

UNITED STATES DEPARTMENT OF COMMERCE
U. S. PATENT & TRADEMARK OFFICE

NATIONAL INFORMATION INFRASTRUCTURE TASK FORCE
WORKING GROUP ON INTELLECTUAL PROPERTY

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In the matter of: :
PUBLIC HEARING ON :
INTELLECTUAL PROPERTY ISSUES :
INVOLVED IN THE NATIONAL :
INFORMATION INFRASTRUCTURE :
INITIATIVE :
- - - - -X

Thursday, November 18, 1993

Marriott Crystal Forum
Marriott Hotel, Crystal City
1999 Jefferson Davis Highway
Arlington, Virginia

The PUBLIC HEARING ON INTELLECTUAL PROPERTY ISSUES
INVOLVED IN THE NATIONAL INFORMATION INFRASTRUCTURE
INITIATIVE was convened, pursuant to notice, at 9:12 a.m.

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P R O C E E D I N G S

(9:12 a.m.)

OPENING REMARKS

CHAIRMAN LEHMAN: May I have your attention, please. I think we'll get underway. My name is Bruce Lehman, and I'm Assistant Secretary of Commerce and Commissioner of Patent and Trademarks. I would welcome you here to the Patent and Trademark Office today. I'm also the Chair of the Working Group on Intellectual Property of the Information Committee of the National Information Infrastructure Task Force. Welcome to our public hearing today.

The National Information Infrastructure is a system of high-speed telecommunication networks, databases, and advanced computer systems that will make the electronic information and entertainment products more widely available and accessible to the public than ever before. Hopefully that's an understatement. This increased availability and accessibility will dramatically affect the way information and entertainment products are created, marketed, distributed and received throughout the world.

On February 22nd of this year, President Clinton announced his plan to create a White House Information

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1 Infrastructure Task Force to work with the Congress and the
2 private sector to develop comprehensive telecommunications
3 and information policies aimed at articulating and
4 implementing the administration's vision for the NII. And I
5 should say that as we all know, this is not going to be a
6 federal public works project. It's really an attempt to turn
7 the dials of public policy in such a way that an activity
8 which is already underway, the development of this
9 infrastructure, will really be all that it can be and that
10 its potential will be maximized rather than limited.

11 The Working Group on Intellectual Property which is
12 a part of the Information Policy Committee, as I mentioned,
13 was established to resolve issues of concern in the
14 intellectual property area regarding the digital distribution
15 of works of authorship.

16 The commercial viability of digital networks hinges
17 on implementing policies that not only assure that the owners
18 of information and entertainment products retain sufficient
19 control over these products to prevent unauthorized use, but
20 also that assure the interest of users of that information
21 and those products are adequately considered. Changes to
22 intellectual property laws may be needed to prevent the
23 proliferation of piracy and to protect the integrity of

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1 intellectual property while assuring broad public access to
2 information.

3 As noted in the October 19th Federal Register
4 notice of this hearing, we have requested that all written
5 commits be submitted by December 10th. We will encourage
6 anyone with views on intellectual property implications of
7 the NII to make those views known to the Working Group.

8 Members of our Working Group, who are all from
9 various agencies in the Federal Government, are here on the
10 panel with me this morning. Because there are a quiet a few
11 of them, not everybody may be able to have a seat right here
12 at the panel, so the latecomers from our Working Group will
13 be seated in the front row of the auditorium.

14 At this time for the benefit of those who are here
15 for the hearing and members of the public, I'd like to have
16 the members of the Working Group that are here with us this
17 morning to introduce themselves. Why don't we start down at
18 that end of the table with Howard Lange.

19 MR. LANGE: I'm Howard Lange. I'm with the Office
20 of Intellectual Property at the Department of State.

21 MR. ABBOTT: I'm Alden Abbott, Chief Counsel of the
22 National Telecommunications and Information Administration,
23 NTIA, in the Department of Commerce.

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1 MR. HOFFMAN: Michael Hoffman. I'm an Intellectual
2 Property Attorney in the Office of General Counsel at the
3 Department of Energy.

4 MR. McDERMID: I'm Walt McDermid. I'm a policy
5 analyst in the General Services Administration, Information
6 Resources Management Service.

7 MS. SOUTHWICK: I'm Terri Southwick, an attorney
8 advisor in the Office of Legislation and International
9 Affairs at the Patent and Trademark Office.

10 MR. SAUNDERS: I'm Jack Saunders. I'm Chief of the
11 Motion Picture Sound and Video Branch at the National
12 Archives.

13 MS. BERNSTEIN: I'm Maya Bernstein. I'm with the
14 Office of Information and Regulatory Affairs at the Office of
15 Management and Budget.

16 MR. JORDAN: I'm David Jordan. I'm Assistant Chief
17 of the Professions and Intellectual Property Section of the
18 Antitrust Division at the Department of Justice.

19 MR. LINN: Jerry Linn, Associate Director of
20 Computer Systems Laboratory, National Institute of Standards
21 and Technology.

22 MR. RAUBITSCHKE: I'm John Raubitschek with the
23 Technology Administration in the Department of Commerce.

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1 MR. LYTEL: David Lytel, Office of Science and
2 Technology Policy in the White House.

3 CHAIRMAN LEHMAN: I think we have some more of our
4 people in the front row.

5 MR. KUPFERSCHMID: Keith Kupferschmid with the
6 Office of Legislation and International Affairs at the Patent
7 and Trademark Office.

8 MR. KEPLINGER: Mike Keplinger with the Patent and
9 Trademark Office.

10 MR. CZYINSKI: Jack Czyinski, Patent and Trademark
11 Office, Office of the Commissioner.

12 MS. HARTSOCK: Phyllis Hartsock, National
13 Telecommunications and Information Administration.

14 CHAIRMAN LEHMAN: Well, that's a good share of our
15 Working Group. As you can see, it represents a broad range
16 of Federal Government agencies that have an interest in this
17 subject matter.

18 We also have, I'd like to note, a court reporter
19 here today, and the entire transcript of this hearing will be
20 taken down and will be available from us here at the Patent
21 and Trademark Office after December 3rd for \$30.00. You can
22 contact the Office of Legislation and International Affairs,
23 and particularly Terri Southwick here to my right about that.

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1 Copies of written statements which have been
2 submitted up to this date are available for inspection in
3 room 902 of Crystal Park II, across the street at 2121
4 Crystal Drive.

5 Because of the number of persons testifying today,
6 we are going to have to limited each speaker's presentation
7 to a maximum of 10 minutes in order to ensure that all the
8 people who have requested to testify get the opportunity to
9 do so. If time permits, members of the Working Group, the
10 panel, may ask questions.

11 And I must say, to the extent that you're
12 interested in having us have a dialogue with you, you might
13 want to reserve part of your 10 minutes for the questions.
14 Otherwise it's going to be hard to do that. But we will try
15 to be pretty firm about that 10 minutes per person. I wish
16 we could have a longer dialogue with everybody, but I think
17 for obvious reasons we understand that won't work.

18 Therefore, we hope that you will be able, since I
19 think it is important to be able to follow-up and have
20 dialogue, that you will be willing to respond; those who are
21 offering testimony today will be willing to respond to
22 written questions that the Working Group may have following
23 the hearing.

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1 The help the speakers stay within the time limit,
2 we have a computer set up here that has a screen which the
3 people sitting at the witness table will be able to see, and
4 that will display a green panel for the first eight minutes
5 of the speaker's presentation. And the yellow screen will
6 appear when two minutes remain, and then finally when the
7 time is up, a red screen will appear. And we have another
8 alternate screen up here so we can sort of bang the gavel if
9 necessary. Hopefully that won't be necessary, and people
10 will wrap up their presentation by the time the red screen
11 appears.

12 A list of all of the speakers today has been
13 prepared and is available in the lobby. I image many of you
14 have already picked it up. This list only gives the
15 approximate times that people have been scheduled to appear.
16 For those of you who may be thinking of leaving the room for
17 a while, you should note that people should be prepared to
18 come forward within a half hour of their scheduled time.

19 This is the second one of these hearing that we've
20 had in the Patent and Trademark Office. And the one we had
21 about a month ago on patent harmonization we found that
22 actually we ran a little bit ahead of schedule and some
23 people who thought that they might have had 10 minutes more,

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1 lost their opportunity. So please make certain that you're
2 here in advance so that if we're moving right along, that we
3 can hear from you.

4 Once again we are happy to welcome all the members
5 of the public here today. We'll hope you'll listen carefully
6 to what is being said, that you'll supply us with further
7 written comments if you have any.

8 I think now we can get underway with what we came
9 here for, which is to hear from the first of our witness,
10 Steven Metalitz, Vice President and General Counsel of the
11 Information Industry Association. Welcome, Steve.

12 TESTIMONY BY STEVEN J. METALITZ, ESQ.

13 MR. METALITZ: Thank you very much, Commissioner
14 Lehman, and members of the Working Group. I appreciate this
15 opportunity to present our perspectives. I want to start by
16 commending, first the administration for identifying
17 intellectual property issues as crucial to the success of the
18 National Information Infrastructure, and second commend this
19 Working Group. I think you're asking the right questions and
20 we will do our best to try to provide you with our
21 perspectives on the answers.

22 If I may, Commissioner, exercise the prerogative of
23 the first witness and state something very obvious so the

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1 other witnesses don't have to spend their time stating it.
2 And that is that we in the United States already have a
3 National Information Infrastructure, and it works. We, as a
4 people, generate an enormous volume of information, products
5 and services of all kinds. We have distribution networks
6 that deliver this information efficiently and ubiquitously,
7 and they met the needs of an information hungry public.

8 Obviously, the advanced National Information
9 Infrastructure is going to deliver even more information,
10 more economically in a wider variety of media and formats to
11 even more American homes and business and into the schools.
12 But we need to remember why our information infrastructure
13 works so well today.

14 One key element of this infrastructure and the one
15 that sometimes is overlooked in discussions of the NII is the
16 information itself, the information content. And what is so
17 important about the work of this Working Group are the
18 incentives that are in place to stimulate the generation and
19 the distribution of that information content. No more
20 powerful incentive for the investment that's needed in order
21 to accomplish that has yet been discovered in the system of
22 legal protection for intellectual property.

23 The challenge that is before this group and the

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1 administration as a whole and, indeed, our whole society, is
2 that the capabilities that give advanced information
3 infrastructure its great potential also invite an epidemic of
4 abuse of intellectual property rights. If we don't prevent
5 that epidemic, then our hopes for what the NII can deliver
6 will never be fully realized.

7 Copyright issues are sometimes described as a
8 problem that is plaguing the development of the NII. And I
9 think that trivializes what's really at stake here. If we
10 aren't able to protect copyright in the new information
11 environment, then the information that will be available, the
12 useful information, the supply of that will be drastically be
13 curtailed. Or just as troubling, it will be limited to the
14 information that the government chooses to create or some
15 other powerful institution chooses to create.

16 So the information content issues really lie at the
17 heart of the NII project and you're grappling with some of
18 the key issues here.

19 I think your questions recognize that it will take
20 a combination of efforts; legal, technological, and perhaps
21 most importantly, educational, to surmount this challenge.

22 Let me turn to the questions briefly that you have
23 posed in your Notice.

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1 First, is existing copyright law adequate. In our
2 view, copyright law has proven to be a flexible and a
3 powerful instrument in providing the incentives for
4 authorship in a wide variety of media. And it has done that
5 in an environment of rapid technological change. Copyright
6 isn't a Gutenberg era law. It's also a Daguerre era law, and
7 Edison era law, a Marconi era law, a Morse era law. It's a
8 law that has proved very successful in the post-Gutenberg
9 environment.

10 Accordingly, we don't believe that any fundamental
11 changes are needed in order for existing copyright law to
12 continue to achieve its major objective. And that is to
13 stimulate the create and distribution of original works of
14 authorship.

15 Now that being said, there may be areas where the
16 application of these existing copyright concepts to new
17 technology developments can usefully be clarified. And we've
18 suggested a couple of areas in our written testimony. We're
19 certainly ready to work with the administration, with other
20 interested parties, in identifying areas where it might be
21 useful to draft clarifying legislation and craft the language
22 that's needed to accomplish this.

23 In considering any changes to copyright law the

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1 administration must pay particularly close attention to the
2 global copyright law regime. There are two initiatives
3 underway now, as you know, at the World Intellectual Property
4 Organization. And in both of them, both the protocol to the
5 Bern Convention and a possible new instrument, there is a lot
6 of discussion about recognizing and defining exclusive rights
7 in digital transmissions. And that debate is still at an
8 early stage, but it may be quite helpful to the United States
9 in deciding whether or not any changes are needed to its law
10 to clarify the application to digital networks.

11 We've very pleased to see that this administration
12 is expanding the U.S. leadership role in the WIPO and other
13 international fora, because virtually any changes in
14 copyright law will have to take this global environment into
15 account.

16 The second question: Are the existing fair use
17 provisions adequate? Fair use is an integral part of our
18 copyright law. And like the copyright law as a whole, it's
19 proven very adaptable to technological changes, including
20 those involved in the NII.

21 One of the exciting things about the technological
22 developments is that it reinforces a growing trend toward
23 defining permissible uses of copyrighted material by

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1 contract. We sometimes overlook the fact that our copyright
2 law works hand-in-hand with contract law to map out the
3 terrain of exclusive rights and the rights of users of
4 copyrighted material.

5 Some of these technological developments could
6 enable more widespread and more flexible use of contracts to
7 define permissible uses of copyrighted material. That
8 material could be accompanied by headers or surrounded by
9 envelopes that offer a range of terms and conditions for
10 varied uses of the materials. Intelligent agents and other
11 software tools could be used to facilitate an automated
12 contracting process between proprietors and users. And that
13 would reduce the transaction costs.

14 So one thing the Federal Government could usefully
15 do is encourage further research and development of the
16 technologies that facilitate electronic contracting and
17 licensing of intellectual property. The statutory fair use
18 provisions, of course, are very important in the extra
19 contractual areas.

20 The third question: Should there be labeling or
21 encoding standards? As I've noted already, there's a lot of
22 work going on now toward developing practical techniques for
23 identifying the ownership of copyrighted material on the

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1 networks, and specifying the terms and conditions of
2 authorized use. We're summarizing some of that in a research
3 paper that's underway now which we'll be glad to share with
4 the Working Group when it is completed.

5 Government can play some important roles in this
6 development. It can be a catalyst to support further
7 research and development. It can provide a forum for
8 information sharing, and it can also create an environment
9 that encourages the adoption of voluntary standards.

10 However, we think Government should refrain from setting
11 mandatory standards in this area. There's a very rich
12 creative soup brewing out there and this is really not the
13 time for Government to put it's thumb into it. We think that
14 the users of these networks will ultimately benefit greatly
15 from the technological developments in the labeling and
16 encoding.

17 And by the way, that benefit will not just be in
18 the copyright area, but also in the area of privacy. There's
19 a very clear overlap between the copyright management
20 techniques and the privacy and security techniques. And I
21 know one of our sibling working groups deals with that
22 privacy area, and there's probably a lot of room for
23 interaction.

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1 Fourth: Should interoperability or inter-
2 communication standards be adopted? Here again, we think
3 government should serve as a catalyst, but not as a mandator
4 of standards. Market forces are going to lead us to greater
5 interoperability and interconnection, and they should be
6 given a chance to do that.

7 Fifth: Licensing systems. Again, let's think
8 about our existing information infrastructure. We have a
9 wide range of licensing systems: individualized contracts,
10 collective administration on a voluntary basis, and in a few
11 narrow specified instances, compulsory licenses.

12 Under the advanced NII as well, there's not going
13 to be a one size fits all approach. And some of these
14 technological trends that I've already mentioned are going to
15 make it more feasible for individualized licensing to take
16 place and for voluntary collective licensing to be handled
17 quite efficiently with an economy of scale.

