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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. KERR: When I was asked to speak on this panel, which was some time yesterday morning as it turns out, I had to think quickly, of course, given the time constraints. But when I was asked to come to the Cato Institute, to speak in the F.A. Hayek Auditorium on the Digital Millennium Copyright Act, my thoughts naturally turned to the question of: What would Friedrich Hayek think of the Digital Millennium Copyright Act? What would the great Austrian economist, author of "The Road to Serfdom," "The Constitution of Liberty," and many other great works, think of the DMCA?

And although Hayek was fairly skeptical of intellectual property overall, I think he would appreciate the underpinnings of the DMCA. I think he would actually think this law was furthering his vision of what a government should do. And here is why:

Hayek, of course, is known for his appreciation of the merits of private ordering; the idea being: give everyone their property rights, allow them to contract freely, keep the

government out of it. Let people contract. And by contracting themselves privately, they will actually do much better than the government could if the government were sort of affirmatively trying to reach a distribution of property. So that was sort of Hayek's idea.

And it is premised on the view that contracts regarding property rights have to be enforceable, otherwise people won't engage in contracting. Because if they cannot enforce their contracts, they won't actually engage in these contracts.

Well, in the Internet realm, in the technological realm, we find that the Internet technologies don't necessarily allow this to happen as easily as we might like. In particular, the technology limits the kind of effective contracts that you might be allowed to or be able to enter into on the Internet. Here's an example:

Say I'm an author and I want to have a Web site where I make my writings available. And I say: You can get a copy of one of my stories for \$5. But I don't want you to be able to sell this copy to everyone else; this is my copyrighted work, my story. But I'll let you read it once, and after you have read it once you have to promise me not to distribute it to anyone.

In the physical world, we could do that reasonably effectively through just paper copies. In the Internet realm, though, it is much harder to do. Because once you get a copy,

you've paid your \$5, you have your copy of my story, and you say, gosh, this story is so great, I want everyone to have a copy. And within hours, within days, within weeks, hundreds, thousands of copies of this great story that I've written are available on the Internet, and of course nobody is coming to my Web site to buy my story. So my total amount I can benefit from this story is, in this extreme example, clearly not realistic, but, nonetheless, an example, \$5, which is not going to give me a great incentive to keep writing stories. Although, I must say, as an academic, the idea that anyone would actually be reading what I write sounds pretty appealing, as it is.

So what do we do with this technological problem?

Well, like most technological problems, there is a technological answer. And the answer is access control devices, technological means of stopping people from doing what they would otherwise be able to do. An electronic lock, if you will.

So, for example, in the Web site version, where I give you my story for \$5, I am going to have an access control which actually blocks you from reading the story more than once. And maybe I will say, okay, you can have it for \$3, since I've taken away the right you otherwise might have. But I'm going to give you a limited right and you have to give me a certain amount of money in return as consideration. And that way we can have our free contracting. Anyone who wants my story pays their \$3. If

they don't want my story, they don't pay it. That's fine. Everybody sort of does what they want with their property. And through this regime of private ordering the Hayekian ideal is achieved.

Well, what is the problem with this? As with all technological solutions, there are technological problems that come along with it. In particular, you can have the limitation on the access control. You can circumvent the access control. So we have made a deal, where you get my story for \$3, but you can only read it once. Somebody else comes up with a way of basically picking the electronic lock. So even though you have agreed to only read it once in exchange for \$3, you might say, hey, I've got this great tool that allows me to breach the contract. It lets me strip off this access control and read the story as many times as I want. I only pay for the rights to read it once, but actually I am getting much more than I paid for.

That's terrific for the person who is in this situation. They only have to pay \$3, but they're actually getting much more. However, this of course breaks down the regime of private ordering, in the sense that people cannot contract for what they have paid for. Basically, we have these circumvention devices, which are contract-breaching devices. It is stopping people from entering into contracts and being able to

enforce that contract through a technological means. Which is where the DMCA comes in.

The DMCA basically prohibits the provision and sale and the distribution of these contract-breaching devices. The idea being that you can make this regime of private ordering work by having these contracts be enforced by deterring people from going into the business of making available contract-breaching devices which are going to interfere with a private ordering scheme.

Now, is this a good idea or is this a bad idea? And what is the bottom line? Well, I think that depends a lot on what you think of the Hayekian ideal of private ordering. If you like Hayek, you might think, well, at least on an intellectual level, this is kind of an appealing approach. Let's try it out. Let's see what happens.

On the other hand, if you don't like the Hayekian model, you might say this is a horrible law. And in particular, Julie Cohen, whom I'm honored to be with here on the panel, wrote a very, very interesting piece in the Michigan Law Review, drawing these connections, and pointing out that the private ordering ideal might not work in cyberspace. And she offers ideas as to why perhaps Hayek's model might not work on the Internet, which sort of implicitly is critiquing the DMCA framework from whence it comes.

Why else might you be pro or con the DMCA? Well, clearly, I think if you see yourself as a potential contract breacher, you are not going to like the idea of limits on these contract-breaching tools. Similarly, if you see yourself as a provider, who is going to try to stop these contract-breaching tools, you are going to like this law which creates means of enforcing those sort of contracts by blocking the anti-circumvention devices.

One brief note on the criminal remedies. I know the panel title here is "Should Code Breakers Go to Jail?" so I feel it is my duty, especially as a former prosecutor, to speak at least a little bit about the criminal provisions. There is a lot of criticism in the press about the criminal provisions of the Digital Millennium Copyright Act. There has been one prosecution brought, against a Russian computer programmer named Dmitry Sklyarov, who was working at a company in Russia and helped this Russian company come up with a product which would allow you to basically strip off the access control devices for e-books, electronic books. And providers of these books might say, you can buy my book in hard copy for \$20 or you can read it online, and you only get to read it once or twice, or with fairly limited rights, for \$5.

So what this tool that Sklyarov and his company came up with is it basically said, hey, this is great, you can pay \$5 for

the e-book and then strip off all the controls and have much more than you paid for. And not only that, you can buy this product on the Web for 100 bucks. That was what the company did. Just looking at the criminal remedies section of the DMCA, that is a fairly clear violation of the statute, in that the statute refers to willful violations -- so it needs to be an intentional breaking of that law -- and then, for purposes of commercial advantage or private financial gain.

Well, clearly you have a company that is selling this product for \$100, basically saying, we can give you a tool to breach contracts and all you have to do is give us 100 bucks. So that led to the prosecution which started, I think, maybe two or three months ago -- it is still in the fairly early stages -- of Sklyarov in the Northern District of California.

Is this law ultimately a good law or a bad law? I think it is just far too early to tell. We do not yet know whether the incentive structure of how people are doing business over the Internet is going to require this kind of anti-circumvention provision. I think it is just too early to tell whether, on the merits, this is a law that we are going to have 10 years from now, 20 years from now, 50 years from now. But at least right now, looking at the different ways of distributing property over the Internet, it does seem to be one

that is at least conceptually consistent with that of the Hayekian ideal, whether you like that one or not.

Thank you.

(Applause.)

(End of Mr. Kerr's remarks.)