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PANEL #3: COPYRIGHT-2

"Technology vs. Technology: Should Code  
Breakers Go to Jail? The Limits of Fair Use  
and Anti-circumvention"

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

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MR. GODWIN: Well, I guess the first thing I want to say is I like Hayek okay.

(Laughter.)

MR. GODWIN: The Hayek I read, I read in the library. And I'm feeling guilty about it, because I didn't pay anything.

(Laughter.)

MR. GODWIN: And you're assuming I read it at a university library. I was a kid actually and I hadn't even paid taxes yes, so, go figure.

(Laughter.)

MR. GODWIN: I actually wanted to speak last. And I was desperately arranging to speak last because a lot of the time that I was going to have drafting my remarks for today was last night. I had allocated a certain amount of time to prepare my remarks. And, amazingly, I discovered that I had accidentally trashed the system folder on one of the important volumes of my Macintosh. And so I ended up spending several hours reconstructing my software on the laptop that I had taken home.

Now, if you like technology, as I do, this is not an insuperable problem. If you want to reinstall stuff, if you have the installers at home, you can reinstall. And if you have the serial numbers all there, you can type them in at the appropriate places when you reinstall. I wasn't quite that well prepared, so I actually had another laptop and I connected them and I pulled stuff over and I sort of violated the installation process that you might say controls my access to the technology, to the copyrighted work. Don't let that leave this room.

(Laughter.)

MR. GODWIN: I think that what it reminded me of, though, was a situation that existed in the 1980's, in the first full decade of the software industry in the United States. And that is that we had, I think quite rationally, software providers, software vendors, pricing their software at various price points, who believed that there was some percentage of individuals who would engage in unlicensed copying of the software and there would even be infringement.

The problem with computers, the very scary aspect of computers, is of course that they reproduce digital works with 100 percent fidelity. So copies of software generally work as well as the originals do, unless you build in copy protection. And as the last speaker pointed out, this was a trend in the software industry. There has been a cycle of building copy

protection into software and then taking it away a little bit, and then maybe building it in in a new form, and trying to find some balance between control of copying and customer convenience.

One of the things that I thought was kind of interesting, though, in the 1980's -- because I was a big computer user even then -- was that we had a number of forces that sort of rationalized the copy protection norms that were existing in the middle 1980's. And it was basically this:

There were tools that you could buy that allowed you to remove the copy protection from Lotus-123 or from Microsoft Word or from AutoCAD, and you could reinstall it on another system. These tools were marketed, perhaps disingenuously, as archival tools. I don't think there is any serious dispute that people used them to pirate. Some people did. I think that is quite clear. But it is also the case that they were marketed openly in the software and computer magazines, and people did use them for archival purposes, to make it more convenient to restore a damaged volume and so on, and to do the kind of thing that I found myself doing last night, in the dim hours after "Buffy the Vampire Slayer" was over.

I think the thing that I want to point out here is that the movement of the industry in that environment was away from copy protection, partly because consumers complained and partly because consumers actively had created this aftermarket for

defeated copy protection. And there was sort of an arms race between the major software vendors and the copy protection defeating utility vendors as these things became more complex. There was a very high degree evolution of copy protection before finally it sort of collapsed of its own overhead. And the general trend, at the end of the 1980's and the beginning of the 1990's, was for software to be relatively unencumbered by copy protection, if not outright unprotected.

Now, as we know, Microsoft, since the 1980's, has done nothing but decline in its fortunes in the absence of strong copy protection. They have spiraled down the economic toilet, and we pity them. You know, I pass Mr. Gates on the street with his cup every now and then and I put a quarter in, or a dime sometimes.

I think the experience that the software industry had in the 1980's tells us that the fears about digital copying defeating or destroying markets for digital copyrighted works are overblown. They are overblown. We have now a world of content producers that is worried about the presumption that individuals will steal the music on CD's or steal the text in e-books. I don't know anyone who actually buys e-books.

(Laughter.)

MR. GODWIN: But they will steal the text of e-books and somehow destroy the revenue model for the various sectors of the content industry. I think that if that was going to happen,

we would have seen Lotus and Microsoft spiral out of control, with their much more higher-priced products that were much smaller and more easily copied in the 1980's. Every single Microsoft product in 1985 is smaller than one MP-3 today, so it was relatively easy to engage in infringement as well as unauthorized copying.

I'm not going to defend the unauthorized copying, especially when people could afford it, especially when people were engaging in piracy. As a member of the Bar, I can't promote law breaking. I'm against law breaking. I thought I would settle that question. What I am troubled by is that the balances that we have built into our copyright law seem to have been sidestepped by the DMCA and by future measures that are being proposed.

The Digital Millennium Copyright Act aims at circumvention regardless of whether the underlying circumvention of copy control, or access control, is in service of infringement. I think the result is sufficiently absurd that it allows me to take the chance of saying that we already know the DMCA is badly crafted. Stephen King, whom I like to use as an example because he is a great example of market success, like me, owns a Macintosh. And all Macintosh users know each other. It's like a secret handshake.