18 The goal here really ought to be to facilitate
19 transactions in copyrighted materials. That's the key to
20 getting more and better information dissemination. And these
21 technologies are going to be able to do that much more
22 effectively than a single compulsory licensing system, or
23 even a single voluntary licensing system. There's a lot of

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1 room for diversity here.

2 Sixth: Technical means for preventing unauthorized
3 uses. We think that it would be premature at this point to
4 set standards for these kinds of copy protection mechanisms
5 for the reasons we've already discussed. There is one aspect
6 of the 1992 digital audio legislation that is worth looking
7 at, and that is the possibility of providing legal sanctions
8 against devices or techniques whose primary use is to defeat
9 or circumvent intellectual property management technology.
10 It may not be time for that yet, but that's something in the
11 future.

12 And finally, the question of education. You listed
13 it last, but it's certainly not least. It's one of the most
14 important questions. These are not just legal or technical
15 problems, there are also cultural issues here. And unless
16 these cultural factors are addressed, the NII environment
17 will never be fully hospitable to creators and other
18 copyright proprietors.

19 Government has a role here, and so very definitely
20 does industry and other elements of the private sector. We
21 really need to do more to step up to this problem and to find
22 out the best ways to communicate these rules to the millions
23 of Americans who in effect hold the future of this National

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1 Information Infrastructure in their hands.

2 Thank you very much.

3 CHAIRMAN LEHMAN: Thanks a lot, Mr. Metalitz.

4 Sorry we're not going to be able to have oral questions if
5 we're going to stick with our schedule here. But hopefully
6 you'll be available for written questions.

7 Next we'll here from Maria Pallante. Welcome, Ms.
8 Pallante. Please go ahead.

9 TESTIMONY BY MARIA PALLANTE, ESQ.

10 MS. PALLANTE: Thank you, Mr. Chairman. My name is
11 Maria Pallante. I'm a lawyer specializing in literary
12 property, and Executive Director of the National Writers
13 Union. I presently also serve as a member of ACCORD, the
14 Advisory Committee on Copyright Registration and Deposit,
15 appointed by the Library of Congress.

16 The National Writers Union is a nationwide trade
17 organization of 4,000 authors. We have 11 chapters from
18 coast to coast and an award-winning members that includes
19 journalists, poets, novelists, biographers, historians,
20 children's book authors and other authors. The livelihoods
21 of our members will undoubtedly be affected by the
22 opportunities presented here today and we're both excited and
23 a little concerned about that. Thank you for giving this

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1 opportunity to testify.

2 Intellectual property is a major United States
3 trade assets representing an enormous contribution to the
4 international balance of payments. Not only is the United
5 States the largest market for information in intellectual
6 property, it is the worlds largest producer and exporter of
7 written works, movies and music. We have individual American
8 authors and artists to thank for this.

9 Just as it's a small business and individual
10 entrepreneurs who are creating most of the new jobs, products
11 and services in the U.S. economy today, it is individual
12 authors who create most intellectual property. It is thus
13 vital to U.S. trade advantage that individual copyrights and
14 individual production and distribution, be produced and
15 encouraged, not just those of our corporation who buy their
16 works.

17 Indeed, the policy of granting incentives to
18 individual authors as a means to public creative wealth is a
19 constitutionally-based incentive that does not discriminate
20 between commercial or noncommercial, published or
21 unpublished, good or bad. We believe this policy is
22 important because it serves the nation's diverse interests.

23 The beauty of the NII is that it has the power to

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1 increase distribution of minority writers and reach black,
2 Spanish-speaking and Asian markets that have typically been
3 ignored by the mainstream commercial publishers. Small
4 presses, political journals, minority papers and other
5 diverse voices that make up the culture of our country will
6 be able to contribute and compete.

7 We agree with the first speaker that clarification
8 of copyright law may be necessary as we progress. First, it
9 does not definitively distinguish forms of electronic-based
10 rights into categories of performance rights, display rights,
11 distribution rights, reproduction rights, or the right to
12 make electric derivative works. Thus, it does confuse
13 creators and users as to both the scope of existing licenses
14 and the fair market price of those rights that are the
15 subject of negotiation today.

16 Second, it does not statutorily prohibit publishers
17 and other users from claiming by contract with the creator
18 those rights, usually electronic-based rights, that do not
19 yet exist and/or those rights that at the time of negotiation
20 lack measurable economic value, as did CD-ROM rights a few
21 years ago and other optical-based disk rights today.

22 Since the turn of the century, courts have ruled
23 that language granting rights to media is not yet invented

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1 may be upheld despite the fact that such rights did not exist
2 at the time of a contract, and despite the fact that they did
3 not achieve measurable value at the time of negotiation and
4 whether or not additional compensation was paid for those
5 rights.

6 Whether the unknown technologies where movies,
7 television or books on tape, the courts have operated from
8 the premise that authors negotiate knowingly and on equal
9 footing. But lack of bargaining power for writers today, the
10 result of a decade of the largest incident of media
11 conglomeration ever, has deteriorated contracts of authors
12 badly. Many are told to sign restrictive language or lose
13 the writing assignment.

14 As new mediums have taken over old mediums, authors
15 have lost fundamental leverage year by year. But the purpose
16 of copyright law which stems directly from the U.S.
17 Constitution is to induce a public stockpile of creative
18 wealth by securing to authors for a limited time the
19 exclusive rights to their works. It is not a present balance
20 between authors and users, rather the law is a means to an
21 end. Control and compensation are meant to be incentives
22 that inspire individuals to create.

23 But what happens to an author's incentive to create

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1 if she cannot negotiate a fair share of the proceeds, and
2 what happens then to her ability to create or to make a
3 living by continuing to create, what happens to the diversity
4 and quality of the creative materials available in our
5 society, if the only creative that is bought and sold is that
6 which drives our major corporate entities?

7 Third, present copyright law does not set forth
8 whether electronic rights in their various manifestations
9 should be calculated on a traditional per use royalty scale,
10 such as compulsory licenses, or if their income shares based
11 on time rental or time access.

12 Fourth, it does not encourage voluntary notice of
13 copyright or variations of notice as clarifying measures that
14 authorize certain uses for academic or other noncommercial
15 use. That is, permission without payment but conditional on
16 proper attribution. We have a working paper out on the
17 Internet with what we call the reverse notice. It says you
18 can use this provided you give us credit. And people have
19 written back and just thanked us in relief that they knew
20 that they could use it.

21 Fifth, it does not adequately address moral rights
22 per the Berne Convention. We think this will become more and
23 more important. Internationally authors works are protected

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1 from mutilation and other measures that destroy the integrity
2 of their works. In this country we protect moral rights for
3 visual art, but more and more multimedia products will
4 incorporate visual art as well.

5 Sixth, the work for hire exception may need to be
6 limited further. Audiovisual works are one of the exceptions
7 authorized under the work for hire exception in the statute,
8 but much of the text authors will be writing in the future
9 will be for audiovisual products that are not the traditional
10 motion pictures. If these mediums become the primary
11 publications, authorship could be at risk unless the work for
12 hire doctrine is interpreted narrowly.

13 In terms of fair use, we believe the copyright law
14 must settle the question of whether works available on the
15 NII are published or unpublished or whether this is an
16 artificial distinction. Whether a work is published can have
17 severe repercussions as to the application of the Fair Use
18 Doctrine, application of international law, availability of
19 attorney's fees and statutory damages, and the relative
20 commercial value.

21 It should be noted that authors of unpublished
22 works do not consider their work to be without value and
23 should not be penalized by copyright regulations that protect

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1 the mass commercial distribution that is also important.

2 Much of the great reflective works of civilization
3 are discovered by historians looking back, while many of the
4 best sellers of the day are later lost to mediocrity. New
5 technology will allow works to stay in print longer, perhaps
6 forever. But copyright protection must continue to apply to
7 the commercially successful and commercially obscure works
8 alike, whether works are distributed by major international
9 houses or by an individual author, as Walt Whitman printed
10 and distributed "Leaves of Grass" himself in 1855.

11 In terms of labeling and encoding of works, we
12 support the use of technology to develop tracking devices and
13 depositories. Publicly accessible facilities would preserve
14 the contents, including text and author's name in non-
15 erasable media in the order they were submitted. Invisible
16 electronic signatures can be developed to prevent plagiarism.
17 It is also technically feasible to attach authenticated check
18 sums to documents that would reveal whether the document has
19 in any way been altered.

20 Finally, authors and owners of intellectual
21 property should have the right to encrypt their works to
22 ensure that copyrights are not violated.

23 We believe there should be a multiplicity of

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1 private licensing systems competing, the transactions of
2 which should be regulated by a government body that takes
3 into account legitimate needs for exemptions from antitrust.
4 Such licensing systems should allow networks and data
5 carriers to automatically transfer payment to the copyright
6 holder each time a book, article, art work or a file is
7 accessed. They must also provide a mechanism for tracking
8 the use of information and providing timely, accurate and
9 understandable royalty reports to copyright holders.

10 Database compilations of intellectual properties
11 should always include permissions information, as will the
12 Library of Congress if the Copyright Reform Act of 1993
13 passes; names of various rights holders, contract information
14 for permission request, and other relevant data.

15 To the extent that transaction-by-transaction
16 systems require a direct nexus between the user and the
17 copyright holder, we would oppose such a system because
18 authors cannot be easily found and should not have to grant
19 all rights to a corporate entity in order to exploit them.

20 Clearly, education about general copy written law
21 must be available to educators, librarians, researchers,
22 students and private users. The National Writers Union very
23 much wants to assist in this process. Without copyright law,

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1 creators lose the economic incentive to create. Without such
2 an incentive, the drive for creativity fails, and progress
3 towards the ultimate goal of increasing the public stockpile
4 of creative wealth falters.

5 Protection of the work of small copyright holders
6 is basic to the public interest. Such protection can only be
7 achieved through partnership with the public, general
8 education on every level, in all academic settings and all
9 public arenas.

10 We hope the Working Group will keep in mind the
11 Constitutional purpose of copyright law and the protection of
12 authors. And we thank you for your time this morning.

13 CHAIRMAN LEHMAN: Thank you very much for that
14 excellent statement. We don't have time to follow-up right
15 now, but I'd like to follow up more. Maybe we could have a
16 written dialogue by what you mean by a government agency to
17 regulate the administration of these rights.

18 Our next witness is Mr. Stephen Haynes, Manager,
19 WESTLAW Research and Development of West Publishing Company
20 in St. Paul, Minnesota. Welcome.

21 TESTIMONY BY STEPHEN L. HAYNES

22 MR. HAYNES: Mr. Chairman, members of the Working
23 Group, good morning. My name is Stephen Haynes and I'm an

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1 Executive at West Publishing Company in Minnesota. West is a
2 leading publisher of materials used by lawyers, including
3 Case Law Reporters of the National Reporter System and
4 annotated statutes of 22 states, plus the United States Code
5 Annotated. In addition, West provides the WESTLAW computerized
6 legal research service for which I'm manager of research and
7 development. Thus, and perhaps uniquely among the companies
8 whose witnesses will testify before you today, West is both a
9 leading print publisher and a provider of one of the most
10 sophisticated on-line information retrieval services
11 available in the world today.

12 West Publishing has been part of the National
13 Information Infrastructure since 1876. In modern times,
14 since 1975, WESTLAW has been a major provider of on-line
15 research services for attorneys. Over 4,000 databases offer
16 ever conceivable type of textual and abstracted material of
17 interest to attorneys. Virtually the entire National Report
18 system and statutes of all 50 states, plus the Federal
19 Government are on-line. In addition, we have gone to
20 considerable lengths to convert or in some cases keyboard
21 from printed sources public domain materials, such as the
22 Federal Register, the Congressional Record and decisions or
23 other publications of numerous federal and state agencies.

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1 The sum total of all these databases will exceed one terra
2 byte in size.

3 Now I personally have been long and intensively
4 involved in many aspects of West intellectual property
5 concerns. Several of these concerns relate to the Internet
6 and to the proposed National Information Infrastructure.
7 Among the seven questions posed by the Working Group I will
8 concentrate my remarks today on three: fair use, licensing,
9 and technological solutions for protection of intellectual
10 property.

11 Let me begin, however, that West does not
12 anticipate that existing copyright law prove inadequate for
13 protection of its or other publisher's rights in the NII.
14 West has been diligent in protecting its intellectual
15 property and we will continue to be diligent in the future.
16 However, our greatest concern is not the wholesale copying
17 and offering for sale of West materials. These instances can
18 be detected and the offenders pursued. Rather, we are more
19 concerned with the casual copying and redistribution of our
20 materials in manners that exceed standards of fair use. We
21 believe that use casual copyright infringement is a proper
22 subject of education, and we applaud and support the
23 announced effort to educate the public in appropriate

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1 behavior under the copyright law.

2 Now as to fair use, for decades our position has
3 been abundantly clear, if perhaps seldom explicitly stated.
4 West not only accepts appropriate exercise of fair use of our
5 copyrighted material, but in fact has accepted very generous
6 use under certain circumstances.

7 In a former life I was a litigator with a major New
8 York law firm. I know from personal experience the piles,
9 literally piles of West Reporters that daily accumulated in
10 that firm's copying center for reproduction of individual
11 case reports. West accepts this type of copying as a normal
12 consequence of the successful practice of law. As I will
13 shortly discuss, we essentially ratify this position in our
14 WESTLAW license.

15 The AAP preliminarily comments, and perhaps other
16 witnesses will identify high-speed downloading as a concern
17 for publishers. Clearly such downloading may exceed the
18 bounds of fair use. West agrees that this is a concern, but
19 we also feel that detecting such downloading is more properly
20 a function of individual services available over the NII. It
21 will eventually be possible to incorporate technological
22 means to detect downloading of copyright information. But we
23 question whether this is an appropriate investment for the

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1 NII as a whole, given the overhead burdens that will be
2 imposed on the infrastructure itself, as well as on
3 individual providers who must take their information to
4 permit detection.

5 Moreover, it is less the high-speed downloading
6 that will concern us as high volume. Whatever mechanistic
7 technologies are proposed to track transmission of
8 copyrighted materials, they will ultimately be ineffective
9 since short of truly Draconian measures, the dedicated
10 infringer can easily modify copyright information so that it
11 cannot be detected.

12 In West's view, striking the appropriate balance
13 between the restriction and fair use of the online
14 environment is best accomplished by traditional written
15 licenses executed between the online service provider and its
16 subscribers. West has used this approach.

17 While West's own WESTLAW subscriber agreement is
18 phrased in legal language, let me try to summarize regarding
19 use of our materials. West explicitly permits WESTLAW
20 subscribers in the regular course of their legal work to
21 download and temporarily store insubstantial portions of
22 information found in WESTLAW databases. The subscriber must
23 retain control over the downloaded material at all times and

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1 except in limited circumstances not redistribute it. The
2 subscriber may display the downloaded material internally or
3 quote from it in memoranda, briefs, or other work product
4 provided appropriate citation and credit is given for such
5 use. The subscriber may also create printouts of material
6 contained in the WESTLAW database for internal use and for
7 unpaid distribution to third parties, if such third parties
8 agree not to further distribute those materials.

9 You will note that this latter permission is a
10 relaxation of traditional fair use and is consistent with
11 West's attitude toward copying of its case reports by law
12 firms.

13 As this discussion of the WESTLAW subscriber
14 agreement illustrates, West feels that licenses are a highly
15 appropriate way in dealing with issues raised in the online
16 electronic environment, and we feel that licenses will
17 continue to play a pivotal role in the NII as it evolves.

18 West commends this approach as a non-statutory
19 means to balance the needs of an NII information provider's
20 customers with the provider's own needs for protection. West
21 also generally supports the efforts of some creators and
22 providers to grant copyright licenses to cooperative
23 licensing and royalty collection groups such as ASCAP, BMI

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1 and NCC. We do not believe that such licensing is or should
2 be the province of the Federal Government.

