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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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The Cato Institute
F.A. Hayek Auditorium
Washington, D.C.

P R O C E E D I N G S

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MR. SIMON: I'm not an academic, so I don't have much to say about Hayek.

I guess one of the things that puzzles me about how the debate on DMCA has played out is that it's a complicated statute, but it's fascinating to me how it's either about good or evil. It's either vilified or it's posed up there on a pedestal as a wonderful kind of panacea.

And the vilification runs the gamut of every legal and emotional heartstring that can be pulled. "It's unconstitutional." Oh, that's really bad. "It will limit free speech." That's really bad. "It will limit my freedom." That's really bad. "It will criminalize basic research," the lifeblood of the industry I work for, software. That's really bad. "It will put scholars at risk of going to jail." "It will be the end of creativity." "It will be the death of our educational system." And I could go on.

It's pretty evil stuff. Doesn't it sound like pretty evil stuff? I'm scared, and I'm a little wondering why I'm standing up here, about to defend this really evil thing. But

it's really not about good and evil. It is really about a dialogue at two mismatched levels.

At one level we have a really interesting, complicated, hard puzzle -- and that's at an academic level -- about what is good law and what is good policy as we move into dramatically different ways of sharing and distributing information. And that's a hard puzzle, it's a good puzzle, it's an interesting puzzle, and it's an academic puzzle.

There is also another side to it, which is a marketplace reality. And the marketplace reality is that businessmen are rational profit maximizers. Most of the copyrighted works that we talk about here today are not about my sitting in my attic and writing poetry; they're really about commercially viable products. And the notion somehow that it is the purpose of a company that is in the business of distributing, whether it's books or movies or software, to create such obstacles to their consumer base that it will frustrate their customers, it will make them angry enough not to buy their product, seems to me on its face a nonsensical proposition.

It's the hard balance that the software industry has struggled with. And the software industry has struggled with aspects of copy protection and access control for almost 20 years, and we've gone through cycles. We've gone through cycles of applying strong protection to prevent people from stealing our

products, and we've had consumer backlashes. And then we've gone back to applying more protection, and we've had other consumer disagreements. This is an ebb and flow in what you do as a business in this world. And the reality is there are bad people out there who steal. And what you want to do is you want to stop the thieves. You don't want to hurt your customers. You don't want to create disincentives for your customers. What you want to do is you want to stop the thieves.

There is a balance to be struck here. And in striking that balance you have to be careful not to create technologies that are so hard, so inconvenient. The gentleman this morning spoke about ease of use and customer-friendly protections. Ultimately those are very relevant to the marketplace.

Let me take a sidestep for a moment. In the rhetorical sense, this sort of reminds me of the debates in the great West, when the cattlemen were out there first. And you know, cowboys are American and they're good and they're nice people. And then the shepherds came along, who wanted to fence in the prairie. And they're bad people, because they wanted to put fences on it, and all those sheep would eat up all that grass and it was bad development. But the reality is you just have two different economic models, and what you have is evolution, what you have is change and adjustment. And that is a lot of what we're looking at here.

The reason why I agreed with you when you said it's too early to tell whether the DMCA is a good law or a bad law is because it's too early to tell whether or not the Internet as a distribution model will truly succeed or not succeed. I think it will. But the reality is that every industry is in the process of adjusting their business models, adjusting their distribution models, trying to figure out how to respond to a dramatic change in how people acquire and use copyrighted works.

The software industry is probably a little bit ahead of the other copyright-based industries because we have always been a digital industry and our products have always been subject to perfect copying. And we have been pretty early in distributing software online. As other industries are finding themselves in digital form, or shifting from a paper book to a digital book -- music shifted about 15 years ago and movies are now in the process of shifting -- they too will adjust their distribution models. And a lot of what we're seeing here is an effort by right-holders, who perceive a serious threat of theft, to try to engage in elements of using technology to help themselves.

That technology can be used for good things or it can be used for bad things. And peer-to-peer is a great example. Peer-to-peer is one of the most important dynamic developments in the software industry. And you guys haven't written enough about it from that perspective. Because what it is, is it is about

collaborative work. It's about expanding the people that you work with collaboratively. That's a good thing.

When you use it for unauthorized exchange of copyrighted works, that's a bad use of peer-to-peer technology. Similarly, if you're talking about encryption technologies, or if you're talking about any number of these technologies, they can be used for positive purposes, or you can overreach with them. Clearly, you can. The answer that people give too easily, which is that the DMCA is a substantially miscast, misbalanced, overreaching kind of statute, I think is engaging in facile answers to complex questions. It's too easy. It's kind of lazy, frankly.

Now, a couple of other thoughts. The real subject, that was at least the title of this panel -- and you actually gave the facts of the Dmitri case very accurately -- let's take it away from the bad parts of how that thing played out. Which is you've got a very attractive young programmer, who has a small son, who happens to be at a conference of hackers in Las Vegas. And just as he is walking out, a bunch of big, burly guys in blue suits, with guns under their jackets, grab him and towed him off. That looked pretty ugly.

Now, maybe the right thing would have been to wait for the guy at the airport. Or maybe the right thing would have been to get him at his hotel room. Maybe the right thing would have

been to not prosecute him at all but to go after the corporate officers. But let's take a step behind that, which is: What did this guy do? He basically sold a product that was advertised for the sole purpose of making copies of works without authorization.

We may talk about it as space shifting, but when you're shifting that space you've made a copy. It's the copyright law, guys. It's about exercising the right to prevent others from making unauthorized copies. So this is not a hard thing. He distributed a technology that enabled others to engage in infringement.

Now, the way the DMCA works is you don't have to get to that infringement. The mere fact that you were aiding and abetting -- a well-established concept in criminal law -- that you're aiding and abetting or distributing tools to aid and abet, that's all the DMCA codifies. It basically says, if you are a person who is going to sell products that are primarily designed or advertised for the purpose of defeating locks on my doors, locks on my works, that's a criminal act. It is a criminal act when you're doing it for a physical lock on a door; it should be no different when you're talking about technology being used in this context.

Now, should he go to jail? Is this like the kind of thing for which people should go to jail? Nobody should go to jail except really bad people. Is Dmitri really bad? He's a

criminal. But this notion that somehow his acts are without consequence because he is an encryption researcher, furthering science, okay, so why did he sell this stuff for 100 bucks a pop on the Internet off a U.S. Web page? And, by the way, only hard currency, U.S. dollars and European currencies, were being accepted by the processor of the credit card information. So this is not a hard thing to get your mind around. This is a for-profit operation, specifically designed to defeat something that the copyright owner has put in place.

One last thought, and then I'll stop. The Internet changes things dramatically for copyright owners because it creates an enormous opportunity. And that opportunity that it creates is to reach a much broader marketplace. Marketplaces are price sensitive. And obviously the cheaper your product, the more you can distribute. In the Internet, zero-priced products are an enormous possibility and they're an enormous threat -- zero-priced products in the sense of stolen and redistributed without authorization. So the trick for the software industry, as well as other copyrighted industries, is how to balance the opportunity the Internet presents against the threats for theft that it also presents.

Now, did we calibrate that balance correctly in 1998, when the DMCA was passed? I don't know. Are we calibrating that balance correctly in 2001, as we sit here? It's probably still

too early to tell. But I'm willing to stand up here before you and tell you that I think the DMCA is a good law, it makes sense, and is going to work. I have an open mind because I am a thinking person. For people to stand up here and vilify this statute as unconstitutional, anti-individual liberties and the death knell of free speech strikes me as kind of close-minded.

Thank you.

(Applause.)

(End of Mr. Simon's remarks.)