(Laughter.)

MR. GODWIN: In 2000, he had a couple of experiments in online fiction publishing. The first one was a novella, called "Riding the Bullet," which was issued in Windows-based copy protected formats. The way my mind works is I imagined Stephen King, who has expressed some contempt for Windows machines in the past, couldn't actually read his own story on his Macintosh laptop. Well, he probably knows what he said. He might want to check the formatting or check the copy editing or something, but I am pretty sure he knows.

But it occurred to me that if I showed up at Stephen King's house in Maine, and got past the guard dogs, and knock on his door and offered him a tool that allowed him to strip the protection away from this Windows proprietary format and get the text out and read it directly on his Mac laptop, I would have committed an offense under the Digital Millennium Copyright Act. Because you are not supposed to distribute tools that circumvent access control or copy protection.

Now, you might think, well, isn't there a defense under the Act if there is no underlying copyright infringement? Well, as has been explained in previous remarks, no, that is not a defense. In other words, even though I could go and say that if anyone has the right to look at his copyrighted work, Stephen King does -- maybe even more than John Grisham does -- it doesn't matter. It is not a defense.

That is an absurd result. And the reason it is an absurd result is that it, number one, uncouples the enforcement of copyright interests from the balances that are built into the substantive copyright law. And Julie Cohen has addressed those, I think rather eloquently, when she talked about leaky rights. But another way of looking at them is to say that we normally invoke penalties in the copyright context for infringers. That has been the history of our copyright law until relatively recently.

When we say that it does not matter whether you are an infringer or not, it does not matter whether you are a bad actor or not, if you engaged in this technology development at all or if you distribute this technology development at all you are going to be criminally or civilly liable, that has unmoored the copyright enforcement framework from its original policy infrastructure, from its original policy foundation.

And I come back to Orin Kerr's remarks. I was struck by the fact that he was dividing up the world into those who like the DMCA and those who don't. And those who liked the DMCA were the providers and the copyright holders. And those who don't were the contract breachers. I am thinking there may be a few other classes of people that were left out of that. They may be librarians. They may be people like me, who occasionally need to defeat access control in order to restore my hard drive. They

may be people who are engaging in fair use. I am quite troubled by the fact that the policy balances in the substantive copyright law are not reflected in the DMCA's anti-circumvention provisions.

Having said that, I think the natural conclusion is that you can imagine a version of the DMCA that looks kind of humane. It outlaws circumvention when you are infringing, when you are promoting infringing, when you are actively doing it, when you are a deliberate contributory infringer. I think it is very clear that, in that context, no one seriously objects to people who are actively and knowingly promoting lawbreaking from getting punished.

I don't think that reform of the DMCA is on the table any time soon, but I do think that some of the constitutional challenges, which were so dismissively discussed here just a moment ago, actually do have the potential to lead to legislative revisiting of the provisions of the Digital Millennium Copyright Act.

Now, that is the DMCA. And I just want to close my remarks by saying that, on the agenda are measures that make the DMCA, in its current form, positively humane and limited. In particular, I am talking about the security standard bill promoted by Senator Hollings. It hasn't yet been introduced but drafts have been circulated. It would require that every

consumer electronics manufacturer, every computer maker, every Internet company build digital rights management and digital rights control into future versions of their technologies.

To get an idea of the difference in scope between this and the DMCA, the DMCA forbids a certain class of activities having to do with a relatively narrow class of technologies called circumvention tools. The Hollings bill promotes a legislative technology requirement that affects everybody and will require building digital rights management into everybody's new technologies, and in fact will make it an offense if you don't. This has immense potential effects through all sectors of the economy.

I think underlying that approach is a very rational attitude on the part of the content companies. Specifically, in a world where individuals are empowered to engage in copyright infringement relatively easily, compared to how easy it was in past decades, the problem is that those people are mostly judgment-proof. It does not matter that you can go after the Rutgers sophomore who is spreading your music around; he hasn't got any money to pay. And if you are a music company, you don't necessarily feel entirely comfortable about putting a music consumer in jail anyway.

But in economic terms, one way to understand what these measures represent is it is an effort by the content companies to

take the externalities of enforcing their interests and impose them elsewhere. In the criminal provisions, it takes the externalities of enforcement and we give them to the FBI and to other police agencies. In the civil arena, it takes the externalities of enforcement and we impose those in terms of technology requirements on every other sector of the digital economy.

Somehow that does not seem entirely fair. And I find myself wondering how rapidly Professor Hayek would be spinning in his grave at that prospect. I think he would be spinning right out of it.

Like Julie, I don't want to talk so much about the constitutional problems I have with the DMCA, although I think they are sound. I will say that if it is true, as the last speaker commented, that those of us who believe that the DMCA and similar provisions are unconstitutional, anti-liberty and anti-free speech, if it is true that those of us who believe that are close-minded, I can live with that. Because I don't want to be so open-minded that my brain fell out.

Thank you.

(End of Mr. Godwin's remarks.)