3 Finally, let me remark briefly on the role of
4 technological solutions in protecting intellectual property
5 within the NII environment. These comments also relate to
6 the Working Group's questions regarding labeling or encoding
7 of works and the establishment of standards or
8 intercommunication or exchange of information.

9 West agrees with the AAP that it is premature to
10 establish standards for encoding or labeling of copyrighted
11 works. In fact, such steps may prove never to be feasible or
12 practicable. In any event, if such labeling or encoding is
13 eventually deemed desirable we, like the AAP, feel that the
14 marketplace is the appropriate place for competing standards
15 and technologies to be developed and proven.

16 Various forms of encryption, software envelopes,
17 privacy enhanced mail, and hardware solutions, have already
18 been proposed and in some instances debated. Some of them
19 may in time take root. However, many will prove in the end
20 to be not practicable from the standpoint of open market and
21 information. For example, some have suggested that a
22 hardware solution might be imposed analogous to that imposed
23 recently by Audio Home Recording Act for serial copy

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1 management in the digital audio tape or DAT environment.

2 Now I remind the Working Group, however, that the
3 serial copy management technology was imposed well before
4 proliferation in this country of DAT units. We are faced now
5 with a plethora of scanners, digital copiers, fax boards and
6 computers, modems and optical character recognition software,
7 all without any restrictive circuitry. This is the
8 proverbial case of barring the gate after the horse has
9 escape. DAT-like solutions are just not feasible at this
10 late date.

11 Moreover, I again emphasize that the best solution
12 for these problems will not be technological but educational.
13 We have the stick: lawsuits; and we have the carrot:
14 pricing of information consistent with its value. Along with
15 pricing will come technological protections selected by
16 individual publishers and on-line providers of information.
17 If an individual publisher's information is of high value and
18 much in demand, that publisher will more likely impose
19 technologies of encryption or software envelopes as a
20 condition of access. If, on the other hand, the information
21 comes from the public domain in unenhanced form, the market
22 will assure an abundance of lower priced unencrypted sources
23 for the information. If current experience on the Internet

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1 proves nothing else, for public domain information, a
2 thousand flowers will bloom.

3 Imposition of technology impediments to accessing
4 information will dampen supply and will likely depress the
5 vibrant market for information that is one this country's
6 unique strengths.

7 In summary, we feel that for the most part the NII
8 is moving forward in positive manner. The proper role of
9 government is to foster experimentation, underwriting where
10 appropriate research and development efforts that lie at the
11 cutting edge, but leaving to the private sector development
12 of practical and for-profit solutions to the nation's
13 information needs.

14 Thank you again for this opportunity to present
15 West's views.

16 CHAIRMAN LEHMAN: Thank you very much. Does anyone
17 have any questions that they'd like to ask?

18 (No audible response.)

19 CHAIRMAN LEHMAN: Thank you very much.

20 Next I'd like to ask Timothy King to come forward.
21 He is Vice President, Planning and Development for John Wiley
22 and Sons. Is he not here?

23 I'm sorry, Lisa Freeman is our next witness. I

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1 apologize for that. She is the Director and Chair of the
2 Association of American University Presses' Electronic
3 Caucus, and she's from the University of Minnesota Press in
4 Minneapolis. Welcome.

5 TESTIMONY BY LISA FREEMAN

6 MS. FREEMAN: Thank you. I am speaking today on
7 behalf of the Association of American University Presses or
8 AAUP. And I feel compelled to mention that I'm speaking as a
9 publisher and not a lawyer.

10 Before I respond to the specific questions posed by
11 the Working Group, I'd like to provide some brief background
12 about our members and about the importance of copyright to
13 our activities.

14 The AAUP comprises 114 university and other
15 nonprofit scholarly publishers. In this latter group are
16 such diverse publishers as the Modern Language Association,
17 the American Mathematical Society, and the Smithsonian
18 Institution Press. Of the approximately 47,000 books
19 published in the United States last year, roughly 9,000 or,
20 17 percent, appeared under the imprints of our members.
21 Additionally, the AAUP publishes over 700 scholarly journals.

22 Although our presses produced nearly a fifth of all
23 books and journals sold in the United States last year, the

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1 \$400 million in income received from those sales represents
2 only 2 percent of total industry-wide revenue during the same
3 period. This gap between the volume of publication and the
4 amount of revenue generated by sales of our products reflects
5 the unique mission of not-for-profit scholarly publishers.

6 University presses primarily serve the interests of
7 the research and education community, making available works
8 of scholarship that would in many cases never be published by
9 for-profit commercial publishers.

10 The contribution of a university press to the wider
11 distribution of scholarly work is even more critical within
12 the disciplines of the humanities and the social sciences, as
13 in many cases university presses are the only outlets for
14 scholars working in these areas.

15 Peer review is perhaps the most important and least
16 well understood aspect of university press publishing. This
17 is the process by which the work of potential authors is
18 reviewed by other scholars prior to its being accepted for
19 publication. Peer review ensures the scholarly quality,
20 integrity and contribution of an individual's work. Its
21 importance is widely recognized by the academic community,
22 most vividly expressed by the value of accorded of university
23 press publication by promotion and tenure. Indeed, there are

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1 many institutions of higher education in this country where
2 it is impossible to get tenure or be promoted without a
3 university press publication.

4 My point here is simply to underscore the central
5 role of university presses in the wider systems of scholarly
6 communication, a role that underpins the larger social and
7 cultural enterprise of education more broadly understood.

8 Turning now to the specific question of copyright,
9 I'd like to point out that although copyright is the primary
10 mechanism by which our authors and publishers receive
11 financial remuneration for their efforts, copyright in the
12 scholarly environment also serves another equally important
13 function. When a university press copyrights the scholar's
14 works, the press is also affixing its imprint to that work.
15 And in so doing signals to the purchaser that this the peer
16 reviewed version. In the scholarly world, multiple versions
17 of documents often circulate prior to formal publication via
18 working papers, conference presentations and the like, a
19 practice that has already increased dramatically as a result
20 of the Internet.

21 In this environment the copyright serves to
22 distinguish the authentic version; that is, the version that
23 has been peer reviewed and which the author herself has

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1 chosen to disseminate as the authoritative version from
2 earlier drafts. Copyright thus serves to protect not only
3 the financial interests of authors and publishers, but also
4 the intellectual interests of authors and that the larger --

5 CHAIRMAN LEHMAN: Can I interrupt you just a
6 second. The early version would be copyrighted as well. The
7 unpublished works are copyrighted.

8 MS. FREEMAN: Indeed, but the version that carries
9 the copyright -- for example, the Regents of the University
10 of Minnesota Press -- is the version that has been through
11 the peer review process.

12 CHAIRMAN LEHMAN: And the copyright would be in the
13 University of Minnesota Press or in the author?

14 MS. FREEMAN: In most cases it's in the name of the
15 press; in some cases it's in the author's name. It obviously
16 bears the name of the press on the title page as well.

17 Turning now to the questions posed by the Working
18 Group. The AAUP believes that the present law does
19 adequately protect the rights of creators and consumers of
20 scholarly work whether in print or electronic form. Given
21 the potential for unauthorized copying and transmission on
22 the NII, we are concerned that adequate technical solutions
23 be found to ensure the application and enforcements of the

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1 law.

2 We do not believe that any fundamental changes in
3 the law itself are necessary, however, and would resist any
4 changes that would further limit the rights of authors or
5 publishers or which would act in any way, however
6 unintentionally, to undermine the system of scholarly
7 communication outlined above.

8 On the question of the adequacy of current
9 provisions regarding fair use, the AAUP believes that the
10 present fair use provisions of the copyright law are
11 sufficient to protect the interests of both the producers and
12 consumers of works transmitted via the networks. In the
13 educational setting in particular, their use is critical to
14 enabling scholars and researcher to do their work. An
15 appropriate use of copyrighted works supports the larger
16 missions of the institutions of which we university presses
17 are a part.

18 Obviously, determining what constitutes fair use in
19 the electronic environment will be difficult given the
20 technical capabilities that the networks offer. We're
21 concerned that too liberal an interpretation of fair use
22 could undermine the scholarly legitimation function of
23 university presses. Even in the print environment, scholars

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1 are continually confronted with the possibilities of their
2 work being cited out of context, or being reproduced in other
3 works without their permission. Scholars care deeply about
4 these issues, as any university press copyright manager can
5 tell you. The possibilities for the abuse of fair use in the
6 electronic environment are obviously much greater.

7 Conversely however, a more strict interpretation of
8 fair use that limits scholars' access to the materials that
9 form the basic of their research would not be in the
10 community's best interest. The present guidelines regarding
11 the citation and inclusion of copyrighted materials under
12 fair use contribute to the wider dissemination of scholarly
13 research and often to additional sales as well. We do not
14 believe that the elimination of fair use on the networks
15 would be in anyone's best interest.

16 On the question of labeling or encoding copyrighted
17 works, the AAUP believes that it would be premature to
18 legislate requirements or impose standards given the rapid
19 pace of technological change. We do support the general
20 principle that some system or systems of identification of
21 copyrighted works needs to be developed. But we are equally
22 concerned that the protection of copyright not impede access
23 to copyrighted materials or compromise First Amendment

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1 rights. High quality research is dependent upon the
2 assurance of academic freedom and the free exchange of ideas.
3 Any system of labeling or encoding copyrighted materials
4 should balance these concerns with those of the copyright
5 holders themselves.

6 For similar reasons we also support the general
7 goals of open architecture, interoperability and universal
8 access expressed in the NII's agenda for action. Likewise,
9 we are interested in seeing an NII that enables the largest
10 possible number of users to gain access to our materials.
11 The need to protect copyrighted materials is no justification
12 for inhibiting interoperability, but the goals of
13 interoperability should not be used to justify the weakening
14 of copyright enforcement either.

15 With regard to licenses, the AAUP believes that
16 licensing structures for the use of copyrighted materials may
17 in many cases be appropriate, but the decisions about what
18 such arrangement should look like should be left up to
19 individual copyright holders. Given the complexity of
20 existing contractual arrangements, the differing needs of
21 various end users and producers, and the vast array of
22 copyrighted works that may ultimately be made available, it
23 would be impossible and in our opinion unwise to create any

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1 one centralized licensing systems.

2 Although technical means to prevent unauthorized
3 copying may exist or be developed, the AAUP does not believe
4 that these should be mandated or required. As with licensing
5 initiatives, we believe that choices with regard to technical
6 solutions to copyright protection should be left up to
7 individual copyright holders.

8 Finally, we too believe that educational programs
9 to increase public awareness of issues pertaining to
10 copyright are critical. In the context of research and
11 higher education, we are in particular trying to work to
12 inform scholars about the fundamentals importance of
13 copyright to the larger system of scholarly communication.
14 In our experience authors are not well-informed about these
15 matters, and we would urge the Federal Government to take a
16 strong role in educating people about copyright.

17 In closing, I'd like to thank the members of the
18 task force for their time today, and to urge you to ensure
19 that the concerns of the research and education communities
20 continue to be taken into account when considering
21 intellectual property issues in the electronic environment.
22 We will all be much the poorer if the potential of the NII to
23 further research and education is compromised by the desire

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1 for excessive or overly-centralized control over the free
2 flow of information and ideas. Thank you.

3 CHAIRMAN LEHMAN: Thank you. I wanted to ask a
4 question about the fair use.

5 You've indicated that you thought that in an
6 electronic environment it was important to retain fair use.
7 You indicated that the guidelines that accompany the existing
8 copyright law -- I assume you're referring to the guidelines
9 in the legislative history -- have been valuable in
10 facilitating that and what fair use means.

11 In an electronic environment is fair use as
12 necessary as it was in an non-electronic environment? In
13 other words, with photocopying, which is the primary concern
14 of the guidelines accompanying the 1976 Copyright Act,
15 there's really no way to kind of give permission very easily
16 for photocopying. On the other hand, in an electronic
17 environment, at least in theory, one can give permission at
18 very low cost, presumably, for use of the work; for any
19 downloading, for any access to it.

20 So it strikes me that from a purely practical point
21 of view fair use is not as necessary to permit the kind of
22 access that you're talking about.

23 MS. FREEMAN: I think there are couple of issues.

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1 You mentioned reasonably low cost. In the nonprofit research
2 sector even low cost is cost, and the provisions that I'm
3 referring to are those which allow scholars to cite one
4 another's works or to cite indeed other copyrighted materials
5 for the purposes of criticism and scholarship.

6 Now, the present arrangements allow for one to do
7 that with proper citation, and we certainly think that proper
8 citation should continue to occur. I think that's a separate
9 question from whether someone has to then go ask permission
10 and pay a fee and go through all of those steps when we're
11 talking about a small piece of information as part of
12 someone's scholarly or research work.

13 We're not talking about using copyrighted materials
14 as a substitute for the purchase of the copyrighted work.

15 CHAIRMAN LEHMAN: I think that's important to
16 understand. Clearly, the issue of common citation -- you
17 know, using an excerpt -- that is classical fair use going
18 way back, and is pretty much recognized universally around
19 the world.

20 The question of being able to copy whole articles,
21 significant portions of articles using reprographic
22 technology, of course, is something that has crept into the
23 law relatively recently and is part of our fair use law. And

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1 I'm just suggesting it may be that the electronic environment
2 would permit us, if we wished, to move back a little bit to
3 the more traditional fair use which is what you just
4 described.

5 MS. FREEMAN: Yes. I think the present fair use
6 are fair and appropriate as regards one time copies for
7 personal use. I think there are serious technical questions
8 that have to be answered as to how you ensure that the
9 guidelines are followed. But we feel the guidelines are
10 adequate once the technical solutions are found.

11 CHAIRMAN LEHMAN: Thank you very much, we
12 appreciate it.

13 MS. FREEMAN: Thank you.

14 CHAIRMAN LEHMAN: Next we'd like to call -- I
15 apologize for the mixup before -- Mr. Timothy King, Vice
16 President, Planning and Development of John Wiley and Sons.
17 He comes to us from New York City.

18 TESTIMONY BY TIMOTHY B. KING

19 MR. KING: Mr. Commissioner, my name is Tim King.
20 I'm Vice President of Planning and Development for John Wiley
21 and Sons, the New York based publishing firm. I'm here today
22 as a representative of a leading but mid-sized publisher of
23 scientific technical, professional and educational works.

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1 We enthusiastically support the development of the
2 National Information Infrastructure, and in particular the
3 development of a free market network which will be open to
4 all, even-handed and equipped to protect copyright and
5 support a full range of intellectual property transactions.
6 We see an important role for government in providing
7 incentives and supporting experimentation for the creation of
8 such a network.

9 The value of this network will depend of the
10 quality of the information available over it. To ensure the
11 publication of the widest range of works on the network, the
12 continued effective implementation of copyright law is
13 essential. We share the opinion of the Association of
14 American Publishers, of which Wiley is a member, that
15 existing copyright law fundamentally seems to protect the
16 rights of those who will make their works available via the
17 NII. But it is possible that supplementary provisions may be
18 needed to ensure that the copyright law can be adequately
19 implemented.

20 We do, however, have some concerns that involve
21 fair use. An author's right to take advantage of fair use in
22 a creative of transformational sense to build upon existing
23 materials in crafting a new work should in principle be the

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1 same in the electronic medium as it is in the print medium.
2 However, we fear that there will be a higher incident of
3 plagiarism, whether intentional or due to the mere -- to
4 paraphrase a famous judge -- facile use of the electronic
5 scissors. Consequently, rather than users needing more
6 protection, copyright holders will have to be more vigilant
7 in detecting unfair use.

