability — not for computer scientists, but for everyone.

I think the correct First Amendment understanding is that Congress is clearly trying to do something valuable. They are trying to make sure that there are incentives for production.

The question is: “are there less restrictive ways?” That is the appropriate question that should be asked. Are there less restrictive ways of serving — less convenient, if you will — ways for the copyright owners, but nonetheless less restrictive means of helping copyright owners appropriate the value of what they produce that would not be so restrictive as to users’ rights?

MR. SIMS: Number one, I think that is the wrong question, because when Congress is acting in furtherance of constitutional powers that it has, it is not subject to less-restrictive-means analysis. It should not be and cannot be. I think the question is also wrong because it assumes . . .

PROFESSOR BENKLER: Are you suggesting that media regulation is not based on a congressional power?

MR. SIMS: No.

PROFESSOR BENKLER: All actions of Congress are based on congressional power.

MR. SIMS: Congress could have set up the national television system having all the wires be common carriers, or they could have set it up the way they did. There are areas like that where Congress is entitled to make choices, and, because they are essentially economic choices and choices under the Commerce Clause¹²¹ — although, clearly, there is some First Amendment analysis — it is a less rigorous, less strict analysis. I think this is, as Judge Kaplan

¹²⁰ See *Reimerdes II*, 111 F.Supp. 2d at 294.

¹²¹ See U.S. CONST. Art. 1, § 8, cl. 8.

2001] SYMPOSIUM - FAIR USE, PUBLIC DOMAIN OR PIRACY 359

clearly thought, that kind of case.¹²²

The other thing is that Judge Kaplan found — and I think properly — that, at least for the foreseeable present, the notion that there are meaningful restrictions on anybody’s speech is simply totally not proven.¹²³ Computer scientists, such as Andrew, can talk to each other to their heart’s content. They can describe the problems with certain kinds of security systems.

What they cannot do, and what Corley cannot do, and what nobody can do, is provide to the public the encryption keys that kill the protection altogether. Even though one person wants to do that, and one person might have a good reason for doing that, that causes such harm that Congress concluded in its legislative power, consistent with the First Amendment, that those kinds of technical measures ought to be allowable. Similarly, because I am a lawyer, and I work seventy-eighty hours a week, I cannot use the public library the way I want to use it. It happens to be closed when I want to use it.

But we have rules for other purposes, and they are not invalid just because particular people can be found to say “that violates my First Amendment rights.”

MR. GARBUS: That is a different issue.

PROFESSOR BENKLER: We have to close. Thank you to the panel.

MR. PENNISI: I want to give a hearty thank you to our video panelists, our moderator, and audience.

¹²² See *Remeirdes II*, 111 F. Supp. 2d at 335.

¹²³ See *id.* at 339.