8 Another type of fair use involves the occasional
9 copying of small parts of works for limited educational
10 purposes under certain conditions. Fair use has always been
11 conditioned on such use not having a detrimental commercial
12 impact on the copyright holder. This privilege was never
13 intended to force rights holders to subsidize educational
14 institutions or other users. In the network environment, a
15 significant component of the commercial use of a work will be
16 the access, transmission and copying of elements of the work.
17 Fair use criteria need to be applied in a manner which
18 reflects this difference from the paper world, and protects
19 the authors and publishers interests in the emerging
20 electronic market.

21 Some technologies that enable and attract such use
22 already exist. And additional technologies are in
23 development and include encryption and reader-identifier

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1 systems.

2 In order for the copyright laws to be implemented
3 efficiently, standards for the labeling of copyrighted works
4 with identifiers and the conditioners for their use will be a
5 necessity. Some standards already exist, such as the ISBN
6 and ISSN systems; others are in development. Standards
7 facilitating the exchange of information among different
8 systems will also be necessary if the network is to be widely
9 accessible in the United States and open to all, whether
10 publishers or users. Some such standards as the TCPIP
11 already exist. They need to be augmented with transaction
12 recording protocols. The role of government may well be to
13 support experimental projects and provide incentives for the
14 development of effective standards.

15 There will be a wide range of licensing
16 arrangements in the network environment. No single system
17 could cover all authors, types of work, users, or all forms
18 of use. We do not believe government should mandate a
19 particular system or systems, including collective licensing.
20 Marketplace solutions should be allowed to evolve.

21 For the network to be successful, users must have
22 full confidence that the material they access is authentic
23 and identical to the original. There are technologies in

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1 development that could be employed to ensure this, such as
2 digital signatures and hash values. Their use will not have
3 to be mandated as both users and publishers have a strong
4 incentive to employ them.

5 Authors and publishers desire the widest
6 distribution of their works consistent with a reasonable
7 financial return. Neither is interested in creating
8 artificial restraints on the distribution of their works
9 unless it becomes apparent that customers are redistributing
10 or using all or part of their works without permission or
11 payment of fees. In such cases, technical means for
12 preventing unauthorized access or reproduction are required.
13 There are already some technologies that could be used, such
14 as public key encryption. Rather than government mandating
15 such technical means, we believe that government should
16 facilitate their further development and support their
17 availability.

18 Each year in the United States over 35,000 new
19 titles are published: works of research, scholarship and
20 reference, as well as fiction. In order to enable the
21 continued publication of use works in the network environment
22 and permit the creators of intellectual property to benefit
23 from their creations -- and here I wish to emphasize that I'm

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1 speaking not for the AAP, but as a mid-sized scientific,
2 technical, professional and college publisher -- it is
3 imperative that there be an orderly network for electronic
4 publishing that is, firstly, capable of ensuring the
5 authenticity and security of all intellectual property
6 offered on the network.

7 Secondly, that it is capable of providing
8 transaction information where the network providers, network
9 access points, or some other entities record for each
10 intellectual property transaction the details necessary to
11 enable payment for such transactions.

12 Thirdly, that is open and even-handed to all, all
13 who wish to publish and all who wish to access published
14 works, where the terms and conditions of use are dependant
15 only on the nature of the service provided, and not on the
16 size or nature of the publisher or user, whether commercial,
17 not-for-profit or public sector.

18 And fourth, which is accessible to all, that is
19 where the requirements for connecting to the system as a user
20 and the requirements for publishing on the system are not
21 burdensome. Existing commercial on-line database host and
22 cable services do not provide such a network. Nor does the
23 Internet, at least not yet.

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1 These points are set forth in greater detail in the
2 statement for the record to be submitted by December 10,
3 which is incorporated into my testimony by reference.

4 In closing, we wish to reaffirm our enthusiasm for
5 the development of an open, even-handed transaction-oriented
6 network within the NII. It is our conviction that there are
7 or will technological solutions and free market licensing
8 systems which will facilitate the implementation of copyright
9 protection in the electronic environment, and our belief that
10 the proper role for government is to foster experimentation
11 and provide incentives to industry for the realization of
12 this new open publishing medium.

13 Mr. Commissioner, thank you for the opportunity to
14 testify.

15 CHAIRMAN LEHMAN: Thank you very much. Do any of
16 my colleagues have any questions?

17 (No audible response.)

18 CHAIRMAN LEHMAN: As long as we have just a moment
19 to follow-up on the fair use question -- you indicated that
20 that was a concern -- in the electronic environment, in
21 effect where you can meter every use, is it as necessary to
22 have a broader fair use exemption in your view?

23 MR. KING: We believe that in the electronic

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1 environment the type of use made of many of your works, which
2 are small print from scholarly professional works, will be
3 the access of small portions. A work of let's say 400 pages
4 available over the network will be looked at page by page,
5 paragraph by paragraph. People won't buy the whole work.
6 They will look at small bits. Those payment for those small
7 parts will be the commercial aspect of publishing this work.
8 If people could take those small parts without payment,
9 calling it fair use, then in effect the financial return
10 would be enormously reduced. And we would consider that to
11 be unacceptable. It would prevent us from publishing.

12 So we see that in an electric environment what fair
13 use there is will be primarily that of what one might call
14 creative fair use for creating new products, but duplicative,
15 if you will -- duplicative use -- that should be charged on
16 each transaction.

17 CHAIRMAN LEHMAN: So there is a difference between
18 the existing photocopying world and the electronic digitized
19 world?

20 MR. KING: I think the digitized world, the
21 application of what we believe reasonable commercial use,
22 will be clearer in the various cases that are currently
23 before courts, like the Texaco decision. It's clear that we

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1 don't even believe that single copy use is necessarily fair,
2 especially as is stated in the Texaco situation.

3 CHAIRMAN LEHMAN: Thank you very much.

4 Next we're going to call on Mr. Robert Oakley who
5 has just come across the river -- he didn't have to come very
6 far -- the Director of the Law Library at the Georgetown
7 University Law Center on behalf of various library and
8 education associations. I know that Mr. Oakley is a
9 prominent member of many of them and he can perhaps describe
10 that more for us.

11 TESTIMONY BY ROBERT L. OAKLEY

12 MR. OAKLEY: Thank you, Mr. Chair. Before I begin,
13 I'd like to make a suggestion to the Working Group that you
14 consider making the transcript of this hearing available over
15 the Internet in addition to being available in paper for
16 \$30.00, and I'm sure we could find a host site if that was
17 necessary.

18 As you indicated, I'm the Director of the Law
19 Library at the Georgetown University Law Center, but I'm here
20 this morning on behalf of several different library and
21 education associations; these include the American
22 Association of Law Libraries, the Association of Research
23 Libraries, the American Library Association, the Medical

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1 Library Association, the Association of Academic Health
2 Science Library Directors, the Special Libraries
3 Associations, the Association of American Universities, the
4 National Association of State Universities and Land Grant
5 Colleges, the Coalition for Network Information, EDUCOM,
6 CAUSE, and the National Coordination Committee for the
7 Promotion of History. I am not a member of all of them.

8 A brief introduction to these organizations is
9 appended to my full statement which has been submitted for
10 the record.

11 The library and education communities believe that
12 is premature to propose specific legislative changes while
13 the information infrastructure is still in its infancy.
14 Nonetheless, we are concerned about the need to reaffirm that
15 the rights granted to educators, libraries, and their users,
16 apply in the electronic environment as they have in the paper
17 environment.

18 We also believe the law needs strengthening to
19 allow libraries to use the newest technology to preserve the
20 nation's heritage and to meet the needs of their users. We
21 welcome this forum as really the beginning of a discussion
22 that we hope will lead to these changes and allow us to
23 achieve these goals.

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1 For this morning I which to emphasize three points.
2 First, that the fundament purpose of copyright is for the
3 public good. Second, that fair use and the library
4 exemptions provided for in the Act should remain equally
5 valid in the electronic environment, as they have in the
6 paper-based environment. And third, that any licensing
7 arrangements that are made should likewise take into account
8 fair use and the existing limitations on the rights for
9 copyright owners.

10 First, the copyright exists for the public good.
11 The Copyright Act balances the rights of creators and the
12 rights of users. The constitutional purpose of copyright is
13 to promote the progress of science and the useful arts. This
14 means that the rights of copyright owners should be broad
15 enough to ensure a fair return on their work, but limited in
16 the public interest so as not to inhibit the use of existing
17 works, especially for research, education and the creation of
18 new knowledge.

19 As Justice O'Connor wrote for the Supreme Court in
20 the Fiest Case, "The primary objective of copyright is not to
21 reward authors, but is to promote science and useful arts.
22 To this end copyright assures authors the right to their
23 original expression, but encourages others to build upon the

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1 ideas and information conveyed by a work. This result is
2 neither unfair nor unfortunate. It is the means by which
3 copyright advances the progress of science and art."

4 Now to achieve the goal of promoting the public
5 good, the second point is that the NII should preserve fair
6 use in the library exemptions and allow for a variety of
7 pricing structures.

8 The policy framework for the NII should permit a
9 variety of pricing structures. Any system, for example, must
10 accommodate the distribution of some works at no cost to the
11 individual user, or at least at not cost higher than what
12 might be charged for basic access to the network.

13 There is much that is already flowing over the
14 Internet without a cost to the end user, and there is much
15 that could be added without jeopardizing the rights of
16 copyright owners. The materials that should be readily
17 available include at least three categories of works; non-
18 copyrightable works, such as works from the U.S. Government;
19 works in the public domain because their term of copyright
20 has expired; and works for which the author does not wish to
21 exercise his or her copyright.

22 Just as we believe that certain works should be
23 available without a fee, so too we believe that certain uses

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1 should also be permitted without a fee. In particular, fair
2 use should be available regardless of the medium, whether
3 electronic or print. It is true that we cannot know now how
4 the contours of fair use might evolve, but as an equitable
5 rule of reason it should continue to be available.

6 And indeed here I must say that I'm troubled by the
7 last comments about metering. I find it difficult to
8 understand or to think about how individual scholars and
9 school children might have to pay a sum for the use of
10 individual paragraphs out of particular works.

11 Fair use is the means by which researchers learn
12 and in turn write for the benefit of society. It is the fuel
13 that drives the engine of progress envisioned in the
14 Constitution and restated so well by Justice O'Connor.
15 Similarly, the library exemptions in Section 108 must also
16 continue in the electronic environment because they support
17 educational and research endeavors of library users. Section
18 108 supports primarily preservation and limited interlibrary
19 lending that is not a substitute for a purchase.

20 These goals remain valid even though the
21 methodology is shifting from print to electronic. In fact,
22 with the exception of the preservation subsections, Section
23 108 is neutral on this point specifying copies not just

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1 photocopies. As a result, the intralibrary loan provisions
2 strike a reasonable balance of allowing a library to request
3 a copy of an article, even a copy delivered electronically
4 from another library as long as the other provisions of the
5 Copyright Act are respected.

6 The preservations of the Act, however, need
7 expansion to address the preservation needs of the nation,
8 because they limit preservation coping to a single copy in
9 facsimile form, meaning paper or microform.

10 Because materials printed during the last 150 years
11 are on paper that is becoming brittle with age, the need to
12 preserve the nation's intellectual heritage is a major
13 cultural crisis. Microfilm is still the medium of choose for
14 preservation, but the technology is moving rapidly toward the
15 time when preservation will be done electronically. The law
16 should be amended to accommodate the newest preservation
17 technology.

18 Just as works printed on paper need to be
19 preserved, digital works of enduring value will also need to
20 be preserved. The life expectancy of works in most digital
21 formats is only 15 to 20 years, shorter even than the life
22 expectancy of paper. For such works, preservation takes the
23 work of refreshing or copying the work on to a duplicate of

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1 the medium, or even moving it to the next technological
2 generation. The current law does not accommodate this
3 increasingly important need.

4 Similarly, efforts to create digital libraries have
5 run into significant barriers. These barriers must be
6 resolved if we are to move forward anything like the Vice
7 President's vision of making the Library of Congress and
8 other library collections of national significance available
9 electronically.

10 For example, the Library of Congress tried to
11 develop an American Memory Project to make historic
12 collections of photographs, documents, the written word, and
13 sound recordings, available electronically. As the project
14 began, however, the Library found that many of the items,
15 while relatively old, from the 1930s for example, might still
16 be within their term of copyright. In most cases these were
17 not works of famous authors, and it was difficult, if not
18 impossible, to trace the owner.

19 Multiplied by tens of thousands of documents,
20 photographs, and recordings, this worthy effort become
21 impossible, and the project was scaled back to include works
22 clearly in the public domain or for which the Library has
23 specific permission.

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1 As a result, the public has been deprived of a
2 valuable learning device even though most of the creators of
3 the works in question would probably have consented readily
4 to the use of their work.

5 Librarians and educators have no desire to deprive
6 authors, publishers and other copyright owners of a
7 reasonable economic benefit for their work. But the library
8 and education communities believe that in cases like
9 interlibrary lending and preservation in the electronic
10 environment or the creation of digital libraries, copyrights
11 should not be a barrier to education and learning.

12 Finally, licensing proposals should also
13 accommodate fair use and library use, as authorized in the
14 act. Licenses might seem to be a means by which some of
15 these goals could be achieved. However, the library and the
16 education communities are concerned that many existing
17 licenses fail to take into account fair use or the library
18 exemptions.

19 As an alternative approach as part of a project to
20 digitize and archive both historic and current legal
21 materials, the Columbia Law Library is working with
22 publishers to develop a system that will preserve fair use
23 and public access, while at the same time providing the

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1 necessary controls on user access to electronic information.

2 Licensing should only be for uses that exceed fair
3 use or the other exemptions in the Act. Licenses should not
4 be used to contract around otherwise legitimate uses of
5 proprietary material.

6 Licenses for the acquisition of information create
7 other challenges as well. Increasingly in libraries we are
8 see the substitution of licensees or article-based delivery
9 services to replace subscriptions. These programs satisfy
10 current needs, but they will have a significant economic and
11 structural impact on libraries since libraries will not be
12 able to retain the information to meet futures requests.

13 The NII should support licensing arrangement that
14 provide for the archiving of electronic materials in a way
15 that will recreate the collections and public spaces that
16 have traditionally been presented by libraries.

17 The library and educational communities welcome
18 this forum as the first step of an ongoing process to examine
19 the issues and determine what changes are needed to
20 strengthen the basic goals of copyright. As indicated, we do
21 see some problems that need to be resolved, but we have
22 concluded that it is premature to make specific proposals at
23 this time.

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1 We welcome the opportunity to continue the
2 discussion with you and others in the context of developing
3 the National Information Infrastructure. Thank you.

4 CHAIRMAN LEHMAN: Thank you very much, Mr. Oakley,
5 for those very useful comments.

6 Next I'd like to call on Mr. Joseph Cosgrove of the
7 Political Science Department at King's College, Wilkes-Barre,
8 Pennsylvania.

9 TESTIMONY BY JOSEPH M. COSGROVE, ESQ.

10 MR. COSGROVE: Thank you, Mr. Chairman. My name is
11 Joseph Cosgrove and I'm a lawyer and a teacher in the
12 Department of Political Science at King's College in Wilkes-
13 Barre, Pennsylvania, although my remarks are my own and not
14 necessary those of King's College or any particular
15 department. I appreciate the opportunity to address this
16 Working Group given the serious and exciting prospects which
17 development of the National Information Infrastructure will
18 bring.

19 In my capacity as both an instructor of
20 constitutional law at King's College and as a private
21 attorney with the practice largely devoted to the development
22 and protection of basic civil rights and civil liberties, I
23 have undertaken the examination of certain constitutional

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1 concerns which may arise with the development of this
2 thriving information superhighway. While the Working Group
3 has asked specific answers to specific questions associated
4 with its mandate, it appears that these questions are
5 premised on a concern for a superhighway that balances the
6 rights of both the holders of copyrights as well as those of
7 the users of this material.

8 In our discussion of ways to protect the rights
9 these holders once the NII goes online, we must keep in mind
10 that there are certain constitutional parameters which mark
11 our debate and certainly any legislation which will stem from
12 it. Although it's sometimes hard to remember, we must be
13 mindful that our national government is one of limited
14 powers, and those powers are specifically enumerated in the
15 Constitution itself, including the patent and copyright
16 clause.

17 Well, this modest civic lesson aside, I'm concerned
18 that a certain fog may be developing our discussion of
19 copyright protection in the NII. Contrary to the customary
20 view, the patent and copyright power which the Constitution
21 bestows upon Congress is concerned not primarily with the
22 interest of the artist, author or creator, but instead
23 protects a broader public right to receive information and

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1 ideas.

2 In the world as it exists today, this right of
3 access seems secure. Society has wide access to an almost
4 endless variety of books of magazines and other printed
5 material. The proliferation of television and VCR technology
6 has caused a near explosion in the availability of video and
7 film resources. Development of CD systems has completely
8 revamped our music forms and other recording paradigms.

9 But these all represent informational infants when
10 compared to the possibilities which accompany the NII. What
11 separates the NII from most existing systems is the
12 extraordinary speed with which it will allow distribution of
13 virtually all forms of information to those fortunate enough
14 to be a part of it.

15 But what about those not so fortunate? What of
16 that portion of the public for which the expensive technology
17 necessary to gain a spot on the NII is beyond their reach?
18 Shall they be excised from this information revolution?
19 Shall they relegated to a lower level of national dialogue
20 and thus lose the opportunity to fully participate in the
21 intellectual activity of our nation?

22 I suggest to you that while this segment may lack
23 possession of certain technological tools, it possess

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1 something far more important, and that is a constitutional
2 entitlement to be a part of any informational feast which
3 government may assist in creating.

4 This right to access to information has been
5 supported by the Supreme Court at least in the First
6 Amendment context. More than a decade ago in the case Board
7 of Education v. Pico, the plurality opinion of the Court
8 found such a right as it related to a public school student's
9 access to school library materials.

10 Even the dissenting Justices recognized at least a
11 limited version of this essential First Amendment liberty.
12 Interestingly enough Chief Justice Burger voiced his concern
13 that the plurality opinion would seem to, "support a
14 constitutional right of the people to have public libraries
15 as part of a new constitutional right to continuing adult
16 education." It should be noted that the Chief Justice was
17 not very fond of this idea, but he recognized that that
18 certainly could be the import of what the plurality was
19 stating.

20 But the Chief Justice's fears have never really
21 taken constitutional root, but the do, along with the
22 plurality opinion itself, remain a vital part of our First
23 Amendment jurisprudence.

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1 Defined, such a broad right to receive and have
2 access to information is found even more easily in the
3 copyright context than it is in the First Amendment analysis.
4 As with any fundament right, a First Amendment right does not
5 require any action of government for it to have a life of its
6 own. It exists by itself, irrespective of governmental
7 considerations. That is why the Court is simply reluctant to
8 imply broad avenues of rights when they are not specifically
9 enumerated in the Constitution.

10 But the cousin of this First Amendment right to
11 receive, which I suggest is contained in the Patent and
12 Copyright Clause, comes into being only upon the affirmative
13 legislative action of Congress in the granting of copyright
14 protection to the artist, the inventor, or the writer. Once
15 that congressional power is exercised, like it or not, the
16 coextensive right to receive and have access to the protected
17 material is immediately born. It is also likely that certain
18 equal protection analysis will also be implicated in this
19 context and supportive of this same right to access.

20 I suggest to the Working Group that this
21 constitutional interpretation will most certainly test the
22 validity of any NII legislation which fails to include all
23 segments of society in its attempt to develop the information

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1 superhighway. I suggest that civil libertarians like myself,
2 cantankerous as we can sometimes be, and who rarely encounter
3 our colleagues of the intellectual property bar will almost
4 certainly meet these companions at the court house if the
5 right to access to copyrighted material is not protected by
6 the NII.

7 How can such an unsavory encountered be avoided?
8 It seems that a simple answer to this potential problem is an
9 NII that fully employs the vast national resource that we
10 call the library. NII outlets mandated as part of our
11 national library system, whether the public library or the
12 educational library, would ensure fulfillment of the
13 constitutional requirement that all copyright legislation,
14 "promote the progress of science and the useful arts."

15 The same could also be accomplished through use of
16 public school libraries opened generally after school hours.
17 As an the aside, I once served on a local school board and
18 strongly encouraged a rapidly growing educational philosophy
19 that public schools should be seen simply not as educational
20 institutions, but as vast resources for the general public.
21 Use of school libraries as access points for the NII would
22 serve a dual purpose of furthering this expansive education
23 philosophy as well as protect the access rights previously

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1 discussed.

2 Now, I recognize that this interpretation may cause
3 shift in the balance of rights which the Patent and Copyright
4 Clause should inherently maintain. But there are other
5 remedies available to restore this balance. Since commercial
6 interests are presumably at the heart of any copyright
7 holder's concerns, NII legislation could easily expand
8 commercial copyright protection. The First Amendment
9 freedoms that are associated generally with access to
10 information and other aspects of First Amendment freedoms are
11 not as strong when they're taken in a commercial context.

12 One method would be the adoption of the
13 controversial presumption found in the Sony and the Harper
14 and Row cases where the Supreme Court held that every
15 commercial use of copyrighted material is presumptively an
16 unfair exploitation of the monopoly privilege that belongs to
17 the owner of the copyright. Congress is free to adopt this
18 standard as its own and thereby grant even greater
19 affirmative protection to the copyright holder in the
20 commercial realm. Congress can do this, but what it cannot
21 do is fail to grant general and public access to that
22 material once it grants a monopoly protection.

23 In the end, the NII, if it is indeed an information

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1 superhighway, must mimic our system of interstate highways to
2 which it is analogized. These highways over the past 25
3 years have linked communities, rich and poor alike, and has
4 placed access to all parts of our country within the
5 reasonable grasp of the general public. It is in the best
6 interest of this country that the NII do likewise. If it
7 fails to do so, it shall also fail the Constitution from
8 which it derives its very existence and the people which
9 brought that Constitution into being.

10 I offer many thanks for the opportunity to address
11 this group and I offer an open invitation to discuss this
12 further in writing or in oral form.

13 CHAIRMAN LEHMAN: Thank you very much.

14 MR. COSGROVE: Thank you, Mr. Chairman.

15 CHAIRMAN LEHMAN: Do any of my colleges have any
16 questions?

17 MR. ABBOTT: I was wondering if you were suggesting
18 that the copyright protection would be affected by your
19 concern over the First Amendment rights. In other words it
20 don't protect as much or were you not going that far?

21 MR. COSGROVE: Well, we've heard so many
22 discussions of fair use and how fair use will fit into the
23 NII. Fair use has a genesis in the Constitution, aside from

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1 any legislative protection, and so we must keep that in mind.
2 What I'm suggesting is that commercial restrictions can be
3 placed within any copyright amendments and still be well
4 within First Amendment parameters. Thank you very much.

5 CHAIRMAN LEHMAN: Anything else?

6 (No audible response.)

7 CHAIRMAN LEHMAN: Thank you very much.

8 Next I'd like call on Mr. Dennis Bybee, the
9 Associate Executive Officer of the International Society for
10 Technology in Education from Alexandria, Virginia. Welcome,
11 Dr. Bybee.

12 TESTIMONY BY DENNIS L. BYBEE, Ph.D.

13 MR. DENNIS BYBEE: Thank you very much, Mr. Lehman
14 and members of the committee Working Group. My name is
15 Dennis Bybee and I'm Associate Executive Officer of the
16 International Society for Technology in Education.

17 We're a 45,000-member American-based professional
18 education society whose members are directly involved in K-12
19 education. Our members are typically classroom teachers and
20 computer-using educators and directors of technology in
21 school districts and state departments and teacher
22 preparation of people. We're very concerned about advanced
23 technologies in the classroom and for administrative support

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1 purposes.

2 I'm probably unique in the witnesses today. I'm
3 not a lawyer. So I'm not here to argue the merits of what
4 needs to be done in terms of law, but to represent the user
5 community and as a representative of one major segment of the
6 group; that is, the intended end users of the NII.

7 I guess I would like to say at the outset that I
8 would like to respectfully agree with much of what Mr. Oakley
9 said and disagree with a lot of the other presumptions.

10 I would like to suggest that this group not assume
11 that the present information infrastructure management
12 systems are adequate, efficient or desirable in a new NII
13 environment. The rules that we have governing the current
14 system seem to be creator-dominated, one-way delivery
15 environment and should not be considered inherently adequate.
16 They should be looked at carefully and maybe in fact unduly
17 restrictive when apply to a new environment which is going to
18 be user-dominated with interactive access as opposed to the
19 rules that are currently in place which seem to be more
20 directed at the single one-way delivery system.

21 So I think with that caveat I would like say that
22 first off we really are concerned about access and
23 availability. Our members and our users in the education and

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1 training community, if we're going to have improvement in
2 education, need to have access and availability, and it needs
3 to be to the degree possible unrestricted.

4 At the same time, we are very much in favor of all
5 forms of creative endeavor being compensated. So we are not
6 suggesting that the unrestricted access be at the expense of
7 the creative process.

8 That has been, in our view, the traditional role of
9 the copyright environment, is to balance these interests; the
10 availability of art in all forms or creativity, against the
11 user community's interest in accessing. And so as you move
12 into this new environment, there's a tremendous challenge
13 that this group has to balance those interests, and I think
14 that one should keep in mind the primary objective; to
15 achieve a National Information Infrastructure, which is the
16 free flow of information. We don't want restrictions and
17 inhibitions to preclude the ultimate objective of this kind
18 of a new technology.

19 So as a non-lawyer let me respond to some of your
20 questions. The intellectual property rights of creators: We
21 want, for example, users to have unrestricted access to
22 information. We want them to not be inhibited in any way by
23 protection devices or by rules or other restrictions. Our

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1 primary concern is the free speech right of the use. There
2 shouldn't be any restrictions on use, nor should there be any
3 administrative burden placed on the user to limit uses. And
4 I think it would be almost impossible in that environment to
5 expect that millions of new users would exercise restriction.
6 If they have access to information, one presumes that they
7 should use that access.

8 Therefore, that tells us that we should probably
9 recommend that to achieve a freedom of information flow, it
10 would be recommended that protections be universally and
11 systemically provided for all creative works at the point of
12 entry into the system, if you can figure out the methods and
13 the methodologies for adopting a guiding principle that once
14 in the system, universally available to all users.

15 Encoded standards to us are -- we've had a lot of
16 experience with encoded standards and they don't seem to
17 work. There should be unrestricted access. To us,
18 intellectual property rights seem to govern all forms of use
19 and dissemination with the creator having controlling
20 property rights that are selectively conveyed on a case-by-
21 case or use-by-use basis. If such an electronic decision-
22 making process were continued into the NII environment, it
23 would impede the flow of information within the system and

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1 place an unacceptable burden on the NII system
2 administration.

3 Encoded standards are not the answer, and their use
4 would probably inhibit information retrieval and creation in
5 derived sources.

6 Any attempt to restrict uses of intellectual
7 property made available through the NII will be unacceptable
8 to potential users and not result in the intended
9 compensation to creators.

10 Just as we found that copyright protection devices
11 were ineffective in controlling intellectual property stored
12 on magnetic media, we must expect that encoded standards
13 would be ineffective in the NII environment. Neither creator
14 nor the user would benefit from encoded standards to control
15 access because user access would be restricted and the
16 limited use of creative works would reduce the compensation
17 to their creators if you would assume that compensation would
18 be based on use.

19 We recommend that you redefine intellectual
20 property rights in the NII environment and restrict creative
21 control to a simple one-time decision-making to either place
22 works into the environment or not.

23 In terms of interoperability, it seems very

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1 important to us that the information is held in a common
2 format and in common set of NII information archival format
3 standards may be appropriate. It is not as clear that a
4 similar compelling need to establish full interoperability
5 standards exist with respect to the hardware and the software
6 systems. It is more likely that unregulated flexibility in
7 accessing hardware and in software systems would stimulate
8 continued development of products and services in that
9 information resource marketplace.

10 Our recommendation here is that there should be a
11 common set of the NII information archival standards, but we
12 don't see at this time similar standards for accessing
13 hardware and software systems.

14 In terms of your question about licensing systems,
15 a universal licensing system should be developed and
16 implemented to fully compensate owners of creative works made
17 available on the NII. We would like to see a very simple and
18 comprehensive licensing system providing one-time
19 compensation for works at point of entry or agreed-upon
20 licensing as they come into the system. And we would support
21 some sort of system of compensation to creators based on
22 instances of use.

23 We're recommending a single universal licensing

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1 system be developed and implemented to fully compensate
2 owners of creative works made available and used on the NII.

3 In terms of unauthorized reproduction, this term
4 probably has different meaning in the NII setting than it has
5 in the common setting. Information must flow freely within
6 the system without restriction. Since it is expected that
7 the information resources will physically exist somewhere
8 within NII and probably a best location would be a single
9 location rather than multiple locations, and if simultaneous
10 access is intended for a single location, then the concept of
11 reproduction may be in fact irrelevant and access to users
12 within the system should be authorized -- multiple access
13 should be authorized.

14 If in fact the system provides that materials are
15 taken from the system and used in some uncompensated forms,
16 then that might be dealt with as an issue here. But it might
17 not be as lucrative as it currently is, if in fact the system
18 is provided universally to all accesses.

19 In terms of educational programs, it is expected
20 that the new environment will result in new ways of
21 interpreting intellectual property rights, and there probably
22 should be a comprehensive effort to inform the public of how
23 this is handled. We would encourage you, however, to begin

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1 with the creative community in terms of ensuring that there
2 is long-term availability. And since there's a lead time in
3 that, that it would take priority over educations of end
4 users. In fact, if you can achieve the goal that we've
5 suggested of having less restrictions on the end user
6 community, it probably would require less education in
7 training of those end users.

8 So I appreciate the opportunity to be with you
9 today. I present these rather unvarnished recommendations
10 and hopefully over the next year or so, as the system is
11 developed, we'll be able to work with this group to present
12 and to represent the educational community in this important
13 endeavor. We're very happy to have you working on this and
14 to be able to present today.

15 CHAIRMAN LEHMAN: Thank you very for sharing your
16 thoughts with us today. Is there anybody who has a question?

17 MR. LINN: A question of clarification. You
18 expressed concern about the access of availability control as
19 there was an existing single entity. What is that entity in
20 your mind that you want to access to control and management
21 of? Is it the Internet? Is that the analogy? Because some
22 of the other speakers have talked about the publishing
23 industry of being part of the NII and this is very different

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1 from the perspective, and it seems a point of entry that was
2 actually threaded through your comments.

3 MR. BYBEE: The thing that we're hoping that will
4 come out of this is that there will be an unrestricted flow
5 of information. As a two-way environment, it seems
6 impossible to negotiate case-by-case contracts or to preserve
7 the current structure of creators setting the standards and
8 users trying to receive that kind of thing.

9 So whether you create a single entity to regulate
10 that environment or you set up a system, and you've mentioned
11 it a couple of times during the comments, Mr. Lehman, about
12 the possibility of recognizing instances of use. And if
13 recognition of instances of use could also imply some
14 compensation, then I think that could be a solution. I'm not
15 suggesting that we have a solution, but I'm suggesting to you
16 that the solution not be to continue in this environment a
17 quagmire of contractual agreements between end users and the
18 providers.

19 It would be preferable to have something similar to
20 the music industry which I'm sure the creative community is
21 compensated when we listen to music over the radio. And I'm
22 sure there's an instance of use provision somewhere.
23 Somebody has figured some of those ideas out that could apply

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1 to the NII. But we need unrestricted flow of information.

2 MR. LINN: Second question. You talked about
3 encoded standards. Does that imply encryption to you?
4 Because it does not to me. Encoding is a scheme for
5 representing information rather than encryption, which is to
6 scramble the information.

7 MR. BYBEE: Running through your statements there
8 was a tenor that I was beginning to see in which we would
9 create classes of information, categories of information,
10 user restrictions. It might be multiple restrictions. There
11 might be different user characteristics and things that you
12 can do. If you in fact have a free flow of information,
13 there should be a single category of information and
14 encryption to the extent of encoding or encryption would
15 inhibit or create classes of information.

16 If you, for example, encoded it, is it going to be
17 used in one environment for single uses and whatever at some
18 cost --

19 MR. LINN: You are talking then in the since of
20 coded and the law as opposed to a technical use of the term.
21 Is that correct?

22 MR. BYBEE: You said encoded standards. I took
23 that to mean that you would have standards for encoding

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1 information and providing protection in individual works. If
2 that was not correct, I can rethink that.

3 MR. LINN: Thank you.

4 CHAIRMAN LEHMAN: Thank you very much.

5 Next we will call David Rothman from Alexandria,
6 Virginia.

7 TESTIMONY BY DAVID ROTHMAN

8 MR. ROTHMAN: I'm probably the only professional
9 writer here. It's rather amusing to here all this talk of
10 creators in the abstract.

11 This isn't just a hearing. In this case I'm the
12 author of two forthcoming books on, among other things, some
13 NII-related issues. Guess how much I'm getting for my
14 electric rights in the case of these books which are both
15 from really good publishers? All of 10 percent. And I
16 believe that's net. And this is outrageous, given the
17 distribution economies that are available.

18 And these are really good publishers. I'm not
19 begrudging the publishers at all. They're just reflecting
20 the realities of the present system.

21 Folks, it's not going to work. It's not working
22 today, and it's not going to work in the future.

23 I'm here with several interests in mind. Interest

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1 number one, as a citizen and a former poverty beat reporter,
2 I fear that the new technology will aggravate rather than
3 mitigate the savage inequalities of our schools and our
4 society in general. I really agree with the speaker who
5 preceded me with his concern about obstructions to the flow
6 of information, and I'm saying this, mind you, as a creator.

7 At the same time -- in fact this is along the same
8 lines -- I cringe when I hear librarians talking about the
9 use of local servers as their main way to distribute
10 copyrighted material. Steve Sizzler of Apple Computer came
11 up with some materials cost for public libraries in
12 California. In 1988 the capita figure for Beverly Hills was
13 something like -- well, to be exact, \$87.46, and for Shasta
14 County which is also in California, all of \$2.51.

15 So I would hope the librarians would keep an open
16 mind in terms of the usefulness of a central national library
17 online reflecting taste of many librarians.

18 That's what I have in mind with the plan I call
19 TeleRead about which I've written in the Washington Post,
20 Computer World and the Baltimore Sun and also in Internet
21 posting.

22 This part of the hearing is already available on
23 the Internet. Anyone here is perfectly free to reach at

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1 Rotman Etsign Netcom, NETCOM.COM and I can E-mail the stuff
2 in a flash.

3 I envision a combination of a central library and a
4 server system. My vision is one of electronic federalism
5 where we would have the main library picking up the best
6 technology and content of the servers.

7 Interest number two: As a writer, I fear for my
8 property rights in this new age. You've just gotten one
9 indication in terms of how much I'll actually be getting for
10 my work. But there's another consideration, and that is
11 piracy. I'm worried that if we base copyright laws on the
12 copy protection schemes, I emphasize the pearl of schemes de
13 jour. It will be like building a nuclear reactor and relying
14 on advise from the administrators of Chernobil. Today's
15 copyrights will go on for decades and decades after the dust
16 of writers. We're really talking about widows and orphans
17 here.

18 As if the vagaries of technology aren't enough,
19 human nature abhors protection schemes. Even strangers love
20 to share online. Here's a disk recording some possible
21 violations of copyright law. In one file a man named Jay
22 pops up on the Internet and uses a Net address from the
23 United Kingdom. He casually asks how he might find an

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1 electronic copy of a short book by the novelist William
2 Gibson. Jay does not mention that Agripa is copyrighted and
3 has sold reportedly in various editions for between \$450 and
4 \$7,500.

5 "Good luck, kid," an American named Robert, replies
6 to Jay. The original E-text was designed to destroy itself
7 after decrypting. "Good luck, Robert," a third man shots
8 back. It's all over the Net. Net soon includes the alt E-
9 text news group helping Jay out and other Internet post Mr.
10 Gibson's work for the whole world to download in a flash.

11 I have hunch that Mr. Gibson probably knew that
12 piracy would be taking place here and that he was looking
13 forward in fact to the publicity. When Agripa was released,
14 his publisher told a magazine that a supercomputer could do
15 the job, but a personal computer could not.

16 But again we have to keep in mind that we're
17 talking about decades or even centuries when we're talking
18 about copyright law. Correct me if I'm wrong, but the
19 existing law the copyrights last for my life plus half a
20 century. So we really need to think in the long-term and
21 even in if in the next few years the market system could come
22 up with a copy protection scheme, I'm just somewhat skeptical
23 as to whether it would last this length of time in terms of

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1 effectiveness. And I really think my way, from a legal
2 viewpoint, is actually more conservation. That is, the idea
3 of a central library reflecting the taste of many librarians
4 with proper compensation for creators.

5 So I'm making the point that the best way to
6 preserve property rights and maintain the spirit of our
7 existing copyright law is to alter the letter.

8 Interest number three. As a small businessperson,
9 like all profession writers, I hate bureaucracy. I believe
10 that the same telereaders used to display books should also
11 be used for electronic forums to streamline transactions with
12 the government. According to the U.S. Chambers of Commerce,
13 we spend several hundred billion dollars a year in time and
14 money on paperwork for bureaucracies. And what if we could
15 reduce this amount by just a fraction? It would more than
16 cost-justify the TeleRead program, the central library,
17 especially if the technology were used at all levels of
18 government. Everything from city hall to agencies here.

19 I'm suggesting that we could have smart electronic
20 forums that would not just allow citizens to enter
21 information, but which would also supply, if desired,
22 detailed prompts both on the screen and in audio to guide
23 citizens through the forums. The software would instantly

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NATIONWIDE
(800) 929-0130

WASHINGTON METRO
(703) 644-7636

FAX
(703) 866-7049

1 alert the citizens if they entered incomplete or inconsistent
2 data.

3 IRS auditors and other hard-working civil servants
4 would have to make fewer follow-up calls. And what's more,
5 there are plenty of opportunities for the private sector. We
6 could private software in place of government forums. It
7 could give birth to a whole new industry.

8 Simply put, TeleRead would dramatically speed up
9 changes of the kind suggested in the National Performance
10 Review Paper. I think the paper is an excellent start in the
11 right direction, but we need to go further in that regard.

12 For reasons of time I won't discuss many other
13 potential uses of TeleRead. I won't tell how TeleRead could
14 promote community networks or allow bookstores to sell paper
15 copies of books from the national database, or how we could
16 use a procurement program for schools and libraries to drive
17 down the cost of sharp screen portable computers for all
18 buyers not just the Federal Government.

19 Nor will I tell how Silicon Valley and telephone
20 and cable companies could sell TeleRead as a new product
21 category. If nothing else, TeleRead would assure small and
22 mid-sized publishers, say the Wileys of this world, or the
23 publishers I'm doing my books for, a wide lane on the

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1 information highway in an era when many communication firms
2 want to merge. But even the big database operators and the
3 baby bells might keep open minds. If such corporations truly
4 had value to offer, then as contractors they could earn more
5 money than they would without TeleRead.

6 I think there would be some magnificent
7 opportunities for members of the IIA here. Right now
8 consumers can spend only so much on information services, and
9 TeleRead could vastly increase opportunities for companies of
10 all sizes that truly serve the public.

11 William F. Buckley, Jr., one of journalism's most
12 vigorous defenders of free enterprise and property rights,
13 endorsed this proposal last May in a column called, The
14 TeleRead in your Future. I hope that many other Americans
15 will want TeleRead to be part of their futures.

16 Thank you, and again the full proposal is available
17 to anyone if they'll E-mail me at Rothman Etsign NETCOM.COM.
18 It's 160k. Thank you very much.

19 CHAIRMAN LEHMAN: Thank you very much, Mr. Rothman.
20 Are there any questions?

21 (No audible response.)

22 CHAIRMAN LEHMAN: Thank you. At this point we're
23 going to take a 10-minute break. We'll be back in 10

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1 minutes.

2 (Recess.)

3 CHAIRMAN LEHMAN: Next I'd like to call on Mr.
4 David Pierce, the President of the American Association of
5 Community Colleges. Welcome, Mr. Pierce.

6 TESTIMONY BY DAVID PIERCE

7 MR. PIERCE: Thank you, Mr. Chairman and members of
8 the committee. I'd like to thank you very much for the
9 opportunity to testify this morning. On behalf of the
10 largest single segment of America's post-secondary
11 educational system, the community colleges. My name is Dave
12 Pierce, and I'm President of the American Association of
13 Community Colleges which represents well over 1,100 of the
14 nations associate degree-granting post-secondary
15 institutions.

16 Community colleges enroll approximately one-half of
17 all of the students enrolled in higher education and they are
18 community-based with close ties to their community. And all
19 are very heavily involved in data and in transmission and in
20 various forms of media use in serving their communities. We
21 have more than 6 million students enrolled in credit
22 programs, and an additional 5 million students in courses for
23 personal enrichment and lifelong learning. We serve the

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1 majority of Americans first entering college, as well as the
2 largest undergraduate populations of women, ethnic
3 minorities, and the economically disadvantaged.

4 In the emerging global economy where the skills
5 necessary for personal and economic success are consistently
6 changing, community colleges are in the forefront of
7 developing continuing education and training for the nation's
8 workforce, small and large business and health care
9 providers. As pioneers of business education programs and
10 multimedia instruction, we have the technical ability to
11 reach a majority of citizens in the country.

12 Community colleges promote an open door admissions
13 philosophy. Our students come from all walks of life with
14 varying academic credentials, and pursue many different
15 goals. The curricula of community colleges are
16 extraordinarily diverse. They include occupational,
17 technical and life-long programs, in addition to university
18 transfer programs.

19 Community colleges also work in partnership with
20 high schools and the civic and business communities to
21 develop the world class workforce that is prerequisite to
22 success in today's global economy.

23 Community colleges will continue to lead the way in

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1 helping all elements of society in the utilization and
2 training of information age technology, and must be an
3 integral part of the development of the National Information
4 Infrastructure.

5 First, the NII must be developed in a partnership.
6 Business, industry, labor, government and higher education
7 must work together to develop the NII. Community colleges
8 are a vital element in this partnership. We're the foremost
9 practitioners of distance learning to bring education to
10 Americans. Therefore, we're a natural vehicle to ensure
11 access and equity to the NII for both urban and rural
12 communities, and are well positioned to serve as the conduit
13 for local communities in accessing, retrieving and
14 communicating from the NII.

15 Second, funding, standardization and
16 interoperability must be integral components of NII. Many
17 obstacles can inhibit the growth of the NII. Diverse
18 protocols, the lack of interoperability, the high cost of
19 equipment, connection and operation will frustrate access and
20 could prevent many entities, including community colleges,
21 from full participation in the information age. As the
22 various aspects of this infrastructure are developed and
23 implemented, funding must be made available to the public

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1 sector to ensure connection.

2 Further, standardization and interoperability must
3 be strongly encouraged. Educational institutions cannot
4 afford to invest in equipment hoping that their choice will
5 become the norm. Educators must be confident that their
6 investment and technology will be useful over the long term.

7 Finally, community colleges can provide education
8 and training for this nation's infrastructure. Community
9 colleges are logical links for communities to the NII and
10 will be sought out for training and information on
11 intellectual property and copyright issues. As the system is
12 developed and as the issues of intellectual and copyright law
13 are reviewed and updated, community colleges, leaders in the
14 use of technology for the delivery of education and training,
15 are eager to play an important role in increasing public
16 awareness.

17 Let me give you some examples of what our colleges
18 are currently doing in this area. Community colleges deliver
19 courseware using a variety of technologies, including
20 telecourses, computer assisted instruction and interactive
21 programs.

22 For example, Dallas County Community College
23 District produces telecourses which they deliver over local

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1 public television and cable channels to over 11,000 students
2 annually.

3 Kirkwood Community College in Iowa has an extensive
4 live interactive video network that provides credit classes
5 to almost 4,000 students annually at multiple locations.

6 Students in the Mericopa Community College District
7 in Phoenix, Arizona can sit at their PCs at home and have
8 access to a wide array of instructional services communicated
9 via computer network. In fact, at that particular
10 institution, which is the Glendale Community College as a
11 part of that district, students can actually achieve a full
12 associate degree, a two-year program, either going to the
13 college campus and participating at the PC laboratory which
14 they have, or if they choose to do so, they could stay at
15 home and achieve the entire associate degree from their home.

16 The examples are endless. Just yesterday I talked
17 with the President of Hudson Valley Community College in New
18 York and he described a project they had with the local
19 Hispanic Council of preparing programs for transmission into
20 four prisons for Hispanic incarcerated prisoners. Thirty
21 percent of all the prisoners in that state are Hispanic and
22 they're working with the Hispanic leadership in an attempt to
23 provide educational services. If that project is successful,

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1 it will be taken statewide. That's simply and example of the
2 positive use of both a community college and technology.

3 With an established information infrastructure
4 educators can concentrate on the content of the programming
5 and not have to worry about the nuts and bolts of the
6 delivery method. Government and private industry will use
7 the community college system as a vehicle for training and
8 supplying information on the policy and procedures for
9 utilizing the NII. A grant program to develop and deliver
10 onsite training, electronic town meetings and local public
11 hearings needs to be established.

12 Community college partnerships with government and
13 industry should be a priority to assure timely dissemination
14 of new regulations as they are developed and implemented. As
15 I've stated in testimony today, community colleges are and
16 will be primary link between the NII and local communities
17 throughout this next decade and beyond. It's critical that
18 we are directly involved in all aspects of National
19 Information Infrastructure development.

20 Thank you for permitting me to appear before you.

21 CHAIRMAN LEHMAN: Thank you very much. I have a
22 question to ask. I notice in the written comments that were
23 submitted you talked about the evolution of use of technology

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1 in community college programs, sunrise semester programs and
2 television and so on.

3 When you both have programs in a classroom and you
4 have programs in broadcast, and then presumably if you have
5 programs on some interactive service, I assume that there's
6 some sort of fee that's presumably a modest fee, but some
7 sort of fee that's charged for course materials and so on and
8 so forth for the students. Is that correct?

9 MR. PIERCE: Yes, sir.

10 CHAIRMAN LEHMAN: That mechanism could be a
11 mechanism, I assume, for in effect providing licensing for
12 the copyrighted materials that would go through this system.

13 MR. PIERCE: I think it probability could.

14 CHAIRMAN LEHMAN: In other words, part of putting
15 together the course could be of getting the licenses to use
16 the work and then just building that right into your course
17 fee.

18 MR. PIERCE: Mechanically I believe that's
19 possible. Yes, sir.

20 CHAIRMAN LEHMAN: Thank you. Does anybody else
21 have any questions?

22 (No audible response.)

23 CHAIRMAN LEHMAN: Thank you very much.

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1 MR. PIERCE: Thank you very much.

2 CHAIRMAN LEHMAN: Next we're going to hear from
3 Fritz Attaway who is Senior Vice President and General
4 Counsel of the Motion Picture Association of American.
5 Welcome, Mr. Attaway.

6 TESTIMONY BY FRITZ E. ATTAWAY, ESQ.

7 MR. ATTAWAY: Thank you, Secretary Lehman, members
8 of the panel. I'm accompanied here today by Bernard Sorkin
9 who is Vice President and Senior Counsel of Time Warner.

10 CHAIRMAN LEHMAN: Would you like to have him come
11 forward?

12 MR. ATTAWAY: He has refused to come down here and
13 sit with me, but if you have any hard questions, they should
14 be directed to him. There he comes.

15 Thank you, Bernie. Bernie is a real copyright
16 lawyer.

17 I would like to start by commending Vice President
18 Gore and the Clinton Administration both for taking this
19 initiative to develop a National Information Infrastructure,
20 and also for recognizing the critical importance of
21 intellectual property protection in this undertaking.

22 Adequate and effective copyright protection is an
23 essential element of the National Information Infrastructure.

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1 Without effective protection of the rights of those who
2 create copyrighted works, the wondrous potential
3 communications technology will be delayed or never developed.

4 The value to society of a National Information
5 Infrastructure will depend in large part on the availability
6 of information. The communication superhighway is of little
7 use to society if it does not have large quantities of
8 information on which that superhighway can carry. Faithful
9 adherence to basic principles of copyright protection, as
10 well as the effective implementation of the work for hire
11 doctrine, has helped this country become the largest creator,
12 user and exporter of intellectual property in the world.

13 The economic importance of America's copyright
14 industries is illustrated by the following statistics just
15 recently released by the International Intellectual Property
16 Alliance. The core copyright industries accounted in 1991
17 for over \$206 billion in revenues from their copyright
18 related activities, or 3.6 percent of the U.S. GDP. In 1991,
19 total copyright industries accounted for \$325 billion in
20 value-added or about 5.6 percent of GDP. The core copyright
21 industries grew at close to 3 times the rate as the economy
22 as a whole between 1977 and 1991; 4.2 percent versus 1.5
23 percent.

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1 Total copyright industry employment in 1991 stood
2 at 4.8 percent of all employment, 5.5 million people. These
3 industries employed new workers at a greater rate, 3 percent
4 between 1977 and 1991, than any other comparably sized sector
5 of the U.S. economy. And more than three times of the
6 remainder of the U.S. economy as a whole, 3 percent versus
7 .97 percent.

8 These industries delivered over \$36 billion in
9 foreign sales to this country in 1991. Preliminary data for
10 1992 indicate growth of 9 percent to \$39.5 billion, an
11 achievement exceeded only by the aerospace and agriculture
12 industries.

13 The motion picture industry alone, as I'm sure all
14 of you have heard numerous times from Jack Valenti and me and
15 everyone else who represents the industry, contributes over
16 \$4 billion in positive balance of trade every year. Trade is
17 essential to the production of copyrighted works in this
18 country. Therefore, my first recommendation to you is that
19 the task force participate in the ongoing GATT talks on
20 intellectual property, the TRIPS negotiations. I know that
21 the Patent and Trademark Office has been very much involved
22 in this process. I would urge that this task force also take
23 a role in this because trade is absolutely vital to the

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1 continued development of intellectual property in this
2 country and to communications generally.

3 Specifically, I would urge you to support the
4 provision of full national treatment in a TRIPS agreement.
5 This is an element this is lacking in the current text. It
6 needs to be inserted. Domestically, the task force should
7 seek to ensure that the exclusive rights provided Section 106
8 of the Copyright Act are broadly constructed to cover new
9 uses of copyrighted material made possible by technological
10 advances. One of the great features of our copyright law is
11 that it lays down basic principles in simple language that
12 can be adapted to changing circumstances.

13 It should be presumed that the National Information
14 Infrastructure can function effectively under the current
15 structures of the Copyright Act. In most cases the
16 marketplace can and will adapt to ensure maximum availability
17 of copyrighted works within the bounds of the Copyright Act
18 that maintain financial incentives necessary for the creation
19 and distribution of works.

20 Exceptions to the exclusive rights enumerated in
21 Section 106 should be considered only after clear and
22 convincing evidence has been presented that the marketplace
23 cannot adapt under the existing statute to maximize the long-

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1 term interest of creators and users of copyright.

2 Turning to the specific questions presented in the
3 notice of this hearing I would like to make the following
4 points.

5 With relatively modest fine-tuning, including the
6 recognition of performance rights for sound recordings, our
7 existing copyright law is adequate to protect the rights of
8 those who will make their works available via the NII. As
9 recommended above, if existing law is given broad application
10 to protect the rights of copyright owners, few statutory or
11 regulatory changes should be necessary.

12 Second, the fair use provisions of existing law do
13 in fact accommodate legitimate user interest and should not
14 be expanded with regard to works available via the NII. To
15 expand fair use at the expense of rights owners would be
16 counterproductive, because rights owners would be discouraged
17 from using the NII.

18 Third, government should avoid to the greatest
19 extent possible the imposition of standards for labeling,
20 encoding, intercommunications, interoperability, licensing,
21 et cetera. The marketplace should be given maximum
22 opportunity to meet the needs of NII users.

23 Fourth, technical means to prevent unauthorized

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1 reproduction should encouraged. But use of government
2 mandates should be limited to situations where the
3 marketplace cannot adopt to meet the needs of owners, and
4 users of copyrighted material.

5 And fifth, there's a need for greater public
6 awareness of intellectual property laws and their value to
7 society. Children should be educated at an early age that
8 intellectual property right are as important as other
9 property rights, and this should be a goal of the task force.

10 That concludes my statement. I would be glad to
11 entertain your questions, as would Mr. Sorkin.

12 CHAIRMAN LEHMAN: Thank you very much. As I
13 understand your statement, you basically don't think there is
14 any need for any statutory change at all.

15 MR. ATTAWAY: At this point circumstances may
16 develop as the information infrastructure develops where
17 statutory changes may be necessary. But at this point, other
18 than, as I mentioned, performance rights for sound recordings
19 and some fine tuning, we don't recommend any major changes to
20 the Copyright Act.

21 CHAIRMAN LEHMAN: Yes, Jerry.

22 MR. LINN: A question about your position on
23 standards. What I think I heard is you don't want the

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1 government producing standards, but you did not suggest that
2 the industry produce its own standards. Now, is that proper
3 interpretation of what you said?

4 MR. ATTAWAY: Yes, sir.

5 MR. LINN: Thank you.

6 CHAIRMAN LEHMAN: In that regard, is there -- you
7 know, Mr. Linn is from the National Institute of Standards
8 and Technologies -- is there a role for NIST or government to
9 play in helping facilitate that process?

10 MR. ATTAWAY: Absolutely. I'm sure there's a large
11 government role in facilitating the process. I'm just urging
12 that government mandates be avoided where the industry or the
13 marketplace can develop standards on its own, perhaps with
14 greater flexibility than often occurs when one has government
15 mandates.

16 CHAIRMAN LEHMAN: The other question I have is, to
17 the extent that a system that requires interoperability and
18 requires standards to come extent to work, even though they
19 may be industry-developed standards is going to evolve --
20 does that have any antitrust implications? Is there any
21 necessity to develop a mechanism that provides some immunity
22 basically from antitrust concerns in order to develop these
23 standards?

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1 MR. ATTAWAY: Secretary Lehman, I am not an
2 antitrust lawyer, nor familiar with the standard-setting
3 activities that may be going on. Perhaps antitrust
4 exemptions might be called for. I'm not aware of any at this
5 time.

6 CHAIRMAN LEHMAN: It's certainly not a problem that
7 you have in your industry perceive that you can't get
8 together and develop these standards right now?

9 MR. ATTAWAY: So far as I'm aware, there's not
10 problem in that regard.

11 MR. SORKIN: That's true, I think. And I think the
12 day may come when because of particular standard-setting
13 devices that are developed there might conceivability be
14 anti-competitive result, in which case a visit to the
15 Department of Justice might be desirable. But at the moment
16 we don't see it.

17 CHAIRMAN LEHMAN: Any other questions?

18 (No audible response.)

19 CHAIRMAN LEHMAN: Thank you very much for joining
20 us. I should add during the break it was -- one of the
21 attendee who wasn't here for the opening comments, said there
22 was some disappointment we we're more vigorously cross-
23 examining some of the witnesses. I want to reiterate what I

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1 said earlier, that we're trying to get through the hearing
2 and give everybody a chance to present their presentations.
3 Generally speaking, we're only asking questions of the
4 witnesses who don't use up their whole 10 minutes in their
5 prepared statements. We on the panel are trying to stay
6 within that 10-minute limit as well. But we will have plenty
7 of opportunity for further discussion after the hearing takes
8 place.

9 MS. ROSEN: I don't know what that's an incentive
10 to do. Speak less or longer.

11 CHAIRMAN LEHMAN: I'd like to call on Hilary Rosen
12 from the Recording Industry Association of America. Maybe
13 you can explain why the movie industry is pushing performance
14 rights in sound recording, and you can introduce your
15 colleague too.

16 TESTIMONY BY HILARY B. ROSEN

17 MS. ROSEN: Fritz has always been a wise counsel.
18 His view of the world is a sound one. I will say up front,
19 though, that we may not share some of the more hands-off
20 approaches on some of the technical issues that come today.

21 RAA is the trade association that manufactures,
22 produces and distributes 90 percent of the sound recordings
23 sold in the United States, and about 60 percent of those sold

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1 worldwide. We have submitted written comments in advance and
2 so --

3 CHAIRMAN LEHMAN: Excuse me. Could you introduce
4 your colleague.

5 MS. ROSEN: I'm sorry. Emil Torick is RAA's
6 Engineering Consultant. And since we have some views on
7 standards and compatibility, I thought that it would be
8 useful to have him present.

9 We certain welcome the Administration's efforts to
10 help forge the creation of NII, and particularly for creating
11 this task force under PTO's leadership.

12 The intellectual property issues within NII are
13 really critical for our industry and I want to echo basically
14 the importance that Fritz outlined of this industry to our
15 nation's economic infrastructure, and so I'm going to try and
16 skip over some of those pieces of my statement.

17 Some have said recently that the purpose of the NII
18 is not to figure out the best way to get MTV to kids, but
19 rather a more -- is MTV a bad example these days? It's a
20 little politically incorrect -- but rather a more serious and
21 important use for the exchange of library or reference
22 resources, data for operations in business, et cetera.

23 We certainly agree that there are a variety of

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1 loftier goals for this project than entertainment. However,
2 the public will want entertainment, and by most account will
3 invest the resources necessary to help build the
4 infrastructure that assures access to that entertainment. So
5 we think that by working together that we can assure that the
6 NII will be able to serve a variety of needs with this same
7 system.

8 There are other issues I believe, social and
9 cultural, issues that the NII also raises. We're talking,
10 after all, about creative works and art being digitized and
11 accessed. If this is government sponsored, must we consider
12 content, would there be an approval process? While this is
13 not the subject of today's inquiry, I think that these and
14 other issues should be examined for their impact on our
15 country's cultural development. But for today I'll just
16 stick to the subject at hand and respond to the questions
17 that you have outlined in the hearing notice.

18 First, is the existing copyright law adequate to
19 protect the rights of those whose works will be made
20 available on the NII? The recording industry believes that
21 answer is a resounding no. The copyright law is deficient in
22 one major place, and that's the absence of a right of public
23 performance for sound recordings.

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1 Under Section 106 copyright owners enjoy several
2 exclusive rights with respect to their creative works. Among
3 these rights is the exclusive right to control the public
4 performance of your work. Every single type of copyrighted
5 work, except sound recordings enjoys this right. So
6 therefore, while we don't think there is any need to create a
7 new type of right, certainly this loophole must be closed.
8 And without this change sound recording copyright owners have
9 no ability to control how, when and in what manner their
10 works are transmitted via the NII. Certainly a right we
11 think is very important.

12 All the recorded music in existence today could be
13 available on the NII. You'll hear I think from Mr. Kenswil
14 next when he talks about the variety and vastness of just MCA
15 Record's Catalog alone and what opportunities that provides
16 for consumers. But at first blush, while this does seem like
17 a tremendous opportunity, in reality it jeopardizes the
18 fundamental infrastructure of the music industry. When a
19 pre-recorded song is transmitted via the NII, the artists who
20 sings the song, the musicians and backup singers, and record
21 companies whose creative and technical contributions and
22 financial investment made that recording possible, have no
23 right to control or receive compensation for that

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1 performance.

2 Without amending our copyright to provide for
3 public performance of sound recordings, access to music via
4 NII syphons off, and in our view eventually eliminates, the
5 major source of revenue for investing in sound recordings and
6 obviously the major source of music. Legislation is pending
7 that I would call this task force's attention to that would
8 remedy this problem and I would urge your leadership in
9 endorsing its passage.

10 Issue two. Are fair use provisions sufficient? In
11 short, we think so. Fair use remains an equitable rule of
12 reason with each case decided on its own particular facts.
13 We don't really see at this point the need for statutory
14 alternatives, although some interesting examples have come up
15 this morning.

16 Issue three, encoding. We believe that it's in the
17 interest of both copyright owners and NII consumers for
18 transmitters to identify copyrighted works. There has to be
19 a commercial incentive to disseminate these works. And
20 perhaps it's a little easier for those of us in the sound
21 recording industry to take this view because potentially,
22 unlike most other copyright industries, we actually have a
23 system in place that would do that identification. It's

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1 called the International Standardized Recording Code. It's a
2 series of characters that are embedded in the digital subcode
3 of a recording that will identify the country of origin, the
4 owner of the recording, the recording code and/or the
5 recording item or title. This system is currently being
6 implemented nationwide.

7 It's conceivable that the marketplace alone may
8 dictate that these codes be transmitted via an NII type
9 system even if the government doesn't. But we certainly
10 think its existence in the digital subcodes of audio
11 recordings is something that the government should be aware
12 of, and you should factor into your consideration as you deal
13 with the issues of standardization.

14 Issue four, the compatibility issue. We have a lot
15 of experience in our industry with incompatible systems, and
16 so perhaps that's why I sit here and urge you and take more
17 of an active role in assuring compatibility. The proposed
18 merger of telephone and cable companies, as well as the
19 strategic alliances among programming communications
20 companies, are all aimed at serving a part of this electronic
21 highway. But compression systems that may be employed by
22 these entities are currently incompatible, that at a minimum
23 some significant measure of liaison and coordination we

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1 believe is required by the government.

2 It's certainly, in our view, unlikely that NII
3 would ever achieve its full potential until such standards
4 are developed which would encompass the varied user
5 requirements over the full spectrum of telecommunications,
6 computer and entertainment industries. Those standards
7 simply don't exist today.

8 In multimedia applications we have CD-ROM, CDI, CD-
9 graphics, CD-FMV, all of which are incompatible systems. No
10 interface standard for communication between them has been
11 developed yet. In digital audio alone for consumer formats
12 we have a digital compact cassette that's using one
13 compression system called PAS. The mini disk that's using
14 another compression system called A-Track. High definition
15 television sound is going to use a third compression system.
16 And digital audio radio systems which are now under
17 consideration by the FCC are considering two additional ones.

18 We suggested in our written statement that there
19 are a variety of organizations that should be consulted and
20 coordinated with to discuss these standards issue. I think
21 that Gary Shapiro from the EIA could also address some of
22 that later. But in sum, we urge you to take an active role
23 in that.

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1 Fifth, the licensing systems. Ultimately, we
2 believe the marketplace should dictate licensing systems. We
3 think that it's really too early to tell what kinds of
4 licensing systems will be required in the marketplace. And
5 we do believe that some antitrust protection may be needed
6 for those licensing systems to effectively serve the number
7 of users that could potentially be required with this
8 infrastructure.

9 Seven. The technical means for presenting
10 unauthorized copy. This is another area where frankly the
11 recording industry has had some experience and some
12 unsatisfactory experience. The Audio Home Recording Act did
13 require implementation of the serial copy management system.
14 We believe that's a worthwhile system, but frankly it's too
15 early to tell whether the plethora of interfaces in consumer
16 audio electronic equipment actually will contain compatible
17 interfaces that would allow that system to be effective.

18 We simply think this is something you should
19 consider and certainly transmitters who will take
20 responsibility for moving data across the NII in our view
21 have a huge responsibility to assure unauthorized uses are
22 not a problem, as well as protections against piracy. And I
23 think that perhaps setting general guidelines in that area

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1 may be as far as you need to go.

2 Finally, we think education is certainly a worthy
3 goal of the NII. And while we don't have any particular
4 initiatives, we would be ready to work with the government in
5 any way that you chose. Thank you.

6 CHAIRMAN LEHMAN: Thank you very much. I'd like to
7 ask a brief question which I think does relate to your
8 industry. And that is, which is what the first industry did,
9 confront this in the context as what's known as sampling.
10 But the NII opens up and the associated technology open up
11 the possibility of a kind of interactivity which we have not
12 traditionally had in the use of copyrighted works in which
13 individuals will in effect will oftentimes create others
14 works from pre-existing works. And sometimes these other
15 works in fact may need up being published, it may be
16 marketable, it may be hard sometimes to trace back whether or
17 not their derivative works trace back the genesis
18 particularly if a computer code is in a sense scrambled up.

19 Is there a need in your view to consider this sort
20 of special problems that are created by the interactive
21 nature of the digital environment and the problems that are
22 associated with creating derivative works?

23 MS. ROSEN: Sampling has become a standard practice

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1 in sound recording these days. For the most part when
2 artists' works are sampled, they're either acknowledged to
3 have been so by the producer, or they're discovered by
4 somebody within the record company who is producing the work.
5 It's clear that as you take smaller and smaller pieces of a
6 work, it becomes more and more difficult to identify it. And
7 the system of licensing that occurs with sampling today is in
8 some respects a disorganized one. Its a private transaction
9 to a private transaction. I guess the short answer is I'm
10 not sure. Perhaps Mr. Kenswil, as a practitioner of
11 licensing, would have some more views on that.

12 CHAIRMAN LEHMAN: Thank you very much. Did you
13 something?

14 MS. BERNSTEIN: In your testimony you were talking
15 about how you would want the government to ensure the
16 mandatory transmission of codes which identify certain works.
17 My understanding is that there is an industry standard which
18 pretty much everybody is using that you described that the
19 government was not involved in. I'm wondering why there is
20 now a need for the government to get involved in ensuring
21 that these codes are in works, whereas there was a voluntary
22 industry which is already is being used now and it seems to
23 be working.

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1 MS. ROSEN: It's a good question. Currently the
2 codes are being inserted, but essentially aren't being used.
3 I mean, there's really not much purpose for them except the
4 development of some consumer hardware that may have digital
5 readouts as to what title and the like is playing.

6 As I said, I had to back-paddle back some from the
7 written statement, because as I read I see that the
8 marketplace may well dictate that transmitters have an
9 incentive to transmit copyright identification.
10 Unfortunately, I think in an area where there's an area to
11 subvert information, where there's an incentive to use
12 unauthorized distribution, or unauthorized piracy, the
13 ability to recognize that a work is copyrighted may be of
14 some value.

15 MS. BERNSTEIN: Why would it be incumbent on the
16 transmitter of information to provide this service rather
17 than on the creator or the publisher of the work to provide
18 some kind of protection?

19 MS. ROSEN: Well, I suppose I should clarify.

20 MS. BERNSTEIN: If you're going to put something on
21 the network, and you're a publisher or something, it seems to
22 me that it's incumbent upon you to notify people what the
23 proper use IS and to take precautions to protect your own

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1 work rather than to require, say, the phone company to do it
2 for you.

3 MS. ROSEN: I suppose this gets back to the issue
4 what exactly the system of this NII will be, and it's
5 something different to everybody. We are assuming that a
6 variety of situations could occur where record manufacturers
7 are simply in essence wholesalers to a transmitter,
8 essentially licensing or selling works to somebody who then
9 is responsible for conducting a transaction with the
10 consumer.

11 It's possible that there would direct transactions
12 between manufacturers and consumers. Either way I think that
13 when you have a system of subcodes, as opposed to things that
14 basic music as relied upon, somebody could at their will
15 essentially strip off the subcode information. And so you
16 could get the music without getting the subcode information.
17 So unless there's an incentive to distribute that subcode
18 information, it may not necessarily happen.

19 MS. BERNSTEIN: If there were a technology, though,
20 that would allow the fixing of these codes that it would be
21 difficult to strip them off -- I don't know, some kind of
22 encryption scheme or some kind of other technical means where
23 it would be difficult to strip that information off, would

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1 that satisfy your needs? The publisher or the recording
2 industry could cut a deal with the transmitter rather than
3 having to have the transmitter and the user of the work
4 together.

5 I seems to me that there are ways for publishers to
6 protect their works rather than -- that the technology may
7 make available certain means for publishers to protect their
8 works rather than the transmitter.

9 MS. ROSEN: I think that's a fair point.
10 Unfortunately, I agree with something that was said something
11 earlier which is that for every technical system to prevent
12 something if there is an incentive, somebody will come up
13 with an alternative way to access that information. And so I
14 guess I have less confidence in a series of technical sort of
15 means to stop a transmission than I do in some broad based
16 guidelines about information standards.

17 MS. BERNSTEIN: In which case then it's incumbent
18 upon the user to understand -- I mean, then they're breaking
19 the law essential. I mean, if they strip off the encoding,
20 they're breaking the law and there is a mechanism for fixing
21 that problem, which is to sue.

22 There seems to be mechanisms already in place. I'm
23 trying to get at what is it that's new about this technology

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1 that requires something new that we're not already doing now.

2 MS. ROSEN: First of all, there's not necessarily a
3 law that would allow any individual copyright owner to go
4 into individual homes. Theoretically you could do it, but
5 it's an impractical level of enforcement. I think that the
6 value of consideration in mandatory inclusion is simply that
7 it provides a level of identification that's broader based
8 than you have now. It creates a system of information that
9 has value.

10 CHAIRMAN LEHMAN: We probably need to move on. I
11 would like to follow-up on something maybe in the written
12 comments, and that is the issue of possibly a modest
13 amendment to the Copyright Act that would make it clear that
14 when one engages in a commercial activity the primary purpose
15 of which is to abet infringement, that that indeed is
16 infringement. That may be unclear in the law right now.
17 That might go to Ms. Bernstein's issue that she's just
18 raised.

19 MS. ROSEN: And it's certainly something that's
20 applicable to copyright owners across the board. Computer
21 software would have exactly the same issue.

22 CHAIRMAN LEHMAN: Thank you very much.

23 MS. ROSEN: Thank you.

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1 CHAIRMAN LEHMAN: Next we're going to here from Mr.
2 Lawrence Kenswil, the Vice President for Business and Legal
3 Affairs, MCA Music Entertainment Group from Universal City,
4 California.

5 TESTIMONY BY LAWRENCE KENSWIL

6 MR. KENSWIL: Good morning, Mr. Secretary and the
7 Working Group. And thank you for allowing me to speak here
8 today. My name is Lawrence Kenswil. I'm the Senior Vice
9 President for Business and Legal Affairs for the MCA Music
10 Entertainment Group which includes MCA, Geffen and GRP
11 Records, MCA Music Publishing and other concert and
12 merchandising companies.

13 My testimony today focuses on what the NII might
14 mean to those companies. I can state unequivocally that our
15 primary concern is to ensure that the legal framework is in
16 place to protect the copyright owners whose works will be
17 available on the NII, and to provide an efficient means for
18 delivering those works to the public.

19 It is proper that the first question raised in the
20 announcement for this meeting is whether existing law
21 adequately protects the owners of the intellectual property
22 that will be available on the system. As you have heard, or
23 answer is no. There is not public performance right for

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1 sound recordings in the United States.

2 The NII will provide users under a variety of
3 transmission scenarios with a readily accessible source for
4 all types of information. It is reasonable to assume, and in
5 fact desirable, for entertainment products to be available to
6 consumers as well. Indeed, every piece of recorded music
7 could be made available to the public via the NII.

8 The realities of the marketplace currently make it
9 impractical and uneconomical to distribute each and every
10 sound recording my companies control. And even if we did
11 manufacture and make available in our catalog every record we
12 own, no retail store would be large enough or maintain
13 warehousing facilities flexible enough to inventory those
14 recordings.

15 But the NII may be the Holy Grail for lovers of
16 recorded music. Without the need to duplicate, ship,
17 warehouse, and display copies of the record, one can easily
18 foresee a system that would catalog and offer to the public
19 every recording in existence. MCA alone possess hundreds of
20 thousands of master recordings and we produce thousands more
21 each year. Without changes to our copyright law, however, it
22 would also be the death nail for my industry.

23 Every category of copyright work, save one, carries

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1 for its owner in its bundle of rights and exclusive public
2 performance right under Section 106 of the Copyright Act.
3 That one, of course, is sound recordings. All of those other
4 copyright proprietors have the right to chose whether and
5 under what conditions their creative works will be made
6 available to users, including on the NII and elsewhere.
7 However, under current law, MCA and all other record
8 companies will not be so fortunate. Until the copyright law
9 is amended to provide sound recording copyright owners a
10 right of public performance, a service provider on the NII
11 will simply be able to procure one copy of our copyrighted
12 works and then transmit them to millions of users at the
13 touch of a button. It is difficult to image a more bleak
14 future for our company and for the artists who create the
15 works.

16 What would be the financial incentive for any
17 record company to invest hundreds of thousands of dollars to
18 produce a recording when the finished product could be made
19 available on the NII without permission? We spend anywhere
20 from \$100,000 to well over \$1 million to produce and market
21 each record album we release. This investment is especially
22 significant when one considers that a small percentage of all
23 records ever made back their cost production. I know we all

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1 agree that no one will be willing to make such an investment
2 if the ability to make a profit is eliminated. And more
3 basically, how could we sign a recording artists in the first
4 place if we cannot offer them financial rewards for a
5 successful recording?

6 As a business person, I see technology rapidly
7 changing the face and the underpinnings of the marketplace.
8 While advancements in technology normally directly benefit my
9 industry and have usually been a welcome sight for
10 intellectual property owners, without legal protection for
11 our sound recording copyrights technology destroys the
12 industries it should benefit. We must ensure that the
13 copyright law keeps pace with those changes.

14 As we speak, two digital cable audio services are
15 in operation in cities and towns across our country. These
16 companies provide subscribers for about \$10.00 a month up to
17 40 channels of commercial-free CD quality music delivered
18 over cable and into the home. These services need buy but
19 one compact disc to enable the transmission of the music on
20 that disc to each of their customers with no degradation of
21 sound and no permission from or compensation to the copyright
22 owners or recording artists. This situation will be
23 compounded as compression technologies allow expansion of

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1 channel capacities from dozens to hundreds. One does not
2 have to be a seer to envision each of the top 20 records of
3 the week having their own channel being repeated over and
4 over again 24 hours a day, available at any time to anyone
5 who wants to hear them. It is only a short step from there
6 to pay-per-listen, digital downloading on demand, and most
7 likely through the NII the celestial jukebox.

8 We must correct the inequity in the copyright law
9 and provide performance rights in sound recordings. Once the
10 law has been amended in this record, the NII will be a
11 tremendous opportunity for our company to make a broad
12 category of music available to a wider audience than is now
13 possible. So we just don't understand the rationale for
14 treating sound recording copyrights any differently than all
15 other copyrights.

16 I call the Working Group's attention to legislation
17 currently pending in Congress, House bill 2576 and Senate
18 bill 1421. Passage of this legislation is essential of the
19 establish of the proper legal framework for the recording
20 industry to function in the NII future. And I urge the
21 Administration to lend its support for this critical
22 legislation.

23 In closing, I realize my comments are focused on

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1 the singular point of creating the necessary statutory
2 framework before moving forward with the NII. But frankly,
3 there is no greater issue for the MCA Music Entertainment
4 Group and the recording industry. If the NII comes into
5 existence without this change into our copyright, we will see
6 the demise of one of America's most creative and successful
7 enterprises.

8 Thank you for the opportunity to present my
9 company's views here today. We enthusiastically support this
10 initiative and its promise of bringing a new age of
11 opportunity to business and access to the consumer. And we
12 greatly appreciate being given the chance to be part of the
13 process. Thank you.

14 CHAIRMAN LEHMAN: Thank you very much. Are there
15 any questions of the panel?

16 (No audible response.)

17 CHAIRMAN LEHMAN: Do you want to comment about some
18 of the questions that we asked Ms. Rosen? She indicated, for
19 example, on the sampling issue that you might be more
20 knowledge about that.

21 MR. KENSWIL: Sure.

22 CHAIRMAN LEHMAN: Is there a need to deal with that
23 issue in this new NII/digitize world?

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1 MR. KENSWIL: The sampling problems in my industry
2 has really created a quagmire creatively and legally. I
3 haven't really thought through whether this would make it
4 worse or better. It certainly should have the opportunity of
5 making it better. I don't know how it could make it worse.

6 Unlike other copyrights, the digital availability
7 of sound recordings is there for anyone who wants them just
8 by buying a CD. I think the problems of sampling are going
9 to become obvious to other types of copyrights, specifically,
10 audiovisual works, as they are digitized and made available
11 to consumers for the first time.

12 Perhaps ways of identifying the work and making
13 that somehow stick to just even portions of the work could
14 help us identify samplers and facilitate the licensing
15 mechanism.

16 CHAIRMAN LEHMAN: That's really I guess the issue I
17 was getting to. I think you've properly pointed out that
18 this is an embryonic problem, but in a digital world it is
19 very possible -- and in a world in one of the major
20 advantages of it is interactivity in the capacity to create
21 new works based on old. Obviously, if the integrity of the
22 copyright system, the intellectual property system, is to be
23 maintained there have to be licensing mechanism. And you've

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1 indicated that already in this very narrow area of digital
2 sampling in the sound recording industry there is chaos
3 apparently. So this is, I think, a concern that we'd like to
4 look into a little more and see if there isn't some way of
5 addressing it.

6 MR. LINN: A question regarding -- your concern is
7 digital broadcast, if I understand it properly. And yet your
8 industry has survived with analog broadcast industry for as
9 long as there has been radio waves on the air and people had
10 receivers. How is it that the change from an analog medium
11 to digital medium threatens your industry precipitously?
12 You've already adopted digital media, CD-ROM as an example,
13 or CDs as an example. So why in change of encoding, because
14 that's all we've done when we go from AM to FM to digital
15 transmission, is your industry threatened?

16 MR. KENSWIL: The industry is threatened in two
17 respects. One is the inherit nature of the digital sound
18 being pure with no generational loss to the consumer. So
19 that the problem of the consumer achieving the recording and
20 not having to buy it becomes exacerbated.

21 The greater problem, however, is access on demand
22 or at will by the consumer. When and where they want to hear
23 it. They don't have that now with radio. They turn on the

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1 radio and whatever the radio station plays is what they get.
2 The new system in the new world will basically allow them to
3 hear what they want when they want it, and that could well
4 replace sales.

5 CHAIRMAN LEHMAN: Isn't that a distribution, and
6 one of the exclusive rights that you now enjoy under Section
7 107 of the Copyright Act is the right of distribution. You
8 do enjoy that even though you don't enjoy a public
9 performance right. So aren't you moving from there from
10 public performance to distribution; therefore, you would have
11 exclusivity?

12 MR. KENSWIL: Well certainly it starts to sound
13 like a distribution. However, if we're going to draw a line
14 between performance and distribution and say if you're on one
15 side of it, it's a distribution; and if you're on the other,
16 it's a performance. And if we maintain performances are free
17 and distributions you have to pay for, then there will be an
18 incentive for people for people to cloak what is essentially
19 a distribution as a performance by somehow trying to get it
20 just over the line into performance. And all that will do is
21 it will encourage many lawsuits and years of litigation to
22 figure out what everyone's rights are.

23 I just don't see the need for engaging in that when

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